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DIVISION II
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No. 46912-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

James Cloud,

Appellant.

Pierce County Superior Court Cause No. 14-1-02535-3

The Honorable Judge Jack Nevin

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The prosecutor committed flagrant and ill-intentioned misconduct that deprived Mr. Cloud of his Fourteenth Amendment due process right to a fair trial.
2. The prosecutor improperly asked Mr. Cloud if Officer Olson “completely imagined” an interaction that Olson had described in his testimony.

ISSUE 1: It is misconduct for a prosecutor to ask the accused person if state witnesses are lying. Did the prosecutor commit reversible misconduct by asking Mr. Cloud if Officer Olson “completely imagined” their interaction?

3. The prosecutor improperly argued that acquittal required jurors to believe that “all four of [the state’s witnesses were] manufacturing their testimony.”

ISSUE 2: It is misconduct for a prosecutor to argue that acquittal requires jurors to believe that prosecution witnesses lied in their testimony. Did the prosecutor commit reversible misconduct by suggesting that acquittal required the jury to find that prosecution witnesses were “manufacturing their testimony”?

4. The prosecutor made improper closing arguments shifting the burden of proof.
5. The prosecutor improperly shifted the burden of proof by arguing that Mr. Cloud failed to present evidence refuting the state’s version of events.
6. The prosecutor committed reversible misconduct by arguing that “[t]here is nothing submitted that would indicate, reasonably, that Ms. Matsubayashi was inaccurate in her identification” of Mr. Cloud as the person who allegedly threatened her.
7. The prosecutor committed reversible misconduct by suggesting that Mr. Cloud had some obligation to prove he’d spoken to medical staff or complained to “internal affairs or to [his] lawyer” about abuse at the hands of Officer Olson.

ISSUE 3: A prosecutor may not make an argument shifting the burden of proof. Did the prosecutor commit flagrant and ill-intentioned

misconduct by improperly shifting the burden of proof during closing arguments?

ISSUE 4: A “missing witness” argument raised against an accused person will improperly shift the burden of proof unless the prosecutor lays a proper foundation for the argument. Did the prosecutor commit reversible misconduct by suggesting that Mr. Cloud should have presented evidence supporting his testimony without laying the groundwork for a missing witness argument?

8. The prosecutor improperly bolstered the testimony of state witnesses by “testifying” to “facts” outside the record.
9. The state’s attorney improperly expressed her personal opinions on witness credibility by referring to “polygraph keys” establishing that testimony from Matsubayashi and Olson had the “ring of truth.”

ISSUE 5: Prosecutorial misconduct can deprive the accused of a fair trial. Did the prosecutor’s improper “testimony” to “facts” outside the record and her personal opinions on witness credibility deprive Mr. Cloud of his Fourteenth Amendment right to due process?

10. Mr. Cloud’s convictions were based in part on propensity evidence, in violation of his Fourteenth Amendment right to due process.
11. The trial court erred by overruling Mr. Cloud’s objection to two prior felony convictions that did not involve false statements or dishonesty.
12. The trial court violated ER 609 by admitting prior felony convictions without properly determining whether or not they were probative of Mr. Cloud’s truthfulness.
13. The trial court erred by denying Mr. Cloud’s request for a mistrial, following introduction of his prior conviction for residential burglary perpetrated with intent to commit assault.
14. The trial judge erred by allowing the jury to consider irrelevant and inadmissible allegations of Mr. Cloud’s prior misconduct at the jail.
15. The trial judge erred by failing to properly limit jurors’ consideration of prior misconduct.

ISSUE 6: ER 609 prohibits admission of most prior convictions unless the court determines that the probative value of admitting the ev-

idence outweighs the prejudice. Did the trial court err by allowing the state to introduce two prior felony convictions not involving dishonesty or false statement?

ISSUE 7: A criminal conviction may not be based on propensity evidence. Did Mr. Cloud's convictions violate his Fourteenth Amendment right to due process because they were based in part on propensity evidence?

16. The trial court erred by allowing the state to introduce Mr. Cloud's booking photo.

ISSUE 8: Booking photos are inherently prejudicial and should not be introduced into evidence except in rare cases. Did the trial court err by overruling Mr. Cloud's objection to introduction of his booking photo?

17. Mr. Cloud was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
18. Defense counsel unreasonably failed to properly object to evidence of numerous allegations of prior misconduct until after they'd been introduced into evidence.
19. Defense counsel unreasonably agreed to a nonstandard limiting instruction that allowed jurors to consider some prior instances of misconduct as propensity evidence.
20. Defense counsel unreasonably failed to timely object to evidence of Mr. Cloud's prior conviction for residential burglary.
21. Defense counsel provided ineffective assistance by failing to object to testimony that Mr. Cloud was housed with the "worst offenders" in the jail, who were high security risks because they were assaultive.
22. Defense counsel unreasonably agreed to a nonstandard limiting instruction that allowed jurors to consider improperly admitted misconduct for any purpose other than "in deciding the crime[s]."

ISSUE 9: Defense counsel provides ineffective assistance by unreasonably failing to object to inadmissible evidence. Did defense counsel unreasonably fail to object to admission of Mr. Cloud's prior burglary conviction, numerous allegations of prior

misconduct, and evidence that he was housed with the “worst offenders” in the jail?

ISSUE 10: Under ER 404(b), prior acts of misconduct may never be used as proof of criminal propensity. Did defense counsel unreasonably agree to a limiting instruction that allowed jurors to use some prior instances of misconduct as propensity evidence?

ISSUE 11: When evidence is admitted for a limited purpose, the court should instruct jurors on that limited purpose. Did defense counsel unreasonably agree to a limiting instruction that allowed jurors to use certain instances of misconduct for any purpose other than “deciding the crime[s]”?

23. Defense counsel provided ineffective assistance by failing to timely object to prosecutorial misconduct.
24. Defense counsel unreasonably failed to object when the prosecutor asked Mr. Cloud if Officer Olson “completely imagined” an incident.
25. Defense unreasonably failed to object to prosecutorial misconduct in closing argument.

ISSUE 12: Failure to object to prosecutorial misconduct waives the issue for appeal unless the misconduct is flagrant and ill-intentioned. Did defense counsel provide ineffective assistance by failing to object to numerous instances of misconduct?

26. The sentencing court failed to properly determine Mr. Cloud’s offender score and standard range.
27. The prosecution failed to prove that Mr. Cloud had previously been convicted of unlawful imprisonment.
28. The sentencing judge erred by sentencing Mr. Cloud with an offender score of seven.
29. The sentencing judge erred by failing to score Mr. Cloud’s 2010 convictions as the same criminal conduct.

ISSUE 13: The state must present some evidence that a prior conviction exists in order to use it to increase the offender score at sentencing. In the absence of evidence, did the court err by including a

prior conviction for unlawful imprisonment in Mr. Cloud's offender score?

ISSUE 14: Multiple offenses score as the same criminal conduct if they occurred at the same time and place against the same victim with a single overall criminal purpose. Did Mr. Cloud's 2010 convictions comprise the same criminal conduct, where he broke into his ex-girlfriend's house to assault and threaten her in violation of a no contact order?

ISSUE 15: A sentencing court must exercise independent judgment when determining whether or not prior convictions comprised the same criminal conduct. Did the trial judge abuse his discretion by failing to consider whether or not Mr. Cloud's convictions comprised the same criminal conduct?

30. Defense counsel's ineffective assistance at sentencing deprived Mr. Cloud of his Sixth and Fourteenth Amendment right to counsel.
31. Mr. Cloud was denied the effective assistance of counsel by his attorney's failure to object to inclusion in the offender score of an unlawful imprisonment conviction.
32. Mr. Cloud was denied the effective assistance of counsel by his attorney's failure to point out that his 2010 convictions comprised the same criminal conduct.

ISSUE 16: Defense counsel provides ineffective assistance by failing to object to the inclusion of any unproven prior convictions in the offender score, and by failing to properly argue that multiple prior convictions score together as the same criminal conduct. Was Mr. Cloud denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel at sentencing?

33. The trial court erred by giving Instruction No. 3.
34. The trial court's reasonable doubt instruction violated Mr. Cloud's right to due process under the Fourteenth Amendment and Wash. Const. art. I, § 3.

35. The trial court's reasonable doubt instruction violated Mr. Cloud's right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§ 21 and 22.
36. The trial court's reasonable doubt instruction unconstitutionally shifted the burden of proof and undermined the presumption of innocence.
37. The trial court's instruction improperly focused jurors on "the truth of the charge" rather than the reasonableness of their doubts.

ISSUE 17: A criminal trial is not a search for the truth. By equating proof beyond a reasonable doubt with "an abiding belief in the truth of the charge," did the trial court undermine the presumption of innocence, impermissibly shift the burden of proof, and violate Mr. Cloud's constitutional right to a jury trial?

ISSUE 18: A juror with reasonable doubt must acquit, even if unable to articulate a reason for the doubt. By defining a "reasonable doubt" as a doubt "for which a reason exists," did the trial court undermine the presumption of innocence, impermissibly shift the burden of proof, and violate Mr. Cloud's constitutional right to a jury trial?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

James Cloud was in the Pierce County jail, in their special management unit. In this unit, inmates don't share cells and can't see each other from within their cells. RP (10/8/14) 26, 112.

Mental health worker Azusa Matsubayashi alleged that Mr. Cloud threatened her. She said that while she didn't see the person make the statement, she heard an inmate make a threat to her. She claimed to recognize the voice as Mr. Cloud's. RP (10/7/14) 122-123, 126; RP (10/8/14) 20-22. Corrections officer Olson also alleged that Mr. Cloud threatened him. RP (10/7/14) 91.

The state charged Mr. Cloud with two counts of felony harassment on July 1, 2014. CP 1-2. Mr. Cloud was held in custody pending the trial, which the court set for August 19, 2014. CP 4. On August 4, 2014, the prosecutor asked the court to reset the trial date, explaining:

This is simply a case I did not get to Mr. Cooper in sufficient time. It would have been a week turnover to give this file to Terry Lane for trial. Mr. Cooper is out of the office on vacation this week. The State has dropped the ball in processing this on to a trial deputy. That is no fault of Ms. Chabot [def attorney] because she did let me know last Monday this would be going to trial.
RP (8/4/14) 2.

The defense objected. RP (8/4/14) 3. The court found good cause to set the case for trial September 8, 2014. RP (8/4/14) 4.

When the case was called that day for trial, the state's attorney told the court the wrong corrections officer was subpoenaed for trial. RP (9/8/14) 3-4. Again, the court found good cause and reset the trial date. RP (9/8/14) 4.

The next week, Mr. Cloud asked for a new attorney. He told the court his assigned attorney hadn't seen him in custody since he was arraigned, and that she whispered in his ear at the last hearing that he would not win at trial. RP (9/15/14) 6-7. Not denying Mr. Cloud's statements, the attorney said that it was her job to tell Mr. Cloud what she really thought of his case, and she agreed she hadn't reviewed all of the discovery with him. RP (9/15/14) 8. The court denied Mr. Cloud's request. RP (9/15/14)

9. The defense attorney then noted that Mr. Cloud had only recently asked her to view the scene of the alleged threats, so she hadn't had time to do so. RP (9/15/14) 9-10.

The parties next appeared in court on September 23, 2014, for trial to start the next day. RP (9/23/14) 11. The defense attorney said that she hadn't interviewed the complaining witnesses, and that she needed time to locate some defense witnesses. RP (9/23/14) 12-13. When the judge asked her why she had not completed the interviews, she said: "Not any particular reason, your Honor." RP (9/23/14) 16. Once again, a new trial date was set. RP (9/23/14) 17-19.

Trial began on October 6, 2014. The state sought to admit prior convictions against Mr. Cloud. The court ruled that the state could ask Mr. Cloud about a prior residential burglary and a prior assault two, both from 2010. RP (10/7/14) 52.

Officer Olson told the jury that Mr. Cloud was held in a unit where they kept the "worst offenders", those who pose the highest security risk who usually have been assaultive. RP (10/7/14) 78. Inmates here are checked on more frequently than in other areas, are usually moved solo, RP (10/7/14) 79-81. He said that inmates in this area get checked so often because they will cause water damage, or do damage with their urine and feces, or simply fail to follow directives. RP (10/7/14) 82.

Olson said that in May, Mr. Cloud attempted to stare him down at the infirmary months before the incident at issue. RP (10/7/14) 86, 106. He told the jury that on another occasion, Mr. Cloud grabbed his hand once and called him a bitch. RP (10/7/14) 87.

Matsubayashi said that Mr. Cloud was already on a security alert when she heard the threatening statements. RP (10/7/14) 123. She acknowledged that she did not observe the speaker when the threat was made. RP (10/8/14) 20-22.

The state called the classification supervisor from the jail. RP (10/8/14) 50-62. She reviewed for the jury Mr. Cloud's sanctions from the jail. Without objection, she said that he was written up for assaulting staff earlier in his incarceration (separate from the incidents that led to the charges). RP (10/8/14) 59. She also said that Mr. Cloud was put into this high-security unit due to his behaviors, not due to a mental illness. RP (10/8/14) 61-62. Again without objection, she opined that the statements attributed to Mr. Cloud would be cause for concern and vigilance. RP (10/8/14) 62.

The state offered Mr. Cloud's booking photo. Over defense objection, it was admitted. RP (10/8/14) 56-57.

Mr. Cloud testified, stating that he did not make any of the threats for which he stood accused. RP (10/8/14) 65-79, 84-114.

During cross-examination, the prosecutor asked Mr. Cloud if Officer Olson “completely imagined this?” RP 10/8/14) 72. As Mr. Cloud tried to explain how he sat and couldn’t turn to glare at the officer, the prosecutor interrupted him:

Mr. Cloud, your attorney may have an opportunity to ask you other questions. I've asked you a question which is very simply, is it your testimony that Officer Cody Olson imagined or fabricated his observations?
RP (10/8/14) 73.

The court sustained the defense objection. RP (10/8/14) 73.

The state reviewed the incident logs kept by the jail with Mr. Cloud, bringing out that there were notes, after the date of the allegations at issue, that he was uncooperative, had disturbing mannerisms, was disrespectful to staff. RP (10/8/14) 75-78. She asked Mr. Cloud if he’d been sanctioned for these behaviors, and he said he was. RP (10/8/14) 78. After some time, the defense attorney objected to the cross-examination being beyond the scope of the direct. RP (10/8/14) 79. The court sent the jury out and noted that these instances seemed to be unknown to the complaining witnesses, and therefore could not be relevant to whether their fear was reasonable. RP (10/8/14) 80. The defense attorney acknowledged that she should have raised that objection and much sooner. RP (10/8/14) 82. The court instructed the state the examination was simply painting Mr. Cloud as a problematic prisoner and was not relevant. RP (10/8/14) 83.

After other questions, the prosecutor returned to this area of inquiry. She asked Mr. Cloud if he agreed that he'd been written up for being "uncooperative", "disruptive" and "assaultive" on "a number of occasions". RP (10/8/14) 112.

Mr. Cloud acknowledged his residential burglary conviction. RP (10/8/14) 95. The court denied the defense request for a mistrial. RP (10/8/14) 108. The court gave an agreed limiting instruction:

[D]uring the course of this trial, evidence was presented concerning misconduct of the defendant directed towards employees of the Pierce County correctional facility other than Officer Cody, Olson, and Ms. Azusa Matsubayashi. The jury is instructed they cannot consider this evidence in deciding the crime alleged in Count IA, C. Olson, and the crime alleged in Count IIA, Azusa Matsubayashi.
RP (10/9/14) 3-4.

The prosecutor told the jury that several items were "undisputed" and therefore proven beyond a reasonable doubt. RP (10/9/14) 9-17. This included that "nothing [was] submitted that would indicate, reasonably, that Ms. Matsubayashi was inaccurate in her identification of the defendant's comments..." RP (10/9/14) 21. She also told the jury:

One of the things I would point to, a teacher I had used to call them polygraph keys. And what they were, not like the polygraph machine, but there is a ring of truth that happens when certain things are said that make you kind of realize, you know what, this makes sense. Only somebody who truly was in this circumstance would think to say that or would think to include it. As it relates to Officer Olson, I would say his comment that he never looked up the inmates who he is supervising. ... He specifically said he does

not do that because it ensures he treats them all the same. I would submit that to you as kind of an insight as to how he does his business and how he works his job. And that he is not the type of officer who goes and looks for inmates to focus on them. I also submit his demeanor does not strike me as a person who is particularly anxious to have confrontations that are particularly aggressive or of that nature. You get to decide his demeanor from what you saw.

RP (10/9/14) 26-27.

The prosecutor told the jury that Mr. Coloud's actions created "an enormous amount of work for all the people involved". RP (10/9/14) 31.

She also said:

If you have been pepper sprayed by an officer for no reason, would you not make a comment to the medical staff? Would you not seek to make a complaint to the internal affairs or to your lawyer or to anybody that you were essentially being abuse[d] in jail by a particular officer [?] None of that occurred. None of that occurred. RP (10/9/14) 35.

She continued with the thought, telling the jury that the defense presented no evidence that Mr. Cloud complained about being pepper sprayed or otherwise abused by jail staff. RP (10/9/14) 35-36. She also accused the defense attorney of claiming state witnesses exaggerated, asking "are all four of them manufacturing their testimony, all of them? How on earth – how did you explain that?" RP (10/9/14) 53.

The jury convicted Mr. Cloud of both counts. RP (10/10/14) 2.

At sentencing, the state alleged that Mr. Cloud had 7 points. RP (11/18/14) 3. No documents supporting an unlawful imprisonment were

offered, though it was counted as a prior. RP (11/18/14) 3; CP 147. Two of the convictions happened at the same time and were sentenced together, and though the court did not analyze whether they were the same course of conduct, they were counted separately. CP 147.

Mr. Cloud timely appealed. CP 135.

ARGUMENT

I. THE PROSECUTOR COMMITTED FLAGRANT AND ILL-INTENTIONED MISCONDUCT THAT INFRINGED MR. CLOUD'S DUE PROCESS RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY.

Prosecutorial misconduct can deprive the accused of a fair trial by an impartial jury. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, art. I, § 22. Misconduct requires reversal if it creates a substantial likelihood that the verdict was affected.¹ *Glasmann*, 175 Wn.2d at 704. The inquiry examines the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight. *Glasmann*, 175 Wn.2d at 706.

¹ Prosecutorial misconduct requires reversal, even absent an objection below, if it is so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012).

- A. The prosecutor improperly asked Mr. Cloud if Officer Olson “completely imagined” a prior incident, and suggested that jurors would have to believe that prosecution witnesses were “manufacturing their testimony” in order to acquit Mr. Cloud.

A prosecutor may not ask one witness whether another was mistaken or lying. *State v. Walden*, 69 Wn. App. 183, 187, 847 P.2d 956 (1993). Such questions are irrelevant, argumentative, and invade the province of the jury. *Walden*, 69 Wn. App. 183. It is also misconduct to suggest that an acquittal requires the jury to believe the state’s witness were lying or mistaken. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996).

The prosecutor in this case committed both forms of misconduct.

First, during cross-examination of Mr. Cloud, the state’s attorney asked if Officer Olson “completely imagined” a stare-down in the infirmary.² RP (10/8/14) 72. When Mr. Cloud tried to explain his position, the prosecutor interrupted, and asked “[I]s it your testimony that Officer Cody Olson imagined or fabricated his observations?” RP (10/8/14) 73. The court sustained an objection to this second question.

Second, in closing argument, the prosecutor suggested that acquittal required jurors to believe the state’s witnesses were lying:

[A]re all four of them manufacturing their testimony, all of them? How on earth – how [do] you explain that? How do you explain

² Defense counsel was ineffective for failing to object, as argued elsewhere in this brief.

Sergeant Breiner [?] He wrote a police report with the defendant's statements. That's a question I would like to know why would somebody do something like that [?]
RP (10/9/14) 53.

These rhetorical questions echoed a point the prosecutor made earlier: "it doesn't make any sense that all these individuals are wrong." RP (10/9/14) 31. Her arguments suggested that jurors could not acquit Mr. Cloud unless they found that all of the state's witnesses "were wrong" or had "manufactur[ed] their testimony." RP (10/9/14) 31, 53. This is especially problematic when considered in conjunction with the improper cross-examination and the prosecutor's other burden-shifting arguments.

There is a substantial likelihood that the verdict was affected by the prosecutor's improper questions on cross examination. *Glasmann*, 175 Wn.2d at 704. Furthermore, the misconduct in closing was flagrant and ill-intentioned. *Id.* Mr. Cloud's convictions must be reversed, and the case remanded for a new trial. *Id.*

B. The prosecutor committed reversible misconduct by shifting the burden of proof during closing argument.

A prosecutor commits misconduct by making arguments shifting the burden of proof onto the accused. *State v. Lindsay*, 180 Wn2d 423, 434, 326 P.3d 125 (2014). The state's misstatement of the burden creates "great prejudice" by undermining a defendant's due process rights. *State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010) *review denied*,

171 Wn.2d 1013, 249 P.3d 1029 (2011). Because the accused has no duty to present evidence, a prosecutor generally cannot comment on the lack of defense evidence. *State v. Thorgerson*, 172 Wn.2d 438, 467, 258 P.3d 43 (2011).

Here, the state made several arguments improperly suggesting that Mr. Cloud had an obligation to disprove the state's evidence. She said that "[t]here is nothing submitted that would indicate, reasonably, that Ms. Matsubayashi was inaccurate in her identification." RP (10/9/14) 21. She suggested that Mr. Cloud had an obligation to prove he'd spoken to medical staff or complained to "internal affairs or to [his] lawyer" about the earlier incident in which Olson had pepper-sprayed him. RP (10/9/14) 35.

Mr. Olson had no obligation to present evidence. He was not required to submit anything proving that Matsubayashi "was inaccurate in her identification." RP (10/9/14) 21. Nor did he have any duty to present information confirming his account on the collateral issue of his prior interaction with Olson.

Furthermore, even if there were witnesses available to Mr. Cloud who could have provided testimony about the pepper-spraying or undermining Matsubayashi's identification, the state should not have made this kind of missing-witness argument without timely disclosing its intention and giving the defense an opportunity to explain the witnesses' absence.

It is misconduct for a prosecutor to point out the defendant's failure to call a witness unless the missing witness rule applies. *State v. Dixon*, 150 Wn. App. 46, 54, 207 P.3d 459 (2009). The missing witness rule only applies in limited circumstances. *State v. Montgomery*, 163 Wn.2d 577, 598, 183 P.3d 267 (2008). A prosecutor may not make a missing witness argument unless, *inter alia*, the potential testimony is material and not cumulative. *Id.* at 598. The argument must be raised "early enough in the proceedings to provide an opportunity for rebuttal or explanation." *Id.* at 599. The limits of the missing witness rule "are particularly important when...the doctrine is applied against a criminal defendant." *Id.* at 598.

The prosecutor's suggestion that Mr. Cloud had an obligation to submit testimony undermining Matsubayashi's identification or confirming his account of the pepper-spraying incident violates these principles. *Id.* It improperly shifted the burden of proof and infringed his Fourteenth Amendment right to due process. *Johnson*, 158 Wn. App. at 685-86.

The misconduct was flagrant and ill-intentioned. Accordingly, Mr. Cloud's convictions must be reversed and the case remanded for a new trial. *Glasmann*, 175 Wn.2d at 704.

C. The prosecutor improperly “testified” to “facts” not in evidence in order to bolster the testimony of state witnesses.

A prosecutor commits misconduct by arguing facts that have not been admitted into evidence. *Glasmann*, 175 Wn.2d at 696. This is especially true where the state uses “facts” outside the record to bolster the testimony of law enforcement witnesses. *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008).

Here, the prosecutor improperly bolstered the testimony of her law enforcement witnesses by referring to facts outside the record. Specifically, the prosecutor claimed that the state witnesses must be telling the truth because “[t]his created an enormous amount of work for all of the people involved in the jail in terms of who you heard from and others.” RP (10/9/14) 31. She went on to say that “all of these individuals took on extra work in terms of documenting, reporting, relaying, forwarding, and testifying.” RP (10/9/14) 31.

In fact, no evidence suggested that the witnesses or these unnamed “others” took on “an enormous amount of extra work.” RP (10/9/14) 31. The prosecutor relied on this “fact” from outside the record to reinforce her improper argument: that jurors could not acquit unless they believed that the state’s witnesses lied. RP (10/9/14) 31, 53.

This misconduct was flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 704. Given the “fact-finding facilities presumably available” to the prosecutor’s office, the jury likely took the prosecutor’s statements at face value. *Glasmann*, 175 Wn.2d at 706 (citation omitted). The misconduct is especially egregious because it involved bolstering the credibility of law enforcement witnesses. *Jones*, 144 Wn. App. at 293. Mr. Cloud’s convictions must be reversed and the case remanded for a new trial. *Id.*

D. The prosecutor improperly expressed her personal opinion by referring to “polygraph keys” that had “a ring of truth.”

The state must “seek conviction based only on probative evidence and sound reason.” *Glasmann*, 175 Wn.2d at 704. It is improper for a prosecutor to convey a personal opinion on the credibility of a witness. *Lindsay*, 180 Wn.2d at 437.

The prosecutor did so in this case. First, she asserted that Olson and Matsubayashi “credibly gave [the jury] explanations as to why they could hear when they could hear.” RP (10/9/14) 26.

Second, she went on to refer to what she called “polygraph keys,” which she described as details that have “a ring of truth.” RP (10/9/14) 26-27. She told jurors that she learned about “polygraph keys” from “a teacher I had.” RP (10/9/14) 26. She gave her own personal opinion regarding the “polygraph key” in Matsubayashi’s testimony:

the little polygraph key that I heard is when on June 30th she was working on the tier and she thought she heard somebody threatening her, but she wasn't sure. So she paused and waited to see if she heard anything else, and she did. And that was when she was sure that she was hearing the defendant directing threats at her. RP (10/9/14) 27.

She also applied this "polygraph key" concept to Officer Olson:

As it relates to Officer Olson, I would say his comment that he never looked up the inmates who he is supervising...I also submit his demeanor does not strike me as a person who is particularly anxious to have confrontations that are particularly aggressive or of that nature.³
RP (10/9/14) 27.

These arguments amounted to improper personal opinions on the credibility of the state's two direct witnesses. The prosecutor did more than merely argue that facts in the record supported a finding of credibility. *Cf. State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). Instead, she talked about her own former teacher (an authority figure who did not testify), outlined a scientific-sounding concept ("polygraph keys"), and gave her own opinions on how this concept applied to the testimony ("the little polygraph key that I heard..."; "As it relates to Officer Olson, I would say...").

The prosecutor committed flagrant and ill-intentioned misconduct. She should not have made these statements of personal opinion regarding

³ She went on to say "You get to decide his demeanor from what you saw." RP (10/9/14) 27.

the credibility of the two primary state witnesses. *Lindsay*, 180 Wn.2d at 437. Mr. Cloud's convictions must be reversed. *Id.*

II. MR. CLOUD'S CONVICTION WAS IMPROPERLY BASED ON PROPENSITY EVIDENCE.

A criminal conviction may not be based on propensity evidence. *State v. Wade*, 98 Wn. App. 328, 336, 989 P.2d 576 (1999). Mr. Cloud's convictions in this case must be reversed because they were based in part on propensity evidence. *State v. Gunderson*, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014).

A. The trial court should have excluded Mr. Cloud's prior felony convictions under ER 609 because they were not crimes of dishonesty or false statement and were not probative of his truthfulness.

Evidence of prior felony convictions is generally inadmissible against a criminal defendant. *State v. Hardy*, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997). Such evidence is irrelevant to guilt, and is highly prejudicial because it suggests a propensity to commit crimes. *Id.* Under ER 609, a prior conviction not involving dishonesty should be excluded unless probative of the accused person's "truthfulness." *Id.*, at 707-708.

Other than offenses involving dishonesty or false statement, very few prior convictions are probative of truthfulness, and the burden of proving probative value rests with the state:

prior convictions not involving dishonesty or false statements are not probative of the witness's veracity until the party seeking admission thereof shows the opposite by demonstrating the prior conviction disproves the veracity of the witness.

Id., at 708.

Furthermore, the trial court must state on the record factors which favor admission and exclusion. *Id.*, at 708-709. These include “(1) the type and nature of the prior crime; (2) the remoteness of the prior conviction; (3) the similarity of the prior crime to the current charge; (4) the age and circumstances of the defendant when previously convicted; (5) whether the defendant testified at the previous trial; and (6) the length of defendant's criminal record.” *Id.*, at 709 n. 8.

Here, Mr. Cloud's prior burglary and the assault⁴ underlying it should have been excluded. In overruling defense counsel's objections,⁵ the court did not explain how either conviction was probative of truthful-

⁴ The prosecutor did not introduce evidence of the prior assault. It is included here to preserve any error should the case be remanded for a new trial.

⁵ Although counsel did not object to the burglary conviction prior to trial, she did object and asked for a mistrial when the prosecutor elicited Mr. Cloud's prior conviction for residential burglary. RP (10/7/14) 49-52; RP (10/8/14) 101-108.

ness.⁶ In fact, the court considered only one of the six factors listed above (the similarity of the prior crime to the current charge). RP (10/8/14) 105-108. Nothing about the remaining factors suggest that the prior offenses had any bearing on Mr. Cloud's truthfulness.⁷

The evidence should have been excluded under ER 609. *Id.* Like almost all crimes not involving dishonesty or false statement, the burglary and the assault were not probative of truthfulness. *Id.*

The error requires reversal because there is a reasonable probability that it affected the trial's outcome. *Id.*, at 712-713. As in *Hardy*, Mr. Cloud's credibility was important: his testimony contradicted that of the state's witnesses. RP (10/7/14) 76-131; RP (10/8/14) 16-43; 65-114. As in *Hardy*, it was "virtually his word against [that of each] alleged victim." *Id.* Olson provided the only testimony supporting his account; Matsubayashi provided the only testimony supporting hers. Likewise, Sergeant Breiner provided the only testimony alleging that Mr. Cloud "confessed," an allegation Mr. Cloud denies. RP (10/8/14) 48-49.

⁶ With regard to the burglary conviction, the judge said only "I think that this is probative of his credibility." RP (10/8/14) 107. The court did not make any statement suggesting the assault was probative of truthfulness. RP 52

⁷ The prior offenses occurred more than four years prior to the start of trial. CP 67-98. Mr. Cloud was under thirty when he committed the crimes, and had recently been released from jail. CP 70-74. He pled guilty to the offenses. CP 74. At the time, he allegedly had one prior felony charge. CP 67-98.

In addition, although jurors knew that Mr. Cloud was in jail at the time of the incident, they did not know why he was in jail. Some may have believed he was in custody for a misdemeanor or for a civil contempt charge. Introduction of the burglary charge made clear that Mr. Cloud's criminal history included a serious felony, and likely prejudiced jurors against him, notwithstanding the court's instruction.

The erroneous admission of the burglary prejudiced Mr. Cloud.⁸ There is a reasonable probability that the error affected the outcome. *Id.* Mr. Cloud's convictions must be reversed and the case remanded. *Id.*

B. Mr. Cloud's due process right to a fair trial was infringed by the jury's consideration of irrelevant and inadmissible propensity evidence.

1. The jury heard an overwhelming amount of propensity evidence, and the judge's limiting instruction was incomplete and misleading.

The use of propensity evidence to prove a crime violates due process.⁹ U.S. Const. Amend. XIV.¹⁰ A conviction based in part on propensity evidence is not the result of a fair trial. *Garceau v. Woodford*, 275 F.3d 769, 777-778 (9th Cir. 2001), *reversed on other grounds at* 538 U.S. 202,

⁸ As noted above, the prosecutor did not introduce evidence of the prior assault. Mr. Cloud includes that offense here in case the charges are remanded for a new trial.

⁹ The U.S. Supreme Court has expressly reserved ruling on a similar issue. *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

¹⁰ *Garceau*, 275 F.3d at 775; *see also McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993).

123 S.Ct. 1398, 155 L.Ed.2d 363 (2003); *see also Old Chief v. United States*, 519 U.S. 172, 182, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).

Here, the jury heard an overwhelming amount of propensity evidence. First, jurors learned that Mr. Cloud had a propensity to act up while in jail: the prosecutor improperly cross-examined him regarding numerous sanctions imposed for repeated instances of misconduct.¹¹ RP (10/8/14) 75-79. The prior misconduct included threatening behavior similar to that underlying each charge. RP (10/8/14) 75-79.

The court did not clearly explain to jurors how they should treat this improperly admitted evidence. Instead, the judge told jurors that they could not consider it “in deciding the crime[s].” CP 122. In addition, the court did not give jurors any guidance or limitation on their consideration of evidence of past misconduct directed at Olson and Matsubayashi. The court admitted the evidence to help the jury determine the reasonableness of each alleged victim’s fear. RP (10/8/14) 60-62, 68-69. However, jurors were never told of this limited purpose. CP 112-132.

Second, the court should not have admitted Mr. Cloud’s booking photo into evidence. Mug shots are “notoriously prejudicial and inflammatory and are generally admissible only if specifically relevant.” *State v.*

¹¹ His numerous prior instances of misconduct in jail should have been excluded under ER 402, ER 403, and ER 404(b), as argued elsewhere in this brief.

Walker, 182 Wn.2d 463, 489-90, 341 P.3d 976 *cert. denied*, 135 S.Ct. 2844 (2015) (Walker I) (Gordon-McCloud, J., concurring). Ordinarily, three conditions must be met for introduction of a mug shot: the prosecution must show a demonstrable need for the photograph, the photo must not imply a criminal record, and the manner of introduction at trial must not draw particular attention to the source of the photo. *United States v. Castaldi*, 547 F.3d 699, 704 (7th Cir. 2008); *see also United States v. Hines*, 955 F.2d 1449, 1456 (11th Cir. 1992). The mug shot here failed all three conditions.

The booking photo was not relevant in this case. Matsubayashi was inside another inmate's cell when she heard the alleged threats; she did not see the person who threatened her. RP (10/8/14) 127; RP (10/9/14) 20-22. The booking photo did not help her identify the voice she heard. Nor did its admission help the jury determine the accuracy of Matsubayashi's voice identification.

The booking photo was also irrelevant to establish that Matsubayashi had a prior face-to-face meeting with Mr. Cloud. RP (10/8/14) 7-10; 16-19. Mr. Cloud did not dispute that he'd had a prior face-to-face meeting. Matsubayashi testified that she examined the photo to confirm she'd met with Mr. Cloud face-to-face; this did not necessitate introduction of the photo itself. RP (10/8/14) 7-10; 16-19.

Mr. Cloud's booking photo was completely irrelevant; it should have been excluded under ER 402, ER 403, and ER 404(b). Its admission undermined the presumption of innocence and suggested criminal propensity. *State v. Sanford*, 128 Wn. App. 280, 285, 115 P.3d 368 (2005).¹² Even though the jury knew that Mr. Cloud was in jail at the time of the alleged offenses, the mug shot showed him "not looking so good," as defense counsel argued. RP (10/8/14) 7. Introduction of a booking photo is akin to allowing jurors to see an accused person in handcuffs or otherwise restrained; it undermines the presumption of innocence. *See, e.g., State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). A juror's unconscious reaction to visual information such as those presented in a mug shot cannot be rectified: "Highly prejudicial images may sway a jury in ways that words cannot. *Glasmann*, 175 Wn.2d at 707.

Third, in addition to the booking photo and all of the uncharged misconduct, the court erroneously admitted Mr. Cloud's prior burglary conviction.¹³ This prior conviction should have been excluded under ER 609. Although the court properly limited the jury's consideration of the

¹² *See also State v. Henderson*, 100 Wn. App. 794, 803, 998 P.2d 907 (2000).

¹³ The court overruled Mr. Cloud's objection to admission of his prior felony assault; however, the prosecutor did not introduce that conviction. RP (10/7/14) 52.

prior conviction,¹⁴ it added to the mountain of evidence of prior bad acts that was improperly placed before the jury.

The admission of propensity evidence violates due process when it is “reasonably likely” that the jury “skipped careful analysis” and “convicted [the defendant] on the basis of his suspicious character and previous acts.” *McKinney*, 993 F.2d at 1385. This occurs when (1) there is no permissible inference that can be drawn from the evidence, and (2) there is a likelihood that the evidence caused prejudice.¹⁵ *Id.*, at 1384.

Here, the jury heard that Mr. Cloud repeatedly threatened staff and committed other acts of misconduct prior to the charged incidents. RP (10/8/14) 75-79. No permissible inference could be drawn from the evidence, and there is likelihood that it prejudiced the jury against him.

Knowing that Mr. Cloud had a prior burglary conviction, that he was housed with the most serious behavioral problems, and that he was constantly in trouble for behavior similar to the charged behavior, it is very likely that jurors convicted him without fully considering the evidence properly admitted. Accordingly, the convictions violated Mr. Cloud’s right to due process. *Garceau*, 275 F.3d at 776, 777-778.

¹⁴ Jurors were instructed to consider the prior conviction to decide what weight or credibility to give Mr. Cloud’s testimony. CP 121.

¹⁵ Such a likelihood may arise, for example, where the evidence is of an emotional character and the state’s evidence is not overwhelming. *Id.*

Constitutional error is presumed prejudicial. *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). The state bears the burden of proving harmlessness beyond a reasonable doubt. *Id.* The error here is not harmless. Mr. Cloud denied both incidents. The improperly admitted evidence (and the absence of an appropriate limiting instruction) encouraged the jury to disregard Mr. Cloud's denials and convict him without properly considering the evidence.

Mr. Cloud's convictions must be reversed, and the case remanded with instructions to exclude the evidence at any retrial. *Id.*

2. The violation of Mr. Cloud's due process right to a fair trial by an impartial jury may be raised for the first time on review under RAP 2.5(a)(3).

To raise an issue under RAP 2.5(a)(3), an appellant need only make "a plausible showing that the error... had practical and identifiable consequences in the trial." *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). The showing required under RAP 2.5(a)(3) "should not be confused with the requirements for establishing an actual violation of a constitutional right." *Id.* An error has practical and identifiable consequences if "given what the trial court knew at that time, the court could have corrected the error." *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010).

Here, the court could have corrected the error. At the time, it was clear that the evidence was inadmissible and highly prejudicial.¹⁶ The court could have excluded the inadmissible evidence of prior misconduct, by crafting a proper limiting instruction that prohibited jurors from considering any of prior misconduct as propensity evidence, and by excluding the evidence of Mr. Cloud's prior burglary conviction.

Because the error is clear in the record, it is manifest. Because it involves Mr. Cloud's Fourteenth Amendment right to due process, it is manifest. It should be reviewed for the first time on appeal under RAP 2.5(a)(3). In the alternative, the court should exercise its discretion and reach the merits of Mr. Cloud's argument. *See State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011).

III. MR. CLOUD WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review.

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a). An ineffective assistance claim presents a mixed question of law and fact, reviewed *de novo*.

¹⁶ Indeed, the trial judge himself noted its irrelevance once defense counsel raised an objection. RP (10/8/14) 80-81, 83. Despite this, the court did not strike the evidence from the

In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

B. Defense counsel provided ineffective assistance by failing to object to inadmissible evidence.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. U.S. Const. Amends. VI, XIV; *Kyllo*, 166 Wn.2d at 862. Reversal is required if counsel's deficient performance prejudices the accused. *Kyllo*, 166 Wn.2d at 862 (citing *Strickland*, 466 U.S. at 687). Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

Defense counsel provides ineffective assistance by failing to object to inadmissible evidence absent a valid strategic reason. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (citing *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). Reversal is required if an objection would likely have been sustained and there is a reasonable probability that the result of the trial would have been different without the inadmissible evidence. *Id.*

record.

3. Defense counsel unreasonably failed to timely object to introduction of Mr. Cloud's prior burglary conviction.

Mr. Cloud's prior burglary conviction was not a crime of dishonesty under ER 609. The record shows that the underlying crimes were assault, felony harassment, and violation of a protection order. CP 66-71.

Despite this, defense counsel failed to object when the prosecutor announced her plan to introduce the burglary under ER 609.¹⁷ RP (10/7/14) 47-52. Had counsel objected, the court would have sustained it and kept the prior burglary conviction from prejudicing the jury.

Had defense counsel timely objected, the conviction would have been excluded. The offense was not a crime of dishonesty or false statement; accordingly, it was presumptively inadmissible. *Hardy*, 133 Wn.2d at 706. Nothing about it suggests that it was probative of truthfulness. CP 66-71; *See* RP (10/8/14) 97. Had the court balanced the appropriate factors, it would have sustained the objection, eliminating jury distraction with Mr. Cloud's record.¹⁸

¹⁷ She did object and moved for a mistrial after the prosecutor elicited the prior conviction from Mr. Cloud during cross-examination. RP (10/8/14) 95-102. She did not renew her objection when the prosecutor again brought on the information at the end of her cross examination. RP (10/8/14) 114.

¹⁸ When counsel *did* object (after the state had already elicited the prior offense), the court did not suggest that the prior conviction was probative of truthfulness. RP (10/8/14) 101-102.

There is a reasonable likelihood that defense counsel's deficient performance prejudiced Mr. Cloud. *Id.*, at 712-713. Accordingly, his convictions must be reversed and the case remanded for a new trial. *Id.*

4. Defense counsel unreasonably failed to raise the correct grounds for excluding evidence of Mr. Cloud's alleged misbehavior in the jail.

Evidence of Mr. Cloud's prior misbehavior in jail should have been excluded under ER 402, ER 403, and ER 404(b). However, the only objection defense counsel raised was that the prosecutor's cross-examination was beyond the scope of direct. RP (10/8/14) 70, 79.

Absent a proper objection, the prosecutor was allowed to introduce evidence that Mr. Cloud had been sanctioned numerous times for threatening staff and other misbehavior at the jail. RP (10/8/14) 70-79. None of the evidence was relevant to prove any element of the offense.¹⁹ It should therefore have been excluded under ER 401 and ER 402.

Furthermore, the danger of unfair prejudice substantially outweighed any minimal probative value, because of the risk that jurors would treat the prior misconduct as propensity evidence. It was also likely to confuse jurors, since it was not actually admissible for any legitimate

¹⁹ The sole exception, arguably, was evidence of prior misconduct that showed whether or not Olson and Matsubayashi had a reasonable fear that Mr. Cloud would carry out any threats. The court had specifically allowed such evidence, but did not thereby rule that any prior incident of misconduct could come in. RP (10/7/14) 53-73.

purpose. It should therefore have been excluded under ER 403.

Finally, the evidence should have been excluded under ER 404(b). In addition to lacking probative value and creating a risk of unfair prejudice and confusion, the prior misconduct was not admissible to prove any of the exceptions to ER 404(b). A proper objection would have been sustained. The trial judge himself noted the lack of relevance:

[T]his level of cross examination does not constitute an unlimited authorization to cross examine the defendant on his entire disciplinary record...I still am not hearing what the relevance is as it relates to the witness, other than to paint him as a problematic prisoner with a lot of administrative misconduct which otherwise is not germane to why we are here.
RP (10/8/14) 83.

Furthermore, defense counsel had no strategic reason to allow the improper testimony. Indeed, counsel noted that she “misstepped by not objecting earlier to all of this extraneous behavior.” RP (10/8/14) 82.

The fact that counsel objected, renewed her objection, and then noted that she should have objected earlier showed that she was pursuing a strategy of excluding the evidence. Accordingly, counsel’s failure to argue the correct grounds for suppression cannot be explained as a legitimate strategic or tactical choice. *Saunders*, 91 Wn. App. at 578.

A proper motion would have resulted in suppression of this damaging propensity evidence. There is a reasonable probability that counsel’s deficient performance affected the outcome. *Id.* Mr. Cloud denied that he

committed either offense. The long string of administrative sanctions suggested that he had a propensity to act out. It undermined his testimony, and shifted the balance in favor of the prosecution. Mr. Cloud's convictions must be reversed and the case remanded for a new trial. *Id.*

5. Defense counsel should have objected to testimony that Mr. Cloud was housed in the unit reserved for the "worst offenders" who posed a security risk because they were assaultive.

Officer Olson, the state's first witness, explained to jurors that Mr. Cloud lived in unit "3A," which Olson described as "where we keep our worst offenders." RP (10/7/14) 77-78. Defense counsel should have objected to this testimony. The evidence was irrelevant to any fact of consequence to the prosecution, and thus should have been excluded under ER 402. Any probative value was substantially outweighed by the risk of unfair prejudice. ER 403. There is no conceivable strategic reason for admission of the evidence.

Counsel's failure to object prejudiced Mr. Cloud. It immediately put him in a negative light, biasing the jury against him. It created a likelihood of conviction not based on the evidence but on the fact that Mr. Cloud ranked among the "worst offenders" in the jail. Mr. Cloud's conviction should be reversed and the case remanded for a new trial. *Id.*

- C. Defense counsel should have objected to the court's nonstandard limiting instruction, because it allowed the jury to consider prior misbehavior as propensity evidence.

Defense counsel requested a limiting instruction addressing the numerous instances of misconduct the prosecutor brought out during cross examination. The trial judge crafted a nonstandard limiting instruction that allowed jurors to consider some of the prior acts—those involving Olson and Matsubayashi—as propensity evidence. The instruction reads as follows:

[D]uring the course of this trial, evidence was presented concerning misconduct of the defendant directed towards employees of the Pierce County correctional facility other than Officer Cody, Olson, and Ms. Azusa Matsubayashi. The jury is instructed they cannot consider this evidence in deciding the crime alleged in Count IA, C. Olson, and the crime alleged in Count IIA, Azusa Matsubayashi.
RP (10/9/14) 3-4.

The instruction was confusing and misleading, and allowed an improper propensity inference for some of the misconduct evidence.

Jury instructions are reviewed *de novo*. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). Instructions must make the relevant legal standard manifestly apparent to the average juror. *Kyllo*, 166 Wn.2d at 864.

The instruction here was not manifestly clear. It only evidence “concerning misconduct of the defendant directed toward employees...

other than” Olson and Matsubayashi. CP 122. This left jurors free to consider misconduct toward Olson and Matsubayashi for any purpose, including as propensity evidence. *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). Additionally, the instruction directed jurors not to consider evidence of misconduct toward third parties “in deciding the crime[s].” CP 122. This left jurors to decide for themselves the legitimate purpose of the evidence. Some might have concluded that the evidence related to Mr. Cloud’s credibility. Others might have concluded that it had some bearing on other aspects of his character.

Defense counsel should have objected to the court’s nonstandard limiting instruction. Her failure to do so allowed jurors to consider evidence of prior misconduct as propensity evidence. It also allowed jurors to consider the improperly admitted evidence for any purpose other than “in deciding the crime[s].” CP 122. There is a reasonable probability that counsel’s deficient performance affected the outcome. *Kyllo*, 166 Wn.2d at 862. Accordingly, Mr. Cloud’s convictions must be reversed and the case remanded for a new trial. *Id.*

D. Defense counsel unreasonably failed to object to the prosecutor’s misconduct.

Failure to object to prosecutorial misconduct is objectively unreasonable under most circumstances: “At a minimum, an attorney... should

request a bench conference... where he or she can lodge an appropriate objection.” *Hodge v. Hurley*, 426 F.3d 368, 386 (6th Cir., 2005). Defense counsel did not even take this minimum step.

Counsel should have objected when the state improperly asked Mr. Cloud if Olson had “completely imagined” their prior interaction, and when she suggested that acquittal required jurors to believe the state’s witnesses were all “manufacturing their testimony.” RP (10/8/14) 72; RP (10/9/14) 53; *Walden*, 69 Wn. App. at 187; *Fleming*, 83 Wn. App. at 213.

Counsel should also have objected when the prosecutor shifted the burden of proof, “testified” to “facts” outside the record, and expressed her personal opinion about the credibility of witnesses.

At a minimum, defense counsel should have asked for a sidebar, objected, and sought a mistrial outside the presence of the jury. The prosecutor violated well-established rules that should have been obvious to defense counsel. Counsel’s failure to protect her client’s interest through a proper objection deprived him of the effective assistance of counsel.

Mr. Cloud was prejudiced by counsel’s repeated failure to object. Had defense counsel objected at the first instance of misconduct, the jury might not have been exposed to the improper comments that followed. There is a reasonable probability that the verdicts would have been more favorable to Mr. Cloud. *Kyllo*, 166 Wn.2d at 862.

Defense counsel provided ineffective assistance. *Id.* Mr. Cloud's convictions must be reversed and the case remanded for a new trial. *Id.*

IV. THE TRIAL COURT FAILED TO PROPERLY DETERMINE MR. CLOUD'S OFFENDER SCORE.

A. In the absence of sufficient evidence or a stipulation, the trial court erred by including a 2006 conviction for unlawful imprisonment in Mr. Cloud's offender score.

In order for a prior conviction to be included in an offender score calculation, the state must prove that the conviction occurred by a preponderance of the evidence. *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012). Bare assertions on the part of the state fail to meet this burden. *Id.* The state must introduce "evidence of some kind to support the alleged criminal history." *Id.*

Mr. Cloud's Judgment and Sentence includes a 2006 conviction for unlawful imprisonment. CP 147. The state did not present evidence proving Mr. Cloud had previously been convicted of that crime. Nor did Mr. Cloud stipulate that he had a 2006 conviction for unlawful imprisonment. No evidence supports the court's finding.

Mr. Cloud's case must be remanded for correction of his Judgment and Sentence. *Hunley*, 175 Wn.2d at 909.

B. Mr. Cloud's 2010 convictions comprised the same criminal conduct and should have scored as one point.

A sentencing court's same criminal conduct determination is reviewed for an abuse of discretion. *State v. Graciano*, 176 Wn.2d 531, 533, 295 P.3d 219 (2013). A court abuses its discretion by failing to exercise discretion. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

A sentencing court must analyze multiple prior convictions to determine whether or not they are based on the "same criminal conduct." RCW 9.94A.525(5)(a).²⁰ The current sentencing court is bound by prior determinations that favor the defendant, but must exercise its discretion anew where prior offenses were scored separately. RCW 9.94A.525(5)(a)(i); *State v. Mehaffey*, 125 Wn. App. 595, 600-01, 105 P.3d 447 (2005). This ensures that an offender will be relieved of any prior errors in the determination. It also allows the offender benefit from any changes in the interpretation of RCW 9.94A.589(1)(a).

The rule is particularly important where prior offenses include a burglary charge. The burglary anti-merger statute does not apply to prior con-

²⁰ The statute reads as follows: "In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except: (i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the 'same criminal conduct' analysis found in RCW 9.94A.589(1)(a)..."

victions: “The burglary antimerger statute relates solely to the prosecution and punishment of current burglary convictions and has no application to calculating an offender score based on prior convictions.” *State v. Williams*, 181 Wn.2d 795, 801, 336 P.3d 1152 (2014). This means a burglary which scored separately when the defendant was originally sentenced will not score separately under the anti-merger statute at sentencing for a subsequent offense. *Id.*

In determining whether multiple offenses require the same criminal intent, simultaneity is not required. *State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997). Furthermore, the “same intent” analysis thus does not depend on the *mens rea* for each offense. *State v. Phuong*, 174 Wn. App. 494, 546, 299 P.3d 37 (2013). Rather, the sentencing court “should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next....” *State v. Garza-Villarreal*, 123 Wn.2d 42, 46-47, 864 P.2d 1378 (1993) (quoting *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987)).

In this case, the facts underlying the two prior assault convictions are set forth in a declaration of probable cause submitted by the prosecuting attorney. CP 70-71. These facts establish that the four convictions comprise the same criminal conduct: Mr. Cloud unlawfully entered his ex-

girlfriend's home in violation of a protection order, assaulted her with a knife, and threatened harm if she called the police. CP 70-71.

There is no indication the trial court reviewed these facts. RP (11/18/14) 2-10. The court did not independently analyze the prior convictions on the record. This failure to exercise discretion amounted to an abuse of discretion and requires reversal. *Grayson*, 154 Wn.2d at 342.

Mr. Cloud's sentence must be vacated. The case must be remanded for a new sentencing hearing, with instructions to score the four prior convictions as one point under RCW 9.94A.525(5)(1)(i).

- C. Defense counsel provided ineffective assistance at sentencing by failing to object to inclusion of the unlawful imprisonment conviction in the offender score and by failing to argue that the 2010 crimes comprised the same criminal conduct.

An accused person has a right to the effective assistance of counsel at sentencing. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Kyllo*, 166 Wn.2d at 862. Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.* An attorney has "the duty to research the relevant law." *Kyllo*, 166 Wn.2d at 862. An unreasonable failure to do so constitutes deficient performance. *Id.*, at 868. Defense

counsel provides ineffective assistance by failing to properly argue same criminal conduct. *Phuong*, 174 Wn. App. at 548.

Here, as noted above, Mr. Cloud's 2010 convictions comprised the same criminal conduct. Mr. Cloud acted with the same overall criminal purpose, and the four offenses occurred simultaneously or in close sequence. CP 66-71. Defense counsel should have pointed out the probable cause statement and argued in favor of a same criminal conduct finding. Counsel provided deficient performance by failing to properly argue that the 2010 offenses comprised the same criminal conduct. *Phuong*, 174 Wn. App. at 548.

Mr. Cloud was prejudiced by his attorney's deficient performance. *Kyllo*, 166 Wn.2d at 862. The facts of Mr. Cloud's case fit squarely into the standard for same criminal conduct. RCW 9.94A.589(1)(a). If defense counsel had raised the issue at sentencing, Mr. Cloud's offender score would have been reduced. RCW 9.94A.589(1)(a). There is a reasonable probability that counsel's deficient performance affected the outcome of the sentencing proceeding. *Phuong*, 174 Wn. App. at 548.

Mr. Cloud's attorney provided ineffective assistance of counsel by failing to argue that his 2010 convictions comprised the same criminal conduct. *Id.* Mr. Cloud's case must be remanded for resentencing. *Id.*

V. THE COURT'S "REASONABLE DOUBT" INSTRUCTION INFRINGED MR. CLOUD'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A. The instruction improperly focused the jury on a search for "the truth."

A jury's role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012). Here, the trial court instructed the jury that proof beyond a reasonable doubt means having "an abiding belief *in the truth of the charge.*" CP 117 (emphasis added).

Rather than determining the truth, a jury's task "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760. In this case, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider "the truth of the charge." CP 117.²¹

A jury instruction misstating the reasonable doubt standard "is subject to automatic reversal without any showing of prejudice." *Id.* at 757 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). Here, by equating proof beyond a reasonable doubt

²¹ Mr. Cloud does not challenge the phrase "abiding belief." Both the U.S. and Washington Supreme Courts have already determined that phrase to be constitutional. *See Victor v. Nebraska*, 511 U.S. 1, 15, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (citing *Hopt v. Utah*, 120 U.S. 430, 439, 7 S.Ct. 614, 30 L.Ed. 708 (1887)); *State v. Pirtle*, 127 Wn.2d 628, 658, 904 P.2d 245 (1995). Rather, Mr. Cloud objects to the instruction's focus on "the truth." CP 75.

with a “belief in the truth of the charge,” the court confused the critical role of the jury. CP 117.

The court’s instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery*. The problem here is greater than that presented in *Emery*. In that case, the error stemmed from a prosecutor’s misconduct. Here, the prohibited language reached the jury in the form of an instruction from the court. CP 117. Jurors were obligated to follow the instruction.

The presumption of innocence can be “diluted and even washed away” by confusing jury instructions. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). Courts must vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated.²² *Id.*

Improper instruction on the reasonable doubt standard is structural error. *Sullivan*, 508 U.S. at 281-82. By equating that standard with “belief in the truth of the charge” the court misstated the prosecution’s burden of proof, confused the jury’s role, and denied Mr. Cloud his constitutional

²² Although the *Bennett* court approved WPIC 4.01, the court was not faced with a challenge to the “truth” language in that instruction. *Id.*

right to a jury trial.²³ Mr. Cloud's convictions must be reversed. The case must be remanded for a new trial with proper instructions. *Id.*

B. The instruction diverted the jury's attention away from the reasonableness of any doubt, and erroneously focused it on whether jurors could provide a reason for any doubts.

1. Jurors need not articulate a reason for doubt in order to acquit.

Due process requires the state to prove each element of a charged offense beyond a reasonable doubt. U.S. Const. Amend. XIV; art. I, § 3; *Sullivan*, 508 U.S. 275; *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Jury instructions must clearly communicate this burden to the jury. *Bennett*, 161 Wn.2d at 307 (citing *Victor*, 511 U.S. at 5-6).

Instructions that relieve the state of its burden violate due process and the Sixth Amendment right to trial by jury. U.S. Const. Amends. VI; XIV; *Sullivan*, 508 U.S. at 278-81; *Bennett*, 161 Wn.2d at 307. An instruction that misdirects the jury as to its duty "vitiates *all* the jury's findings." *Sullivan*, 508 U.S. at 279-281.

Jurors need not articulate a reason for their doubt before they can vote to acquit. *Emery*, 174 Wn.2d at 759-60 (addressing prosecutorial misconduct). Language suggesting jurors must be able to articulate a rea-

²³ U.S. Const. Amends. VI, XIV; art. I, §§ 3, 21, 22.

son for their doubt is “inappropriate” because it “subtly shifts the burden to the defense.” *Emery*, 174 Wn.2d at 759-60.²⁴

Requiring articulation “skews the deliberation process in favor of the state by suggesting that those with doubts must perform certain actions in the jury room—actions that many individuals find difficult or intimidating—before they may vote to acquit...” *Humphrey v. Cain*, 120 F.3d 526, 531 (5th Cir. 1997) *on reh'g en banc*, 138 F.3d 552 (5th Cir. 1998).²⁵ An instruction imposing an articulation requirement “creates a lower standard of proof than due process requires.” *Id.*, at 534.²⁶

2. The trial court erroneously told jurors to convict unless they had a doubt “for which a reason exists.”

The trial court instructed jurors that “A reasonable doubt is one for which a reason exists.” CP 117. This suggested to the jury that it could not acquit unless it could find a doubt “for which a reason exists.” CP 117. This instruction – based on WPIC 4.01 – imposes an articulation requirement that violates the constitution.

²⁴See also *State v. Walker*, 164 Wn. App. 724, 731-732, 265 P.3d 191 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded*, 175 Wn. 2d 1022, 295 P.3d 728 (2012) (*Walker II*); *Johnson*, 158 Wn. App. at 684-86.

²⁵ The Fifth Circuit decided *Humphrey* before enactment of the AEDPA. Subsequent cases applied the AEDPA’s strict procedural limitations to avoid the issue. See, e.g., *Williams v. Cain*, 229 F.3d 468, 476 (5th Cir. 2000).

²⁶ In *Humphrey*, the court addressed an instruction containing numerous errors, including an articulation requirement. Specifically, the instruction defined reasonable doubt as “a serious doubt, for which you can give a good reason.” *Humphrey*, 120 F.3d at 530.

A “reasonable doubt” is not the same as a reason to doubt. “Reasonable” means “being in agreement with right thinking or right judgment: not conflicting with reason: not absurd: not ridiculous. . . being or remaining within the bounds of reason... Rational.” *Webster’s Third New Int’l Dictionary* (Merriam-Webster, 1993). A reasonable doubt is thus one that is rational, is not absurd or ridiculous, is within the bounds of reason, and does not conflict with reason.²⁷

The “a” before “reason” in Instruction No. 3 inappropriately alters and augments the definition of reasonable doubt. CP 117. “[A] reason” is “an expression or statement offered as an explanation of a belief or assertion or as a justification.” *Webster’s Third New Int’l Dictionary*. The phrase “a reason” indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable doubt—one for which a reason exists, rather than one that is merely reasonable.

This language requires more than just a reasonable doubt to acquit. *Cf. In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (“[W]e explicitly hold that the Due Process Clause protects the ac-

²⁷ *Accord Jackson v. Virginia*, 443 U.S. 307, 317, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (“A ‘reasonable doubt,’ at a minimum, is one based upon ‘reason.’”); *Johnson v. Louisiana*, 406 U.S. 356, 360, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (collecting cases defining reasonable doubt as one “‘based on reason which arises from the evidence or lack of evidence’” (quoting *United States v. Johnson*, 343 F.2d 5, 6 n.1 (2d Cir. 1965))).

cused against conviction except upon proof beyond a reasonable doubt.”) Jurors applying Instruction No. 3 could have a reasonable doubt but also have difficulty articulating or explaining why their doubt is reasonable.²⁸ For example, a case might present such voluminous and contradictory evidence that jurors with reasonable doubts would struggle putting their doubts into words or pointing to a specific, discrete reason for doubt. Despite reasonable doubt, acquittal would not be an option under Instruction No. 3, if jurors couldn’t put their doubts into words. CP 117.

As a matter of law, the jury is “firmly presumed” to have followed the court’s reasonable doubt instruction. *Diaz v. State*, 175 Wn.2d 457, 474-475, 285 P.3d 873 (2012). The instruction here left jurors with no choice but to convict unless they had a reason for their doubts. This meant Mr. Cloud couldn’t be acquitted, even if jurors had a reasonable doubt.

The instruction “subtly shift[ed] the burden to the defense.” *Emery*, 174 Wn.2d at 759-60. It also “create[d] a lower standard of proof than due process requires...” *Humphrey*, 120 F.3d at 534. By relieving the state of its constitutional burden of proof, the court’s instruction violated Mr. Cloud’s right to due process and his right to a jury trial. *Id.*; *Sullivan*, 508 U.S. at 278-81; *Bennett*, 161 Wn.2d at 307. Accordingly, his convictions

²⁸See Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165, 1213-14 (2003).

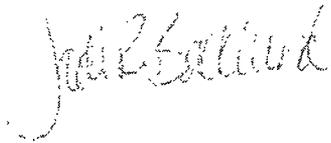
must be reversed and the case remanded for a new trial with proper instructions. *Sullivan*, 508 U.S. at 278-82.

CONCLUSION

Mr. Cloud's convictions must be reversed. First, he was prejudiced by the prosecutor's flagrant and ill-intentioned misconduct. Second, the trial court improperly allowed the state to impeach his testimony with a prior burglary that was not a crime of dishonesty or false statement. Third, his convictions were improperly based on propensity evidence. Fourth, his attorney provided ineffective assistance that prejudiced the outcome. Fifth, the trial court's "reasonable doubt" instruction misstated the burden of proof. If the convictions are not reversed, the sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on August 6, 2015,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

James Cloud, DOC #881187
Clallam Bay Corrections Center
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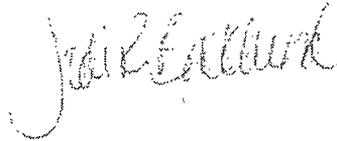
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on August 6, 2015.



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