

Nº. 50238-1-II

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

STATE OF WASHINGTON
Respondent,

v.

MICHAEL PRESTON, Jr.,
Appellant.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Thurston County,
Cause No. 15-1-00433-0
The Honorable Chris Lanese, Presiding Judge

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient insufficient evidence to convict Mr. Preston of theft and trafficking in stolen property.
2. The jury instructions failed to define all essential elements of the crimes charged and relieved the State of its true burden.
3. Prosecutorial misconduct deprived Mr. Preston of a fair trial.
4. Mr. Preston received ineffective assistance of counsel that deprived him of a fair trial.
5. Cumulative error deprived Mr. Preston of a fair trial.
6. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Can an individual be found guilty of theft for appropriating property he believes is abandoned? (Assignment of Error No. 1)
2. Does the State present sufficient evidence to convict an individual of theft of lost property where the State introduces no evidence of that individual's knowledge as to the nature of the property obtained? (Assignment of Error No. 1)
3. Does the State present sufficient evidence to convict an individual of the crime of trafficking in stolen property if the State fails to introduce evidence that the individual knew the property was obtained by theft? (Assignment of Error No. 1).
4. Do jury instructions for the crimes of theft by appropriation

of lost property and trafficking in stolen property fully define all essential elements of those crimes where the jury instructions do not include the legal definitions of “lost property” and “abandoned property”? (Assignment of Error No. 2)

5. Do jury instructions for the crimes of theft by appropriation of lost property and trafficking in stolen property relieve the State of its burden to prove all essential elements of those crimes where the jury instructions do not include the legal definitions of “lost property” and “abandoned property”? (Assignment of Error No. 2)
6. Is it prosecutorial misconduct for a prosecutor to misstate the elements of a crime during closing argument? (Assignments of Error Nos. 2 & 3)
7. Is it prosecutorial misconduct to misstate the reasonable doubt standard during closing argument? (Assignments of Error Nos. 2 & 3)
8. Does a defendant receive effective assistance of counsel where his trial counsel fails to object to the introduction of highly prejudicial yet irrelevant evidence that tends to bias the jury against the defendant? (Assignment of Error No. 4)
9. Does a defendant receive effective assistance of counsel where his trial counsel fails to object to the jury receiving jury instructions that do not fully define the essential elements of the crimes charged and fails to propose instructions that would define those essential elements? (Assignments of Errors No. 2 & 4)
10. Does a defendant receive effective assistance of counsel where his trial counsel fails to object to improper argument by the prosecutor that misstate the elements of the crimes charged and misstates the reasonable doubt standard? (Assignments of Error Nos. 2, 3, and 4)
11. Did cumulative error deprive Mr. Preston of a fair trial

where: (1) the jury instructions failed to define all essential elements of the crimes charged and relieved the State of its burden to prove all essential elements of the crimes charged; (2) the prosecutor committed misconduct during closing argument by misstating the elements of the crimes and the reasonable doubt standard; and (3) Mr. Preston's defense counsel failed to object to the introduction of irrelevant and inflammatory evidence, failed to object to the jury instructions and propose correct instructions, and failed to object to the improper closing argument? (Assignments of Error Nos. 2, 3, 4 and 5)

12. If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Preston is indigent, as noted in the Order of Indigency? (Assignment of Error No. 6)

C. STATEMENT OF THE CASE

Factual and Procedural Background

On February 18, 2015, Ms. Nicole Amacker went to the Tumwater Walmart and, through a series of events, ended up dropping her wedding ring in the store.¹ About twelve minutes after Ms. Amacker dropped her ring and left, Mr. Michael Preston, Jr. saw the ring and picked it ring up.²

On February 19, 2015, Ms. Amacker placed two ads on Craigslist regarding her lost ring.³ The ads indicated that there was a reward.⁴ At

¹ RP 35-37, 49, 103-104, VOL. I. The page numbers of the report of proceedings is not numbered continuously between the volumes. Reference to the report of proceedings will be made by giving the page number followed by the date of proceeding, except for the two volumes covering the dates of March 13, 14, and 15, 2017, which will be referred to by giving the page number followed by the volume number.

² RP 103-104, 106, VOL. I.

³ RP 50, VOL. I.

⁴ RP 50-51, VOL. I.

1:38 p.m. on February 19, 2015, Mr. Preston pawned the ring at Tumwater Pawnbroker and received \$175.⁵

On February 20, 2015, Ms. Amacker was contacted by a woman in response to one of Ms. Amacker's Craigslist ads.⁶ The woman put Ms. Amacker in touch with Mr. Preston who told Ms. Amacker that he had found the ring but had pawned it the next day because he needed parts for his car.⁷ Mr. Preston told Ms. Amacker that he had pawned the ring at Tumwater Pawn and that his girlfriend had made him call.⁸ Ms. Amacker told Mr. Preston that she needed his help recovering the pawned ring and he told her that he did not have the money anymore and could not get to the pawn shop.⁹ Ultimately, Mr. Preston hung up the phone when Ms. Amacker told him that she was going to involve the police in recovering the ring.¹⁰

Ms. Amacker called the Tumwater police to report her lost ring and Tumwater Police Lieutenant Bruce Brenna was dispatched to contact her.¹¹ Lt. Brenna was informed the ring had been pawned at the Tumwater Pawn Shop and informed Ms. Amacker he would meet her at

⁵ RP 87, 88, VOL. I.

⁶ RP 51, VOL. I.

⁷ RP 52-53, VOL. I.

⁸ RP 53-54, VOL. I.

⁹ RP 55-56, VOL. I.

¹⁰ RP 58-59, VOL. I.

¹¹ RP 96-97, VOL. I.

the Tumwater Pawn shop.¹² Lt. Brenna spoke with Ms. Amacker and Barney McClanahan, the owner of Tumwater Pawn, and confirmed the ring was at the pawn shop and confirmed that Mr. Preston was the individual who had pawned the ring.¹³

Lt. Brenna was advised by his dispatcher that Mr. Preston had requested a telephone call, so Lt. Brenna called Mr. Preston from the parking lot of the pawn shop.¹⁴ Mr. Preston told Lt. Brenna that he had found the ring at the Walmart and thought it was fake.¹⁵ Mr. Preston said he showed the ring to his “lady friend” who suggested Mr. Preston take the ring to a pawn shop to see what it was worth, which is how he ended up pawning the ring for \$175.¹⁶ Mr. Preston told Lt. Brenna that he asked his lady friend to check Craigslist and see if anyone had posted a flyer about a lost ring.¹⁷ Mr. Preston’s lady friend found Ms. Amacker’s Craigslist post which is how Mr. Preston got in touch with Ms. Amacker.¹⁸ Mr. Preston told Lt. Brenna that he believed Ms. Amacker no longer owned the ring because she had lost it and that the ring became his property when he found it.¹⁹

¹² RP 97-99, VOL. I.

¹³ RP 98-102, VOL. I.

¹⁴ RP 113, VOL. I.

¹⁵ RP 114, VOL. I.

¹⁶ RP 115, VOL. I.

¹⁷ RP 115, VOL. I.

¹⁸ RP 115, VOL. I.

¹⁹ RP 117-118, VOL. I.

Lt. Brenna never spoke to Mr. Preston in person and did not arrest him.²⁰ Lt. Brenna referred the case to the prosecutor's office for a charging decision.²¹

On March 31, 2015, Mr. Preston was charged with trafficking stolen property in the second degree and theft in the third degree.²²

On July 18, 2016, a hearing was held to address a motion to suppress noted by Mr. Preston's initial trial counsel.²³ Counsel for Mr. Preston withdrew the motion to suppress, but Mr. Preston failed to appear for the hearing.²⁴

On August 30, 2016, the charges against Mr. Preston were amended to include one count of bail jumping based on Mr. Preston's failure to appear for the suppression hearing on July 18, 2016.²⁵ On September 13, 2016, the State amended the theft charge from third degree theft to second degree theft.²⁶ On February 24, 2017, the charges were amended for the fourth and last time to trafficking in stolen property in the second degree, theft in the second degree, and bail jumping.²⁷

²⁰ RP 120-121, VOL. I.

²¹ RP 122-123, VOL. I.

²² CP 4.

²³ RP 3-7; 7-18-16.

²⁴ RP 3-7; 7-18-16.

²⁵ CP 16-17.

²⁶ CP 18-19.

²⁷ CP 53.

Mr. Preston's jury trial began on March 13, 2017.²⁸ Mr. Preston's trial counsel did not propose and did not object to the court's failure to give a jury instruction defining or discussing abandoned property in relation to a charge of theft.

The jury found Mr. Preston guilty of all charges.²⁹ The trial court ordered Mr. Preston to serve four months on the bail jump charge, nine months on the trafficking charge, and four months on the theft charge, all counts to be served concurrently.³⁰ Notice of Appeal was filed on April 19, 2017.³¹

D. ARGUMENT

1. The State presented insufficient evidence to convict Mr. Preston of theft in the second degree.

A. Standard of Review.

In a criminal sufficiency claim, the defendant admits the truth of the State's evidence and all inferences that may be reasonably drawn from them.³² Evidence is reviewed in the light most favorable to the State.³³ Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the

²⁸ RP 34, VOL. I.

²⁹ CP 111, 112, 145.

³⁰ CP 121-122; RP 11-12; 3-23-17.

³¹ CP 129-140.

³² *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

³³ *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004).

essential elements of the crime beyond a reasonable doubt.³⁴

Circumstantial evidence and direct evidence are equally reliable.³⁵

In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case.³⁶ Substantial evidence is evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed."³⁷ The existence of a fact cannot rest upon guess, speculation or conjecture.³⁸

"A person being tried on a criminal charge can be convicted only by evidence, not by innuendo."³⁹ If there is insufficient evidence to prove an element, reversal is required and retrial is 'unequivocally prohibited.'⁴⁰

B. The State's burden to convict Mr. Preston of second degree theft in this case.

The State charged Mr. Preston with theft in the second degree in violation of RCW 9A.56.040(1)(a) and RCW 9A.56.020(1)(c) occurring

³⁴ *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068.

³⁵ *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

³⁶ *State v. Fiser*, 99 Wn.App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000).

³⁷ *State v. Hutton*, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972).

³⁸ *State v. Carter*, 5 Wn.App. 802, 807, 490 P.2d 1346 (1971), *review denied*, 80 Wn.2d 1004 (1972), *cited in Hutton*, 7 Wn.App. at 728, 502 P.2d 1037.

³⁹ *State v. Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 181 (1950).

⁴⁰ *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

on February 18, 2015.⁴¹

Under the version of RCW 9A.56.040(1)(a) in effect in 2015, “A person is guilty of theft in the second degree if he...commits theft of...property or services which exceed(s) seven hundred fifty dollars in value but does not exceed five thousand dollars in value.”

Under the version of RCW 9A.56.020(1)(c) in effect in 2015, “‘Theft’ means...To appropriate lost or misdelivered property or services of another...with intent to deprive him or her of such property or services.”

The version of RCW 9A.56.010(2) in effect in 2015 defined “appropriate lost or misdelivered property” as “obtaining or exerting control over the property...of another which the actor knows to have been lost or mislaid.”

Therefore, the State had the burden in this case of proving beyond a reasonable doubt that Ms. Amacker’s ring was worth more than \$750 and that Mr. Preston obtained or exerted control over Ms. Amacker’s ring while knowing that the ring was lost or mislaid. As will be discussed below, knowledge that the ring was “lost or mislaid” is not established by simply showing the ring was found on the ground.

C. The crime of theft does not include the act of picking up abandoned property.

⁴¹ CP 53.

“The provisions of the common law relating to the commission of crime and the punishment thereof, insofar as not inconsistent with the Constitution and statutes of this state, shall supplement all penal statutes of this state.”⁴²

Washington law recognizes that, in the context of found property, the terms “lost” and “misaid” are terms of art with specific meanings, and are used to describe different categories of found property:

The common law distinguishes among property that is abandoned, lost, or misplaced. Property is abandoned when the owner intentionally relinquishes possession and rights in the property. Property is lost when the owner has parted with possession unwittingly and no longer knows its location. Property is misaid when the owner intentionally puts it in a particular place, then forgets and leaves it.⁴³

These different categories of found property have different rights and responsibilities for the finder of the property and the current or former owner of the property:

A person who abandons property loses any ownership interest in the property, and relinquishes any reasonable expectation of privacy in it. By contrast, at common law, one does not relinquish ownership in goods by losing or misplacing them: “‘Finders keepers, losers weepers’ is a time-worn old saying, but not true. The finder of lost goods is a bailee of them for the true owner with certain rights and obligations....” Misaid property is presumed to have been

⁴² RCW 9A.04.060.

⁴³ *State v. Kealey*, 80 Wn. App. 162, 171, 907 P.2d 319 (1995), *review denied* 129 Wn.2d 1021 (1996), as amended on denial of reconsideration (Feb. 26, 1996) (internal citations omitted), *citing* 1 Am.Jur.2d Abandoned, Lost, and Unclaimed Property §§ 4, 6, 11-13 (Rev. ed. 1994).

left in the custody of the owner or occupier of the premises upon which it is found. When an owner takes possession of mislaid property he or she becomes a gratuitous bailee by operation of law. The owner of mislaid property is constructively in possession although the property may be in custody of another on whose premises it has been left. “The owner is treated as still constructively in possession of it, although its custody may be in another, in whose shop ... it has been left.” A gratuitous bailee is responsible for delivering the property to the true owner.⁴⁴

It is clear that found property that has been abandoned is a different category of found property that is treated very differently from found property that is “lost” or “misplaced/mislaid.” As discussed above, the definition of the crime of theft includes the appropriation of “lost” or “misdelayed/misplaced/mislaid” property. However, appropriation of “abandoned” property is not included in the definition of theft or in the definition of appropriating lost or mislaid/misplaced property.

The legislature has intentionally not included the appropriation of abandoned property in the definition of theft. Further, the definition of appropriation of “lost or misdelivered/mislaid” property also does not include the appropriation of abandoned property. Ergo, under Washington law, an individual does not commit the crime of theft if that individual appropriates property he believes has been abandoned. In fact, this defense has been explicitly acknowledged by the legislature in RCW

⁴⁴ *Kealey*, 80 Wn. App. at 171–72, 907 P.2d 319 (internal citations omitted).

9A.56.020(2) which provides that, “In any prosecution for theft, it shall be a sufficient defense that [t]he property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable.”

An individual who abandons property relinquishes all ownership interests in that property. Therefore, a second individual who appropriates that abandoned property under a belief the property is abandoned, appropriates that property under a claim of title made in good faith, the claim to title being that the property was abandoned by the previous owner allowing whoever finds the property to legally claim it. Stated another way, appropriation of abandoned property does not constitute theft since the appropriation of the property is not depriving another person of that property.

D. The State presented insufficient evidence to establish that Mr. Preston knew the ring was “lost or mislaid” as those terms are defined in these circumstances.

As discussed above, the State’s burden in this case was to prove beyond a reasonable doubt that Mr. Preston knew the ring had been lost or mislaid. In other words, to prove Mr. Preston had committed the crime of theft, the State had the burden of proving that Mr. Preston knew the owner of the ring had either “parted with possession of the ring unwittingly and

no longer knew its location” or “intentionally put the ring it in a particular place, then forgot and left it.”

The evidence introduced at trial was that Mr. Preston picked the ring up about twelve minutes after Ms. Amacker had dropped the ring and left the area and that Mr. Preston did not see Ms. Amacker drop the ring.⁴⁵ The State’s evidence established only that Mr. Preston picked up a ring he found on the floor and about which he knew nothing. This is not a sufficient factual basis to support an inference that Mr. Preston knew the ring had been “lost” or “mislaid” as those terms are defined for purposes of the crime of theft. The State presented insufficient evidence that Mr. Preston committed theft by appropriating the property of another he knew to have been lost or misdelivered.

2. The State presented insufficient evidence to convict Mr. Preston of trafficking in stolen property in the second degree.

The State charged Mr. Preston with trafficking in stolen property in the second degree in violation of RCW 9A.82.055.⁴⁶

Under RCW 9A.82.055(1), “A person who recklessly traffics in stolen property is guilty of trafficking in stolen property in the second degree.”

RCW 9A.82.010(16) defines “stolen property” as “property that

⁴⁵ RP 103-106, VOL. I; RP 10-11, VOL. II.

⁴⁶ CP 53.

has been obtained by theft, robbery, or extortion.”

As discussed above, under the definitions of found property recognized by Washington courts, Mr. Preston did not obtain the ring by theft unless he appropriated the ring with knowledge that the owner of the ring had either “parted with possession of the ring unwittingly and no longer knew its location” or “intentionally put the ring in a particular place, then forgot and left it.” The State failed to establish that Mr. Preston had such knowledge when he obtained the ring, therefore the State failed to establish that the ring was “stolen property” obtained by theft. If the State presented insufficient evidence to establish the ring was stolen property, then the State presented insufficient evidence to establish that Mr. Preston trafficked in stolen property.

3. Erroneous and incomplete jury instructions deprived Mr. Preston of a fair trial because the jury instructions in this case failed to define the essential elements of the crimes and relieved the State of its burden to prove all elements.

Challenges to jury instructions are reviewed de novo, examining the instruction in the context of the instructions as a whole.⁴⁷ Instructions must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt.⁴⁸ An instruction must inform the jury of the proper applicable law, avoid

⁴⁷ *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

⁴⁸ *Id.*

misleading the jury, and permit each party to argue its theory of the case.⁴⁹

An instruction to the jury that relieves the State of its burden to prove every element of a crime beyond a reasonable doubt constitutes reversible error.⁵⁰

A jury instruction is erroneous if it relieves the State of its burden to prove every element of a crime.⁵¹ “A to-convict instruction must contain all essential elements of a crime because it serves as a yardstick by which the jury measures the evidence to determine the defendant's guilt or innocence.”⁵² “The fact that another instruction contains the missing essential element will not cure the error caused by the element's absence from the to-convict instruction.”⁵³ “[T]he omission of an element of a charged crime is a manifest error affecting a constitutional right that can be considered for the first time on appeal.”⁵⁴

A defendant does not receive a fair trial if “the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved.”⁵⁵

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *State v. DeRyke*, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003).

⁵² *State v. Richie*, 191 Wn. App. 916, 927, 365 P.3d 770 (2015).

⁵³ *Id.* at 927–28.

⁵⁴ *Id.* at 927.

⁵⁵ *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

A. The jury instructions did not fully define the essential elements of the crime of theft by appropriation of “lost or misdelivered” property.

The jury instruction in this case did not give the full definition of “lost” and “mislaidd” property. As discussed above, Washington recognizes three categories of found property: property that has been abandoned, property that has been lost, and property that has been misplaced.⁵⁶

Jury instructions 13, 14, and 20 define theft, define “appropriate lost or misdelivered property, and contain the “to convict” instruction, respectively. The flaw in these instructions is that they define theft as “to appropriate lost or misdelievered property of another...with the intent to deprive such person of such property” (instruction 13) and define “appropriate lost or misdelivered property” as “obtaining or exerting control over the property of another that the actor knows to have been lost or mislaidd” (instruction 14) but fail to define “lost property” and “mislaidd property” and fail to mention abandoned property at all.

Because the jury instructions failed to provide the common law definition of “lost property” and “mislaidd property,” the jury was forced to guess what those terms meant. As will be discussed further below, the jury being required to guess what those terms mean is particularly

⁵⁶ *Kealey*, 80 Wn. App. at 171, 907 P.2d 319.

problematic in this case since the words “lost” and “mislaid” have colloquial use and meaning which are similar to the legal definitions, but not exactly equivalent.

B. The jury instructions relieved the State of its burden of proving all elements of the crime.

As stated above, the State’s burden in this case was to prove beyond a reasonable doubt that Mr. Preston knew the ring had been lost or mislaid. Applying the common law definitions of those terms, the State’s burden was proving that Mr. Preston knew the owner of the ring had either “parted with possession of the ring unwittingly and no longer knew its location” or “intentionally put the ring in a particular place, then forgot and left it.”

The jury was not given these definitions of the terms “lost” and “mislaid.” In fact, the jury was given no definition for these terms and was forced to speculate what those terms might mean. At several points in closing argument, the State relied on the lack of a correct legal definition of the term “lost property” to argue the jury should find Mr. Preston guilty of theft and trafficking in stolen property.

With regards to trafficking in stolen property, the State argued,

So when the defendant takes that property, takes Ms. Amacker’s ring and sells it, pawns it to Barney McClanahan at Tumwater Pawn, he has trafficked that ring.

“Stolen” means obtained by theft. And then you’re defined “theft” means to appropriate lost -- we know it’s lost, he admitted it’s lost, she said it was lost. Everybody agrees this is a lost ring. He describes it as found and he admits that on the stand.

Appropriate lost or misdelivered property or services -- just property in this case -- means obtaining or exerting control over the property or services of another **the actor knows to have been lost**. And again, we don’t have services here, we’re just talking about property. And we know that he knows it’s lost; he’s admitted that. **And quite plainly, any reasonable person also knows that in the same situation**. I would submit to you.

[T]he law is not telling you intent requires you to go in and say I’m intending you to go in and commit a theft at Walmart today. That’s not what intent means. Intent means this belongs to someone else. I intend to pick it up and take it. That’s as far as intent goes. Not that’s somebody else’s property I’m going to intend to steal it, it’s I intended to pick it up and take it. You intended to commit the act that ultimately results in that crime.⁵⁷

With regards to the theft charge, the State argued,

Theft in the second degree. A person commits the crime of theft in the second degree when he or she commits theft of property exceeding \$750 but not exceeding \$5,000 in value. Here’s your elements. On or about February 18th, 2015, the defendant appropriated lost or misdelivered property of another, that the property exceeded \$750 in value but did not exceed \$5,000 in value, and that the defendant intended to deprive the other person of that property, and that this act occurred in the State of Washington.

⁵⁷ RP 100-102, VOL. II (emphasis added).

Again, I would submit to you February 18th, 2015, is not a fact in issue, nor is the State of Washington. **I would also submit to you that the defendant appropriated lost or misdelivered property of another, the last classification of that, also not at issue. We know that that's lost property, we know it belongs to another person, and we know the defendant took it. Not an issue; he's acknowledged that.**⁵⁸

The “he” and “she” referred to by the State when arguing that “he testified” or “she testified” are Mr. Preston and Ms. Amacker. Mr. Preston testified that he had found the ring in Walmart but that he did not see it fall off anybody and there was nobody in the area where he found the ring.⁵⁹ Ms. Amacker testified that she dropped her ring the Walmart but did not see the ring fall off her sweater and only saw Mr. Preston pick the ring up when she watched the security video.⁶⁰

It is clear that the State’s closing arguments were based on the colloquial meaning of “lost,” i.e. that the ring was “lost” because it fell off Ms. Amacker’s sweater without her noticing it, rather than the legal definition of “lost” property. The State relied on that colloquial meaning of “lost” to argue that Mr. Preston “knew” the ring was “lost” because he “knew it belonged to another person” and “any reasonable person also knows that in the same situation.” In other words, the State relied on the

⁵⁸ RP 105, VOL. II (emphasis added).

⁵⁹ RP 10-11, VOL. II.

⁶⁰ RP 35-37, 49, 64, VOL. I.

colloquial understanding of what “lost” property was to argue it had met its burden of proving that Mr. Preston knew the ring was “lost” because “any reasonable person” would “know that in the same situation.”

The absence of the proper legal definition of “lost” property relieved the State of its burden to prove Mr. Preston took the ring with knowledge that the ring was “lost” because the jury was never informed that there was a specific legal test that must be satisfied before a piece of property can be classified as “lost” property for purposes of a theft or trafficking in stolen property charge.

Finally, the jurors were never informed that they could consider whether Mr. Preston knew the ring was abandoned property rather than lost property. The jury was only informed of “lost” property and “mislaid” property, both types of found property in which the owner retains a possessory interest. The elimination of the category of abandoned property from the types of property the jury could consider in determining what type of property Mr. Preston knew the ring to be when he picked it up relieved the State of its burden of establishing that Mr. Preston knew the ring was “lost” and therefore acted with the intent of depriving the owner of the ring of the property.

The absence of an instruction on “abandoned” property relieved the State of its burden of demonstrating that Mr. Preston took the ring with

knowledge it was “lost” rather than with knowledge the ring was “abandoned.” Instead of having to prove through evidence that Mr. Preston took the ring knowing that the ring was “lost,” the State argued that the ring was “lost” simply because it was on the floor with nobody around it and Mr. Preston took the ring “knowing” it was “lost” because “any reasonable person” would “know that in the same situation.”

People lose possession of rings in many contexts. Ring can be truly lost, but rings can also be abandoned in public places. A ring can be thrown on the ground and abandoned following a divorce, or an emotional break-up, or a death, or any one of a number of very plausible fact patterns. The jury could have believed that Mr. Preston took possession of the ring believing it was abandoned. In one of these situations. Instead, the State argued to the jury that the jury “knew” Mr. Preston “knew” the ring was “lost” simply because he found the ring on the ground. The lack of jury instructions properly informing the jury of the legal definitions of “lost” and “abandoned” relieved the State of its burden of proving the element that Mr. Preston acted with the requisite knowledge that the ring was “lost” rather than “abandoned.”

4. Prosecutorial misconduct deprived Mr. Preston of a fair trial.

A defendant has a fundamental right to a fair trial under the Sixth

and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington Constitution.⁶¹ “[I]t is the duty of a prosecutor, as a quasi judicial officer, to see that one accused of a crime is given a fair trial.”⁶²

Prosecutorial misconduct can deprive a defendant of this constitutional right.⁶³ A conviction must be reversed if there is a substantial likelihood that prosecutorial misconduct affected the verdict.⁶⁴

To prevail on a prosecutorial misconduct claim, a defendant must prove that the prosecutor's conduct was both improper and prejudicial.⁶⁵ Prejudice is established if there is a substantial likelihood that the misconduct affected the jury's verdict.⁶⁶

If the defendant did not object at trial, as is the case here, the defendant is deemed to have waived any error unless the misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice.⁶⁷

“In the context of closing arguments, the prosecuting attorney has ‘wide latitude in making arguments to the jury and prosecutors are

⁶¹ *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012), *cert. denied* 136 S.Ct. 357 (2015).

⁶² *State v. Gibson*, 75 Wn.2d 174, 176, 449 P.2d 692 (1969).

⁶³ *Glasmann*, 175 Wn.2d at 703–04, 449 P.2d 692.

⁶⁴ *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied* 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995).

⁶⁵ *Glasmann*, 175 Wn.2d at 704, 449 P.2d 692.

⁶⁶ *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

⁶⁷ *State v. Emery*, 174 Wn.2d 741, 760–61, 278 P.3d 653 (2012).

allowed to draw reasonable inferences from the evidence.’⁶⁸ “We review the prosecutor's comments during closing argument in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the jury instructions.”⁶⁹

[D]eciding whether a prosecuting attorney commits prejudicial misconduct “is not a matter of whether there is sufficient evidence to justify upholding the verdicts.” *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 711, 286 P.3d 673 (2012). “Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict.” *Id.*⁷⁰

A. The prosecutor committed misconduct by misstating the law regarding Mr. Preston’s knowledge that the ring was “lost.”

A prosecuting attorney commits misconduct by misstating the law.⁷¹

“The prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury.” *Davenport*, 100 Wn.2d at 763, 675 P.2d 1213. This is because “[t]he jury knows that the prosecutor is an officer of the State.” *Warren*, 165 Wn.2d at 27, 195 P.3d 940. “It is, therefore, particularly grievous that this officer would so mislead the jury” regarding a critical issue in the case. *Id.*⁷²

⁶⁸ *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (quoting *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006), overruled on other grounds by *State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014)).

⁶⁹ *State v. Sakellis*, 164 Wn. App. 170, 185, 269 P.3d 1029 (2011), review denied 176 Wn.2d 1004 (2013).

⁷⁰ *State v. Allen*, 182 Wn.2d 364, 376, 341 P.3d 268 (2015).

⁷¹ *Allen*, 182 Wn.2d at 373–74, 341 P.3d 268, citing *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

⁷² *Allen*, 182 Wn.2d at 380, 341 P.3d 268.

“Repetitive misconduct can have a “cumulative effect.””⁷³

As discussed above, the prosecutor repeatedly misrepresented to the jury the standard the State had to meet to demonstrate that Mr. Preston “knew” the ring he found was “lost” property. Rather than discuss the true test for determining if property is “lost” as set out in *Kealey*, 80 Wn. App. 162, 171, 907 P.2d 319, *supra*, the prosecutor instead argued to the jury that “any reasonable person” who found the ring would know it was “lost” property and “we know it belongs to another person.”⁷⁴

Compounding the error of the prosecutor’s repetition of the incorrect standard of determining if Mr. Preston knew the ring was “lost” property and the prosecutor’s repeated mischaracterization of its burden of proof is the fact that the jurors were not instructed on the true legal tests for determining if property was lost or abandoned.

Typically, we presume that a jury follows the instructions provided by the court. *Warren*, 165 Wn.2d at 29, 195 P.3d 940. However, that presumption is rebutted where the record reflects that the jury considered an improper statement to be a proper statement of the law. *Davenport*, 100 Wn.2d at 763–64, 675 P.2d 1213; *see also State v. Teal*, 152 Wn.2d 333, 342, 96 P.3d 974 (2004) (Sanders, J., dissenting) (“Juries are presumed to follow the instructions given by the court, but that presumption is overcome when they are forced to ‘assume’ the law is different from that provided.”)⁷⁵

⁷³ *Allen*, 182 Wn.2d at 376, 341 P.3d 268 (2015).

⁷⁴ RP 100-102, 105, VOL. II.

⁷⁵ *Allen*, 182 Wn.2d at 380, 341 P.3d 268 (2015).

Here, the impact of the prosecutor's improper argument was not mitigated by the jury instructions since the instructions that might have diminished the prejudicial effect of the prosecutor's improper argument (proper legal definition of "lost" and "abandoned" property) were not given. The jurors were forced to assume that the prosecutor's incorrect statements about the State's burden and the test to be applied when the jury determined if Mr. Preston took the ring knowing it was "lost" property because the jury was not instructed on the correct test to be applied.

There is a very substantial likelihood that the prosecutor's misstatement of the law affected the verdict because, in effect, the jury could do nothing but conclude that Mr. Preston acted with the requisite knowledge to be found to have committed theft because the prosecutor's arguments and the jury instructions told the jury that Mr. Preston "knew" the ring was "lost" simply because he found it.

B. The prosecutor committed misconduct by misstating the "reasonable doubt" standard.

"Under both the federal and state constitutions, due process requires that the State prove every element of a crime beyond a reasonable

doubt.”⁷⁶

A prosecutor's argument misstating, minimizing, or trivializing the law regarding the burden of proof can be improper.⁷⁷

In *State v. Osman*, 192 Wn. App. 355, 375, 366 P.3d 956 (2016), the court addressed whether defense counsel's definition of the term “abiding belief” misstated the State's burden of proof. The *Osman* court took note of the Supreme Court of the United States' determination that “[t]he word “abiding” here has the signification of settled and fixed, a conviction which may follow a careful examination and comparison of the whole evidence.”⁷⁸ As a result, the term “abiding belief” encouraged jurors “to reach a subjective state of near certitude of the guilt of the accused.”⁷⁹ Accordingly, the *Osman* court held that defense counsel did not improperly quantify the State's burden of proof by arguing that an abiding belief of guilt meant that the jurors would not look back on their decision after leaving the courthouse and wonder if they made a mistake.⁸⁰

A prosecutor’s closing arguments about the State’s burden of proof are improper where they trivialize or ultimately fail to convey the gravity

⁷⁶ *State v. Johnson*, 93453-3, 2017 WL 2981033, at *3 (Wn. July 13, 2017).

⁷⁷ *State v. Johnson*, 158 Wn. App. 677, 685, 243 P.3d 936 (2010), *review denied*, 171 Wn.2d 1013, 249 P.3d 1029 (2011).

⁷⁸ *Osman*, 192 Wn. App. at 374 (internal quotation marks omitted) (*quoting Victor v. Nebraska*, 511 U.S. 1, 15, 114 S.Ct. 1239, 127 L.Ed. 2d 583 (1994)).

⁷⁹ *Osman*, 192 Wn. App. at 375 (*quoting Victor*, 511 U.S. at 14–15).

⁸⁰ *Osman*, 192 Wn. App. at 375.

of the State's burden and the jury's in assessing the State's case against the defendant.⁸¹

During closing arguments in this case, the State described the "reasonable doubt" standard as follows:

[S]ometimes you'll hear in a case or on TV somebody comes back and says, "Well, you know, I really believe that they did it, I just really believe that, but they didn't prove it to me." And when I hear that, what I hear is, oh you applied the wrong standard...So if you walk out and say, "Well, I really believe he did it," that's an abiding belief in the truth of the charge. **So you can't say, "Well, I believe he did it, I really, really believe he did it but they didn't prove it," because to me that says you're applying the wrong standard. If you don't believe that they did it, then you don't have an abiding belief in the truth of the charge, but if you believe then you do, and I have met my standard of beyond a reasonable doubt.**⁸²

Jury Instruction number 4 (CP 85) came from Plaintiff's Proposed instruction number 4 (CP 29) which was derived from WPIC 4.01. The third paragraph of jury instruction four reads,

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.⁸³

As recognized by the court in *Osman*, an "abiding belief" requires

⁸¹ *Johnson*, 158 Wn.App. at 684, 243 P.3d 936.

⁸² RP 98-99, VOL. II (emphasis added).

⁸³ CP 85.

“a subjective state of near certitude of the guilt of the accused.” This state leaves ample opportunity for a juror to believe a defendant is guilty of the crimes charged but to also entertain reasonable doubts. Under the prosecutor’s argument, a juror could not believe Mr. Preston had committed the crime but also believe that the State had not carried its burden beyond a reasonable doubt. The prosecutor’s argument to the jury about the reasonable doubt standard and abiding belief minimized the State’s burden and misrepresented the reasonable doubt standard. The State’s argument equated believing Mr. Preston committed the crime to not having any reasonable doubts. This minimized the reasonable doubt standard and told the jury that if they believed Mr. Preston committed the crimes, even if they still had one or more reasonable doubts, the jury had to return a verdict of guilty. This was improper argument that misstated, minimized, and trivialized the State’s burden.

5. Mr. Preston received ineffective assistance of counsel where his trial counsel failed to object to the introduction of highly prejudicial yet irrelevant evidence, failed to object to the lack of jury instructions defining all elements of the crimes charged, and failed to object to the State’s improper closing argument that misstated legal standards.

A. Mr. Preston had a right to effective assistance of counsel.

Article 1, §22 of the Washington State Constitution guarantees a

criminal defendant the right to effective assistance of counsel. The Sixth Amendment, as applicable to the states through the Fourteenth Amendment, entitles an accused to the effective assistance of counsel at trial.⁸⁴

To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice.⁸⁵

To establish ineffective representation, the defendant must show that counsel's performance fell below an objective standard of reasonableness.⁸⁶

To establish that counsel's performance was deficient, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *State v. King*, 130 Wn.2d 517, 531, 925 P.2d 606 (1996) (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064). To establish that the deficient performance prejudiced the defense, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial." *King*, 130 Wn.2d at 531, 925 P.2d 606 (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064). **A defendant is denied his right to a fair trial when the result has been rendered unreliable by a breakdown in the adversary**

⁸⁴ *Dows v. Wood*, 211 F.3d 480, cert. denied 121 S.Ct. 254, 531 U.S. 908, 148 L.Ed.2d 183 (2000), citing *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) ("[T]he right to counsel is the right to the effective assistance of counsel.").

⁸⁵ *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002), cert. denied, 126 S.Ct. 2294, 164 L.Ed. 820 (2006) (citing *State v. Rosborough*, 62 Wn.App. 341, 348, 814 P.2d 679 (1991)).

⁸⁶ *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *Strickland v. Washington*, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

process. *King*, 130 Wn.2d at 531, 925 P.2d 606.⁸⁷

There is a strong presumption that trial counsel's performance was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions.⁸⁸ If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.⁸⁹

The remedy for ineffective assistance of counsel is remand for a new trial.⁹⁰

B. It was ineffective assistance of counsel for Mr. Preston's trial attorney to fail to object to the introduction of highly prejudicial yet irrelevant evidence.

Throughout the testimony of the State's witnesses, the State elicited testimony from its witnesses about how Mr. Preston refused to help Ms. Amacker recover the ring,⁹¹ how Mr. Preston become "uncooperative" once Ms. Amacker informed him she had to involve the police,⁹² how Lt. Brenna thought Mr. Preston was being manipulative, was not remorseful, and did not seem to have any intention of assisting in the

⁸⁷ *State v. Glenn*, 86 Wn.App. 40, 45, 935 P.2d 679 (1997), *review denied* 134 Wn.2d 1003 (1998) (emphasis added).

⁸⁸ *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *Strickland*, 466 U.S. at 689).

⁸⁹ *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

⁹⁰ *See In re Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

⁹¹ RP 56-59, 62, VOL. I.

⁹² RP 62, VOL. I.

retrieval of the ring,⁹³ and how Lt. Brenna thought Mr. Preston's actions broke the law.⁹⁴ Trial counsel for Mr. Preston failed to object to any of this testimony.

Irrelevant evidence is inadmissible under ER 402. Evidence that is more unfairly prejudicial than probative is inadmissible under ER 403. Both the United States Constitution and the Washington State Constitution article I, section 22, guarantee the criminal defendant a fair trial by an impartial jury.⁹⁵ "A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial."⁹⁶ "A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial."⁹⁷

The elements of the crimes of theft and trafficking in stolen property do not include helping the owner of the property recover that property or being cooperative with a police investigation. The introduction of the evidence of Mr. Preston's behavior and demeanor on the day after he pawned the ring was irrelevant to any issue before the jury but had a high probability of prejudicing the jury against Mr. Preston. In

⁹³ RP 116-119, VOL. I

⁹⁴ RP 124, VOL. I.

⁹⁵ *State v. Latham*, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983).

⁹⁶ *State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968).

⁹⁷ *Miles*, 73 Wn.2d at 70, 436 P.2d 198.

fact, the State relied on this evidence throughout its closing to argue that Mr. Preston was guilty because he did not assist Ms. Amacker in recovering the ring,⁹⁸ that the fact he did not assist Ms. Amacker in recovering established that he picked the ring up with the requisite intent to commit theft,⁹⁹ and the State emphasized that because Mr. Preston took no action to find out who the ring belonged to or to assist Ms. Amacker in retrieving her ring he was guilty of the crimes charged.¹⁰⁰

Despite the irrelevant yet inflammatory nature of this evidence, counsel for Mr. Preston failed to object to the admission of this evidence and failed to object to the prosecutor's use and emphasis of this evidence during closing argument.

It was not objectively reasonable nor was it a legitimate trial strategy for Mr. Preston's trial counsel to fail to object to the admission of evidence of actions taken by Mr. Preston after he pawned the ring. Mr. Preston's trial counsel failed to object to this evidence and thereby failed to protect Mr. Preston's right to a fair trial. Mr. Preston was prejudiced by the introduction of this evidence because it would naturally play to the passions and prejudices of the jury and inflame the jury against Mr. Preston. Further, the State relied on this evidence in closing argument to

⁹⁸ RP 101, VOL. II.

⁹⁹ RP 108, VOL. II.

¹⁰⁰ RP 116-135, VOL. II.

argue an incorrect burden of proof on the part of the State regarding Mr. Preston's knowledge and intent.

- C. It was ineffective assistance of counsel for Mr. Preston's trial counsel to fail to propose or object to the lack of jury instructions fully defining the terms "lost or misdelivered property," "abandoned property," and "lost property."

As discussed above, the jury instructions failed to fully inform the jury of the legal definitions of "lost property" and "abandoned property," definitions that are critical to the definition of the essential elements of the crimes of theft and trafficking in stolen property. Also as discussed above, the lack of instructions properly defining these elements relieved the State of its burden of proving all elements of the crimes.

Trial counsel for Mr. Preston failed to propose jury instructions with the correct legal definition of lost property and abandoned property and failed to object to the lack of these instructions in the final instructions given to the jury. It was not objectively reasonable nor was it a legitimate trial strategy for Mr. Preston's trial counsel to fail to object to the lack of jury instructions regarding the proper definition of essential elements of the crimes charged and to fail to propose those instructions. Mr. Preston was prejudiced by his trial counsel's failure to propose such instructions and failure to object to the lack of such instructions because the absence of these instructions relieved the State of its burden in proving the essential

element that Mr. Preston did not know the ring was abandoned, permitted the State to make incorrect arguments about its burden in closing argument, and required the jury to guess about the true definition of those terms. As a result, Mr. Preston's right to a fair trial was violated and he was found guilty of theft and trafficking in stolen property.

D. It was ineffective assistance of counsel for Mr. Preston's trial counsel to fail to object to the State's improper closing argument.

As discussed above, during closing arguments, the prosecutor misstated the law as to the State's burden in the case and the elements of the crimes charged. Trial counsel for Mr. Preston failed to object to these improper arguments.

It was not objectively reasonable nor was it a legitimate trial strategy for Mr. Preston's trial counsel to fail to object to the prosecutor's improper closing arguments. As discussed above, the prosecutor's improper arguments almost certainly impacted the jury's verdict. Likewise, the failure of Mr. Preston's trial counsel to fail to object to the prosecutor's arguments also impacted the verdict of the jury. Mr. Preston's trial counsel failed to ensure that the jury was properly instructed regarding the elements of the crime and failed to ensure the jury was properly instructed as to the State's true burden. Mr. Preston received ineffective assistance of counsel that deprived him of a fair trial.

6. Cumulative error deprived Mr. Preston of a fair trial.

Under the cumulative error doctrine, a defendant's conviction may be reversed when the combined effect of trial errors effectively deny the defendant's right to a fair trial, even if each error alone would be harmless.¹⁰¹

Should this court find that none of the errors discussed above constitute sufficient error standing alone to warrant reversal and remand for a new trial, this court should find that the prejudice to Mr. Preston caused by the combined effect of his ineffective trial counsel and the misconduct of the prosecutor combined to effectively deny Mr. Preston a fair trial. This court should vacate Mr. Preston's convictions and remand for a new trial.

7. If the state substantially prevails, the Court of Appeals should decline to award any appellate costs requested.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should

¹⁰¹ *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137, 127 S.Ct. 2986, 168 L.Ed.2d 714 (2007).

it substantially prevail.¹⁰²

Appellate costs are “indisputably” discretionary in nature.¹⁰³ The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. Furthermore, “[t]he future availability of a remission hearing in a trial court cannot displace [the Court of Appeals’] obligation to exercise discretion when properly requested to do so.”¹⁰⁴

Mr. Chesley has been convicted of a felony and sentenced to prison. The trial court determined that she is indigent for purposes of this appeal.¹⁰⁵ There is no reason to believe that status will change. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations.¹⁰⁶

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

E. CONCLUSION

This case should never have been charged. The State filed the charges based on an incomplete understanding of the elements of the

¹⁰² *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016) *review denied*, 185 Wn.2d 1034 (2016).

¹⁰³ *Id.*, at 388.

¹⁰⁴ *Id.*.

¹⁰⁵ CP 192-193.

¹⁰⁶ *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680 (2015).

crime of theft as it relates to “lost” property. Specifically, the State failed to understand that a person does not commit theft by picking up property found on the ground in a public place unless that person knows the property has not been abandoned and is truly “lost” as that term is defined at common law.

The State presented insufficient evidence to establish that Mr. Preston picked up the ring while knowing that the ring was “lost” as that term is defined in the common law. Because the State presented no evidence of Mr. Preston’s knowledge regarding the ring at the time he picked it up, the State presented insufficient evidence to convict Mr. Preston of theft and of trafficking in stolen property.

The jury instructions did not fully instruct the jury on the State’s burden or on the elements of theft and trafficking in stolen property. The jury was left to guess what the legal definition of “lost” property was and was never informed that the category of “abandoned” property even existed. This relieved the State of its burden to prove all elements of the crime charged because the jury was, in effect, required to presume that Mr. Preston “knew” the property was lost simply because he found it and knew it wasn’t his.

The State’s misunderstanding of the elements of theft combined with the incorrect jury instructions caused the State to commit

prosecutorial misconduct during closing argument misstating the law regarding “lost” property. The prosecutor also committed misconduct during closing argument by misstating the reasonable doubt standard and arguing that if a juror believed a defendant committed the crime then that juror could not have any reasonable doubts. The State’s argument failed to appreciate the difference between a personal belief that a defendant might have committed a crime and a belief that the State had met its burden of proving the defendant committed the crime beyond a reasonable doubt.

Trial counsel for Mr. Preston failed to object to the incomplete jury instructions, failed to propose correct jury instructions, and failed to object to the State’s improper closing arguments.

Any one of these three categories of errors is sufficient to warrant a new trial, if not the outright dismissal of the theft and trafficking charges. However, the cumulative effect of these errors certainly deprived Mr. Preston of a fair trial and requires his convictions be vacated and the case remanded for a retrial.

This court should vacate the theft and trafficking charges and remand for dismissal of those charges with prejudice. Alternatively, whether it is due to prosecutorial misconduct or ineffective assistance of counsel or both, this court should vacate all of Mr. Preston’s convictions

and remand for a new trial.

DATED this 21st day of August, 2017.

Respectfully submitted,



Reed Speir, WSBA No. 36270
Attorney for Appellant

CERTIFICATE OF SERVICE

Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 21st day of August, 2017, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Thurston County Prosecuting Attorney's Office
2000 Lakeridge Dr. SW, Building 2
Olympia, WA 98502

And to:

Mr. Michael Ray Preston
2000 Lakeridge Drive SW
Olympia, WA 98502

Signed at Tacoma, Washington this 21st day of August, 2017.



Reed Speir
Reed Speir, WSBA No. 36270

LAW OFFICE OF REED SPEIR

August 21, 2017 - 9:19 AM

Transmittal Information

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Appellate Court Case Number: 50238-1
Appellate Court Case Title: State of Washington, Respondent v. Michael Preston, Jr., Appellant
Superior Court Case Number: 15-1-00433-0

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