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Court of Appeals  
Division II  
State of Washington  
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No. 50446-4-II

COURT OF APPEALS,  
DIVISION TWO  
OF THE STATE OF WASHINGTON

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State of Washington, *Respondent*

v.

Carl Lee Domingue, *Appellant*.

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**REPLY BRIEF OF APPELLANT**

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## I. ARGUMENT IN REPLY

### A. Due process of law compels reversal of Mr. Domingue's conviction where the prosecutor misstated the law and relieved the State of its burden of proof.

In its response brief, the State—as it must—hangs its hat on two central themes: (1) that the prosecutor's argument that "*There's really only two possibilities. One, she's making it up; or two, she's telling the truth[]*" was "an argument relating to the credibility of K.W. and not a misstatement of the burden of proof[;]" and (2) that, even if improper, the "[d]efendant waived his prosecutorial misconduct objection by failing to make that objection in the trial court." *See* Br. of Resp. at 4, 8.

In support of the first theme, the State contends that the argument "*There's really only two possibilities. One, she's making it up; or two, she's telling the truth[]*" is logical and is based on the facts of the case. *See* Br. of Resp. at 3. Citing *State v. Wright* (*see* Br. of Resp. at 3-4), the State essentially claims that the argument advanced by the prosecutor is similar to one approved in *Wright* where the court concluded that when the parties present the jury "with conflicting versions of the facts and the credibility of witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other." *See State v. Wright*, 76 Wn. App. 811, 825 (1995).

In support of the second theme, the State contends that “[t]he brief remarks at issue in this case are much less insistent, much less pronounced, and much less grievous than the closing argument in *State v. Warren*[<sup>1</sup>]” in which the prosecutor’s argument that the defendant did not enjoy the benefit of any reasonable doubt was repeated three (3) times. *See* Br. of Resp. at 7. The State concludes its that “in this case it is difficult to discern, from the confused nature of the argument, that the erroneous statement was even intentional, much less ... so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” *See id.*

The problem for the State is found in *State v. Fleming*<sup>2</sup>, which the State fails to mention, let alone distinguish, in its response brief. *See* Br. of Resp. at ii.

It is settled law that a prosecutor may not argue that to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken. *See Fleming*, 83 Wn. App. at 213 (“This court has repeatedly held that it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken.”).

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<sup>1</sup> *See State v. Warren*, 165 Wn.2d 17, 27 (2008).

<sup>2</sup> *See State v. Fleming*, 83 Wn. App. 209 (1996).

“Such arguments may undermine the presumption of innocence, shift the burden of proof, and mislead the jury *because the testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved.*” See *State v. Rafay*, 168 Wn. App. 734, 836 (2012) (citing *State v. Casteneda-Perez*, 61 Wn. App. 354, 363 (1991) and *Fleming*, 83 Wn. App. at 213) (emphasis added).

In *Fleming*, a prosecution for second degree rape, the court found misconduct in the following statement made at the beginning<sup>3</sup> of the prosecutor’s closing argument:

Ladies and gentlemen of the jury, for you to find the defendants ... not guilty of the crime of rape in the second degree, with which each of them have been charged, based on the unequivocal testimony of [D.S.] as to what occurred to her back in her bedroom that night, *you would have to find either that [D.S.] has lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom.*

*Fleming*, 83 Wn. App. at 213 (emphasis added).

In striking down the above statement, the *Fleming* court declared:

The prosecutor's argument misstated the law and misrepresented both the role of the jury and the burden of proof. The jury would not have had to find that D.S. was mistaken or lying in order to acquit; instead, it was *required*

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<sup>3</sup> The State’s response brief invites this Court to compare the “two sentences” made by the prosecutor in this appeal with the “proper and unambiguous presentation of the burden of the proof during his rebuttal argument.” See Br. of Resp. at 7, n. 6. However, as shown in *Fleming*, the order of impropriety in the statements is irrelevant.

to acquit unless it had an abiding conviction in the truth of her testimony. ***Thus, if the jury were unsure whether D.S. was telling the truth, or unsure of her ability to accurately recall and recount what happened in light of her level of intoxication on the night in question, it was required to acquit. In neither of these instances would the jury also have to find that D.S. was lying or mistaken, in order to acquit.***

*Fleming*, 83 Wn. App. at 213 (emphasis added).

The court then noted that “this improper argument was made over two years after the opinion in *Casteneda-Perez*[.]” *See Fleming*, 83 Wn. App. at 214. Therefore, the court deemed it to be a “flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial.” *See id.*; *see also id.* at 215 (agreeing that “trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.”).

The court ultimately reversed and remanded for a new trial, notwithstanding the fact that the defendant failed to contemporaneously object at trial. *See Fleming*, 83 Wn. App. at 216 (concluding that the “misconduct, taken together and by cumulative effect, rose to the level of manifest constitutional error, which [it] [could not] find harmless beyond a reasonable doubt given the nature of the evidence at trial.”).

To be sure, the argument made in this case, “*There's really only two possibilities. One, she's making it up; or two, she's telling the truth[,]*” is virtually identical to the argument struck down in *Fleming*: “for you to find the defendants ... not guilty of the crime of rape in the second degree ... you would have to find either that [D.S.] has lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom.” *See Fleming*, 83 Wn. App. at 213 (emphasis added). The State makes no real attempt to distinguish the prosecutor’s argument in this case from the argument struck down in *Fleming*. Indeed, it bears repeating that the State’s response is completely devoid of any reference to *Fleming*. This omission is telling and should be dispositive of the issue of whether reversal is appropriate in this case.

Moreover, the error was clearly harmful because it misstated the burden of proof. The argument instructed the jury that unless they found that K.W. was “making it up,” *e.g.*, lying, then they must find that she was telling the truth (and therefore, that Mr. Domingue was guilty.) This is a false choice. The jury may have been unsure whether K.W. was telling the truth, or unsure of her ability to accurately recall and recount what happened, especially considering the inconsistent statements she acknowledged making in prior interviews on the subject. *See OBA* at 7-8.



**CERTIFICATE OF SERVICE**

I certify that on April 20, 2018, I caused a copy of the foregoing **REPLY BRIEF OF APPELLANT** to be served on the following individuals by delivery to the same. Service was made by email:

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And I further certify that on April 20, 2018, I caused a copy of the foregoing **REPLY BRIEF OF APPELLANT** to be served on the appellant, Carl Lee Domingue via first class mail, postage prepaid. The address of the appellant is as follows:

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*s/ Joseph O. Baker*  
Joseph O. Baker, WSBA #32203

**GEHRKE, BAKER, DOULL & KELLY, PLLC**

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**Transmittal Information**

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