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Division II
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NO. 51276-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT LEATHERMAN,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

Thurston County Cause No. 15-1-00544-1

The Honorable Carol A. Murphy, Judge

BRIEF OF APPELLANT

Skylar T. Brett
Attorney for Appellant

LAW OFFICE OF SKYLAR T. BRETT
P.O. Box 18084
Seattle, WA 98118
(206) 494-0098
skylarbrettlawoffice@gmail.com

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Leatherman was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Mr. Leatherman was deprived of his Wash. Const. art. I, § 22 right to the effective assistance of counsel.
3. Mr. Leatherman's defense attorney provided ineffective assistance of counsel by failing to propose a lesser-included instruction for second degree animal cruelty.

> **ISSUE 1:** A defense attorney provides ineffective assistance of counsel by failing to propose an appropriate lesser-included instruction when the defense rebuts only some portion of the greater offense but leaves the jury in the "arduous position" of either letting the accused "go free" or to convict of the greater offense because of the evidence of some culpable conduct. Did Mr. Leatherman's attorney provide ineffective assistance by failing to propose an instruction for animal cruelty in the second degree when the evidence demonstrated that Mr. Leatherman had failed to provide his dog with necessary veterinary care even if it did not establish that he had "starved" the dog?

4. Defense counsel provided ineffective assistance by failing to object to evidence that was inadmissible under ER 404(b).
5. Defense counsel provided ineffective assistance by failing to object to evidence that was inadmissible under ER 403.

> **ISSUE 2:** A defense attorney provides ineffective assistance of counsel by failing to object to inadmissible evidence that prejudices the defense. Did Mr. Leatherman's attorney provide ineffective assistance by failing to object to evidence of his dog's extensive, untreated medical conditions when the state had charged only that Mr. Leatherman had "starved" the dog?

6. Prosecutorial misconduct violated Mr. Leatherman's Sixth and Fourteenth Amendment right to a fair trial.
7. Prosecutorial misconduct violated Mr. art. I, § 22 right to a fair trial.

8. The prosecutor committed misconduct by mischaracterizing the law regarding the definition of criminal negligence.
9. The prosecutor committed misconduct by appealing to the jury's passion and prejudice.
10. Mr. Leatherman was prejudiced by the prosecutor's misconduct.
11. The prosecutor's misconduct was flagrant and ill-intentioned.

> **ISSUE 3:** A prosecutor commits misconduct by mischaracterizing the law to the jury and by appealing to the jury's passion and prejudice. Did the prosecutor at Mr. Leatherman's trial commit misconduct by encouraging the jury to judge Mr. Leatherman's treatment of his dog based on how the jurors would treat their children?

12. The prosecutor committed misconduct by making an argument that minimized the state's burden of proof.
13. The prosecutor committed misconduct by making an argument that undermined the presumption of innocence.

> **ISSUE 4:** A prosecutor commits misconduct my making arguments that minimize the state's burden of proof or undermine the presumption of innocence. Did the prosecutor commit misconduct by telling the jury that "Before [they] say 'not guilty,' [they] have to ask yourself, is the doubt that [they] have a reasonable one?

14. The court's to-convict instruction violated Mr. Leatherman's Fourteenth Amendment right to due process.
15. The court's to-convict instruction violated Mr. Leatherman's Wash. Const. art. I, § 3 right to due process.
16. The court's to-convict instruction impermissibly relieved the state of its burden of proof.
17. The court's to-convict instruction erroneously omitted the element that Mr. Leatherman had failed to appear in court "as required."
18. The court erred by giving instruction number 16.
19. The violation of Mr. Leatherman's due process rights constitutes manifest error affecting a constitutional right.

ISSUE 5: An accused person has a due process right to have the jury instructed on each element of an offense. Did the court's to-convict instruction violate Mr. Leatherman's due process right by allowing conviction without proof that his conduct met the statutory element that he had failed to appear in court "as required"?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

A. The state charged Mr. Leatherman with cruelty toward his dog, alleging that he had "starved" the dog by failing to recognize and treat his periodontal disease.

Wolfy was a large dog who was more than fifteen years old. RP 222, 251. Every day he made his "rounds" through the small town of Bucoda, stopping at Joe's Place (the local bar) to get his pepperoni treats. RP 232, 235, 252, 254-55, 271. Everyone in town knew him. RP 252. Other older dogs in town do the same thing, wandering freely for some portion of the day. RP 252.

Everyone in Bucoda called Wolfy the "lion dog" because he lost his hair below the neck in the summer, leaving him with what looked like a lion's mane. RP 226, 231, 251, 263. The hair grew back as the weather cooled. RP 226, 231, 251.

Robert Leatherman took over care of Wolfy around 2009 when his father was no longer able to care for the dog. RP 256.

One day in 2014, Shawna Estrada was passing through Bucoda and encountered Wolfy RP 53-54. She thought that he looked injured and tried to contact the town's animal control RP 54. Not getting the response she wanted, Ms. Estrada posted pictures of Wolfy on social media, lambasting the town of Bucoda for failing to care for him properly. RP 58-59, 72, 238.

Around this same time, Wolfy started having seizures. RP 264, 269-70. Mr. Leatherman decided that it was time to put him down. RP 142, 266. One of Mr. Leatherman's friends took Wolfy to a secluded area and shot him in the head. RP 263-64, 266.

Responding to the posts on social media, Sheriff's deputy Swanson went to Bucoda and easily found out that Mr. Leatherman was Wolfy's owner. RP 136-39. Mr. Leatherman told the deputy that Wolfy had been put down a few days prior. RP 142.[1]

The deputy and an animal control officer went and retrieved Wolfy's body, where it had been laying for two days. RP 136, 142, 145-46. Veterinarian Dr. Victoria Smith performed a necropsy on Wolfy five days later. RP 81.

Based on the findings, the state charged Mr. Leatherman with first degree animal cruelty, alleging that he had starved Wolfy in a manner that caused him substantial unnecessary pain. CP 24.

At trial, Mr. Leatherman presented testimony from several townspeople from Bucoda, including a former police officer, the Bucoda mayor, and a waitress at Joe's Place, all of whom testified that Mr. Leatherman took good care of Wolfy and that Wolfy looked fine as

[1] Not wanting to implicate his friend, Mr. Leatherman originally lied about the name of the friend who had shot Wolfy. RP 143-44. Mr. Leatherman admitted to the lie the next day and told the deputy the friend's real name. RP 145.

recently as a few days before his death. RP 226, 232-34, 253-54, 264-65. Specifically, witnesses testified that Mr. Leatherman always provided Wolfy with sufficient water and dog food. RP 254, 267. The mayor also said that Wolfy did not look alarmingly thin or emaciated. RP 239.

The state did not offer the photos that Ms. Estrada had taken of Wolfy – supposedly showing him to be injured – at trial *See* RP *generally*. Instead, the state offered Dr. Smith's testimony regarding her assessment of Wolfy's condition. RP 77-133.

Dr. Smith opined that Wolfy had only been dead for "a few days" when she did the necropsy. RP 116. It appears that neither deputy Swanson nor animal control had told her that he had actually been dead for a week. *See* RP 77-133. The state did not offer any evidence regarding the conditions in which Wolfy's body had been stored during the five days between its retrieval and handing it off to Dr. Smith. *See* RP *generally*.

Dr. Smith opined that Wolfy had suffered from numerous chronic health conditions, none of which were related to starvation. RP 77-133. She spoke at length about his hair loss, which she said was caused either by a skin infection or by Wolfy chewing his skin because of fleas. RP 94-99. She said that his skin was thickened and damaged. RP 96. She said that Wolfy had skin lesions on the back half of his body, which had attracted maggots. RP 98-99.

Dr. Smith also testified that Wolfy had chronic ear infections which caused pus to drain out of both of his ears. RP 101-03. She said that the ear infections would have been painful to Wolfy and that there was no evidence that they had been treated. RP102-03.

She also said that Wolfy had degenerative disease in his spine, shoulders, and hips, which may have caused him to limp. RP 106-08. She said that Wolfy would have felt pain as a result of that disease. RP 108. Dr. Smith said the degenerative disease is not curable, but that veterinary treatment could have made Wolfy more comfortable. RP 108.

Mr. Leatherman's defense attorney did not object to any of Dr. Smith's testimony. *See* RP 77-133.

Dr. Smith also testified that Wolfy had stage four periodontal disease, which is the most severe of the four stages. RP 86-88. She said that he had dental infections and abrasions in his gums, caused by hairs that were wrapped around some of his teeth. RP 85. She said that he had pus coming from his gum line. RP 85. She said that the disease should have been noticed by Wolfy's owner based on his bad breath. RP 129. Dr. Smith opined that Wolfy's periodontal disease would have made it painful for him to eat, especially hard dog food. RP 88-89, 91.

Finally, Dr. Smith testified that Wolfy was underweight. RP 84. She scored him as a 2.5 on a scale of 1-10, with 1 meaning that an animal

is cachetic, 10 meaning that it is morbidly obese, and 5 representing the ideal. RP 82-84. She said Wolfy could have gotten that way either because of poor diet or because of disease. RP 84-85. Wolfy's stomach only contained some undigested corn kernels and a few small rocks. RP 103. She said that dogs eat rocks either because they are experiencing gastric pain or because they are starving. RP 104. She said that the extreme lack of fat on Wolfy's body indicated that he had been losing weight for months or years. RP 106.

Dr. Smith did not review any of Wolfy's prior veterinary records because the sheriff and animal control had not provided her with Mr. Leatherman's name or any other way to try to get them. RP 123-24. She admitted that she generally does review an animal's medical records as part of a necropsy, when they are available. RP 124.

Mr. Leatherman's witnesses testified that they did not notice anything unusual about Wolfy's teeth. RP 254, 265. They said that Wolfy had "dog breath," but that it was not any worse than other geriatric dogs they had met. RP 254, 265.

The state's theory in closing was that Mr. Leatherman had "starved" Wolfy not by neglecting to feed him, but by failing to treat his periodontal disease, which made it too painful for Wolfy to eat his kibble. *See* RP 315-16, 350. The prosecutor argued that Mr. Leatherman had been

criminally negligent by failing to realize that Wolfy's disease was making it too difficult for him to eat hard dog food. RP 317.

The prosecutor said a reasonable person in Mr. Leatherman's situation would have brushed Wolfy's teeth. RP 318. She made lengthy arguments comparing a reasonable person's care for a dog with a reasonable person's care for him/herself or for a child:

> Let's talk about what a reasonable person would do. Reasonable person would brush their teeth. Reasonable person would make sure, if they have kids, they would brush their kid's teeth, if their kid couldn't do it themselves. Reasonable person would make sure they would eat. Reasonable person would make sure, if they had kids, their kids were eating.
> RP 345-46.
>
> Ladies and gentlemen of the jury, can you imagine if you had a kid. You can say all day long, I love my kid. I would do everything I possibly can for my kid. I put food out on the table for my kid, but if your kid had periodontal disease in their teeth, if your kid had so many unhealthy teeth conditions that it was making it difficult for your kid to eat, then I submit to you the fact that you say, I love my kid, and the fact that you put food out for your kid but the fact you don't do anything else for your kid, don't brush your kid's teeth, don't take your kid to the doctor to make sure your kid is healthy, don't solve the problems thats (sic) causing your kid to starve, that still makes you a neglectful parent, and this is the same situation.
> RP 354.

When explaining the beyond a reasonable doubt standard to the jury, the prosecutor claimed that it posed hurdle that the jurors had to overcome before they could *acquit* Mr. Leatherman:

> What does [reasonable doubt] mean? In a nutshell, it means when you go back and you deliberate and you say, well, I have a doubt in this case. Before you say 'not guilty,' you have to ask yourself, is the doubt that you have a reasonable one? If the answer is, no, it's not reasonable, then that's not a reasonable doubt.
> RP 326-27.

Mr. Leatherman's defense counsel did not propose a lesser-included instruction for second-degree animal cruelty, which is a misdemeanor that criminalizes negligently failing to provide medical care for an animal. *See* RP *generally*; RCW 16.52.207(2)(a).

The jury found Mr. Leatherman guilty of the animal cruelty charge. RP 371.

B. The jury also found Mr. Leatherman guilty of one count of bail jumping.

Mr. Leatherman was not in the relevant courtroom during the first pretrial hearing in his case. RP 206-08. As a result. The state added a charge of bail jumping to his Information, which was also submitted to the jury at his trial. CP 24.

As evidence of the charge, the state called two deputy prosecutors as witnesses. The prosecutor who was present when Mr. Leatherman allegedly failed to appear had no independent recollection of Mr. Leatherman's case. RP 213. There was no evidence regarding whether Mr. Leatherman was in some other area of the courthouse at the time of the hearing. *See* RP *generally*. In fact, the state's exhibits clarify neither which

courtroom he was supposed to appear in nor which courtroom he was determined to be absent from at the appointed time. *See* Ex. 49-51; *See also* RP *generally*.

The court's to-convict instruction delineated the elements of bail jumping as follows:

> (1) That on or about June 4, 2015, the defendant failed to appear before a court;
> (2) That the defendant was charged with Animal Cruelty in the First Degree;
> (3) That the defendant had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court; and
> (4) That any of these acts occurred in the State of Washington.
> CP 45.

The jury also convicted Mr. Leatherman of the bail jumping charge. RP 371.

This timely appeal follows. CP 67.

ARGUMENT

I. MR. LEATHERMAN WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The state and federal constitutions both protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; art. I, § 22; *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015).[2]

[2] Ineffective assistance of counsel claims are reviewed *de novo*. *Jones*, 183 Wn.2d at 338.

In order to demonstrate ineffective assistance of counsel, the accused must show deficient performance and prejudice. *Id.* Performance is deficient if it falls below an objective standard of reasonableness. *Id.* The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that counsel's mistakes affected the outcome of the proceedings. *Id.*

A "reasonable probability" under the prejudice standard for ineffective assistance requires less than the preponderance of the evidence standard. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Rather, "it is a probability sufficient to undermine confidence in the outcome." *Id.*; *see also Jones*, 183 Wn.2d at 339.

The presumption that a defense attorney has acted reasonably is rebutted if "no conceivable legitimate tactic explains counsel's performance." *State v. Fedoruk*, 184 Wn. App. 866, 880, 339 P.3d 233 (2014) (*quoting State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

Here, Mr. Leatherman's attorney provided ineffective assistance of counsel by unreasonable failing to propose a lesser-included instruction for misdemeanor animal cruelty in the second degree and by failing to object to extensive, highly-prejudicial, inadmissible evidence.

A. Mr. Leatherman's defense attorney provided ineffective assistance of counsel by unreasonably failing to request a lesser-included jury instruction for second degree animal cruelty.

Animal cruelty in the first degree is a felony that criminalizes, *inter alia*, negligently starving an animal in a manner that causes substantial and unjustifiable physical pain. RCW 16.52.205(2).

Animal cruelty in the second degree is a gross misdemeanor criminalizing, *inter alia*, knowingly, recklessly, or negligently failing to provide an animal with medical attention in a manner that causes unjustifiable physical pain. RCW 16.52.207(2)(a).

The right to a jury instruction on a lesser-included offense is codified at RCW 10.61.006. Under the two-prong *Workman* test, an instruction on a lesser-included offense is warranted if (1) the elements of the lesser offense are necessary for conviction of the greater offense (legal prong) and (2) the evidence supports an inference that only the lesser offense was committed (factual prong). *State v. Condon*, 182 Wn.2d 307, 316, 343 P.3d 357 (2015) (*citing State v. Workman*, 90 Wn.2d 443, 447–48, 584 P.2d 382 (1978)). When applying the *Workman* test, the court must view the evidence in the light most favorable to the party requesting the instruction. *Id.* at 321.

Animal cruelty in the second degree meets the legal prong of the *Workman* test, as a lesser-included offense of animal cruelty in the first

degree. *See State v. Smith*, 154 Wn. App. 272, 277–79, 223 P.3d 1262 (2009).

Under the factual prong, the evidence supported the conclusion that Mr. Leatherman committed only second degree animal cruelty. The evidence supported the conclusion that Mr. Leatherman had failed to get treatment for Wolfy's teeth, skin, ear, and joint problems even while he continued to provide him with adequate food. RP 77-133. Taken in the light most favorable to Mr. Leatherman, the evidence established that he had not "starved" Wolfy but that he had committed animal cruelty in the second degree.

But Mr. Leatherman's defense attorney did not request a jury instruction on that lesser-included offense. *See* RP *generally*. Defense counsel's all-or-nothing strategy was not a reasonable trial tactic, though, because he only presented evidence to call the state's theory of starvation into evidence. *Smith*, 154 Wn. App. at 277–79. Defense counsel did not present evidence that Mr. Leatherman had sought veterinary care for Wolfy.

This Court reversed a conviction for animal cruelty in the first degree based on ineffective assistance of counsel in strikingly similar circumstances in *Smith*. *Id.* In that case, the evidence demonstrated that the defendant's llama had been severely underweight either because of a

parasite or because of a lack of nutrition. *Id.* at 275-76. Defense counsel presented evidence that Mr. Smith had fed the llama and sought lay advice about how to help it gain weight but had not sought veterinary care. *Id.* In that context, this Court found counsel's failure to seek a jury instruction on second-degree animal cruelty was unreasonable because it "left the jury in an arduous position: to either convict Smith of first degree animal cruelty or to let him go free despite evidence of some culpable behavior." *Id.* at 278. That unreasonable choice met both prongs of the *Strickland* test for ineffective assistance of counsel. *Id.* at 279.

Similarly, in Mr. Leatherman's case, defense counsel's all-or-nothing strategy was not reasonable because it left the jury in the same "arduous position" as in *Smith*: to convict Mr. Leatherman of the felony or to let him go free even though he had indisputably failed to get veterinary care for his geriatric dog. *Id.* at 278. Mr. Leatherman's attorney provided ineffective assistance of counsel by failing to propose a lesser-included instruction for second degree animal cruelty. *Id.* at 279. Mr. Leatherman's animal cruelty conviction must be reversed. *Id.*

B. Mr. Leatherman's defense attorney provided ineffective assistance of counsel by failing to object to extensive evidence that was inadmissible under ER 403 and ER 404(b).

Defense counsel provides ineffective assistance by waiving a valid objection without any sound strategic reason. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Under ER 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." ER 404(b) must be read in conjunction with ER 403. *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

A trial court must begin with the presumption that evidence of uncharged bad acts is inadmissible. *State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). The proponent of the evidence carries the burden of establishing that it is offered for a proper purpose. *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2015).

Before admitting misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose for which the evidence is offered, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. *Slocum*, 183 Wn. App. at 448.

The court must conduct this inquiry on the record. *McCreven*, 170 Wn. App. at 458. Doubtful cases are resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Wilson*, 144 Wn. App. 166, 176-178, 181 P.3d 887 (2008).

Here, the state charged Mr. Leatherman with "starving" Wolfy, based on the allegation that he had made it impossible for Wolfy to eat by not seeking treatment for his periodontal disease. *See* RP 315-16, 350; CP 24. The state's evidence that Mr. Leatherman had also not sought treatment for Wolfy's significant skin, ear, and joint problems were not relevant to that charge. But the evidence supported the type of propensity inference prohibited by ER 404(b), encouraging the jury to find Mr. Leatherman guilty based on uncharged bad acts. Defense counsel had no valid tactical reason for waiving objection and provided deficient performance by failing to object. *Saunders*, 91 Wn. App. at 578; *McCreven*, 170 Wn. App. at 458; ER 404(b); ER 403.

Mr. Leatherman was prejudiced by his attorney's deficient performance. *Jones*, 183 Wn.2d at 339. It was uncontroverted at trial that Mr. Leatherman provided Wolfy with dog food. RP 254, 267. Mr. Leatherman also presented evidence that other people who contacted Wolfy did not notice that his teeth were in bad shape. RP 254, 265. Accordingly, the jury could have concluded that Mr. Leatherman had not

been negligent in failing to recognize Wolfy's periodontal disease, but still found him guilty based on his failure to seek treatment for Wolfy's more obvious health problems, which Dr. Smith described in excruciating detail. There is a reasonable probability that defense counsel's failure to object affected the outcome of Mr. Leatherman's trial. *Id.*

Mr. Leatherman's attorney provided ineffective assistance of counsel by failing to object to extensive, highly-prejudicial evidence that was inadmissible under ER 403 and ER 404(b). *Id.* Mr. Leatherman's animal cruelty conviction must be reversed. *Id.*

II. PROSECUTORIAL MISCONDUCT DEPRIVED MR. LEATHERMAN OF A FAIR TRIAL

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Even absent objection, reversal is required when misconduct is "so flagrant and ill-intentioned that an instruction would not have cured the prejudice." *Glasmann*, 175 Wn.2d at 704.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight "not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office." Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

The prosecutor committed misconduct at Mr. Leatherman's trial by misstating the law, undermining the presumption of innocence, and appealing to the jury's passion and prejudice.

A. The prosecutor misstated the law and improperly appealed to the jury's passion and prejudice by encouraging conviction of Mr. Leatherman if the jury found that he had not cared for his dog the way that the jury would have cared for a human child.

A prosecutor commits misconduct by misstating the law to the jury during closing argument. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). A prosecutor also may not make arguments that are designed to inflame the jury's passion and prejudice. *Glasmann*, 175 Wn.2d at 704.

First degree animal cruelty requires proof of criminal negligence. RCW 16.52.205(2). Whether a person has acted with criminal negligence is completely circumstance-specific:

> A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

RCW 9A.08.010(1)(d). Accordingly, conduct that may be criminally negligent in one situation would not be in a different context.

In the context of animal cruelty, the jury must determine whether the accused has acted with criminal negligence based on its assessment of how a reasonable person would act toward the same animal in the same circumstances. RCW 16.52.205(2); RCW 9A.08.010(1)(d).

But the prosecutor argued that the jury should consider the standard of care that a reasonable person would exercise toward another *human*:

> Reasonable person would brush their teeth. Reasonable person would make sure, if they have kids, they would brush their kid's teeth, if their kid couldn't do it themselves. Reasonable person would make sure they would eat. Reasonable person would make sure, if they had kids, their kids were eating.
> RP 345-46.

> You can say all day long… I put food out on the table for my kid, but if your kid had periodontal disease in their teeth, if your kid had so many unhealthy teeth conditions that it was making it difficult for your kid to eat, then I submit to you the fact that you

> say, I love my kid, and the fact that you put food out for your kid but the fact you don't do anything else for your kid, don't brush your kid's teeth, don't take your kid to the doctor to make sure your kid is healthy, don't solve the problems thats (sic) causing your kid to starve, that still makes you a neglectful parent, and this is the same situation.
> RP 354.

The prosecutor misstated the law by encouraging the jury to judge Mr. Leatherman's conduct toward his dog based on how a reasonable person would treat his/her children. The argument was also designed to inflame the jury's passion and prejudice by conjuring the image of a child who was un-cared-for, or unable to eat. The prosecutor's arguments were improper. *Allen*, 182 Wn.2d at 373; *Glasmann*, 175 Wn.2d at 704.

There is a substantial likelihood that the prosecutor's misconduct affected the verdict in Mr. Leatherman's case. *Glasmann*, 175 Wn.2d at 704. No witness testified regarding the standard of care for brushing a dog's teeth. *See* RP *generally*. But it is common knowledge that reasonable people brush their children's teeth daily. There was also contradictory evidence regarding whether a reasonable person would have recognized Wolfy's periodontal disease. Dr. Smith opined that the disease would have been apparent from Wolfy's breath. RP 129. But other lay people who came into contact with Wolfy did not notice his breath to be unusual. RP 254, 265. In this murky evidentiary landscape, the prosecutor's arguments relying on reasonable care for a child encouraged

the jury to find Mr. Leatherman guilty even if they were not convinced beyond a reasonable doubt that a reasonable dog-owner would have known that Wolfy's teeth needed attention. Mr. Leatherman was prejudiced by the prosecutor's improper arguments. *Id.*

Misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time of the improper statement. *Glasmann*, 175 Wn.2d at 707. Here, the prosecutor had access to longstanding case law prohibiting appeals to the jury's emotion, passion, and prejudice. *Id.* Arguments with an "inflammatory effect on the jury" are also generally not curable by an instruction. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012). The prosecutor's misstatement of the law and appeal to the jury's emotions was flagrant and ill-intentioned. *Id.*

The prosecutor committed flagrant, ill-intentioned misconduct at Mr. Leatherman's trial by making arguments encouraging the jury to judge his care for his dog based on a reasonable person's care for a human child. *Allen*, 182 Wn.2d at 373; *Glasmann*, 175 Wn.2d at 704. Mr. Leatherman's convictions must be reversed. *Id.*

B. The prosecutor committed misconduct by making arguments designed to undermine the presumption of Mr. Leatherman's innocence and to improperly shift the burden of proof.

A prosecutor commits misconduct by minimizing the state's burden of proof to the jury. *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). A prosecutor's misstatement of the state's burden of proof during argument to the jury "constitutes great prejudice because it reduces the state's burden and undermines a defendant's due process rights." *Johnson*, 158 Wn. App. at 685-86.

A prosecutor also commits misconduct by making arguments designed to undermine the presumption of innocence. *Id.; State v. Evans*, 163 Wn. App. 635, 643–44, 260 P.3d 934 (2011); *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009); *State v. Venegas*, 155 Wn. App. 507, 523, 228 P.3d 813 (2010). The presumption of innocence is the "bedrock upon which the criminal justice system stands." *Evans*, 163 Wn. App. at 643 (*quoting State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007)). The presumption persists throughout the proceeding and is only overcome if the state presents sufficient proof. *Id.*

The presumption of innocence and the beyond a reasonable doubt standard work in tandem to create a hurdle which must be overcome by

the state's evidence; not one which must be overcome by doubt in that evidence.

But the prosecutor at Mr. Leatherman's trial argued the opposite. The prosecutor told the jury that: "Before you say 'not guilty,' you have to ask yourself, is the doubt that you have a reasonable one? If the answer is, no, it's not reasonable, then that's not a reasonable doubt." RP 327.

In short, the prosecutor argued that the jury should presume that Mr. Leatherman was guilty and acquit him only if it had been provided with reasonable doubt. RP 326-27. The prosecutor's argument mischaracterized the state's burden of proof and undermined the presumption of Mr. Leatherman's innocence. *Johnson*, 158 Wn. App. at 685-86; *Evans*, 163 Wn. App. at 643–44. The argument was improper.

Mr. Leatherman was prejudiced by the prosecutor's improper argument. *Glasmann*, 175 Wn.2d at 704. The state's theory of "starvation" was somewhat tenuous. A reasonable jury could have concluded that the state had failed to prove that a reasonable person would have recognized that Wolfy's periodontal disease was making it difficult for him to eat. At the same time, based on the prosecutor's description of the state's burden, the jury could have thought that it was required to convict unless it had a reasonable explanation as to why it would have been unrecognizable.

There is a substantial likelihood that the prosecutor's misconduct affected the outcome of Mr. Leatherman's trial. *Id.*

Prosecutorial misconduct is flagrant and ill-intentioned if it violates case law and professional standards that were available to the prosecutor at the time of the argument. *Glasmann*, 175 Wn.2d at 707. The prosecutor at Mr. Leatherman's trial had access to long-standing caselaw prohibiting a arguments undermining the state's burden or the presumption of innocence. *See e.g. Johnson*, 158 Wn. App. at 685-86; *Evans*, 163 Wn. App. at 643–44; *Anderson*, 153 Wn. App. at 431; *Venegas*, 155 Wn. App. at 523.

A prosecutorial argument improperly minimizing the state's burden of proof cannot be cured by an instruction. *Johnson*, 158 Wn. App. at 685 (*citing Venegas*, 155 Wn. App. at 523 n. 16). The prosecutor's improper arguments at Mr. Leatherman's trial were flagrant and ill-intentioned. *Id.*

The prosecutor committed misconduct by making an argument designed to undermine the state's burden of proof and the presumption of Mr. Leatherman's innocence. *Id.* Mr. Leatherman's convictions must be reversed. *Id.*

III. THE COURT'S TO-CONVICT INSTRUCTION FOR BAIL JUMPING VIOLATED MR. LEATHERMAN'S RIGHT TO DUE PROCESS BECAUSE IT RELIEVED THE STATE OF ITS BURDEN TO PROVE EACH ELEMENT OF THE CHARGE.

A trial court's failure to instruct the jury as to every element of the crime charged violates due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). A "to convict" instruction must contain all the elements of the crime, because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004).

Jurors have the right to regard the court's elements instruction as a complete statement of the law. Any conviction based on an incomplete "to convict" instruction must be reversed. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (Smith II). This is so even if the missing element is supplied by other instructions. *Id; Lorenz*, 152 Wn.2d at 31; *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).[3]

In Mr. Leatherman's case, the court's to-convict instruction for bail jumping was constitutionally inadequate because it failed to provide

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[3] Alleged constitutional violations are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3). Instruction No. 16 presents manifest error affecting a constitutional right, and thus may be reviewed for the first time on appeal. RAP 2.5(a)(3).

Jury instructions are also 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. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

the jury with an accurate yardstick of the requirements for conviction. *Id.;* CP 45.

A. The court's to-convict instruction for bail jumping failed to inform the jury of the state's burden to prove that Mr. Leatherman failed to appear for court "as required."

In order to convict a person for bail jumping, the state must prove that s/he: (1) was held for, charged with, or convicted of a particular crime; (2) was released by court order or admitted to bail with knowledge of a required subsequent personal appearance; and (3) failed to appear as required. *State v. Williams*, 162 Wn.2d 177, 184, 170 P.3d 30 (2007); RCW 9A.76.170(1).

The court's to-convict instruction permitted conviction even if Mr. Leatherman had not failed to appear "as required." CP 45. The instruction was not available as an accurate "yardstick," and thus did not make the state's burden manifestly clear to the average juror. *Kyllo*, 166 Wn.2d at 864.

Constitutional error is presumed to be prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). Constitutional error is harmless only if it is trivial, formal, or merely academic, if it is not prejudicial to the accused person's substantial rights, and if it in no way

affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000).

Absent a showing that the accused failed to appear "as required," the jury could convict for activity that is not illegal: such as missing a non-mandatory hearing or simply failing to be in the courthouse on a random day on which no hearing is held.

Without the missing element (that Mr. Leatherman had failed to appear "as required,") the jury could have found him guilty based on non-appearance in court at some irrelevant date and time. The jury could have convicted Mr. Leatherman even if it found that there was insufficient evidence that the June 4th hearing was required. Indeed, the state failed to introduce evidence that Mr. Leatherman was absent from other areas of the courthouse on the date and time when he had been ordered to appear. The state's key witness for the bail jumping charge admitted that he had no recollection of Mr. Leatherman's case. RP 213. The evidence against Mr. Leatherman was not overwhelming.

The error here is presumed prejudicial, and the state cannot prove harmless error under the stringent test for constitutional error. *Watt*, 160 Wn.2d at 635. Accordingly, Mr. Leatherman's bail jumping conviction must be reversed. *Id.*

B. This Court should decline to follow its prior decision on this issue in *Hart* because that decision was wrongly-decided and is harmful.

This Court has decided that a to-convict instruction similar to the one given in Mr. Leatherman's case was constitutionally adequate. *See State v. Hart*, 195 Wn. App. 449, 456, 381 P.3d 142 (2016), *review denied*, 187 Wn.2d 1011, 388 P.3d 480 (2017).

The *Hart* court upheld the instruction because it "required the State to prove beyond a reasonable doubt that Hart 'had been released by court order or admitted to bail with knowledge *of the requirement* of a subsequent personal appearance before that court.'" *Id.* at 456.

But the reasoning in *Hart* is unavailing because it conflates two elements of bail jumping. The statutory element of bail jumping requiring proof that the accused failed to appear in court "as required" is textually and logically distinct from the element requiring proof that the court ordered a hearing, which the accused was required to attend. The first is proved through evidence that the hearing was held on the appointed date and time and that the accused was not present. The latter is proved through evidence that the court – on some previous date – scheduled the hearing and required the presence of the accused.

Indeed, the evidence establishing the two elements necessarily occurs at different times through the actions of different parties. Even so,

Hart holds that the element that of failure to appear "as required" was established through the state's proof that he "had been released by court order or admitted to bail with the knowledge of the requirement of a subsequent personal appearance before the court." *Id.* at 456.

Mr. Leatherman does not challenge the court's instruction regarding the element that he was aware of a required appearance in court. Rather, the court did nothing to inform the jury that it had to also find that he – at some later date – actually failed to appear as he had been ordered to do.

The *Hart* court's reasoning is flawed because it renders superfluous the language of the bail jumping statute requiring proof that the accuses failed to appear "as required" by equating it with the language requiring proof that s/he was released by the court "with knowledge of the requirement of a subsequent court appearance." *See* RCW 9A.76.170(1); *State v. LaPointe*, 1 Wn. App. 2d 261, 269, 404 P.3d 610 (2017) (statutes should not be construed in a manner rendering any of the language meaningless or superfluous).

This court should overrule its decision in *Hart* because it is both incorrect and harmful. *State v. W.R., Jr.*, 181 Wn.2d 757, 760, 336 P.3d 1134 (2014).

The court's to-convict instruction for bail jumping violated Mr. Leatherman's right to due process by relieving the state of its burden of proof. *Lorenz*, 152 Wn.2d at 31. His conviction for bail jumping must be reversed. *Id.*

CONCLUSION

Mr. Leatherman's defense attorney provided ineffective assistance of counsel by failing to offer a necessary lesser-included instruction and failing to object to highly-prejudicial, inadmissible evidence. The prosecutor committed misconduct at Mr. Leatherman's trial by misstating the law, appealing to the jury's passion and prejudice, mischaracterizing the burden of proof, and undermining the presumption of innocence. The court's to-convict instruction for bail jumping violated Mr. Leatherman's right to due process by omitting one of the elements. Mr. Leatherman's convictions must be reversed.

Respectfully submitted on July 20, 2018,

_____

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

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

Robert Leatherman
PO Box 261
Rainer, WA 98576

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Thurston County Prosecuting Attorney
paoappeals@co.thurson.wa.us

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 Seattle, Washington on July 20, 2018.

_____

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

LAW OFFICE OF SKYLAR BRETT

July 20, 2018 - 11:01 AM

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