

FILED
Court of Appeals
Division II
State of Washington
7/31/2018 2:19 PM

NO. 51837-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS BRADSHAW,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Repeated instances of prosecutorial misconduct in closing and rebuttal argument deprived appellant of a fair trial.

2. Defense counsel was ineffective and denied appellant a fair trial by failing to object to the improper closing argument.

Issues Pertaining to Assignments of Error

1. In closing argument, the prosecutor penalized appellant for exercising his constitutional right not to testify at trial. In rebuttal argument, the prosecutor shifted the burden of proof to appellant to provide a basis for reasonable doubt. Is reversal necessary where the cumulative effect of this repeated and flagrant misconduct deprived appellant of a fair trial?

2. Defense counsel failed to object to any of the prosecutor's improper closing argument. Did this failure to object deny appellant his constitutional right to effective representation?

B. STATEMENT OF THE CASE

1. Procedural History.

The Grays Harbor County prosecutor charged appellant, Thomas Bradshaw, by information with one count of possession of a stolen vehicle. CP 1-2.

A jury found Bradshaw guilty as charged. CP 23, 31-42; 2RP¹ 69. The trial court imposed a prison-based DOSA of 12.75 months confinement and 12.75 months community custody. 3RP 2; CP 31-42. The trial court imposed only mandatory legal financial obligations, agreeing that Bradshaw was indigent. 3RP 3-4; CP 31-42

Bradshaw timely appeals. CP 49-50.

2. Trial Testimony.

Jared Jones owns a white 1999 Nissan Maxima that he purchased in 2016. 2RP 4-5. On the evening of July 15, he parked the car at his house but neglected to remove the keys or lock the car. 2RP 6. When Jones' mother left for work the next morning around 7:00 a.m., the car was gone. 2RP 6. Jones reported the car stolen to police a short time later. 2RP 6-7, 15.

Three days later, police officer, Cody Blodgett, was on routine patrol in the City of Aberdeen. 2RP 10-11. As Blodgett drove past a white Nissan Maxima headed in the opposite direction, he recognized Bradshaw through the windshield, as the driver of the car. 2RP 13. Blodgett could not recall whether the car's windows were also rolled down. 2RP 20. Blodgett recalled that during that passing glance,

¹ This brief refers to the verbatim report of proceedings as follows: 1RP -- December 7, 2017; 2RP -- December 13, 2017; 3RP -- January 12, 2018.

Bradshaw looked away from him. 2RP 13. Blodgett also saw two other people in the car. 2RP 14-15.

Although nothing about the Nissan Maxima piqued Blodgett's interest, he nonetheless decided to run the car's license plate. 2RP 13. The car came back as reported stolen. 2RP 15. Blodgett turned around his police car and began pursuing the Nissan Maxima. When he caught up to the car about 100 yards down the road, it was parked. 2RP 16, 20-21. The only person in the car was Ashely McGrath, who was seated in the backseat. According to Blodgett, McGrath had been sitting in the front passenger seat of the car when he passed it. 2RP 16, 21-22. Although Blodgett had never seen McGrath driving the car, she had the car keys in her possession. 2RP 17, 21-22. Blodgett looked inside the car for paperwork about the Nissan Maxima's owner but found none. 2RP 19-20.

Aberdeen police officer, Jason Capps, responded to Blodgett's call for assistance. 2RP 23-24. Blodgett told Capps to look for Bradshaw. 2RP 24. Capps found Bradshaw inside a padlocked tent in a homeless encampment about 100 yards from where the car was parked. 2RP 25-27. Capps searched Bradshaw but found no car keys or documents pertaining to the Nissan Maxima on his person. 2RP 28.

Blodgett and Capps also detained James Lynch, the car's other passenger, when he returned to the Nissan Maxima a short time later.

Police saw Lynch as he came up the embankment from the river and tried to get into the backseat of the car. 2RP 17-18.

3. Closing Argument.

Whether Bradshaw acted with knowledge that the Nissan Maxima was stolen was the primary disputed issue at trial. See 2RP 30-33, 55, 65. Bradshaw did not testify at trial and the defense called no other witnesses.

During closing argument, the prosecutor maintained that Bradshaw's avoiding eye contact with Blodgett, leaving the parked car, and occupancy inside a padlocked tent was circumstantial evidence that Bradshaw knew the car was stolen. 2RP 58-62. As the prosecutor concluded his closing argument, he referenced Bradshaw's constitutional right to remain silent. As the prosecutor told the jury:

Now, Mr. Bradshaw has the absolute fifth amendment right not to testify. You saw it in the jury instructions, the fact that he didn't testify cannot be used against him. And that leaves you with the evidence that the State has presented. You get to draw inferences based on that, absent any other explanation. The evidence that you have explains his behavior, explains why he ran. Again, he doesn't have to testify. He doesn't -- we can't know necessarily what is in his head, because he doesn't have to tell you what he was thinking. He doesn't have to tell you what he knew or didn't know. And so you get to determine -- as the jurors, you're in a unique situation to try to figure out what to do or what a reasonable person in his situation would have done, given all of the context, given all of the evidence. It's almost like you guys get to be mind readers. What did he know? What should he have known? And what does the State show beyond a reasonable doubt that he would have

known on the 18th when Officer Blodgett turned around. He knew he was in trouble because he knew that car was stolen.

2RP 63.

In response, defense counsel argued during closing that it was pure speculation as to why Bradshaw looked away from Blodgett, or why he left the parked car. 2RP 64. Defense counsel noted the State "[hasn't] proved that he [Bradshaw] had any knowledge that the vehicle was stolen." 2RP 65.

In rebuttal, the prosecutor noted "we have to speculate because we can't get inside Mr. Bradshaw's head." 2RP 65. The prosecutor then turned his attention to the concept of reasonable doubt, telling the jury:

And I do want to draw your attention to the jury instruction as to what is a reasonable doubt. It is a doubt for which a reason exists. It is contained in Instruction Number 9. A reasonable doubt is a doubt for which a reason exists. Do you have a reason to doubt that he knew that it was stolen? Now, the State, trying to carry its burden, has presented to you circumstantial evidence. And, in fact, direct evidence given Officer Blodgett's direct testimony of what he directly observed the defendant do, we've given you, I put it to you, enough circumstantial evidence to believe beyond a reasonable doubt that he knew it was stolen? Nothing has contradicted the testimony you've heard. It's up to you to make the inferences as to whether or not you believe that he knew it. Is there a reason to doubt that he knew it was stolen. There's been no evidence to suggest anything, that he didn't know.

Also, as the last sentence of the jury instructions tells you, if, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable

doubt. An abiding belief in the truth of the charge, that means you're not going to go home and think about it and change your mind. It means you're not going to think about it a month later and think, oh, actually now that I think of it, maybe it's different.

You know, when you go back there and deliberate and you make those connections between what he calls speculation and what I call circumstantial evidence, if you don't have a reason to doubt, you don't have reasonable doubt. If you have an abiding belief in the charge, a belief that you're not going to change your mind later, then you don't have reasonable doubt. If you don't have reasonable doubt, the State's carried its burden proving it to you, then -- and it tells you your duty is to find the defendant and I ask you to do that.

2RP 66-67.

C. ARGUMENT

1. PROSECUTORIAL MISCONDUCT IN CLOSING AND REBUTTAL ARGUMENT DEPRIVED BRADSHAW OF A FAIR TRIAL.

A prosecutor is obligated to perform two functions: “enforce the law by prosecuting those who have violated the peace and dignity of the state” and serve “as the representative of the people in a quasijudicial capacity in a search for justice.” State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Because the defendant is among the people the prosecutor represents, the prosecutor “owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated.” Id.; see also Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. “[W]hile [a

prosecutor] may strike hard blows, he is not at liberty to strike foul ones.” Berger, 295 U.S. at 88. “It is as much [the prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” Id. A prosecutor’s misconduct may deny a defendant his right to a fair trial and is grounds for reversal if the conduct was improper and prejudicial. State v. Swanson, 181 Wn. App. 953, 327 P.3d 67, 69-70 34 (2014) (citing In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012); Monday, 171 Wn.2d at 675).

When, as here, the defense fails to object to improper comments at trial, the misconduct is reversible error if the prosecutor’s comments were “so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice.” State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). “The focus of this inquiry is more on whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remarks.” State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158, rev. denied, 175 Wn.2d 1025, 291 P.3d 253 (2012) (citing Emery, 174 Wn.2d at 761-62). Arguments creating an inflammatory effect on the jury are generally not capable of instructional cure. Emery, 174 Wn.2d at 763; State v. Perry, 24 Wn.2d 764, 770, 167 P.2d 173 (1946).

- a. The prosecutor improperly commented on Bradshaw's exercise of his constitutional right not to testify.

The Fifth Amendment and article I, section 9 guarantee a defendant the right to remain silent. State v. Easter, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996). It is well-settled that when a prosecutor comments on, or otherwise exploits, the defendant's exercise of this right the State violates the defendant's right to Due Process. State v. Romero, 113 Wn. App. 779, 786-87, 54 P.3d 1255 (2002) (citing Doyle v. Ohio, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)); State v. Fricks, 91 Wn.2d 391, 395-96, 588 P.2d 1328 (1979)).

A “[c]omment on the refusal to testify is a remnant of the ‘inquisitorial system of criminal justice.’” State v. Ramirez, 49 Wn. App. 38 332, 336, 742 P.2d 726 (1987) (quoting Murphy v. Waterfront Comm’n, 378 U.S. 52, 55, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964)). A defendant's Fifth Amendment rights have been violated where “the prosecutor's statement was of such character that the jury would ‘naturally and necessarily accept it as a comment on the defendant's failure to testify.’” Ramirez, 49 Wn. App. at 336 (quoting State v. Crawford, 21 Wn. App. 146, 152, 584 P.2d 442 (1978)); see also State v. Brett, 126 Wn.2d 136, 176, 892 P.2d 29 (1995) (finding a prosecutor's comments are

improper where they indicate that certain testimony is undenied and the defendant is the one in position to deny it).

The State concluded its closing argument by commenting on Bradshaw's right to silence. As the prosecutor told the jury:

Now, Mr. Bradshaw has the absolute fifth amendment right not to testify. You saw it in the jury instructions, the fact that he didn't testify cannot be used against him. And that leaves you with the evidence that the State has presented. You get to draw inferences based on that, absent any other explanation. The evidence that you have explains his behavior, explains why he ran. Again, he doesn't have to testify. He doesn't -- we can't know necessarily what is in his head, because he doesn't have to tell you what he was thinking. He doesn't have to tell you what he knew or didn't know.

2RP 63.

When the prosecutor made this statement, he commented on Bradshaw's failure to testify. Similarly, in rebuttal closing the prosecutor further emphasized that "we have to speculate because we can't get inside Mr. Bradshaw's head." 2RP 65. The prosecutor's remarks were manifestly intended to highlight Bradshaw's failure to testify and argue that the State's evidence was uncontradicted. The prosecutor's remarks are further problematic because they suggest Bradshaw was the only witness who would have been able to cast doubt on the State's theory of the case.

Prosecutors know that they may say certain testimony is undenied as long as they do not refer to the person who could have denied it. State v.

Fiallo-Lopez, 78 Wn. App. 717, 729, 899 P.2d 1294 (1995) (citing Ramirez, 49 Wn. App. at 336)). Where, as here, case law in existence well before Bradshaw's trial clearly warned against the type of statement made by the prosecutor, the misconduct may be deemed flagrant and ill intentioned. See Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673 (2012) (holding prosecutor's misconduct was flagrant and ill intentioned given that "[t]he case law and professional standards described above were available to the prosecutor and clearly warned against the conduct here").

In Fiallo-Lopez, the Court found the prosecutor had improperly commented on the defendant's silence when the prosecutor argued, "there was no attempt by the defendant to rebut the prosecution's evidence regarding his involvement in the drug deal." 78 Wn. App. at 729. The Court noted that despite the prosecutor's passing reference to the fact that the defense had no burden to explain Fiallo-Lopez' actions, the State's argument still impermissibly highlighted his silence. As the Court explained, "In this case, no one other than Fiallo-Lopez himself could have offered the explanation the State demanded. Because the argument improperly commented on the defendant's constitutional right not to testify and impermissibly shifted the burden of proof to the defendant, it was misconduct." 78 Wn. App. at 729.

Like Fiallo-Lopez, here the prosecutor's closing argument constituted misconduct because it improperly commented on Bradshaw's constitutional right not to testify and specifically indicated that Bradshaw was the only witness who could testify whether he knew the car was stolen because he was the only one who could explain "what is in his head[.]" 2RP 63. Significantly, like here, no objection was made to the prosecutorial misconduct in Fiallo-Lopez. 78 Wn. App. at 726. Nonetheless, this Court found the prosecutor's closing argument constituted misconduct. 78 Wn. App. at 728-29. The same result is warranted in Bradshaw's case.

- b. The prosecutor also shifted the burden of proof to the defense in rebuttal.

Along with discussing Bradshaw's lack of testimony, the prosecutor also commented on the concept of reasonable doubt in rebuttal:

A reasonable doubt is a doubt for which a reason exists. Do you have a reason to doubt that he knew that it was stolen? ... Nothing has contradicted the testimony you've heard. It's up to you to make the inferences as to whether or not you believe that he knew it. Is there a reason to doubt that he knew it was stolen. There's been no evidence to suggest anything, that he didn't know.

...

You know, when you go back there and deliberate and you make those connections between what he calls speculation and what I call circumstantial evidence, if you don't have a reason to doubt, you don't have reasonable doubt. If you have an abiding belief in the charge, a belief that you're not going to change you mind later, then you

don't have reasonable doubt. If you don't have reasonable doubt, the State's carried its burden proving it to you, then -- and it tells you your duty is to find the defendant and I ask you to do that.

2RP 66-67. These remarks misstated the reasonable doubt standard and shifted the burden of proof to Bradshaw to provide a basis for doubt.

Due process requires that the State bear the burden of proving every element of a criminal offense beyond a reasonable doubt. Glasmann, 175 Wn.2d at 713 (citing In re Winship, 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970)). As such, the defense has no obligation to produce evidence and no obligation to articulate reasons to doubt the State's case. State v. Kalebaugh, 183 Wn.2d 578, 585, 355 P.3d 253 (2015) (“[T]he law does not require that a reason be given for a juror’s doubt.”); Emery, 174 Wn.2d at 760 (“[T]he State bears the burden of proving its case beyond a reasonable doubt, and the defendant bears no burden.”).

A prosecutor commits misconduct by misstating the reasonable doubt standard or shifting the burden of proof to the accused. State v. Lindsay, 180 Wn.2d 423, 434, 326 P.3d 125 (2014) (“Arguments by the prosecution that shift or misstate the State’s burden to prove the defendant’s guilt beyond a reasonable doubt constitute misconduct.”); Glasmann, 175 Wn.2d at 713 (“Misstating the basis on which a jury can acquit insidiously

shifts the requirement that the State prove the defendant's guilt beyond a reasonable doubt.").

The prosecutor's argument in Bradshaw's case that there must be a basis for the jury's doubt is akin to the repeatedly condemned "fill-in-the-blank" argument. In State v. Anderson, 153 Wn. App. 417, 424, 220 P.3d 1273 (2009), the prosecutor argued reasonable doubt "means, in order to find the defendant not guilty, you have to say 'I don't believe the defendant is guilty because,' and then you have to fill in the blank. It is not something made up. It is something real, with a reason to it." The court concluded such argument was improper because "[t]he jury need not engage in any such thought process." Id. at 431. The court explained: "By implying that the jury had to find a reason in order to find Anderson not guilty, the prosecutor made it seem as though the jury had to find Anderson guilty unless it could come up with a reason not to." Id. The argument improperly implied the accused was responsible for supplying such a reason in order to avoid a conviction. Id.

Similarly, in State v. Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010), the prosecutor argued: "In order to find the defendant not guilty, you have to say, 'I doubt the defendant is guilty and my reason is' To be able to find a reason to doubt, you have to fill in the blank; that's your job." The court found this to be flagrant and ill-intentioned misconduct because "it

subverted the presumption of innocence by implying that the jury had an affirmative duty to convict, and that the accused bore the burden of providing a reason for the jury not to convict him.” Id. at 684.

The Washington Supreme Court denounced these “fill-in-the-blank” arguments once and for all in Emery. The argument “improperly implies that the jury must be able to articulate its reasonable doubt,” thereby “subtly shift[ing] the burden to the defense.” Emery, 174 Wn.2d at 760. The State bears the burden of proving its case beyond a reasonable doubt, and the accused bears no burden. Id. Such arguments therefore “misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence.” Id. at 759. Put simply, “a jury need do nothing to find a defendant not guilty.” Id.

The State’s argument in Bradshaw’s case did precisely what the forbidden “fill-in-the-blank” argument did: shift the burden of proof to Bradshaw to provide a basis for doubt. The State repeatedly contended that a reasonable doubt had to be based on something: “nothing has contradicted the testimony you’ve heard” “Is there a reason to doubt that he [Bradshaw] knew it was stolen. There’s been no evidence to suggest anything, that he didn’t know” “If you have an abiding belief in the charge, a belief that you’re not going to change your mind later, then you don’t have a reasonable doubt.” RP 66-67.

The prosecutor's argument explicitly stated there must be a basis for reasonable doubt. But the problem with this argument is, who provides that basis? The implication is either the jury or the accused must provide a basis for reasonable doubt. Certainly the prosecution would not purposefully provide a basis for doubt, as the prosecution wants to win a conviction. These remarks implied the defense had to create reasonable doubt, contrary to the presumption of innocence and the State's burden of proof.

Also, like the arguments in Anderson, Johnson, and Emery, the prosecutor's argument suggested the jury must have more than just a reasonable doubt to acquit. The prosecutor contended the jury must have a basis—some evidence—for its doubt. Just like asking the jury to fill in the blank, if Bradshaw's jury could not come up with a basis for its doubt, then it could not acquit and instead had to find Bradshaw guilty. But the jury need not articulate any basis for its doubt. Kalebaugh, 183 Wn.2d at 585 (“[T]he law does not require that a reason be given for a juror's doubt.”); Emery, 174 Wn.2d at 759-60 (“[A] jury need do nothing to find a defendant not guilty.”). The prosecutor's argument to the contrary shifted the burden of proof away from itself and onto Bradshaw to provide a basis for doubt.

The State bore the entire burden of proving its case beyond a reasonable doubt. Bradshaw did not bear any burden to supply a basis for doubt. Nor did the jury need to have any basis or reason for its reasonable

doubt in order to acquit Bradshaw. The State's suggestion otherwise was clearly improper because it shifted the burden of proof to Bradshaw and undermined the presumption of innocence.

- c. No curative instructions could have erased the cumulative prejudicial effect of the repeated, flagrant prosecutorial misconduct.

Reversal is required, even without defense objection, when a prosecutor's misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). "In other words, if the misconduct cannot be remedied and is material to the outcome of the trial, the defendant has been denied his due process right to a fair trial." State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

In evaluating claims of prosecutorial misconduct, it "is not a matter of determining whether there is sufficient evidence to convict the defendant." Glasmann, 175 Wn.2d at 710. Instead, "[t]he issue is whether the comments deliberately appealed to the jury's passion and prejudice and encouraged the jury to base the verdict on the improper argument 'rather than properly admitted evidence.'" Id. at 711 (quoting State v. Furman, 122 Wn.2d 440, 468-69, 858 P.2d 1092 (1993)). Put another way, "[t]he focus must be on the misconduct and its impact, not on the evidence that was properly admitted." Id.

To that end, courts recognize “the cumulative effect of repetitive prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.” Lindsay, 180 Wn.2d at 443; accord Glasmann, 175 Wn.2d at 707 (quoting State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011)). This is precisely the scenario in Bradshaw's case.

Evidentiary error or prosecutorial misconduct can be especially harmful in a case such as Bradshaw's, where the entire trial boiled down to a single question the jury had to resolve: whether Bradshaw knew the car was stolen. 2RP 55. The jury could have easily entertained a reasonable doubt about whether Bradshaw in fact knew the car was stolen. For example, although Jones reported the car stolen, there was no evidence that Bradshaw was the one who stole it or was associated with anyone alleged to have stolen the car. As Jones explained, the car was stolen after he left the keys in the ignition of the unlocked car. 2RP 6-7. The ignition of the car was therefore in perfect working order. Police also found no documentation in the car, or on Bradshaw, indicating that the car was registered to a particular person. 2RP 19-20, 28. Thus, there was no direct evidence presented that indicated Bradshaw was aware the car was stolen or should have known that it was stolen.

The prosecutor's repeated misconduct in closing and rebuttal arguments undoubtedly made it more difficult for the jury to adhere to the presumption of innocence. This began by inviting the jury to use Bradshaw's constitutional right to silence against him. The misconduct continued in rebuttal, where the prosecutor resorted to shifting the burden of proof to Bradshaw. Courts recognize when prosecutors make improper remarks in rebuttal, it "increas[es] their prejudicial effect." Lindsay, 180 Wn.2d at 443.

This Court has recognized trained and experienced prosecutors do not toy with the threat of appellate reversal unless they believe such tactics are necessary to sway the jury in a close case. State v. Fleming, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996). The Fleming court emphasized "[t]he State must convict on the merits, and not by way of misstating the nature of reasonable doubt, misstating the role of the jury, . . . and improperly shifting the burden of proof to the defense." Id.

The prosecutor in Bradshaw's case engaged in these very tactics: penalizing Bradshaw for the exercise of his constitutional rights, misstating the reasonable doubt standard, and shifting the burden of proof to Bradshaw. Given the multiple instances of misconduct, no instruction or series of instructions could have cured the resulting prejudice. This Court should reverse Bradshaw's conviction and remand for a new trial.

2. DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT CONSTITUTED INEFFECTIVE ASSISTANCE WHICH DENIED BRADSHAW A FAIR TRIAL

Defense counsel's failure to object to the prosecutor's misconduct during closing argument constituted ineffective assistance of counsel. Counsel's ineffectiveness denied Bradshaw a fair trial under the federal and state constitutions.

Every accused person is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and article 1, section 22 of the state constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be raised for the first time on appeal. State v. Kyлло, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

A person asserting ineffective assistance must show (1) counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's performance prejudiced him. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010). This Court reviews claims of ineffective assistance of counsel de novo, as they present mixed questions of law and fact. A.N.J., 168 Wn.2d at 109.

With respect to the deficient performance prong, "[t]here is a strong presumption that counsel's conduct is not deficient." State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). But an accused rebuts that presumption if "no conceivable legitimate tactic explain[s] counsel's performance." Id. Although counsel's decisions are given deference, conduct for which there is no legitimate strategic or tactical reason is constitutionally inadequate. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Purportedly "tactical" or "strategic" decisions by counsel must still be reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

To meet the prejudice prong, an accused person must show a reasonable probability "based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation." McFarland, 127 Wn.2d at 337. The test for "reasonable probability" of prejudice is whether there is a reasonable probability that, without the error, at least one juror would have reached a different result. Wiggins v. Smith, 539 U.S. 510, 537, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

Bradshaw satisfies both requirements. As to the performance prong, there could be no legitimate trial strategy in failing to object to the prosecutor's improper comments in closing argument, set forth in

argument one, supra. The comments impermissibly commented on Bradshaw's constitutional right to silence and misstated the reasonable doubt standard and shifted the burden of proof to Bradshaw.

Counsel has a duty to be aware of the applicable law. Kyllo, 166 Wn.2d at 862. Thus, counsel had a duty to be aware that the prosecutor's comments were improper, and to object. No conceivable legitimate strategy explains counsel's failure to object.

The remaining question is whether counsel's deficient performance prejudiced Bradshaw. As explained above, the answer is yes. Without an objection the jury was allowed to hear, and consider, the prosecutor's impermissible comments on the reasonable doubt standard and on Bradshaw's constitutional right to silence and how it impacted the key issue the jury had to resolve: whether Bradshaw had knowledge that the car was stolen. The absence of any direct evidence that Bradshaw knew the car was stolen opens a realistic possibility that the outcome may have been different absent the improper argument.

In sum, this record establishes that it was objectively unreasonable for defense counsel not to object to the prosecutor's misconduct during closing argument. It also establishes a reasonable probability that but for counsel's deficient performance the result would have been different. As

such, Bradshaw was denied effective assistance of counsel and reversal is required.

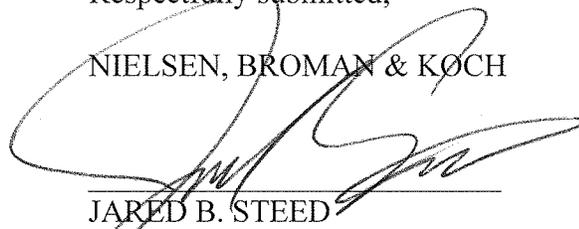
D. CONCLUSION

For the foregoing reasons, Bradshaw respectfully requests that this court reverse his conviction and remand for a new and fair trial.

DATED this 31st day of July, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A large, stylized handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over a horizontal line.

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July 31, 2018 - 2:19 PM

Transmittal Information

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Appellate Court Case Title: State of Washington, Respondent v. Thomas Bradshaw, Appellant
Superior Court Case Number: 17-1-00400-9

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