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

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STATE OF WASHINGTON,  
Respondent,

v.

THOMAS BRADSHAW,  
Appellant.

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

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THE HONORABLE F. MARK MCCAULEY, JUDGE

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BRIEF OF RESPONDENT

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KATHERINE L. SVOBODA  
Prosecuting Attorney  
for Grays Harbor County

BY: \_\_\_\_\_  
RANDY J. TRICK  
DEPUTY PROSECUTING ATTORNEY  
WSBA #45190

OFFICE AND POST OFFICE ADDRESS  
County Courthouse  
102 W. Broadway, Rm. 102  
Montesano, Washington 98563  
Telephone: (360) 249-3951

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## I. INTRODUCTION

Thomas Bradshaw was behind the wheel of a stolen car and, when it appeared he was going to be pulled over by police, he ditched the car and his friends, ran away, and hid in a homeless encampment. At trial, Mr. Bradshaw presented no evidence and he did not take the stand, leaving the State's evidence undisputed. The case hinged on the *mens rea*—did Mr. Bradshaw's behavior indicate he knew the car he was driving was stolen. In closing argument, the prosecutor focused on that question, laying out the inferences favorable to the State, and rhetorically in a moment of rhetorical argument mentioned the Defendant's right not to testify so as to place more emphasis on those inferences.

A prosecutor's comment on the Defendant's silence constitutes misconduct, but not all references to such silence constitute comments, as this Court has consistently found. The prosecutor did not invite the jury to use Mr. Bradshaw's silence to infer his guilt, nor did the remark shift the burden of proof. A remark about undisputed evidence is not unfair to a Defendant where other persons could have conceivably disputed the State's evidence, such as the two passengers in Mr. Bradshaw's car.

In a case where the State's evidence is not challenged, it seems only natural to make this point to the jury. In this case the prosecutor did

so carefully and fairly. In such a case, a defense attorney cannot be said to be ineffective for failing to object to proper argument. The conviction should be affirmed.

## **II. RESPONSE TO ASSIGNMENT OF ERROR**

1. Did the prosecutor actually “comment” during closing argument on the Defendant’s decision not to testify when he did not seek to infer guilt from that decision, and when the reference concerned the undisputed evidence presented by the State.

2. Did the prosecutor’s closing argument actually shift the burden of proof to the Defendant or misstate the burden when the prosecutor rhetorically asked the jurors if they had a reason to doubt the State’s evidence.

3. Was defense counsel actually deficient when he did not object to the State’s closing argument when the argument by the prosecutor did not constitute misconduct.

4. Did the Court actually abuse its discretion when it denied the Defendant’s motion to replace trial counsel when the Defendant failed to provide a proper basis for his motion.

## **III. RESPONDENT’S COUNTERSTATEMENT OF THE CASE**

### **1. PROCEDURAL HISTORY**

The State charged the Defendant by Information with one count of Possession of a Stolen Motor Vehicle. CP 1-2. On December 7, 2017, six days before trial, Mr. Kothari, at the request of his client, moved the court

to appoint new counsel. CP 11–12. That motion was denied. 1RP 4<sup>1</sup>.

The case proceeded to trial on December 13, and a jury found the Defendant guilty as charged. CP 23.

## 2. TESTIMONY AND ARGUMENT AT TRIAL

Per RAP 10.3(b), the State adopts the Appellant’s account of the trial testimony.

The State’s presentation of the case focused on the issue of the Defendant’s knowledge. During closing argument, the State told the jury, early in the argument, that “the facts are very simple ... the one place that gets a little muddy is this issue of knowledge. Whether or not the Defendant, Mr. Bradshaw, knew or reasonably should have known that the car he was driving on July 18<sup>th</sup> was stolen.” 2RP 55. After outlining the evidence regarding the true owner and establishing that the vehicle had been stolen, the prosecutor returned to the issue of knowledge. He reiterated, “this is argument. The words that I say and that Mr. Kothari say is not evidence, but I am going to kind of try to guide your inferences.” 2RP 60. The prosecutor then focused on the Defendant’s actions of trying to be undetected by Officer Blodgett, abandoning and

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<sup>1</sup> The State will conform its references to the reports of proceedings as the Appellant has done—1RP - December 7, 2017; 2RP – December 13, 2013 (trial); 3RP – January 12, 2018 (sentencing).

running from the stolen vehicle, and hiding in a padlocked tent in a homeless encampment. 2RP 61. “That’s a lot of just of suspicious, circumstantial stuff going on,” said the prosecutor. 2RP 60.

After detailing the Defendant’s suspicious actions and circumstances, the prosecutor guided the jury through the inferences he wanted them to make thusly:

I put it to you that absent any other evidence, the reasonable inference to make is that [...] he would have known he didn’t have right to that car because there was not paperwork with his name on it and he—it couldn’t have been because it was stolen. Mr. Bradshaw knew he was about to get into trouble. ... I put it to you that given the evidence you have, you can draw the inference that he ran because he knew that car was not legit. He ran because he knew he was about to get caught behind the wheel of a stolen vehicle. That, I put to you, is a reasonable inference that you can make. And, in fact, I put it to you that it is the only inference that you can make given the evidence that’s been presented. Ultimately you get to decide if that’s reasonable, but there’s no other explanation than that. And the explanation that he ran because he knew or should have known the car was stolen is perfectly rational and reasonable and logical.

2RP 61-62.

To bolster the argument that Mr. Bradshaw knew, or should have known, the vehicle was stolen, the prosecutor directed the jury to think about Defendant’s thought process at the time, an exercise that necessarily required the following series of rhetorical questions:

If Mr. Bradshaw had thought that was a legit car, why wouldn't he have stayed in the car and been pulled over if he thought it wasn't stolen? Why would he have run? But, also, by leaving the keys behind, he literally abandoned that car. He literally abandoned it and left Ashley McGrath to deal with the officer. Why would he literally abandon the car and leave the keys behind if he didn't think it was stolen? That is a reasonable thing to do if you think a car is stolen. ["I'm getting away from this. I don't want the keys in my pocket. I don't want anything to do with this car now that the cops are showing up[?"].

2RP 62. With this context, the prosecutor then touched upon the Defendant's right to remain silent, correctly stating that the jury instructions told the jurors that they cannot use the fact that the Defendant did not testify against him. 2RP 63. The prosecutor then correctly pointed out that the State's evidence is the extent of the evidence that the jury has to consider. Id. The prosecutor delved again into the challenge of trying to divine intent and knowledge from the circumstances and context of the Defendant's actions, saying:

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 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.

2RP 63-64. Defense counsel did not object during closing argument.

During the Defendant's summation, counsel pressed the issue of knowledge, calling the inferences the State hoped the jury would make "mere speculation [...] They're speculating again that he ran away. We do not know that he ran away ... they're just speculating that he knew that the vehicle was stolen." 2RP 64-65. In response, the State agreed that the inferences were partially speculation, but said, "we have to speculate because we can't get inside Mr. Bradshaw's head." 2RP 66.

Regarding the reasonable doubt standard, the State began by citing the jury instruction that reasonable doubt is "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 it was stolen?" 2RP 66; *see* 2RP 52. The State continued:

... 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 inference 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 that ... 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.

2RP 66-67.

#### IV. ARGUMENT

##### 1. STANDARD OF REVIEW

Appellant must show the prosecutor's argument is "so flagrant and ill-intentioned" a jury instruction could not cure it, and the argument "had a substantial likelihood of affecting the jury verdict."

Allegations of prosecutorial misconduct are reviewed for abuse of discretion. *State v. Lindsay*, 180 Wn.2d 423, 326 P.3d 125 (2014); *State v. Brett*, 126 Wn.2d 136, 892 P.2d 29, 49 (1995); *State v. Hughes*, 106 Wn.2d 176, 195, 721 P.2d 902 (1986). Prosecutors are given “wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury.” *State v. Vassar*, 188 Wn. App. 251, 256–57, 352 P.3d 856, 860 (2015).

The prosecutorial misconduct inquiry consists of two prongs: (1) whether the prosecutor's comments were improper and (2) if so, whether the improper comments prejudiced the defendant. *Lindsay*, 180 Wn.2d at 431. The defendant bears the burden of proving both prongs. *Id.* To show prejudice, the petitioner must show a substantial likelihood that the prosecutor’s statements affected the jury’s verdict. *Id.*, at 440; *State v. Brett*, 126 Wn.2d at 174–75. The appellate court reviews the allegedly improper statements in the context of the entire argument, the issues in the

case, the evidence, and the jury instructions. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006); *State v. Osman*, 192 Wn. App. at 366.

Absent a proper objection and request for a curative instruction, the defense waives the issue of misconduct unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. *State v. Charlton*, 90 Wn.2d 657, 661, 585 P.2d 142 (1978). If defense counsel fails to object, move for a mistrial, or request a curative instruction, then allegations of improper argument will not be heard on appeal unless the comments are “so flagrant and ill-intentioned that no curative instruction could have obviated the prejudice they engendered.” *State v. Dunaway*, 109 Wn.2d 207, 221, 743 P.2d 1237 (1987); *State v. Brett*, 126 Wn.2d at 176. “Under this heightened standard, the defendant must show that (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict.” *State v. Emery*, 174 Wn.2d 741, 760-761, 278 P.3d 653 (2012)(internal citations omitted).

The Appellant must demonstrate that the remarks to which he ascribes fault reach this level of misconduct and had this serious prejudicial effect. Rather than making that showing, the appellant simply

asserts as much on appeal. But, compared to the instances of misconduct detailed below, the statements at issue in this case do not rise to a level requiring reversal, if they even rise to misconduct.

2. THE STATE'S ARGUMENT DID NOT RISE TO MISCONDUCT

a. The State made a "mere reference" to the Defendant's silence, not a "comment," because the remark was not used as substantive evidence of guilt, nor did it invite the jury to infer guilt.

The Appellant ascribes error to the prosecutor's mention during argument of the Defendant's silence, and argues that in doing so the State shifted the burden of proof to the Defendant. There exists a threshold question, however, as to whether argument that references the Defendant's decision to remain silent actually constitutes a comment on that decision, compared to a remark. A comment rises to the level of prosecutorial misconduct if a prosecutor makes a statement "of such character that the jury would naturally and necessarily accept it as a comment on the defendant's failure to testify." *State v. Scott*, 58 Wn. App. 50, 55–56, 791 P.2d 559 (1990)(internal citation omitted). A comment on a defendant's right to remain silent occurs when the State uses the defendant's exercise of his Fifth Amendment right as either substantive evidence of guilt, or to suggest that the silence is an admission of guilt. *State v. Lewis*, 130

Wn.2d 700, 707, 927 P.2d 235 (1996). A comment is thus a reference to the silence, plus a negative inference.

At issue in *Lewis* was testimony from a Detective regarding Mr. Lewis's pre-arrest statements about who was at his apartment, and the detective's comment that if he were innocent he should come talk to him. *Id.*, at 703. The Court held that "The officer did not make any statement to the jury that Lewis's silence was any proof of guilt." *Id.*, at 706. To reach its finding, the *Lewis* Court considered the reference to the Defendant's silence in terms of how it could be taken by the jury. "Most jurors know that an accused has a right to remain silent and, absent any statement to the contrary by the prosecutor, would probably derive no implication of guilt from a defendant's silence." *Id.* Thus, the Court found the testimony did not comment on the Defendant's silence and did not rise to misconduct.

Compare the *Lewis* holding with that in *State v. Burke*, 163 Wn.2d 204, 181 P.3d 1 (2008). In *Burke*, the State elicited testimony that when the defendant had the opportunity to speak to an attorney, he terminated the interview. In argument, the State invited the jury to consider the invocation of the right to counsel as evidence of guilt. The Court deemed the statement a clear comment on Burke's right to remain silent. *Id.* But,

in reaching its decision, the *Burke* Court drew the distinction between a comment on the defendant’s silence, and “mere reference to silence”—the distinction is critical in this matter. *Id.*, at 221. In *Burke*, the prosecution intentionally invited the jury to infer guilt from Burke's termination of his interview with Detective Richardson, and “advanced the link between guilt and the termination of the interview. The implication is that suspects who invoke their right to silence do so because they know they have done something wrong.” *Id.*, 222. The prosecutor did not invite any such inference of guilt in the matter at hand. In fact, the prosecutor explicitly told the jury it cannot do so. 2RP 63.

This Court has recently addressed the difference between comments on a Defendant’s silence and mere references in a pair of unpublished opinions. While not binding authority, the reasoning used by the Court before remains sound and should be applied to the case at hand. In 2015, this Court considered statements very similar to those at issue in Mr. Bradshaw’s case and did not deem them to be a “comment” on the Defendant’s right to remain silent. *State v. McElfish*, 190 Wn. App. 1038 (2005).<sup>2</sup> In *McElfish*, the prosecutor stated in closing argument “Now, you

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<sup>2</sup> Per GR 14.1, this case may be considered as persuasive authority, but is not precedential.

cannot hold the defendant not testifying against him. Don't do that. It's the State's job to prove the case.” *Id.*, at 3. This Court declined to find this statement commented on the defendant's failure to testify to infer guilt because the “prosecutor did not suggest that the jury should draw any inferences, and in fact told them that it could not draw such inferences.” *Id.* The Court noted that the prosecutor's argument mirrored the directives in the jury instructions. *Id.*

Most recently, this Court in September did not find misconduct where the prosecutor asked a detective about the defendant’s post-arrest silence. *State v. Abram*, No. 49882-1-II, slip op., 2018 WL 4610788 (Sept. 25, 2018).<sup>3</sup> The question before the court was whether the “prosecutor manifestly intended the remarks to be a comment on that right.” *Id.*, at \*9, citing *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991). This Court found that “A remark that does not amount to a comment on a criminal defendant’s right to remain silent is considered a ‘mere reference’ to silence and is not reversible error absent a showing of prejudice. Thus, focusing largely on the purpose of the remarks, we distinguish between ‘comments’ and ‘mere references.’” *Id.* (internal

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<sup>3</sup> Per GR 14.1, this case may be considered as persuasive authority, but is not precedential.

citations omitted) While these cases—*McElfish* and *Abram*—are not published, this Court’s analysis in them applies well to the issues in the case at hand.

b. The State made a "mere reference" to undisputed evidence, not a "comment" on the Defendant's silence, which did not shift the burden as others could have conceivably contested the State's evidence

The Appellant also ascribes error to the prosecutor's remarks that evidence was undisputed, and claims the remark constitutes a comment on the Defendant’s silence by shifting the burden to the Defendant. The Appellant claims the design of the prosecutor’s comment shows that only Mr. Bradshaw could contradict the State’s evidence, hence a comment on his silence. But, the State’s references in closing argument to undisputed evidence falls within the bounds of *State v. Lichtenberger*, 140 Wash. 308, 248 P. 799 (1926). The factual evidence in the case could have been disputed by any of the several individuals who were present, and the inferences regarding the Defendant’s knowledge that the car was stolen could have been disputed by other witnesses.

In *Lichtenberger*, the Supreme Court found no misconduct where a prosecutor said both in opening statement and in closing argument that certain testimony on behalf of the state was undisputed. The Court wrote

Surely the prosecutor may comment upon the fact that certain testimony is undenied, without reference to who may or may not be in a position to deny it, and, if that results in an inference unfavorable to the accused, he must accept the burden, because the choice to testify or not was wholly his.

*Id.*, at 311.

The Court continued this line of reasoning in *State v. Ashby*, 77 Wn.2d 33, 459 P.2d 403 (1969). In *Ashby*, the prosecutor argued, “I say it is not disputed that he sold those articles to the defendant, Mr. Ashby. Members of the jury, that testimony also is undisputed. Consider it just for a few moments. Has anyone disputed that particular evidence that those articles were sold to Mr. Ashby?” *Id.*, at 37. The Court held that the argument did not constitute misconduct so long as “persons other than defendant could have *conceivably* denied [the State’s evidence],” and then listed possible persons who may or may not have existed and did not testify. *Id.*, at 38-39 (*emphasis added*). The key is not that other possible witnesses actually exist, but that a juror can believe that people other than the defendant could have contradicted the State’s evidence, removing the emphasis from the defendant’s silence. That is why the line of misconduct is drawn and crossed when a prosecutor directly states that a defendant did not contest the state’s evidence.

In the case at hand, any number of persons could have testified regarding the Defendant's knowledge, such as the person who gave him the car, anyone who might have heard him talk about how he obtained the car, and actual people whose names were known to the jury—James Lynch or Ashley McGrath (2RP 17, 2RP 21), who were with him when ran. These individuals exist, as they were referenced at the pretrial hearing. 1RP 2. Just as the State argued to the jury that the circumstantial evidence and the Defendant's behavior indicated he knew the car was stolen, other witnesses could have conceivably provided similar evidence indicating the Defendant acted differently, suggesting he did not know the car was stolen.

References to undisputed evidence do not rise to improper comments on a defendant's silence even when the references touch upon a defendant's thought process. In *State v. Brett*, cited *supra*, the Court did not find misconduct or an improper comment on the Defendant's decision not to testify where the prosecutor argued the evidence of premeditation was undisputed, and posed a series of rhetorical questions about what the Defendant could have been thinking in response to the Defendant's argument that a shooting was accidental. Specifically, the prosecutor argued, "Mr. Brett could have offered aid ... He could have just said, [']oh,

what have I done['] and run out of that residence ... Could have called 9–1–1. Could have done that anonymously. ‘Come to this residence, somebody got shot, let's get out of here Shirley.’” *Brett*, 126 Wn.2d. at 177. The Court determined there could have existed potential witnesses other than Mr. Brett to testify that the shooting was accidental, thus the argument about Mr. Brett’s thoughts and behavior did not constitute an impermissible comment on his failure to testify. *Id.*, 177–78.

The Defendant relies heavily on *State v. Fiallo-Lopez*, 78 Wn. App. 717, 899 P.2d 1294, 1301 (1995) as analogous to the case at hand, but the prosecutor’s reference in *Fiallo-Lopez* is distinguishable and does rise to a comment on the defendant’s silence. In *Fiallo-Lopez*, the Court found error with the State’s comment in closing that there was “absolutely” no evidence to explain why Fiallo-Lopez was present where a drug deal went down, and “argued that there was no attempt *by the defendant* to rebut the prosecution's evidence regarding his involvement in the drug deal.” *Id.*, at 729 (emphasis added). The error there was the explicit comment by the prosecutor that Mr. Fiallo-Lopez did not contest the evidence. No such statement came from the prosecutor in Mr. Bradshaw’s trial. The decision highlights the difference between arguments that say, “the only evidence you’ve heard is from the State” and

the improper argument of “the Defendant gave you nothing to dispute the State’s evidence.” One references the credibility of the evidence; one blames the defendant for that uncontested evidence.

In the case at hand, the Appellant argues that the prosecutor’s argument that the evidence presented by the State is undisputed and “... that leaves you with the evidence that the State has presented. You get to draw the inferences based on that, absent any other explanation,” (2RP 63) exploits the Defendant’s right to remain silent. But the prosecutor’s statement in the context of the argument served simply as a statement preface to how the jury could determine what the Defendant knew, or should have known, by making the inferences the State advocated. The mention of the Defendant not testifying did not shift the attention to his silence, but placed extra emphasis and weight on the State’s circumstantial evidence and the inferences the prosecutor sought to have jury make. Where the argument properly focused on the evidence, the appellant cannot show prosecutorial misconduct. *Osman*, 192 Wn. App. at 367–68.

c. The State accurately repeated a key jury instruction during argument, which would have cured any prejudice, as jurors are presumed to follow the court's instructions

The appellant fails to address that, if the prosecutor’s argument does constitute a comment of the Defendant’s silence, the jury instructions

cure the prejudice. *Ashby*, 77 Wn.2d at 39. Jurors are presumed to follow the court's instructions. *State v. Foster*, 135 Wn.2d 441, 472, 957 P.2d 712 (1998). If anything, the accurate reminder by the prosecutor about Jury Instruction Number 9, as well as the reference to the State's burden of proof, avoided any unintended penalization of the Defendant by a juror. This can especially be said regarding the remark about the uncontested evidence, which drew attention to the State's evidence rather than the lack any defense evidence.

d. The State accurately stated the burden of proof and reasonable doubt standard, and did not engage in argument that invited the jury to convict on any lesser standard

Arguments by the prosecution that shift or misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt constitute misconduct. *State v. Lindsay*, 180 Wn.2d at 434. No such argument was made in the case at hand.

The trial court instructed the jury "The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The Defendant has no burden of proving that a reasonable doubt exists. ... A reasonable doubt is one for which a reason exists." 2RP 51-52. In rebuttal, the prosecutor argued

And I do want to draw your attention to the jury instruction as to what is a reasonable doubt. It is

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?

2RP 66. The prosecutor simply repeated the jury instruction and asked a rhetorical question that mirrored the jury instruction.

The argument by the prosecutor was not a “fill-in-the-blank” argument that the appellant claims, relying exclusively on *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009). In that case, the prosecutor stated

A reasonable doubt is one for which a reason exists. That 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.

*Id.*, at 425. The *Anderson* Court found the argument improper because it “confused the jury’s duty to find Anderson not guilty unless the State proved its case against him beyond a reasonable doubt with the idea that it should convict him unless it found a reason not to.” *Id.*, at 432. In *Anderson*, the prosecutor also gave other examples of situations in which the jurors might be convinced beyond a reasonable doubt to make a decision, such as deciding to eat Cheerios for breakfast, having elective dental surgery, which babysitter with which to leave their children, or changing lanes on the freeway. *Id.*, at 429-432. In *Lindsay*, the court also

found error when the prosecutor compared the reasonable doubt standard to a jigsaw puzzle, crossing the street, or telling the jury that it needed to speak the truth through its verdict. *Lindsay*, 180 Wn.2d at 434. Both *Anderson* and *Lindsay* found these comparisons lessened the reasonable doubt standard—cheapening it, essentially—and encouraged a jury to convict on a lesser standard.

Another clear example of the danger in a fill-in-the-blank argument is found in *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996). In *Fleming*, the prosecutor told the jury that, to acquit, the jury would need to find either that the victim lied about what occurred, or that “essentially that she fantasized what occurred.” *Id.*, at 213. In making this argument, the prosecutor misrepresented both the role of the jury and the burden of proof, twisting the duty of the jury into convicting by default, but acquitting if it found a certain condition was met. This constituted manifest constitutional error. *Id.*, at 211.

The prosecutor in the case at hand did not seek to compare the reasonable doubt standard to other common decisions, or argued in a way that sought to lighten or bypass the burden of proof. Instead, the prosecutor simply read the jury instruction to the jury, argued that the undenied evidence led to one reasonable inference—the Defendant’s

knowledge—and then posed the rhetorical question of whether there was a reason to doubt that. In fact, the prosecutor in the case at hand hedged that argument even further in favor of the Defendant, saying, “It’s up to you to make the inference as to whether or not you believe that he knew it.” 2RP 66. This, unlike in *Fleming*, still informed the jury it had to ability to not agree with the State’s inferences, and thus acquit if the State failed to meet its burden. Such argument is not of the sort prohibited by *Anderson*, *Lindsay*, or *Fleming*.

### 3. DEFENSE COUNSEL WAS NOT INEFFECTIVE

Defense Counsel did not object as the argument was not objectionable. The trial court did not err in denying the Defendant’s request for new counsel.

To demonstrate ineffective assistance of counsel, a defendant must show both that defense counsel's representation was deficient because it fell below an objective standard of reasonableness, and that the deficient representation prejudiced the defendant because of a is a reasonable probability that the result of the proceeding would have been different had it not been for counsel's errors. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995). Failure to show either prong of the test defeats a claim of counsel's ineffective assistance. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052 (1984). Further, “[w]here a claim of ineffective assistance of counsel rests on trial counsel's failure to object, a defendant

must show that an objection would likely have been sustained.” *State v. Fortun–Cebada*, 158 Wn. App. 158, 172, 241 P.3d 800 (2010). If the alleged misconduct by the State does not actually constitute misconduct, an objection would have been overruled. Thus, the defense attorney in the case at hand was not ineffective for failing to object. Even if the prosecutor’s statements did constitute an improper comment, the *Strickland* test requires a showing of prejudice and the likelihood of a different result at trial. That test corresponds with the requirement that, where no objection was made during closing argument, a defendant has the heavy burden of showing prosecutorial misconduct was “so flagrant and ill-intentioned that no curative instruction could have obviated the prejudice they engendered.” *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174, 176 (1988). The nature of the prosecutor’s argument in the matter before the Court, even if improper, is just simply not of the sort where that can be shown.

Mr. Bradshaw assigned error to the Court denying his motion to fire his public defender. The motion was heard on December 7, 2017 and, during that hearing, Mr. Bradshaw told the Court he wanted a new public defender because he felt his attorney was “not doing their full job.” 1RP 2. When pressed by Hon. David Edwards, Mr. Bradshaw said the issue

was his attorney “not ... talking to all the witnesses I described to him, besides just the ones that are clean and sober and have no record.” *Id.* Mr. Kothari told the Court he had interviewed the witnesses identified by the Defendant and told the Court he believed he was ready for trial.

Given the record before the trial court, the Defendant’s motion was properly denied. “Whether an indigent defendant's dissatisfaction with his court-appointed counsel is meritorious and justifies the appointment of new counsel is a matter within the discretion of the trial court.” *State v. DeWeese*, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). “A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.” *State v. Stenson*, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997). Attorney-client conflicts justify substitution only when the attorney-client relationship is such that it prevents presentation of an adequate defense; the general loss of confidence or trust alone is not sufficient to substitute new counsel. *Id.* In this case, the court heard the complaints of Mr. Bradshaw, Mr. Kothari addressed the issues and told the court he was ready for trial. The court,

given the representations before it, properly used its discretion to deny Mr. Bradshaw's motion.

#### 4. THE STATEMENT OF ADDITIONAL GROUNDS

The errors raised by Mr. Bradshaw's personally are not supported by the record, or are not available for appeal

Mr. Bradshaw assigns error to a potential juror being seated who stated during *voire dire* that she knew the Defendant. Jurors number 3 and 72 indicated they knew Mr. Bradshaw.<sup>4</sup> 4RP 12–13. When the prosecutor inquired, Juror Number 3 said it may have been a relative she was thinking of, and that she could be fair and impartial. 4RP 31–32. The comments of Juror Number 3 actually indicate she was mistaken and did not recognize the Defendant. *Id.* She made no other comments to suggest bias or her disqualification. Juror number 3 was empaneled without any challenge. 4RP 66. Without a challenge by the Defendant, there is no action to review from the trial court, and Mr. Bradshaw fails to produce any basis in the record to support an error of constitutional magnitude that could be reviewed by this court.

Mr. Bradshaw also assigns error to certain events before the trial during his representation, or the quality of the representation. These

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<sup>4</sup> The State identifies the Report of Proceedings, which includes *voire dire* on December 7, 2017, as 4RP, as it is the fourth report of proceedings to have been prepared.

issues are not ripe for review and involve matters outside the scope of review. RAP 2.2. Appeals are limited to the records of proceedings before the trial court. *State v. Blight*, 89 Wn.2d 38, 569 P.2d 1129 (1977). The record of proceedings before the trial court consists of three items: a report of proceedings, clerk's papers, and exhibits. *State v. Hughes*, 106 Wn.2d 176; RAP 9.1(a). Other than the hearing on December 7, the Defendant's complaints are not properly preserved in a way such that this court may review. Mr. Bradshaw may have other routes to seek relief, such as CrR 7.8 motion or a petition for review under RAP Title 16.

#### V. CONCLUSION

The State respectfully requests this Court determine that the prosecutor in his matter did not commit misconduct because the argument regarding the Defendant's silence during trial did not encourage the jury to infer guilt or shift the burden of proof, and thus does not constitute a "comment." Further, the State respectfully request this Court determine that the prosecutor did not misstate the reasonable doubt standard during closing argument. As these arguments do not constitute misconduct, the State requests the Court find the defense counsel was not ineffective for failing to object. The State further requests the Court not find error in the trial court's decision denying the Defendant's motion to replace his

appointed counsel, and not consider the remaining statements of additional grounds which are not properly preserved or before this court. In short, the State respectfully requests this Court affirm the conviction.

DATED this eighth day of October, 2018.

Respectfully Submitted,

By:   
Randy J. Trick  
Deputy Prosecuting Attorney  
WSBA # 45190

RJT/rjt

# GRAYS HARBOR PROSECUTING ATTORNEY

October 08, 2018 - 4:20 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51837-6  
**Appellate Court Case Title:** State of Washington, Respondent v. Thomas Bradshaw, Appellant  
**Superior Court Case Number:** 17-1-00400-9

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