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No. 53599-8-II
Thurston County Superior Ct. No. 17-1-01991-34

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

STATE OF WASHINGTON,
Plaintiff / Respondent,

v.

VERNAL G. GARVEY, III,
Defendant / Appellant.

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

The Honorable James J. Dixon, Trial Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed repeated flagrant, ill-intentioned and prejudicial misconduct and shifted a burden of proof to appellant Vernal Garvey, III, in violation of state and federal mandates of due process.
2. The flagrant, ill-intentioned misconduct included comments jurors would naturally see as referring to the exercise of Garvey's Fifth Amendment and Article 1, §9, rights against self-incrimination.
3. The flagrant, ill-intentioned misconduct also included misstating the law and arguing the rejected "in for a penny, in for a pound" theory of accomplice liability.
4. If the corrosive misconduct could have been "cured," appointed counsel was constitutionally deficient in failing to object and seek that remedy on his client's behalf, in violation of appellant's Sixth and 14th Amendment and Article 1, § 22 rights.

B. ISSUES PERTAINING TO ASSIGNMENTS

1. Did the prosecutor commit flagrant, prejudicial and ill-intentioned misconduct, shift a burden to appellant and comment on appellant's constitutionally protected decision not to testify by repeatedly telling jurors there was "no evidence" to dispute the state's version of events and "no evidence other" than what the state had presented where the bulk of the "missing" evidence would have had to come from the accused?
2. Did the prosecutor commit further flagrant, prejudicial and ill-intentioned misconduct in misstating the law of accomplice liability by arguing a theory of accomplice liability which our state's highest court rejected years ago?

3. Even if the different instances of misconduct did not compel reversal, is reversal required because their cumulative effect deprived appellant of a fair trial?
4. In the unlikely event the Court finds the individual or cumulative effect of the misconduct could have been cured by instruction, was counsel prejudicially ineffective in failing to object and seek such a remedy where the failure to do likely had a severe impact on the trial?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Vernal Garvey was charged by second amended information in Thurston County superior court with first-degree robbery while armed with a firearm, bail jumping, second-degree possession of stolen property and intimidating a witness. 3RP 178¹; CP 63-64; RCW 9.94A.533(3); RCW 9.94A.825; RCW 9A.08.020; RCW 9A.56.140; RCW 9A.56.160(1)(c); RCW 9A.56.200(1); RCW 9A.72.110(1)(a); RCW 9A.76.170(3)(c). Pretrial proceedings were held on November 8, 21, December 21, 26, 2017, January 24, 31, February 7, 27, May 16, July 5, August 23, November 1, 15, 29, 2018, February 28, March 11, April 11, 22, May 2, 13, 23, and June 13, 2019. 1RP 1, 2RP 1,

¹There was discussion of a third amended information at trial but one does not appear to have been filed.

3RP 1, 4RP 1, SRP 1.²

A jury trial was held before the Honorable James J. Dixon on June 24-28, 2019. 3RP 1, 586, 4RP 1. The state dismissed the “intimidation” charge with prejudice prior to submission of the case. 3RP 586. Mr. Garvey was convicted of the remaining charges: first-degree robbery while armed with a firearm, bail jumping and second-degree possession of stolen property. 4RP 4-6; CP 143-46.

At sentencing on July 17, 2019, with Garvey’s offender score of “o,” Judge Dixon imposed a low-end standard-range sentence of 41 months plus 60 months for the robbery and enhancement, with 17 months on the “bail jump,” and five months for the possession of stolen property, running concurrent to the robbery’s 101 months.

²The verbatim report of proceedings consists of multiple volumes, not all of which are chronologically paginated. They will be referred to as follows:

The volume containing the pretrial hearings of November 8 and 21, December 6 and 26, 2017, January 24 and 31, February 7 and 27, May 16, July 5, August 23, November 1, 15, and 29, 2018, February 28, March 11, April 11 and 22, May 2, 13, and 23, and June 13, 2019, as “1RP;”

the supplemental transcript from codefendant Wesley’s case, as “2RP;”

the four chronologically paginated volumes containing the trial proceedings of June 24-27, 2019, as “3RP;”

the proceedings of June 28, 2019, as “4RP; and

the sentencing proceeding of July 17, 2019, as “SRP.”

SRP 19. Mr. Garvey appealed and this pleading follows. See CP 166-79.

2. Testimony at trial

One night after he got off work, Harrison Nichols was getting “stoned” smoking marijuana in a car with his former fiancé, Moriah Whittaker, when a man jumped into the backseat of Whittaker’s car. 3RP 147-48, 187, 281. Holding a gun in his left hand, the man pointed it at Nichols’ face and demanded Nichols give up his “stuff.” 3RP 163.

Mr. Nichols recognized the man as someone he had met once before, later identified as “JT” or Jonta’h Wesley. 3RP 190-81, 258, 375-76. Mr. Nichols and Whittaker would later testify that Wesley threatened to kill Nichols if he did not comply, so Nichols gave up his backpack. 3RP 163, 167-69, 250-68. Mr. Wesley then got out of the car and ran away. 3RP 163-69.

Mr. Nichols had several things in that backpack - a cell phone, a pipe for smoking “weed,” some “weed,” \$80 cash, bracelets and a debit card. 3RP 165, 182-83.

A store security video from a nearby Safeway grocery store showed Wesley and another man in the store parking lot with the backpack a little after the incident. 3RP 230-35. The second man

went through the backpack and an automatic teller machine (“ATM”) video showed him trying unsuccessfully to use Nichols’ debit card. 3RP 230-41, 359-68. The two men were also shown with their clothes changed up in the store. 3RP 359-68.

After Wesley got out of the car, Nichols had Whittaker drive him back to the nearby McDonald’s restaurant where he worked so he could call police. 3RP 168-69. Lacey Police Department (“LPD”) patrol officer Jocelyn Uria responded. 3RP 168-70, 218.

When she spoke to them, Officer Uria thought that Nichols seemed stressed but Whittaker was “pretty calm.” 3RP 169, 218, 231-40. Mr. Nichols also raised suspicions he had that Whittaker might have been involved. 3RP 169, 231-33.

At the later trial, Nichols pointed out things which had raised his concern. 3RP 167-68. One was that Whittaker had not appeared scared when a man with a gun jumped into her car. 3RP 167-68, 282. Another was that she had not screamed or tried to drive away but had instead told Nichols to just give up his stuff. 3RP 167-68, 282. Mr. Nichols was also suspicious because he noted that Wesley had not pointed the gun at Whittaker or demanded stuff from *her* - only Nichols. 3RP 163, 167-69.

Mr. Nichols also thought he had seen Whittaker look at something outside the car and to the right just before Wesley jumped into the car from that same direction. 3RP 167. It further bothered Nichols that Whittaker had somehow ensured the electronic car doors stayed unlocked after they had parked. 3RP 166-70.

Mr. Nichols also thought Whittaker had a motive: money. 3RP 152-53. Ms. Whittaker had just recently lost her job and was “freaking out” about losing her apartment for non-payment of rent. 3RP 152-53. Her boyfriend had assaulted her and been arrested and she did not have the money to pay his part. 3RP 152-53.

A couple of weeks before the robbery, Whittaker had called Nichols, demanding that he give her some money because she had let him “crash” on her couch for awhile. 3RP 153. Although he was homeless at the time, Nichols was working and had managed to save “[r]oughly a thousand dollars.” 3RP 153-55. He refused her demand, however, and did not hear from Whittaker again until the day of the robbery. 3RP 155.

That day, Whittaker called Nichols, apologized for having taken him “for granted” and suggested the two “meet up.” 3RP 155.

They arranged for her to come to his work that night in her car. 3RP 156-58. She had asked him to buy her cigarettes, which would have meant that they would have to go to a store together and him to give her his debit card or money, because he was too young. 3RP 156-58. Before she arrived to pick him up, however, Nichols texted Whittaker that he had already purchased cigarettes for her. 3RP 156-60.

Ms. Whittaker arrived late and Nichols felt “something was off.” 3RP 161-62. When she suggested they go to a nearby park to smoke “pot” Nichols declined, instead directing her to a parking lot right next to where he worked. 3RP 161-62. One of them rolled a “blunt” and they were smoking it when Wesley jumped into the back of the car. 3RP 162.

Mr. Nichols recognized Wesley from when Nichols had stayed at Whittaker’s apartment for awhile. 3RP 166, 184. Mr. Nichols had been late for work so someone at the apartment gave him a ride and Wesley had sat next to Nichols in the back of the car. 3RP 166, 184.

After talking with Nichols, Officer Uria thought it was “odd” the assailant had not threatened Whittaker or robbed her, too, but said Whittaker was not yet a suspect that night. 3RP 218, 241. Ms.

Whittaker gave a sworn statement to Uria in which Whittaker said she neither knew Wesley nor had she seen him before. 3RP 218, 240-42. She also denied being involved in the robbery in any way. 3RP 241.

A few days after the incident, Nichols confronted Whittaker about his suspicions but she maintained she had not been involved. 3RP 171-73 192, 309. Indeed, Whittaker told her ex-fiancé, she would “never do that to him.” 3RP 192, 309-10.

By this time, Officer Uria had made “fliers” with photos of the suspects taken from the grocery store tapes. 3RP 397. LPD Officer Jessie Hadley talked to Uria about the case and viewed the grocery store tapes and fliers. 3RP 397, 408-14. Officer Hadley thought there was “more to the story,” so the officer decided to go try to talk to Whittaker at her home. 3RP 414-15.

When the officer arrived at Whittaker’s apartment, a man was on an outside deck and Uria thought it looked like one of the two men pictured in Uria’s flyer. 3RP 416-17. Officer Hadley knocked on Whittaker’s door and, when Whittaker answered, a different man was behind her. 3RP 416-17. The officer thought that the second man also looked like one of the men from the flyer. 3RP 416-17. As a

result, Officer Hadley asked Whittaker and that man to come to the police station to talk about the case. 3RP 417-18. Both Whittaker and the man, later identified as Vernal Garvey, III, agreed. 3RP 418.

At the station, Hadley started by interviewing Whittaker, telling her that the police had started “to connect the dots” and had pictures of the potential suspects - who had both just been seen in Whittaker’s home. 3RP 420. The officer confronted Whittaker, saying she needed to “just be honest about things.” 3RP 420-21.

Eventually, Ms. Whittaker started changing her story. 3RP 425. She told the officer she and Garvey were in an intimate relationship, the two of them and Wesley were living in her apartment and she had received a three-day pay or vacate notice for rent. 3RP 425-27. Ms. Whittaker had been upset, not knowing how she was going to pay. 3RP 425-27. She said that Garvey told her not to worry about it. 3RP 425-27.

Ms. Whittaker had then remembered that Nichols had saved up some money. 3RP 427. She thought he would be an “easy target.” 3RP 427. Mr. Nichols was not “very threatening,” Whittaker would later explain. 3RP 427. In addition, Whittaker claimed that Garvey knew the personal identification number (“PIN”) for Nichols’ debit

card. 3RP 262, 311-12. Ms. Whittaker said she had been present once when Nichols had given that card and number to Garvey to get him to buy marijuana for Nichols. 3RP 262, 311-12. As a result, Whittaker said, they decided to rob Nichols so Whittaker could get money to pay her rent. 3RP 427.

After Whittaker implicated Garvey with her story, Officer Hadley paused the interview with Whittaker and had Garvey arrested. 3RP 420-27. Ms. Whittaker was released, however, after promising to help police find Wesley. 3RP 297, 440. A day or so later she made good on that promise and Wesley was arrested. 3RP 297-98.

Mr. Wesley was questioned and maintained he had nothing to do with the crime. 3RP 369-70, 376. After awhile, however, the officer's questions led Wesley to believe he was "caught," so Wesley ended up admitting he was involved. 3RP 342, 371, 380. Mr. Wesley still denied a gun had been used or that he had a gun and CHK he claimed that *Garvey* had grabbed the back pack. 3RP 342, 371, 380-85.

By trial, however, Wesley was admitting that he was involved, that a gun was used, that Wesley had brandished the gun, that

Wesley had been the assailant in the car, and that Wesley - not Garvey - had grabbed Nichols' backpack and run. 3RP 343-35. Mr. Wesley still minimized his culpability, however, stating that Garvey had somehow made it clear to Wesley that Wesley was not pulling his weight regarding bills for the home and thus needed to participate in the crime. 3RP 343-45. But Wesley admitted that Garvey never said anything about anything bad happening to Wesley if he chose not to be involved. 3RP 345.

According to Wesley, he was not involved in the planning, but was there when Whittaker came up with the idea of robbing Nichols. 3RP 343-44. The idea was Whittaker would get Nichols to a convenience store to buy cigarettes and she would pass off Nichols' debit card to Wesley, who would withdraw money and then give the card back. 3RP 343. The hope was that Nichols would not know until later that the money was gone. 3RP 343. According to Wesley, Garvey was involved in the plotting with Whittaker and he was going to be along but would stay in the car so as not to be recognized by Nichols, whom he knew. 3RP 343-44.

When Nichols "texted" Whittaker that he had already gotten her cigarettes, Whittaker, Wesley, and Garvey were all in Whittaker's

car on the way for her to meet Nichols. 3RP 345. With the change of plans, Ms. Whittaker then suggested that she arrange to meet Nichols in a nearby park where in the past “they kissed or something.” 3RP 345. Mr. Wesley would later testify that Whittaker suggested Nichols could “get robbed easier [there] because there’s not a lot of light and it’s underneath the gazebo.” 3RP 346. Mr. Wesley said he and Garvey were going to put on masks, grab Nichols’ stuff and run. 3RP 347-48.

Mr. Wesley was clear that this was Whittaker’s plan. 3RP 343-46. But Whittaker would claim the plan came from Garvey. 3RP 267-69, 343.

Both would also testify that the gun involved came from Garvey. 3RP 348, 432. According to Wesley, Garvey had handed it to Wesley “kind of abruptly” at the park and Wesley did not feel like he could say “no.” 3RP 348. There had been no discussion of using a firearm up to that moment, Wesley said, and Wesley maintained that he tried to refuse. 3RP 348-54.

Ms. Whittaker, however, testified that she saw Garvey pull out two guns and tell Wesley to pick one. 3RP 432. Mr. Wesley did not try to refuse and expressed no concern but just took one. 3RP 348.

Despite his suggestions that Garvey somehow pressured him to be involved, Mr. Wesley conceded that Garvey never made any verbal threats. 3RP 387-88. Mr. Wesley said he still felt threatened. 3RP 388. Mr. Wesley would also testify at trial, however, that he had not been and was not afraid of Garvey “at any level.” 3RP 370.

Mr. Wesley admitted Garvey did not give him instructions on what to do or say in the car or anything similar. 3RP 350-52.

Ms. Whittaker had already dropped off Wesley and Garvey near the park and driven off to get Nichols when Nichols texted “no” about meeting there. 3RP 346. Ms. Whittaker “texted” Garvey to tell him the new location and Wesley and Garvey ran over. 3RP 346-52.

Mr. Wesley claimed he never threatened Nichols with the gun. 3RP 352. He also said Garvey asked for the backpack after they got to Safeway and that they changed clothes after Garvey’s unsuccessful effort to get money from the debit card. 3RP 352-54.

At trial, Wesley would then state that, despite a “no contact” order between them, Garvey came by his cell block often when they were in jail. 3RP 371-72. But Wesley admitted he did not complain about it to a guard or anyone similar at the time. 3RP 372-73.

In exchange for his testimony, Wesley was given reduced

charges to second-degree robbery, felony harassment and third-degree assault. 3RP 374, 385. Ms. Whittaker, too, received a “deal:” charges were reduced to second-degree robbery with no deadly weapon enhancement and she was sentenced to only a year and a day, of which she only had to serve eight months. 3RP 299-326.

At trial, both Wesley and Whittaker admitted they had lied to police not just the first time they were interviewed and not just in sworn, taped statements but even after they started to admit being involved. 3RP 287, 307, 370. Ms. Whittaker claimed that she was not happy about having been involved but conceded that Garvey never told her to lie to police. 3RP 287, 308. She said he suggested she delete her texts when she was with police and told him she was stuck there. 3RP 287.

According to Whittaker, when she had gotten back to the apartment the night of the incident, Garvey was there and told her he had been across the street “in the bushes watching” while Wesley committed the crime. 3RP 283. Ms. Whittaker first maintained that Garvey was unhappy with Wesley for not having taken stuff from Whittaker, too, because just taking from Nichols made it “look like it was all aimed towards” him. 3RP 284. When pressed, however,

Whittaker could not recall if it had actually been Garvey who had the idea that Wesley should do that “[t]o make it look more random.” 3RP 284.

Mr. Wesley testified that Garvey never said anything about robbing both people. 3RP 350-52.

A search warrant was served on Whittaker’s apartment and the car she had driven that night. 3RP 238. A .22 caliber handgun was found in the drawer next to Whittaker’s bed and a .9 millimeter in the driver’s side pocket of her car. 3RP 228, 447, 456-67. She said these guns belonged to Garvey and that he “always” had one with him. 3RP 254-55, 295-96. Ms. Whittaker also opined the guns had been used in the incident. 3RP 296. Both guns were tested but no fingerprints were found. 3RP 479.

D. ARGUMENT

REVERSAL IS REQUIRED BASED ON THE PROSECUTOR’S FLAGRANT, PREJUDICIAL AND ILL-INTENTIONED MISCONDUCT, OR, IN THE ALTERNATIVE, COUNSEL’S INEFFECTIVENESS

Unlike all other attorneys, prosecutors are “quasi-judicial” officers. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960);

State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). As a result, the prosecutor has “dual roles,” requiring her to prosecute crimes but also “search for justice.” State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

Further, a public prosecutor represents the defendant as part of the public and owes him a fair trial. State v. Walker, 182 Wn.2d 463, 476, 341 P.3d 976 (2015). When a conviction is gained after proceedings which do not meet that standard, reversal is required, because “such convictions in fact undermine the integrity of our entire criminal justice system.” Id.

In this case, reversal is required, because the prosecutor failed in his duties as a quasi-judicial officer, not once but again and again. Further, the misconduct was so serious, prejudicial and ill-intentioned that its corrosive effect could not have been cured. Even if each individual act alone did not compel reversal, their cumulative effect taken together would. In the alternative, in the unlikely event that any of the misconduct could have been cured, appointed counsel was prejudicially ineffective in failing to seek those remedies on his client’s behalf.

1. Misconduct in shifting a burden, misstating the law and repeatedly commenting in a way which invited jurors to draw a negative inference from Garvey's exercise of his constitutional rights

Due process under the state and federal constitutions require the state to bear the burden of proving "every fact necessary" beyond a reasonable doubt in order to prove the charged crime. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. W.R., Jr., 181 Wn.2d 757, 761-62, 336 P.3d 1134 (2014); Fourteenth Amend.; Art. 1, § 3. It is a "corollary rule" that the state "cannot require the defendant to disprove any fact which constitutes the crime charged." W.R., Jr., 181 Wn.2d at 762.

As a result, it is prosecutorial misconduct and a violation of due process rights to imply that the defense bears a burden of disproving the state's case or has a duty to present evidence. State v. Fleming, 83 Wn. App. 209, 213-14, 921P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997).

In addition, the accused are cloaked with the right to remain silent. State v. Easter, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996); Doyle v. Ohio, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); Fifth Amend.; Art. 1, § 9. As part of these rights, a defendant has a constitutional right to be free from having to testify, and the state

may not draw a negative inference from his exercise of that right. See State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987). While not all comments about evidence being “undisputed” are improper, where those comments are of such character that jurors would “naturally and necessarily accept it as a comment on the defendant’s failure to testify,” they will violate the rights to be free from self-incrimination. State v. Sargeant, 40 Wn. App. 340, 346, 698 P.2d 598 (1985); see, Lockett v. Ohio, 438 U.S. 586, 595, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978). Further, such comments violate the due process right to a fair trial. See Doyle, 426 U.S. at 619.

In this case, the prosecutor committed flagrant, ill-intentioned and prejudicial misconduct and Garvey’s due process rights and rights to be free from self-incrimination were violated when the prosecutor shifted a burden of proof to Garvey and repeatedly commented in a way which any reasonable juror would accept as a comment on Garvey’s failure to testify or to rebut the state’s case.

a. Relevant facts

In initial closing argument, the prosecutor started by telling the jurors it was “interesting” because there were “a lot of issues that

really aren't subject to much confrontation." 3RP 620. The prosecutor said jurors were "only to consider the evidence that was presented in court, nothing else, only the evidence that was here." 3RP 620-23.

After a few more minutes, the prosecutor started with a theme that jurors had been given "no evidence" other than the state's case. In arguing about whether Garvey was living in the apartment and knew about the potential eviction, the prosecutor told jurors, "[y]ou have evidence of nothing else except the defendant was in her bedroom with her as a apartment tenant and that Jonta'h was sleeping on the couch." 3RP 628 (emphasis added). In arguing that Whittaker had not been the ringleader and it had instead been Garvey, the prosecutor repeated Whittaker's testimony that she had asked about the stolen items after the robbery and the claim that Garvey had told her not to "worry about" it. 3RP 629. The prosecutor then declared, "[t]hat's the only evidence you have, ladies and gentlemen, in regards to that." 3RP 629 (emphasis added).

In arguing that the gun found in Whittaker's bedroom belonged to Garvey as Whittaker claimed, the prosecutor told jurors,

“[y]ou have no evidence that [Whittaker] ever possessed that gun, none.” 3RP 629 (emphasis added). In arguing that Garvey was the only one to whom Nichols had given his “PIN” number despite Whittaker being Garvey’s fiancé, the prosecutor told jurors, **“there is no other evidence that’s been presented to you that [Nichols] did give the defendant his debit card and his PIN number so he could go into the dispensary and legally purchase marijuana.”** 3RP 631 (emphasis added). The prosecutor told jurors this meant that “the defendant is the only person who had that information. **That’s the only evidence before you.**” 3RP 631-32 (emphasis added).

A moment later, in arguing that the state had proved that Garvey had provided Wesley with the gun used in the crime, the prosecutor declared, **“[t]here is no evidence that’s been presented to you other than the firearm that was used to rob Harrison Nichols came from the defendant,”** and, **“[t]hat’s the only evidence you have.”** 3RP 635 (emphasis added).

About the claim that Garvey had supplied the marijuana Whittaker used to get Nichols stoned to make him less resistant, the prosecutor told jurors, **“[a]gain, you have no evidence of anything**

other than that” Garvey had done so. 3RP 635-36 (emphasis added). The prosecutor repeated a moment later, “[t]**here is no evidence in front of you except the defendant provided both the gun and the marijuana.**” 3RP 636 (emphasis added).

The prosecutor continued with this theme in tying Garvey to the crime by stating Garvey and Whittaker were communicating during the incident about the change of plans in relation to the park, **“again, the only evidence presented to you was that . . . Moriah [Whittaker] and the defendant were communicating.”** 3RP 637 (emphasis added).

The prosecutor said there was “no question” that a robbery occurred at gunpoint, repeating the “no question” declaration several times and then declaring, **“there’s no evidence to suggest anything but that.”** 3RP 638 (emphasis added). The prosecutor went on, “[t]hat is way beyond a reasonable doubt, ladies and gentlemen, **because you have everybody testify to it.**” 3RP 638 (emphasis added).

After arguing that Whittaker’s version of events at trial was credible despite Whittaker giving police a different version at first, the prosecutor talked about “deals” and the timing of the “deals”

from the state, saying that Whittaker had not been offered anything from the state prior to starting to implicate herself and “[t]**here is no evidence to suggest anything otherwise to you, none,** because there was none.” 3RP 640-41 (emphasis added).

The prosecutor said there was “no doubt” and “no question” that Wesley had robbed Nichols and then told jurors, “this is going to get interesting,” because the defense could not explain why Garvey and Wesley met up at the store. 3RP 642. The prosecutor asked jurors, “[h]**ow are they going to explain that? The defendant just happened to be on a jog at the same time and ran across his buddy[?]”** 3RP 642 (emphasis added). The prosecutor reminded jurors of the video showing the defendant taking the backpack and repeated, “[h]**ow are they going to explain that?”** 3RP 642 (emphasis added).

After playing the videotapes again and arguing that they showed Garvey “in charge” of Wesley in the store, the prosecutor then went on: “We know that Harrison [Nichols] is eventually robbed by the gun given to him [Wesley] by the defendant. **It’s the only evidence before you. There’s no other evidence before you.**” 3RP 645 (emphasis added).

A moment later, in again discussing the claim that only Garvey knew the PIN number, the prosecutor declared, “[h]e was the only one that knew Harrison [Nichol’s] PIN number to his debit card, ladies and gentlemen. **There is no other evidence before you than that.**” 3RP 648 (emphasis added). The prosecutor told jurors, “[h]e provided the firearm to Jonta’h [Wesley]. **You have no other evidence before you than that he provided the firearm that Jonta[h] used to rob Harrison Nichols. There’s no other evidence before you but that.**” 3RP 648 (emphasis added). The prosecutor reminded jurors Garvey was older and then declared that Garvey had been living with Whittaker and “brought” Wesley to the home, and “**you have no evidence of anything other than that.**” 3RP 647 (emphasis added).

In summing up initial closing argument, the prosecutor referred to “reasonable doubt” as either a lawyer’s “crutch or stick,” then stated, “[a] **doubt for which a reason exists. There is none here.**” 3RP 654 (emphasis added).

Later, in rebuttal closing argument, the prosecutor again reminded jurors, “**there is no testimony that the firearms that were located in the car and in [Whittaker’s] nightstand were**

anybody's but the defendant's." 3RP 672 (emphasis added).

- b. These arguments violated due process and the right to be free from self-incrimination

The prosecutor committed flagrant, ill-intentioned misconduct in making these arguments, which violated Garvey's due process rights and rights to be free from self-incrimination.

Taking the latter first, Garvey had the right to refuse to testify and a comment on that refusal is improper. Under the Fifth Amendment and Article 1, section 9, no person may be compelled to testify against himself in a criminal proceeding. State v. Charlton, 90 Wn.2d 657, 663, 585 P.2d 142 (1978). As a result, a prosecutor may not comment to the jury about a defendant's failure to testify. Griffin v California, 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229 (1965); Charlton, 90 Wn.2d at 653.

In Griffin, the U.S. Supreme Court established that the Fifth Amendment bars the state from commenting on the defendant's failure to testify. See State v. Barry, 183 Wn.2d 297, 352 P.3d 161 (2015). Not all comments amount to a constitutional violation, however. State v. Fiallo-Lopez, 78 Wn. App. 717, 729, 899 P.2d 1294 (1995). Since Griffin, our state courts have adopted an analysis using two factors to determine whether the prosecutors comments were

unconstitutional comments on the defendant's exercise of his right not to testify. Barry, 183 Wn.2d at 307. Those two factors are 1) whether it appeared the prosecutor's comments were intended to be remarks on the exercise of the defendant's constitutional rights and 2) whether jurors would "naturally and necessarily" interpret the prosecutor's comment as a comment on the defendant's silence. See State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991).

Here, both standards are met. The comments were not slips of the tongue or inadvertent mistakes. They were a deliberate strategy, repeated throughout closing. Further, the comments "naturally and necessarily" amounted to drawing attention to Garvey's decision not to testify, because only Garvey could have provided the "explanation" the state sought. See Fiallo-Lopez, 78 Wn. App. at 719-20.

A prosecutor shifts a burden of proof and makes comments jurors would have "naturally and necessarily" accepted as a comment on the defendant's failure to testify when the prosecutor raises questions for which only the accused could provide the testimonial answer. Id. Thus, in Fiallo-Lopez, such misconduct occurred when the police engaged in an undercover "buy" operation for drugs in a

grocery store parking lot and the prosecutor declared in closing that there was no evidence to explain why Fiallo-Lopez had been present in the parking lot and in another location when the drug transaction was being made by another. 78 Wn. App. at 719-20. Because no one other than Fiallo-Lopez could have provided the explanation the state demanded, the comments were not just improper comments on the right not to testify but also impermissibly shifted a burden of proof. 78 Wn. App. at 729.³

Here, the prosecutor repeatedly commented that there was “no evidence” other than the state’s case and did so in a way which pointed to Garvey’s failure to testify. Jurors were told they had “evidence of nothing else” other than what Whittaker and Wesley said had occurred, again and again, and in the bulk of situations, where only Garvey could have disputed their claims. It started with whether Garvey lived in the apartment and slept with Whittaker (3RP 628), and went on to include a conversation where only Whittaker and Garvey were present (3RP 629), and whether Garvey had given Whittaker marijuana when only Garvey, Whittaker and

³The Fiallo-Lopez Court did not reverse, however, because it was convinced based on the evidence in the case that the improper argument had no effect on the result below. 78 Wn. App. at 729.

Wesley were in the car (3RP 635-36). Only Garvey could have testified to dispute those factual claims.

Even more troubling, the prosecutor repeatedly told jurors there was “no evidence” to disprove the state’s claim that the gun used in the crime came from Garvey. Jurors were told there was “no evidence” Whittaker ever possessed the gun (3RP 629), but also that there had been “no evidence that’s been presented. . .other than the firearm that was used to rob Harrison Nichols came from the defendant,” and, “[t]hat’s the only evidence you have” (3RP 635). The prosecutor declared, “[w]e know that Harrison [Nichols] is eventually robbed by the gun given to him [Wesley] by the defendant. It’s the only evidence before you. There’s no other evidence before you” (3RP 645). He told jurors that Garvey “provided the firearm” and told jurors “you have no other evidence before you than that he provided the firearm....used to rob Harrison Nichols. There’s no other evidence before you but that.” 3RP 648.

The prosecutor also told jurors, “[t]here is no evidence in front of you except the defendant provided both the gun and the marijuana.” 3RP 636. Later, in rebuttal closing argument, the prosecutor again reminded jurors, “there is no testimony that the

firearms that were located in the car and in [Whittaker's] nightstand were anybody's but the defendant's." 3RP 672. Only Garvey, Wesley and Whittaker were present when the gun was provided for the crime. Only Garvey had not testified to deny that he had provided the gun or deny Whittaker's claim of his ownership of the firearms found in Whittaker's home and car. These comments were unmistakable references to Garvey's failure to take the stand.

The prosecutor also commented on Garvey's failure to testify in saying there was "no other evidence before" jurors than that Garvey - and only Garvey - knew Nichols' PIN number, a crucial part of the state's claim that Garvey was involved in the robbery plan. 3RP 648. The prosecutor told jurors that Garvey must have been involved because only Garvey knew the PIN number and there was no evidence of anything other than that. 3RP 631. Despite Whittaker having been Nichols' fiancé, the prosecutor declared there was "no other evidence that's been presented," to prove that anything happened other than that Nichols had given Garvey his debit card and PIN to Nichols when Whittaker was present as both claimed. 3RP 631. The prosecutor further told jurors that they should find that Garvey was "the only person who had that information" regarding

the PIN because “[t]hat’s the only evidence before you” (3RP 631-32). Only Garvey, Nichols and Whittaker were present when the PIN was supposedly given to Garvey, however. Only Garvey could have disputed whether he had been given the PIN.

The jurors were also told that it was evidence that Garvey was involved because Whittaker had testified that she and Garvey were communicating during the incident, telling jurors “again, the only evidence presented to you was that . . . Moriah [Whittaker] and the defendant were communicating.” 3RP 637. Again, these were comments jurors would naturally and necessarily assume referred to Garvey’s failure to testify, to deny that he and Whittaker were communicating.

Notably, in case jurors had not linked the lack of evidence to a failure to testify, the prosecutor then drew a link, telling jurors there was “no question” a robbery had occurred at gunpoint, because “there’s no evidence to suggest anything but that,” and it was proven “way beyond a reasonable doubt, ladies and gentlemen, because you have everybody testify to it.” 3RP 638. Thus, the prosecutor specifically linked testifying to disputing the state’s case and *not* testifying, by clear inference, as amounting to “no evidence” to

disprove the state's case. 3RP 638.

It is also telling that the prosecutor intimated that Garvey had a burden to explain away the evidence of the state when he told jurors "this is going to get interesting," because the defense could not explain why Garvey and Wesley met up at the store, asking jurors "[h]ow are they going to explain that? The defendant just happened to be on a jog at the same time and ran across his buddy." 3RP 642. It is prosecutorial misconduct to mention in closing argument that the defense failed to explain away the charge or the evidence. See State v. Jackson, 150 Wn. App. 877, 886, 209 P.3d 553 (2009).

Finally, after repeatedly drawing attention to Garvey's failure to testify by its comments of "no evidence" to dispute that which only Garvey's testimony would address, the prosecutor made a comment about reasonable doubt which might have seemed inartful but exacerbated the "no comment" misconduct already committed in summing up initial closing argument by focusing jurors only on one part of "reasonable doubt." The concept of reasonable doubt is the foundation of criminal cases. See State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). It is improper to suggest that jurors have to be able to give a reason for their doubt. See State v. Kalebaugh, 183

Wn.2d 578, 355 P.3d 253 (2015). Thus, a jury instruction is a misstatement of the law when it told jurors that reasonable doubt was a doubt for which a reason “can be given, rather than the correct jury instruction that ‘reasonable doubt’ is a doubt for which a reason exists.” 183 Wn.2d at 584. Here, the prosecutor referred to “reasonable doubt” in summation as “[a] doubt for which a reason exists,” then said, “[t]here is none here.” 3RP 654. These arguments added fuel to the already ample misconduct shifting a burden to Garvey, not only improperly telling jurors they had to find a reason to doubt but also reaffirming the state’s theme that Garvey had somehow failed to provide sufficient evidence to disprove - or cast doubt - on the state’s case.

The prosecutor committed flagrant, ill-intentioned misconduct in repeatedly commenting on Garvey’s failure to testify to disprove or dispute parts of the state’s case only he could have testified about, shifting an impermissible burden to Garvey, in violation of both due process and the rights to be free from self-incrimination. This Court should so hold.

2. Misconduct in misstating the law about the law on accomplice liability

The prosecutor also committed serious, ill-intentioned and

prejudicial misconduct in misstating the crucial law of accomplice liability. A prosecutor commits misconduct when he misstates the law. State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940(2008). Our courts have cautioned about the huge impact such a misstatement has on jurors. State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). The Supreme Court has held that “[t]he prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury.” 100 Wn.2d at 763. This is because jurors know the prosecutor’s special status and that “the prosecutor is an officer of the State.” Warren, 165 Wn.2d at 27.

In this case, the prosecutor committed flagrant, ill-intentioned and prejudicial misconduct in misstating the crucial law of accomplice liability.

a. Relevant facts

In initial closing argument, the prosecutor told jurors that the defense was asking them to ignore the law regarding accomplice liability. 3RP 625. A little later, the prosecutor stated there was no “doubt for which a reason exists” in this case, the prosecutor then went on:

There’s nuances to stories, sure. There’s varying degrees of who did what, sure. **But when you break down the**

elements of robbery, when the three are acting in concert, *in for a penny, in for a pound*, you are responsible for what the other person does as long as you're acting in concert. The three were acting in concert[.]

3RP 654 (emphasis added).

In rebuttal closing argument, the prosecutor told the jury it was “interesting” that defense counsel had said he could not really dispute guilt for the possession of stolen property because of the video. 3RP 672. The prosecutor then told jurors the robbery was “not over” when Wesley jumped out of the car but only after the unsuccessful attempt to withdraw money at the grocery store occurred. 3RP 672. The prosecutor reminded jurors of a situation discussed in voir dire where a driver did not know his friend had gone to rob a bank when he drove the friend there and thus was not an accomplice. 3RP 672. The prosecutor contrasted this situation with one where “the bank robber gets into the car, he hands that money to the driver” as the “guy in charge.” 3RP 672-73.

The prosecutor then told jurors someone is an “accomplice to everything that happened” if he was guilty to “getting the spoils of the robbery and attempting to complete the robbery by taking the money” from the card after the fact. 3RP 672-74.

b. The prosecutor argued a theory of accomplice liability our courts have rejected

These arguments were flagrant, ill-intentioned and prejudicial misconduct which relieved the state of the full weight of its burden of proof by misstating the law of accomplice liability.

Accomplice liability is provided for in RCW 9A.08.020. State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015). Under that statute, an accomplice is legally accountable for a crime if committed by the conduct of another. RCW 9A.08.020(1). To prove such liability, the state must show the defendant had actual knowledge that principals were engaging in the crime charged when he acted as an “accomplice” to that crime. State v. Shipp, 93 Wn.2d 510, 517, 610 P.2d 1322 (1980).

In other words, an accomplice must be shown to have actual knowledge that he is promoting or facilitating the commission of the charged crime and does not have “strict liability” for all crimes about which he had no knowledge. See State v. Cronin, 142 Wn.2d 568, 577, 14 P.3d 752 (2000); State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000).

In Cronin, the jury in one of the consolidated cases was told that a person could be convicted as an accomplice if they knew the

“general nature” of the crime they were assisting, not the specific crime which would occur. 142 Wn.2d at 574. In another case, the prosecutor used the same theory as used here, telling jurors the “principle” of accomplice liability was found in the common phrases, “in for a penny, in for a pound,” and “in for a dime, in for a dollar.” 142 Wn.2d at 577.

Our state’s high Court rejected this description of accomplice liability as flawed, because “the fact that a purported accomplice knows that the principal intends to commit ‘a crime’ does not necessarily mean that accomplice liability attaches for any and all offenses ultimately committed by the principal.” Roberts, 142 Wn.2d at 510-11. Instead, the Court held, “in order for one to be deemed an accomplice, that individual must have acted with knowledge that he or she was promoting or facilitating *the* crime for which that individual was eventually charged.” Cronin, 142 Wn.2d at 578-79.

Cronin and Roberts rejected the theory of accomplice liability the prosecutor argued here. Years after the Supreme Court explicitly held that the “in for a penny, in for a pound” theory of accomplice liability was a misstatement of the law, the prosecutor here told the jury there was no doubt for which a reason existed and that Garvey

was guilty of the robbery just because of his later involvement with possessing the stolen property on accomplice liability because, “when the three are acting in concert, ***in for a penny, in for a pound, you are responsible for what the other person does as long as you’re acting in concert.***” 3RP 654 (emphasis added).

These arguments were flagrant, ill-intentioned misconduct. Where, as here, the prosecutor makes an argument which has already been condemned, that is flagrant and ill intentioned. See State v. Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010). Further, it is “particularly grievous” misconduct for a prosecutor, a quasi-judicial officer, to “so mislead the jury” about relevant law. Warren, 165 Wn.2d at 27. These misstatements of the law of accomplice liability were flagrant, ill-intentioned and prejudicial misconduct, and this Court should so hold.

3. The misconduct compels reversal and remand for a new trial, whether taken separately or in cumulative effect

Reversal is required based on the flagrant, ill-intentioned and prejudicial misconduct committed in this case, either taken separately or in its combined corrosive effect. Even without defense objection, reversal is required where the misconduct is so flagrant

and ill-intentioned no curative instruction could have erased the prejudice. See Suarez-Bravo, 72 Wn. App. at 367.

The misconduct here meets that standard. The prosecutor shifted a burden to Garvey to disprove his guilt and commented on the lack of evidence only Garvey could provide not once or even twice but as the entire theme of initial closing. Repetitive misconduct can have a cumulative corrosive effect. In re the Personal Restraint of Glasmann, 175 Wn.2d 696, 711, 286 P.3d 673 (2012). Further, the state's entire theory of Garvey's guilt was involved - his alleged possession of and provision of the gun, things he allegedly said in conversations only he, Wesley and Whittaker would have had about the crime. In fact, the "no evidence" theme was used by the state regarding almost every part of the case the state had to prove to establish Garvey's guilt as an accomplice. Similarly, the question of whether Garvey had been proved to be an accomplice was directly affected by the state's misstatement of that crucial law.

Even if separately the misconduct would not support reversal, taken together in its effect it would. The only question at trial was whether the state had proven Garvey guilty as an accomplice to the

crime Wesley committed with Whittaker's assistance in Whittaker's car for the purpose of paying Whittaker's rent. The prosecutor's comments, placing a burden on Garvey to disprove the state's case, commenting on his decision not to testify to rebut the claims, and misstating the burden of proof and law to prove Garvey's guilt, completely eroded the ability of jurors to fairly and impartially decide this case.

4. Even if the misconduct could have been cured, reversal is required based on counsel's failure to object or seek that remedy on his client's behalf

In the alternative, in the unlikely event the Court were to conclude that the corrosive effect of any of the misconduct could have been cured if counsel had objected and sought such instruction, reversal and remand for a new trial should still be ordered, because counsel was prejudicially ineffective in his handling of the case. Both the state and federal prosecutions guarantee the right to effective assistance of appointed counsel. See Strickland v. Washington, 466 U.S. 668, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To show ineffective assistance, an appellant must show 1) defense counsel's representation "fell below an objective standard of reasonableness,"

and 2) counsel's deficient performance caused prejudice, as shown by establishing a "reasonable probability" that the result of the proceeding would have been different except for counsel's errors. Strickland, 466 U.S. at 697; State v. Brockob, 159 Wn.2d 311,344-45, 150 P.3d 59 (2006).

Mr. Garvey, III, can meet both of those requirements in this case. First, counsel's performance fell below an objective standard of reasonableness when counsel failed to object to the repeated misconduct of the prosecutor declaring the jury had "no evidence" other than what the prosecution had presented at trial. In general, a claim that counsel was deficient by failing to object requires the defendant to show that the objection would likely have been sustained - or *should* have been, under the law. See, e.g., State v. Fortun-Cabada, 158 Wn. App. 158, 172, 241 P.3d 800 (2010).

Here, both the misconduct in repeatedly commenting about "no evidence" and the misstatement of the law of accomplice liability were incredibly pervasive and it is appellant's position it could not have been cured by instruction. If the Court were to find that the misconduct *could* have been cured, it should hold that counsel's failure to object and seek that cure on his client's behalf fell below an

objective standard of reasonableness. Counsel sat mute while the prosecutor repeatedly exhorted to the jury that they could only consider the evidence in court (not lack of evidence) and that no evidence had been presented to rebut the state's case - when only Garvey could have provided such testimony. Counsel further sat mute and sought no redress when the prosecutor invoked the discredited "in for a penny, in for a pound" argument our state's highest court has condemned as allowing improper "strict liability" for the accused.

Further, counsel's unprofessional failures prejudiced his client. Mr. Garvey was not in Whittaker's car when Wesley got in and committed the robbery. Mr. Garvey was not the one who brandished a gun. Nor was he, like Whittaker, sitting there encouraging the victim to give up his "stuff."

The only evidence against Garvey showed him in possession of a stolen debit card and trying to use it, and Garvey conceded the possession of stolen property charge that evidence showed. To prove that Garvey was involved in the robbery, the prosecution relied on the testimony of two witnesses who had admittedly lied in sworn statements to police. It was only the testimony of Whittaker and

Wesley which accused Garvey of being involved - of living in the apartment, participating in planning with Whittaker there, riding in the car to the park, communicating with Whittaker about the change of plans, hiding in the bushes while Wesley committed the crime.

Counsel's failures to object allowed the prosecution to gain a conviction based on a theory of accomplice liability our state's highest court has declared is so wrong it subjects the accused to strict liability, in violation of the constitution. Accomplice liability was the state's theory of guilt for the robbery, the most serious crime. And counsel's failure to object and seek a cure also allowed the jury to convict on an improper basis after shifting a burden to Garvey and effectively faulting him for failing to testify to rebut the state's case. If the Court finds the misconduct could have been cured, it should hold that counsel was ineffective in failing to object and seek such cures to the pervasive misconduct below. It should further reverse, because that ineffectiveness prejudiced Mr. Garvey, III.

E. CONCLUSION

For the reasons stated herein, this Court should grant relief.

DATED this 10th day of June, 2020.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Brief to opposing counsel and petitioner by depositing the same in the United States Mail, first class postage pre-paid, as follows, to Mr. Vernal Garvey, DOC 417766, Coyote Ridge CC, P.O. Box 769, Connell, WA. 99326,

and to the Prosecutor's Office, via e-filing this date.

DATED this 10th day of June, 2020.



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