

No. 35215-3-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

THE STATE OF WASHINGTON,

Respondent

v.

GIOVANNI KINSEY,

Appellant

**ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY**

NO. 16-1-00945-3

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The trial court did not violate the appearance of fairness doctrine by making the comment regarding his grandchildren.
- B. The trial court did not violate the defendant's presumption of innocence.
- C. The trial court did not violate the defendant's due process rights to a fair trial.
- D. Defense counsel's performance was not ineffective.

II. STATEMENT OF FACTS

The defendant, Giovanni Kinsey, was charged and convicted of violating a misdemeanor domestic violence no-contact order under RCW 26.50.110(1) and RCW 10.99.020. CP 11; RP¹ at 244. There were two mistrials before the defendant was finally convicted following his third trial.

In August 2016, the defendant ran into his ex-girlfriend, Shannon Duran, at a gas station. RP at 27-28. Both parties were aware that there was a valid no-contact order in place. RP at 90. It is undisputed that it was mere happenstance that these two ran into each other at the gas station. RP at 28-29. Duran testified that although she and the defendant dated for about three years, she had not been in a relationship with him for the last

18 months. RP at 28. During the last 18 months, they had not had any contact with one another. RP at 28.

Duran obviously did not want to testify at the trial and she made that clear in the way that she answered questions. RP at 89, 93, 95, 96. Nevertheless, two police officers happened to be parked across the street from the gas station when the violation of the no-contact order occurred. RP at 46. Officer Joshua Riley and Officer Keith Schwartz both observed the defendant make contact with Duran. RP at 46, 112, 133. Both officers testified that they saw the defendant rush up to Duran's vehicle and when she started to back out of a parking spot, the defendant could be seen grabbing onto the spoiler and did not let go. RP at 112, 133. Officer Schwartz testified that he saw a male hanging onto the "fin" of a red vehicle, then observed the same male get into the passenger side of the vehicle, shut the door, and observed the car drive forward until stopped by the officers activating their emergency lights. RP at 133-34. Similarly, Officer Riley testified that once he saw the defendant get into the passenger side of the vehicle, the door shut and the vehicle moved forward again until law enforcement emergency lights were activated. RP at 113-14. As this was happening, the officers had made their way across the street so they could intervene. RP at 133.

¹ Unless otherwise indicated, RP refers to the verbatim report of proceedings transcribed

When the officers arrived on the scene, the defendant exited the vehicle but then fled from the police. RP at 136-37. The officers pursued the defendant on foot and subsequently had to deploy their tasers to take him into custody. RP at 137. Because force was used in the arrest, the defendant was then taken to a hospital so he could be medically cleared to go to jail. RP at 140. Both officers testified that the defendant was conscious and relatively cooperative up until they arrived at the medical center. RP at 119-20, 138-40. Upon their arrival at the hospital, the defendant instantly became unresponsive and acted as though he was asleep the entire time they were there. RP at 120, 140. The emergency room attending physician diagnosed the defendant with “alcohol intoxication.” RP at 154. The doctor also admitted that the defendant was unresponsive to himself and nursing staff, consistent with the officer’s testimony. RP at 157. The physician admitted that this diagnosis was based solely on the smell of alcohol on the defendant. RP at 156-57. Both officers testified that they had been in close contact with the defendant and did not smell any alcohol on him and made no mention of it in their own reports. RP at 118-19, 138.

During the trial, defense counsel had the emergency room physician testify to the diagnosis of “alcohol intoxication.” RP at 154.

by court reporter Joseph King, comprised of two volumes, paginated 1-246.

The defense also called an expert witness, Dr. William Scott Mabee, whose opinion after interviewing the defendant was that drugs and/or alcohol may have been involved in the incident, and that the defendant had an “antisocial personality disorder,” both of which contributed to the defendant committing the crime because he had impaired decision-making ability. RP at 176-80. The testimony from the on-shift doctor and the expert witness was used to support the defense theory of diminished capacity (i.e. that the defendant could not act with “knowledge” of his actions as is required to prove violation of a no-contact order). RP at 234-38.

During Duran’s testimony, she appeared aggravated with having to be at court and during her testimony she stated, “I have been here how many weeks now? I mean how many trials?” RP at 96. Defense counsel immediately objected as the judge then responded, “No, I don’t want to be here. I’d rather be at home playing with my grand kids than being here dragging on and on and on. I want this over with.” RP at 96. After this exchange, defense counsel requested a sidebar and asked for a mistrial based on what Duran had said. RP at 101. This request was denied. RP at 102. There was no objection to the judge’s comment made at the sidebar. RP at 101.

The defendant was found guilty as charged. The defendant now appeals his conviction.

III. ARGUMENT

A. The trial court did not violate the appearance of fairness doctrine by making the comment regarding his grandchildren.

Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial and neutral hearing. *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995). “The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.” *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172 (1992) (quoting *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972)). Evidence of a judge’s actual or potential bias must be shown before an appearance of fairness claim will succeed. *State v. Chamberlin*, 161 Wn.2d 30, 37, 162 P.3d 389 (2007); *see also Post*, 118 Wn.2d at 619; *State v. Gamble*, 168 Wn.2d 161, 187-88, 225 P.3d 973 (2010). In analyzing prejudice, the court does not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007), *cert. denied*, 554 U.S. 922, 128 S. Ct. 2964, 171 L. Ed. 2d 893 (2008); *State v. Warren*, 165 Wn.2d 17, 26, 195

P.3d 940 (2008). Not only are the comments examined in context, but an assertion of an unconstitutional risk of bias must overcome a presumption of honesty and integrity accruing to judges. *See Jones v. Halvorson-Berg*, 69 Wn. App. 117, 127, 847 P.2d 945 (1993) (quoting *Kay Corp. v. Anderson*, 72 Wn.2d 879, 885, 436 P.2d 459 (1967) (presumption that judges perform functions regularly and properly and without bias or prejudice)).

The defendant contends that the comment made by the trial judge violates the appearance of fairness doctrine. The State disagrees with this contention. When the comment is viewed in context of the entire transcript, it is obvious that the judge was merely responding to the comment made by the witness who was being difficult and making it apparent that she did not want to be there. RP at 96. The judge did not just randomly state that this trial was a waste of his time. The defendant takes the comment out of context and blows it out of proportion, and he also makes inferences about what the judge was thinking when he made that comment that are not supported by the record. Review of the record makes it clear that the judge was more exasperated with the witness than making any comment on the defendant or his actions. Defense counsel requested a sidebar and asked for a mistrial based on the comments made by the witness, and said nothing about the comments of the judge. RP at 101.

Additionally, the defendant cites to *Matter of Welfare of J.B., Jr.*, 197 Wn. App. 430, 387 P.3d 1152 (2016), as analogous and to have precedential authority. GR 14.1. The portion of that opinion that discusses the violation of the appearance of fairness doctrine is unpublished and therefore only has such persuasive value as the court deems appropriate. GR 14.1. The judge in *Matter of JB, Jr.* called the grandmother a liar and conducted intense questioning of the grandparents, and the court found that although the judge's questioning of the witnesses bordered on cross-examination, this still was not enough to violate the appearance of fairness doctrine. 197 Wn. App. at 440. As a purely persuasive authority, it is more convincingly used for the State's argument to show that in this instant case there was no violation. The comment made by the judge did not rise to the level of violating the appearance of fairness doctrine.

B. The defendant's presumption of innocence was not violated by the trial court.

The Constitution of the United States entitles criminal defendants to a fair trial. U.S. Const. amends. VI, XIV § 1. The presumption of innocence is fundamental to a fair trial. *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999).

The defendant cites *State v. Gonzalez*, 129 Wn. App. 895, 120 P.3d 645 (2005), as an analogous case to the one at hand. This analogy

fails in several regards. In *Gonzalez*, the trial court informed the jury that the defendant 1) was in jail because he could not afford his bail, 2) he would be transported to and from court by the Department of Corrections, and 3) he would be in restraints and under guard while in the courtroom. *Gonzalez*, 129 Wn. App. at 898. The court held that these instructions were inherently prejudicial due to the inferences that the jury would draw of the defendant's guilt knowing that he was coming from jail and that he was restrained. *Id.* at 904. In the current case, the judge made a single comment in response to the witness's comment. RP at 96. When viewed in context, it is not prejudicial to the defendant nor does it undermine the presumption of innocence. Also, no reasonable inference could be drawn that the comment was a comment on the defendant's innocence or guilt, nor did it impair his right to a fair trial.

State v. King, 199 Wn. App. 1052 (2017) (unpublished) (attached as App. A), is a very recent unpublished opinion from this Court, and should be considered for its persuasive authority if the Court on appeal so chooses. GR 14.1. In *King*, the defendant was appealing a conviction because during closing arguments the prosecutor misstated the law regarding the presumption of innocence. 199 Wn. App. 1052, *1. The prosecutor stated, "the defendant is presumed to be innocent at this point. That presumption remains here until you go to the jury room and

deliberate on the case.” *Id.* The court agreed that the prosecutor clearly misstated the law, but that it did not warrant a reversal. *Id.* The court stated that it “will not reverse unless the misstatement was so flagrant and misleading that it could not have been corrected by a curative instruction.” *Id.* (citing *State v. Reed*, 168 Wn. App. 553, 578, 278 P.3d 203 (2012)). The court took into consideration that the jury was properly instructed to disregard any statements by the attorneys that were not supported by law. *Id.* In the current case, the court gave the following instructions to the jury:

It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

CP 19-20; RP at 213. Based on analogous case law and the facts at hand, there was not a violation of the defendant’s right to the presumption of innocence.

C. The defendant’s due process rights were not violated by the trial court.

The right to a fair hearing under the federal due process clause prohibits actual bias and “the probability of unfairness.” *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975) (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955)).

The defendant contends that the trial court violated his due process rights by the judge's comment to witness Shannon Duran. The defendant cites from *State v. Elmore*, 139 Wn.2d 250, 985 P.2d 289 (1999), that "a statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." Br. of Appellant at 13. The defendant has misconstrued the quote by leaving out the term "reasonably inferable" (emphasis added) as it is actually found in the case. *Elmore*, 139 Wn.2d at 276. None of the inferences that the defendant has made regarding what could be deduced from the judge's comment are reasonable. The defendant claims that the judge inferred that "the crime had been committed" and that "there was no need for the judge to waste his precious time presiding over the trial of a guilty defendant." Br. of Appellant at 14-15. These are unsupported, self-serving inferences, not reasonably inferable comments on the case. The defendant's due process rights to a fair trial were not violated by the trial court as the judge's comments could not be reasonably inferred to undermine his right to a fair trial.

D. Defense counsel's performance was not ineffective.

To establish ineffective assistance of counsel, a defendant must prove that defense counsel's representation fell below an objective

standard of reasonableness, and that defense counsel's deficient representation prejudiced the defendant. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)); *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A difference of opinion on trial tactics does not constitute either negligence or incompetence. *Lynn v. Lynn*, 4 Wn. App. 171, 175, 480 P.2d 789 (1971). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009)); *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding "[T]his court will not find ineffective assistance of counsel if 'the actions of counsel complained of go to the theory of the case or to trial tactics.'" (quoting *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982))).

The defendant claims that defense counsel's assistance was ineffective because defense counsel conceded guilt to the "only" element of the crime that the State had to prove. Br. of Appellant at 18. This is inaccurate and ignores the legitimate trial tactic utilized by the defense of arguing diminished capacity. The State was not relieved of its burden to

prove that the defendant “knowingly” violated the order by entering the protected party’s car by counsel’s admission.

In reading the instructions that were posed to the jury it states, “a person commits the crime of violation of a court order when he or she knows of the existence of a no-contact order and knowingly violates a provision of the order prohibiting the person from knowingly coming within or remaining within a specified distance of a location.” CP 27; RP at 216. Defense counsel presented a diminished capacity defense throughout the trial. Defense counsel had two witnesses testify to the fact that alcohol may have impaired the defendant’s mental state. RP at 154, 179. Counsel also tried to show that the defendant may have thought someone else was driving the vehicle in question. RP at 103-06. Defense counsel was clearly trying to negate the mens rea of the crime that the State had to prove; his admission that the defendant got into the car did not relieve the State of the burden to prove that he did so with knowledge of who was inside.

Following the test set forth in *Strickland*, neither prong for ineffective assistance is satisfied. Therefore, defense counsel’s representation did not fall below an objective standard of reasonableness and was not ineffective.

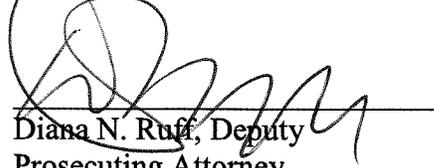
IV. CONCLUSION

Based upon on the aforementioned facts and authorities, the defendant's appeal should be denied and the conviction affirmed.

RESPECTFULLY SUBMITTED this 20th day of October, 2017.

ANDY MILLER

Prosecutor

A handwritten signature in black ink, appearing to read "Diana N. Ruff", is written over a horizontal line. The signature is stylized and cursive.

Diana N. Ruff, Deputy

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

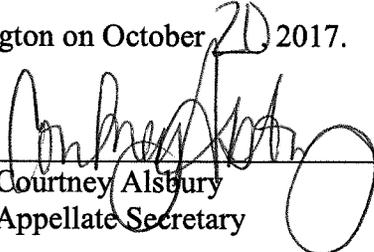
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Appendix A

State v. King, 199 Wn. App. 1052 (2017) (unpublished)

199 Wash.App. 1052

NOTE: UNPUBLISHED OPINION, SEE WA R GEN
GR 14.1

Court of Appeals of Washington,
Division 3.

STATE of Washington, Respondent,
v.

Angela Elizabeth KING, a/k/a Angela Elizabeth
Mendoza, a/k/a Angela Elizabeth Vargas, Appellant.

No. 34374-0-III

|
JULY 11, 2017

Appeal from Yakima Superior Court, 15-1-01902-9,
Honorable Michael G. McCarthy, Judge

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UNPUBLISHED OPINION

Pennell, J.

*1 Angela Elizabeth Mendoza¹ appeals her conviction
for trafficking in stolen property in the first degree. She
contends the prosecutor committed flagrant irremediable
misconduct by misstating the law regarding the
presumption of innocence during closing argument.
Alternatively, she argues she received ineffective
assistance of counsel when defense counsel failed to object
to this misstatement. We affirm.

ANALYSIS

Ms. Mendoza was convicted of first degree trafficking in
stolen property. The facts of Ms. Mendoza's case leading
up to trial are irrelevant to the issue on appeal and need

not be recounted. Instead, Ms. Mendoza's complaint rests
on the following statement uttered by the prosecuting
attorney during closing argument: "We've talked about
the presumption of innocence. The defendant is presumed
to be innocent at this point. *That presumption remains here
until you go to the jury room and deliberate on the case.*" 3
Verbatim Report of Proceedings (Mar. 24, 2016) at 118-
19 (emphasis added). The defense raised no objection to
this statement during trial. Nevertheless, Ms. Mendoza
claims the prosecutor's comment requires reversal either
under a theory of prosecutorial misconduct or ineffective
assistance of counsel.

We agree with Ms. Mendoza that the prosecutor misstated
the law. Our cases explain that the "presumption of
innocence continues 'throughout the entire trial' and may
be overcome, if at all, only during the jury's deliberations."
State v. Venegas, 155 Wn. App. 507, 524, 228 P.3d
813 (2010) (quoting 11 WASHINGTON PRACTICE:
WASHINGTON PATTERN JURY INSTRUCTIONS:
CRIMINAL 4.01, at 85 (3d ed. 2008)). By using the
word "until," the prosecutor suggested the presumption
of innocence ended the moment the jurors walked into the
jury room. This was incorrect. *State v. Reed*, 168 Wn. App.
553, 578, 278 P.3d 203 (2012).

Although the prosecutor misspoke, reversal is
unwarranted. When no objection is made to a prosecutor's
misstatement of law during closing argument, we will
not reverse unless the misstatement was so flagrant and
misleading that it could not have been corrected by
a curative instruction. *Id.* This is a classic example of
an isolated misstatement that could easily have been
corrected upon request. *See id.* at 579. We will not disturb
a jury verdict under such circumstances.²

While defense counsel should have objected to the
prosecutor's misstatement, Ms. Mendoza's ineffective
assistance of counsel claim fails because she cannot
establish prejudice. The prosecutor's remark was a very
small part of his argument. It was neither repeated nor
emphasized. Although, with the assistance of a transcript,
we can parse the prosecutor's comment and discern error,
there is no reason to think the prosecutor's momentary
misstatement had an impact on the jury. The jury was
properly instructed and told to disregard any statements
by the attorneys that are not supported by the law. We
presume the jury follows the court's instructions absent
evidence to the contrary. *State v. Lamar*, 180 Wn.2d 576,

586, 327 P.3d 46 (2014). Ms. Mendoza has failed to show a basis for reversal.

CONCLUSION

*2 Ms. Mendoza's conviction is affirmed. Her request to deny costs is granted.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

I CONCUR:

Korsmo, J.

Fearing, C.J. (concurring)

I concur in the majority's decision, but I write separately because of a vacuous state of the law regarding prosecutorial misconduct. Conflicting decisions and principles occupy this field of law. These variances offer the court different paths to follow, which paths lead to opposite ends. I fear that available opposing paths allow reviewing judges unlimited discretion in deciding the outcome of prosecutorial misconduct appeals such that our personal partialities influence the results of cases.

Typically in opinions we refer to the prosecution as the "State," but, in the context of purported prosecutorial misconduct, we shift our argot from the "State" to the "prosecutor," almost as if the prosecuting attorney strode outside his or her role as a State agent when engaging in claimed misconduct. To a layperson, the term "misconduct" denotes intentional and bad conduct. Nevertheless, in the context of "prosecutorial misconduct," the concept expands to simple and unintentional mistakes.

Angela Mendoza's trial prosecutor told the jury that:

We've talked about the presumption of innocence. The defendant is presumed to be innocent at this point. That presumption remains here until you go to the jury room and deliberate on the case.

Report of Proceedings (RP) at 118–19. The easy part of the appeal is concluding that the prosecutor engaged in misconduct not necessarily in the sense of deliberate delinquent behavior, but at least in the sense of committing error. The difficult part of the appeal is characterizing the nature and degree of the misconduct, and determining what, if any, prejudice Mendoza suffered. The grade of the prosecutorial misconduct and the extent of the prejudice control whether we reverse Mendoza's conviction.

Angela Mendoza's prosecutor perpetrated misconduct because the closing remarks eroded the presumption of innocence that does not end when the jury enters the jury room. The presumption continues while the jury deliberates and until the jury finds the evidence established guilt beyond a reasonable doubt. The presumption of innocence does not stop at the beginning of deliberations; rather, the presumption persists until the jury, after considering all the evidence and the instructions, becomes satisfied that the State proved the charged crime beyond a reasonable doubt. *State v. Evans*, 163 Wn. App. 635, 643, 260 P.3d 934 (2011). The presumption continues throughout the trial and may only be overcome, if at all, during deliberations. *State v. Evans*, 163 Wn. App. at 643; *State v. Venegas*, 155 Wn. App. 507, 524, 228 P.3d 813 (2010).

The presumption of innocence arises from the federal and state constitutions. The presumption of innocence, although not expressly enumerated in the Constitution, comprises a basic component of a fair trial under our system of criminal justice as protected by both the state and United States Constitutions. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L.Ed. 2d 126 (1976); *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). The presumption of innocence is the bedrock on which the criminal justice system stands. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008); *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). Washington courts, as guardians of all constitutional protections, are vigilant to protect the presumption of innocence. *State v. Warren*, 165 Wn.2d at 26; *State v. Bennett*, 161 Wn.2d at 316.

*3 A Washington statute confirms the constitutional dictate of a presumption of innocence. RCW 10.58.020 declares, in part:

Every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt.

At least six Washington decisions directly or indirectly address a prosecutor's errant remark in diminishing the presumption of innocence. In *State v. Warren*, 165 Wn.2d 17, the prosecutor, in closing argument, told the jury that reasonable doubt does not mean giving the defendant the benefit of the doubt. The *Warren* court observed that the prosecutor committed misconduct. Although Warren's prosecutor's argument did not restate Angela Mendoza's prosecutor's words about the presumption of innocence ending when the jury retires to the jury room, the comments attacked the presumption of innocence.

In *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996), the prosecuting attorney commented, during summation, that to find the defendants not guilty of rape, the jury must either find that the victim lied or was confused. This court held that the prosecutor misstated the law and misrepresented the role of the jury and the burden of proof. The argument conflicted with the State's burden of proving each element of its case beyond a reasonable doubt. The need to establish each element beyond a reasonable doubt is a corollary to the presumption of innocence.

In *State v. Johnson*, 158 Wn. App. 677, 243 P.3d 936 (2010), the trial court instructed the jury that the State must prove all elements of the crime beyond a reasonable doubt. The prosecutor told the jury that, to acquit the defendant, the jury needed to find a reason for its doubt in the defendant's guilt and that the jury needed to disbelieve the defendant's testimony. The court held that the argument constituted misconduct since the argument subverted the defendant's presumption of innocence.

In *State v. Venegas*, the prosecutor argued, in closing, that the presumption of innocence "erodes each and every time you hear evidence that the defendant is guilty." 155 Wn. App. at 519. This court found this misstatement of the law to constitute prosecutorial misconduct.

In *State v. Evans*, the prosecutor, during closing, echoed the comments of Angela Mendoza's prosecutor. Evans' prosecutor informed the jury that presumptive innocence "kind of stops once you start deliberating." 163 Wn. App. at 643. This court held the comment to be misconduct. The comment invited the jury to disregard the presumption of innocence once it began deliberating, a concept that diluted the State's burden of proof.

State v. Reed, 168 Wn. App. 553, 278 P.3d 203 (2012) restates the holding in *State v. Evans*. Reed's prosecutor engaged in misconduct by stating in rebuttal argument that the presumption of innocence "does last all the way until you walk into that [jury] room and start deliberating." *State v. Reed*, 168 Wn. App. at 578 (alteration in original). This court characterized the prosecutor's statement regarding the presumption of innocence as an incorrect statement of the law. Rather than dissipating at the beginning of deliberations, the presumption of innocence continues throughout the entire trial and may be overcome, if at all, during the jury's deliberations.

*4 The State argues that the trial prosecutor did not misstate the law. The State contends that the prosecuting attorney meant that the presumption of innocence ends after the jury renders a final verdict at the end of deliberations. Nevertheless, the State's interpretation skews the ordinary meaning of the words uttered by the prosecuting attorney. The prosecutor commented: "That presumption remains here until you go to the jury room and deliberate on the case." RP at 119. The jury goes to the jury room at the commencement of deliberations, and the presumption of innocence endures after deliberations begin. The word "deliberate" does not entail the vote to convict after jury discussion. The word means: "to think about or discuss issues and decisions carefully. • *The jury deliberated for several days before reaching a verdict.*" MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/deliberate> (last visited July 3, 2017). The jury thinks about and discusses issues as much at the beginning of deliberations as at the end of deliberations. If the jury deliberated for days, as in the example given by the dictionary, the jury engaged in deliberations not only immediately before its final vote but also on the first day and during the first hour. Angela Mendoza's prosecutor echoed the comments made by the prosecutors in *State v. Evans* and *State v. Reed*.

Since we hold that Angela Mendoza's prosecuting attorney committed prosecutorial misconduct, we must next measure the extent of the misconduct. Mendoza's trial counsel failed to object to the misleading comments of the prosecutor concerning the presumption of innocence. Different rules reign concerning the nature of the misconduct the appellant must show to gain a new trial depending on whether defense counsel objected at trial.

The law encourages a party to raise objections at trial rather than for the first time on appeal. Despite this policy, one might argue that a defendant should be entitled to one free trial, even without an objection, when the prosecuting attorney misstates the law. The prosecutor should know the law, and the defendant should not undergo the embarrassment of objecting before a jury to correct the prosecutor's mistake of the law. Vindication of an accused's rights should not depend on the skills of her lawyer and whether her lawyer timely objected to errors by the prosecuting attorney. According to one Supreme Court decision, the failure to object should and will not prevent a reviewing court from protecting a defendant's constitutional right to a fair trial. *State v. Walker*, 182 Wn.2d 463, 477, 341 P.3d 976, cert denied, 135 S. Ct. 2844, 192 L.Ed. 2d 876 (2015). The State, by its misconduct, bears the blame for any retrial despite the lack of an objection. Unless the courts impose a prophylactic rule that always reverses a conviction upon prosecutorial misconduct, a prosecuting attorney could knowingly continue to misstate the law with the expectation that a reviewing court will find no prejudice and affirm a verdict of guilt at least as long as he or she misstates the law only once.

Alas, the law consistently places a burden of objection on the criminal defendant with few exceptions. Counsel may not remain silent, speculating on a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal. *State v. Russell*, 125 Wn.2d 24, 93, 882 P.2d 747 (1994); *State v. Reed*, 168 Wn. App. at 577–78 (2012). Proper and timely objections provide the trial court an opportunity to correct the prosecutorial misconduct and caution jurors to disregard it. *State v. Walker*, 182 Wn.2d at 477. Timely objections prevent abuse of the appellate process and save the substantial time and expense of a new trial. *State v. Emery*, 174 Wn.2d 741, 761–62, 278 P.3d 653 (2012).

To prevail on appeal on a claim of prosecutorial misconduct when the defense objected below, a defendant must show first that the prosecutor's comments were improper and second that the comments were prejudicial. *State v. Warren*, 165 Wn.2d 17, 26 (2008); *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007); *State v. Russell* 125 Wn.2d at 85. If defense counsel fails to object to the misconduct at trial, the defendant on appeal must show more than a misstatement of the law and some prejudice. We consider the claim of prosecutorial misconduct waived on appeal unless the misconduct is so flagrant and ill-intentioned that it evinces an enduring prejudice the trial court could not have cured by an instruction. *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201(2006), overruled on other grounds by, *Sate v. W. R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014); *State v. Evans*, 163 Wn. App. at 642–43 (2011).

*5 Because of Angela Mendoza's attorney's failure to object to the prosecutor's eroding of the presumption of innocence, this appeal tasks us with determining whether the prosecuting attorney's misconduct was flagrant and ill-intentioned and whether Mendoza suffered enduring prejudice. I question our ability to do so.

When defense counsel failed to object to prosecutorial misconduct, this court must find the prosecuting attorney to be ill-intentioned in order to grant the defendant relief. “Ill-intention” means having malicious intentions. DICTIONARY.COM, <http://www.dictionary.com/browse/ill-intentioned> (last visited July 3, 2017). A prosecutor will likely never concede to malevolent intent. Thus, a reviewing court enters a quagmire when attempting to discern the intentions of a prosecuting attorney.

The misconduct of the prosecutor must also be flagrant. “Flagrant” is something considered “wrong or immoral[,] conspicuously or obviously offensive.” OXFORD ENGLISH DICTIONARY ONLINE, <https://en.oxforddictionaries.com/definition/flagrant> (last visited July 3, 2017). Characterizing a prosecuting attorney's conduct as flagrant also is problematic. I am generally able to assess a flagrant foul in professional basketball and may even be able to distinguish between a flagrant one and flagrant two foul. I possess this ability because I can see the player's conduct. Nevertheless, as an appellate judge, I am unable to hear the prosecutor's intonation and view the prosecuting attorney's mannerisms and do not necessarily

comprehend the entire context of the misconduct. I was not courtside.

Reviewing courts wish not to impugn any attorney with a ruling that the attorney engaged in flagrant, malicious behavior. This reluctance particularly extends to a prosecuting attorney who is a representative of the State of Washington and either an elected official or the deputy of an elected official. Assessing whether prosecutorial misconduct is flagrant and ill-intentioned imposes an embarrassing and difficult duty on a reviewing court. For this and other reasons, courts may shy from assessing prosecutorial misconduct as flagrant. Such an assessment may depend on the predilection of individual judges rather than being based on the rule of law, and the outcome of the appeal could vary from panel to panel.

Despite the ill-intentioned standard, our Supreme Court directed us not to delve into the mind of the prosecutor. The Supreme Court has written twice that we should not focus on the prosecutor's subjective intent in committing misconduct, but instead on whether the defendant received a fair trial in light of the prejudice caused by the violation of existing prosecutorial standards and whether that prejudice could have been cured with a timely objection. *State v. Walker*, 182 Wn.2d at 478 (2015); *State v. Emery*, 174 Wn.2d at 762 (2012). This principle conflicts with the common understanding of ill-intention being subjective in nature. Intentions are always subjective.

The law affords a reviewing court few guidelines and standards for determining either the subjective or objective intentions of the prosecuting attorney. Nevertheless, at least two Washington courts have noted one factor to consider when determining if improper prosecutorial arguments were flagrant and ill-intentioned. An argument should be so characterized when a Washington court previously recognized those same arguments as improper in a published opinion. *State v. Johnson*, 158 Wn. App. at 685 (2010); *State v. Fleming*, 83 Wn. App. 213–14 (1996). In *State v. Fleming*, the prosecuting attorney told the jury that to acquit the defendants of rape the jury must find that the victim lied or was confused. This court held the misconduct to be flagrant because the prosecutor uttered the argument two years after an opinion proscribing the argument.

*6 We do not know the intentions of Angela Mendoza's trial prosecuting attorney. We do not know if Mendoza's

trial prosecutor knew he misstated the presumption of innocence. Nevertheless, if we follow *Johnson* and *Fleming*, we would need to hold Mendoza's prosecutor to have engaged in flagrant and ill-intentioned conduct. Numerous decisions before the date of trial held that a prosecuting attorney should not tell a jury that the presumption of innocence ends when the jury enters the deliberation room. Any prosecutor should know not to render any comment that hints at ending the presumption when the jury goes "to the jury room and deliberate[s] on the case." RP at 118–19. This court, however, chooses not to follow the path of *Johnson* and *Fleming*.

In *State v. Warren*, the Washington high court highlighted the error of a prosecutor demeaning the presumption of innocence. The court wrote:

The jury knows that the prosecutor is an officer of the State. It is, therefore, particularly grievous that this officer would so mislead the jury regarding the bedrock principle of the presumption of innocence, the foundation of our criminal justice system.

165 Wn.2d at 27. Based on this Supreme Court passage, a reviewing court could determine any erosion of the presumption of innocence to be flagrant and ill-intentioned. In this appeal, this court chooses not to follow the path of *Warren*.

Remember that, in the end, the defendant must show the prosecutorial misconduct resulted in enduring prejudice, if counsel raised no objection. The rule of prosecutorial misconduct is often phrased as requiring the defendant to demonstrate that the prosecutor's remark was so flagrant and ill-intentioned that no curative instruction would have been capable of neutralizing the resulting prejudice. *State v. Gregory*, 158 Wn.2d at 841 (2006); *State v. Evans*, 163 Wn. App. at 642–43 (2011). From this rule, one may deduce that the prosecutor's conduct is flagrant and ill-intentioned if and only if no curative instruction could correct the resulting prejudice. If so, the adjectives "flagrant" and "ill-intentioned" become redundant. We could streamline the rule by simply stating the defendant gains a new trial if and only if she establishes that no instruction could cure the prejudice of the prosecutor's misstatement. But this streamlined presentment of the rule begs the most important question in resolving

appeals based on alleged prosecutorial misconduct: how do appellate judges, who did not observe the entire trial and who know nothing about the twelve jurors' thoughts and deliberations, determine whether a curative instruction will prevent the jury from being influenced by the prosecuting attorney's misstatement.

In Angela Mendoza's appeal, the majority probably applies a nonconstitutional prejudice standard. Under this standard, prosecutorial misconduct is grounds for reversal when there is a substantial likelihood the improper conduct affected the jury. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009); *State v. Gregory*, 158 Wn.2d at 858–59 (2006). This standard may echo the conventional nonconstitutional standard in other contexts stated awkwardly and backhandedly as whether, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected. *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012). In analyzing prejudice resulting from prosecutorial misconduct, we do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. *State v. Warren*, 165 Wn.2d at 28 (2008); *State v. Yates*, 161 Wn.2d at 774. When applying this standard, the court usually measures the strength of the State's evidence of guilt. *State v. Barry*, 183 Wn.2d 297, 303, 352 P.3d 161 (2015).

*7 In their briefs, neither party addressed the strength or weakness of the State's evidence for purposes of appraising prejudice against Angela Mendoza. In turn, the majority has not reviewed any of the State's evidence. This court does not enlighten Mendoza whether we consider the State's evidence strong such that prosecutorial misconduct did not impact her verdict.

On a side note, our Supreme Court, in its recent decision of *State v. Walker*, 182 Wn.2d 463 (2015), rejected weighing the State's evidence when assessing prejudice in the context of prosecutorial misconduct. *Walker* did not entail a prosecutor's attempt to weaken the presumption of innocence. Instead, during closing the prosecutor employed a PowerPoint presentation that included 250 slides, one hundred of which were captioned with the words "DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER." One slide showed Walker's booking photograph altered with the words "GUILTY BEYOND A REASONABLE DOUBT,"

which words were superimposed over the defendant's face in bold red letters. *State v. Walker*, 182 Wn.2d at 471–75 (boldface omitted). Other photographs juxtaposed the defendant with the victim and included inflammatory captions. Trial defense counsel remarkably never objected to the PowerPoint slides. The Supreme Court reversed the conviction and held that the prejudicial effect could not have been cured by a timely objection.

In *State v. Walker*, the Supreme Court directed an analysis that ignores the State's evidence. The court held that an analysis of "prejudicial impact" does not rely on a review of sufficiency of the evidence. 182 Wn.2d at 479. The Court of Appeals had affirmed Walker's conviction despite misconduct by minimizing the prejudicial impact because of overwhelming evidence of guilt. The high court wrote that, even if the State has strong evidence to affirm the convictions had the defendant challenged the sufficiency of the evidence, the focus must be on the misconduct and its impact, not on the evidence that was properly admitted. The voluminous number of slides depicting statements of the prosecutor's belief as to defendant's guilt, shown to the jury just before it was excused for deliberations, was presumptively prejudicial and difficult to overcome, even with an instruction. The ruling in *Walker* may be limited to its unique facts. Otherwise *Walker* may have silently overruled numerous Washington decisions that weigh the vigor of the State's evidence when assessing prejudice.

I previously asked how appellate judges, who did not observe the entire trial and who know nothing about the twelve jurors' thoughts and deliberations, determine whether a curative instruction will prevent the jury from being influenced by the prosecuting attorney's misstatement. I question how a reviewing court can adjudge whether the jury would still have convicted the defendant if the prosecutor had not engaged in the misconduct. A jury consists of twelve representatives of the community, with each juror being influenced differently by evidence and argument. Appellate judges' pampered existence in an ivory tower disqualifies them from being representatives of the community. As one earlier court observed:

It is highly improper for courts, trial or appellate, to speculate upon what evidence appealed to a jury. Jurors and courts are made up of human beings, whose condition

of mind cannot be ascertained by other human beings. Therefore it is impossible for courts to contemplate the probabilities any evidence may have upon the minds of the jurors.

*8 *State v. Robinson*, 24 Wn.2d 909, 917, 167 P.2d 986 (1946). If the parties wanted judges to sit in the seat of jurors and recreate the thoughts of jurors, the parties would have waived a jury trial.

The rule that the defendant must show that a curative instruction could not prevent prejudice assumes that a curative instruction helps. The rule is based on the presumption that the jury follows the court's instruction. *State v. Smith*, 144 Wn.2d 665, 679, 30 P.3d 1245, 39 P.3d 294 (2001). Many jurists question the efficacy of a curative instruction under any circumstances. United States Supreme Court Justice Robert Jackson wrote: "The naive assumption that prejudicial effects can be overcome by instructions to the jury ... all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S. Ct. 716, 93 L.Ed. 790 (1949) (Jackson, J. concurring); quoted in *State v. Arredondo*, 188 Wn.2d 244, 280, 394 P.3d 348 (2017) (Gonzalez, J. dissenting); *State v. Craig*, 82 Wn.2d 777, 789, 514 P.2d 151 (1973) (Stafford, J. dissenting); *State v. Newton*, 109 Wn.2d 69, 74, n.2, 743 P.2d 254 (1987).

I return to *State v. Johnson*, 158 Wn. App. 677 (2010), wherein the prosecutor told the jury that, to acquit the defendant, the jury needed to find a reason for its doubt in the defendant's guilt and that the jury needed to disbelieve the defendant's testimony. The *Johnson* court measured the seriousness of the prosecutor's misstatement by determining if a jury instruction cured any prejudice. This court held that the arguments, despite an accurate jury instruction on the presumption of innocence, constituted flagrant and ill-intentioned misconduct and incurable by a trial court's instruction. The court wrote:

Although the trial court's instructions regarding the presumption of innocence may have minimized the negative impact on the jury, and we assume the jury followed these instructions, a misstatement about the law and the presumption of innocence due a defendant, the bedrock upon

which [our] criminal justice system stands, constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights.

State v. Johnson, 158 Wn. App. at 685–86 (2010) (alteration in original) (internal quotation marks omitted). Angela Mendoza's prosecuting attorney battered the bedrock of our criminal justice system when misstating the presumption of innocence. A broad reading of *Johnson* stands for the proposition that no jury instruction may cure this misstatement and a new trial is demanded. This court chooses not to follow the path of *Johnson*.

State v. Reed, 168 Wn. App. 553 (2012) contrasts with *State v. Johnson* and Justice Robert Jackson's observation. *Reed* suggests that, if the prosecuting attorney utters only one erroneous statement of law, the misconduct is not flagrant. In *State v. Reed*, this court observed that the prosecutor engaged in misconduct by stating in rebuttal argument that the presumption of innocence "does last all the way until you walk into that [jury] room and start deliberating." 168 Wn. App. at 578 (alteration in original). Nevertheless, trial defense counsel did not object to the prosecuting attorney's statement. This court affirmed the conviction because *Reed* failed to demonstrate that the remark was so flagrant and ill-intentioned that no curative instruction would have been capable of neutralizing the resulting prejudice. This court also noted that the prosecuting attorney only uttered the error once and did not couple the error with any other obviously improper arguments. The *Reed* court reasoned that a simple instruction from the trial court indicating that the presumption of innocence may be overcome, if at all, only *during* the jury's deliberations would have been sufficient to overcome any prejudice resulting from the prosecutor's remark.

*9 Other decisions conclude that the prosecutor committed flagrant and ill-intentioned misconduct, when eroding the presumption of innocence, but the prosecuting attorney also committed other misconduct. In *State v. Venegas*, the prosecutor argued, in closing, that the presumption of innocence "erodes each and every time you hear evidence that the defendant is guilty." 155 Wn. App. at 519. This court found this misstatement of the law to be a flagrant misconduct. Nevertheless, the State's counsel also informed the jury that it must

provide a reason for any doubt in the defendant's guilt. Defense counsel did not object to either misstatement of the law. This court held that cumulative error denied Venegas a right to a fair trial. We do not know if one isolated comment disparaging the presumption of innocence would have led to a reversal. We do not know if this court would have held only one misstatement to be prejudicial.

In *State v. Evans*, this court reversed a conviction for first degree robbery. The prosecutor told the jury that the presumption of innocence “kind of stops once you start deliberating.” 163 Wn. App. at 643. Nevertheless, the prosecutor also suggested to the jury that its role was to decide the truth of what happened, not merely whether the State proved the elements of the crime beyond a reasonable doubt. The prosecutor told the jury that the jury must be able to explain or supply a reason for its doubt before acquitting the defendants. The court did not expressly declare that misstating the presumption of innocence was inherently flagrant and incurable. The *Evans* court reversed because of cumulative error. We do not know if the court would have reversed only if the prosecutor misstated the presumption of innocence. The court also noted that the case against the defendants was not so strong that the court could hold the prosecutor's comments harmless. The State only had one witness to testify about the events and that witness had credibility problems. The victim refused to cooperate.

I have highlighted hitches inherent in an appeals court's review of a conviction because of prosecutorial misconduct. I solicit firmer principles and methods of resolving appeals that narrow the ability of judges to employ varying analyses and thereby utilize their own attitudes of justice when assessing misconduct and prejudice.

The decision as to whether prosecutorial misconduct warrants a new trial for Angela Mendoza poses a more difficult question than the majority opinion recognizes. I agree, however, with the majority. The prevailing Washington view reverses convictions in trials wherein the prosecuting attorney eroded the presumption of innocence only when the prosecutor uttered other misstatements of the law. Angela Mendoza's trial court rendered a jury instruction that properly instructed the jury on the presumption of innocence. During trial, Angela Mendoza supplied no plausible explanation as to why she returned, for a refund, toys to a local Toys R Us store and represented that the franchise shipped the purchased toys to her home, when someone had earlier stolen the toys from the victim's locked storage unit.

I CONCUR:

All Citations

Not Reported in P.3d, 199 Wash.App. 1052, 2017 WL 2955540

Footnotes

- 1 The appellant is identified by several surnames in the record on appeal. For clarity and consistency, we refer to her by the one utilized throughout trial: Mendoza.
- 2 *State v. Evans*, 163 Wn. App. 635, 648, 260 P.3d 934 (2011); *State v. Johnson*, 158 Wn. App. 677, 243 P.3d 936 (2010); *Venegas*, 155 Wn. App. at 525; and *State v. Fleming*, 83 Wn. App. 209, 213–16, 921 P.2d 1076 (1996) all involved multiple misstatements of law.

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