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NO. 36624-3-III

THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY JOHN SCHLANGEN,

Appellant.

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

OPENING BRIEF OF APPELLANT

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A. INTRODUCTION

Timothy Schlangen's attorney proposed an "unwitting possession" jury instruction in a case where the State had the burden to prove knowledge. This instruction shifted the burden of proof on the only element contested at trial. The court gave this instruction, and defense counsel argued this shifted burden to the jury. The prosecutor did as well, repeatedly arguing that Mr. Schlangen had a burden to prove lack of knowledge.

The prosecutor also repeatedly and deliberately misled the jury about why a potential defense witness was absent, though he knew the real reason for the absence. This suggested Mr. Schlangen was lying.

Mr. Schlangen did not get a fair trial. Multiple errors require reversal.

B. ASSIGNMENTS OF ERROR

1. Mr. Schlangen was denied his constitutional right to effective assistance of counsel under the Sixth and Fourteenth Amendments and article I, section 22.

2. The prosecutor's misconduct prevented Mr. Schlangen from receiving a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A new trial should be granted for ineffective assistance of counsel where defense counsel's performance was deficient and the deficiency prejudiced the defendant.

a. The right to effective assistance of counsel includes the guarantee that counsel will know the law and will advocate for the client. Unlawful possession of a firearm charges require the government to prove the element of knowledge beyond a reasonable doubt. Here, Mr. Schlangen's attorney proposed an unwitting possession instruction requiring the defense to prove lack of knowledge. Was counsel's performance deficient?

b. Deficient performance prejudices a defendant if there is a reasonable probability of a different result absent the deficiency. Here, the gun was found under a pile of clothes and items in a car Mr. Schlangen had just bought from his aunt. Although he had bullets in his pocket, Mr. Schlangen

said he did not know the gun was there and the pile of items belonged to his aunt. Is a new trial required because there is a reasonable probability Mr. Schlangen would not have been convicted if his attorney had not proposed an instruction shifting the burden to him to prove lack of knowledge?

2. A prosecutor commits misconduct by deliberately misleading the jury and a new trial is required if there is a substantial likelihood that the misconduct affected the jury verdict. Here, the State deliberately misled the jurors by suggesting a potential defense witness was absent because she would not corroborate Mr. Schlangen's defense; the prosecutor knew that the real reason was that she would be arrested by the court if she were to appear. Did the prosecutor commit misconduct? Is there is a substantial likelihood that the misconduct affected the jury verdict in light of the conflicting evidence regarding whether Mr. Schlangen knew a gun was the car?

D. STATEMENT OF THE CASE

Timothy Schlangen lives in Klickitat, Washington, with his parents. RP at 6. He is a U.S. Army veteran, deployed three times to Iraq and Afghanistan. Supp. CP __ (Sub No. 52). He was in the Army for eight years. *Id.* Since his discharge, veterans' health services has diagnosed him as having PTSD and a 50% disability. *Id.*

Mr. Schlangen purchased a vehicle from his aunt, Sandra Sorenson. RP 150. The following day, before he had been able to travel to the county seat to register the vehicle, he was pulled over by a sergeant for not having a license plate. RP 17, 155. As Mr. Schlangen looked for the purchase paperwork, the sergeant observed a gun under the many belongings in the front seat. RP 18. The officer detained him and found an ammunition case in his pocket. RP 19. Mr. Schlangen told the sergeant the gun belonged to his aunt. RP 21. He had not known it was there, buried under his aunt's belongings. RP 156-57. He had planned to take the items in

the seat to his aunt's storage unit and had not looked through all of them. RP 156-58, 161.

Mr. Schlangen had previously lost his firearm rights due to a felony conviction. *See* RP 21, 159. The prosecutor charged him with one count of unlawful possession of a firearm in the second degree. CP 1-2.

At trial, Mr. Schlangen's attorney requested a jury instruction on unwitting possession, which he had modified from WPIC 52.01. RP 166-67; *see* Special Defenses—Uniform Controlled Substances Act, 11 Wash. Prac., Pattern Jury Instr. Crim. ["WPIC"] 52.01 (4th Ed). The trial court provided this instruction to the jury, with no objection by the State. RP 166-67; CP 37.

Jury instruction number 11 read:

A person is not guilty of unlawful possession of a firearm in the second degree if the possession is unwitting. Possession of a firearm is unwitting if a person did not know that the firearm was in his possession.

The burden is on the defendant to prove by a preponderance of the evidence that the firearm was possessed unwittingly. Preponderance of the evidence means that you must be persuaded,

considering all the evidence in the case, that it is more probably true than not.

CP 37 (emphasis added).

This instruction shifted the government's burden to prove the knowledge element to the defense. Mr. Schlangen's attorney argued the shifted burden to the jury. RP 187. The prosecutor did so as well in closing:

Now, the defense unwitting possession requires that the defendant prove by a preponderance of the evidence. So, to a certain extent the burden shifts.... Fifty-one percent, more likely than not.... [I]t's ... upon the defendant to prove it.

RP 183.

He continued:

[W]hen you think about preponderance of the evidence, you know, proving something, you know, where's his aunt?

RP 184.

He then referred it again:

Apply your common sense. He hasn't met the burden o[f] proof by a preponderance of the evidence.

RP 185.

Then he did so yet again:

The defendant's burden by a preponderance to prove that it was unwitting...

RP 188.

According to the sergeant, Mr. Schlangen's vehicle had been "absolutely packed" with items, including clothes, boxes, and tools, as well as the firearm. RP 129-30. Over two months before trial, Mr. Schlangen informed the court he would be calling his aunt to testify that she had owned the car and that she owned the contents of the vehicle. RP 14; Supp. CP __ (Sub No. 31).

On the morning of trial, Mr. Schlangen informed the court his only witness – his aunt, Ms. Sorenson – would not appear because of her two outstanding warrants. RP 35. Mr. Schlangen had learned about this situation from the prosecutor, who confirmed Ms. Sorenson's two warrants to the court. *Id.* The court stated it would "pick her up on any warrant," but would not handle the issue in the jury's presence. RP 35-36.

Ms. Sorenson did not come to court or testify. The jury was not told she was absent to avoid arrest. In the prosecutor's closing argument, he suggested Mr. Schlangen would have called her to testify if she would have corroborated Mr. Schlangen's testimony:

[W]here's his aunt? His aunt could have said it was my gun. I left it in the car, but we didn't hear that.

RP 184.

He then reiterated this again:

That somehow, he says... [m]y aunt owns the gun, but we don't have the aunt's testimony.

RP 188.

He repeated the suggestion again:

[I]f you didn't know you had possession of the gun, we could have heard from the aunt, but we didn't.

RP 189.

Mr. Schlangen's attorney did not object to the prosecutor's burden shifting or missing witness arguments. The jury voted to convict Mr. Schlangen as charged. RP 193.

E. ARGUMENT

1. Defense counsel's incompetent and unreasonable representation denied Mr. Schlangen his right to effective assistance of counsel.

Unlawful possession of a firearm charges require the government to prove the element of knowledge beyond a reasonable doubt. Here, Mr. Schlangen's attorney proposed an unwitting possession instruction requiring the defense to prove lack of knowledge, reducing the government's burden. This was deficient performance. It prejudiced Mr. Schlangen and a new trial should be granted.

a. A person accused of a crime has the right to effective assistance of counsel.

The right to effective counsel is “a bedrock principal in our justice system” and “the foundation for our adversary system.” *Martinez v. Ryan*, 566 U.S. 1, 12, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012); U.S. Const. amend. VI, XIV; Const. art. I, § 22. Only “effective assistance” can satisfy the right. *Missouri v. Frye*, 566 U.S. 134, 138, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012) (citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

An attorney renders constitutionally inadequate representation when there is no legitimate strategic or tactical reason for conduct that prejudices the accused. *State v. Grier*, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011). While an attorney's decisions are treated with deference, and her competence is presumed, her actions must be reasonable based on all circumstances. *Wiggins v. Smith*, 539 U.S. 510, 533-34, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *State v. Tilton*, 149 Wn.2d 775, 785, 72 P.3d 735 (2003). Even if defense counsel had strategic or tactical reasons for her actions, the "relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000); *Strickland*, 466 U.S. at 688.

"[E]ffective representation entails certain basic duties, such as the overarching duty to advocate the defendant's cause and the more particular duty to assert such skill and knowledge as will render the trial a reliable adversarial testing process." *State v. Crow*, 8 Wn. App. 2d 480, 507, 438

P.3d 541 (2019). It is deficient to fail to object without a valid strategic reason, when “the objection would likely have succeeded.” *Id.* at 508-09.

A new trial is required when counsel’s performance falls below an objective standard of reasonableness and prejudice results. *State v. A.N.J.*, 168 Wn.2d 91, 109, 119-20, 225 P.3d 956 (2010) (citing *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995)).

Ineffective assistance of counsel claims are of constitutional magnitude and may be raised for the first time on appeal. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). When defense counsel proposes an instruction misstating the law and reducing the government’s burden of proof, the Court may such an error may be reviewed for the first time on appeal. *Id.*

b. Defense counsel had no legitimate strategic purpose and was unreasonable in proposing a jury instruction that lowered the State’s burden.

“Instructions must convey to the jury that the State bears the burden of proving every essential element of a

criminal offense beyond a reasonable doubt.” *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007) (citing *Victor v. Nebraska*, 511 U.S. 1, 5-6, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)). Reversible error occurs when the court instructs the jury in a way that relieves the government’s burden. *Id.* (citing *Sullivan v. Louisiana*, 508 U.S. 275, 280–81, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)). “[W]hen a defense necessarily negates an element of the crime, it violates due process to place the burden of proof on the defendant.” *State v. W.R., Jr.*, 181 Wn.2d 757, 765, 336 P.3d 1134 (2014) (holding in a rape case that consent negated the element of forcible compulsion).

Thus, a defense attorney performs deficiently if he or she proposes an instruction that lowers the State’s burden of proof on an element. “Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.” *Kyllo*, 166 Wn.2d at 862. “There is no legitimate strategic reason” for a defense attorney to permit “an instruction that incorrectly states the law and lowers the State’s burden of proof.” *In re Wilson*, 169 Wn. App. 379, 391, 279 P.3d 990

(2012) (citing *Kyllo*, 166 Wn.2d at 869). Jury instructions, “read as a whole, ‘must make the relevant legal standard manifestly apparent to the average juror.’” *Kyllo*, 166 Wn.2d at 864 (quoting *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)).

In *Kyllo*, defense counsel had proposed an “act on appearances” pattern instruction which was erroneous; it “lowered the State’s burden of proof” by increasing Mr. *Kyllo*’s burden on self-defense. *Kyllo*, 166 Wn.2d at 863-64. The Court held the attorney’s performance was deficient for failing to discover relevant law invalidating the instruction; this “fell below an objective standard of reasonableness.” *Id.* at 866-69 (quoting *McFarland*, 127 Wn.2d at 334–35).

In *Wilson*, defense counsel had proposed an “accomplice liability” pattern instruction. *Wilson*, 169 Wn. App. at 387. The instruction was erroneous; it departed from the statutory definition by creating liability for having abetted the actor in “a crime,” rather than “the crime.” This “unconstitutionally

relieved the State of the burden of proving Wilson's knowing participation in 'the' crime." *Id.* at 390.

In both *Kyllo* and *Walden*, "the jury was properly instructed in part" regarding the defendant's self-defense claim. *Kyllo*, 166 Wn.2d at 864; *Walden*, 131 Wn.2d at 475. However, in *Walden* and in again *Kyllo*, the Court found that partially proper instruction did not correct for an error in an ancillary instruction that misstated the government's burden and "allowed the jury to apply an incorrect standard." *Kyllo*, 166 Wn.2d at 865; *Walden*, 131 Wn.2d at 478 ("[T]he rule requiring instructions to be considered as a whole does not save th[is] internally inconsistent instruction.... '[When] an inconsistency is the result of a clear misstatement of the law, the misstatement must be presumed to have misled the jury in a manner prejudicial to the defendant.'" (quoting *State v. Wanrow*, 88 Wn.2d 221, 239, 559 P.2d 548 (1977))).

The charge of unlawful possession of a firearm requires the State to prove a defendant knowingly possessed or owned a firearm; it has a mens rea element. *State v. Anderson*, 141

Wn.2d 357, 359, 5 P.3d 1247 (2000); WPIC 133.02.02.

Conversely, possession of a controlled substance is a crime with no mens rea element. *See State v. Riker*, 123 Wn.2d 351, 368, 869 P.2d 43 (1994). With a possession of controlled substance charge, the defense bears the burden of proving unwitting possession by a preponderance of the evidence. *Id.*

Here, Mr. Schlangen's attorney proposed, and the trial court gave, a jury instruction on unwitting possession of a firearm. RP 166-67; CP 37. This instruction was crafted from WPIC 52.01, the instruction for unlawful possession of a controlled substance. RP 166-67; *see* WPIC 52.01. The instruction stated "[t]he burden is on the defendant to prove by a preponderance of the evidence that the firearm was possessed unwittingly." CP 37.

Instruction no. 11 constituted a "clear misstatement of the law," improperly shifting the burden of proof to Mr. Schlangen and reducing the government's burden to prove every element beyond a reasonable doubt. *Walden*, 131 Wn.2d at 478 (quoting *Wanrow*, 88 Wn.2d at 239); *see Kylo*, 166

Wn.2d at 864-65; *W.R.*, 181 Wn.2d at 765. It was a violation of due process to place the burden on Mr. Schlangen to prove a defense that “necessarily negate[d]” the knowledge element of the crime charged. *W.R.*, 181 Wn.2d at 765.

The jury received partially proper instruction on the government’s burden in the to-convict and reasonable doubt instructions. *See* CP 29, 33. However, this instruction “allowed the jury to apply an incorrect standard” which was patently erroneous. *Kyllo*, 166 Wn.2d at 865; *see Anderson*, 141 Wn.2d at 359. The “inconsistency [was] the result of a clear misstatement of the law, [thus] the misstatement must be presumed to have misled the jury in a manner prejudicial to” Mr. Schlangen. *Walden*, 131 Wn.2d at 478 (quoting *Wanrow*, 88 Wn.2d at 239).

Mr. Schlangen’s attorney submitted three other erroneous instructions, further demonstrating his general failure to research the law and prepare for adequately for trial. He proposed an insufficient definitional instruction that omitted the essential “knowing” element preceding “has a

firearm in his possession.” CP 15. The judge gave that erroneous instruction and omitted this second instance of “knowing” in his oral instructions; defense counsel failed to object. CP 32 (“knowingly owns a firearm or ___ has a firearm in his possession”); RP 174; *see Crow*, 8 Wn. App. 2d at 508-09. He submitted an incorrect verdict form, noted as error by the court. RP 146. He also proposed an outdated version of WPIC 1.02 that omitted the newer anti-bias language. CP 10. The court gave this outdated version. CP 26.¹

Defense counsel also failed to object to the State’s improper closing argument, increasing Mr. Schlangen’s burden on appeal to show prosecutorial misconduct. *See Crow*, 8 Wn. App. 2d at 508-09; RP 184, 188, 189.

The performance of Mr. Schlangen’s attorney “fell below an objective standard of reasonableness.” *Kyllo*, 166 Wn.2d at 868. (quoting *McFarland*, 127 Wn.2d at 334–35). He

¹ Missing text: “You are also the sole judges of the value or weight to be given to the testimony of each witness. In assessing credibility, you must avoid bias, conscious or unconscious, including bias based on religion, ethnicity, race, sexual orientation, gender or disability.” WPIC 1.02, Conclusion of Trial—Introductory Instructions.

failed in his duty “to research or apply relevant law,” which was deficient performance. *Id.* any published cases, including *Walden, W.R.*, and *Kyllo* would have shown him instruction no. 11 was erroneous. *See id.* at 865-88. It should also have given him pause that the unwitting possession defense does not exist for crimes requiring knowledge and conflicts with other instructions for the charge, such as the reasonable doubt and to-convict instructions. *See id.* ; CP 29, 33. Mr. Schlangen’s attorney failed in his “duty to assert such skill and knowledge as [would] render the trial a reliable adversarial testing process,” making the case substantially easier for the State to prove. *Crow*, 8 Wn. App. 2d at 507.

By proposing instruction no. 11, Mr. Schlangen’s counsel invited multiple errors that violated Mr. Schlangen’s right to a fair trial: the court’s instruction itself and the State’s emphasis of its reduced burden of proof in closing argument. *See Kyllo*, 166 Wn.2d at 869; *W.R.*, 181 Wn.2d at 765; RP 183, 184, 185, 188. There was “no legitimate strategic reason for” counsel’s actions. *Wilson*, 169 Wn. App. at 391; *see*

Kyllo, 166 Wn.2d at 869. Such performance was unreasonable and deficient. *See A.N.J.*, 168 Wn.2d at 109.

Proposing instruction no. 11 was clear error and counsel's other incorrect instructions and failure to object to improper argument were also objectively unreasonable, lacking a legitimate strategic purpose. *See Grier*, 171 Wn.2d at 33-34; *Wiggins*, 539 U.S. at 533-34; *Flores–Ortega*, 528 U.S. at 481. Mr. Schlangen's attorney provided deficient representation.

c. Defense counsel's deficient performance prejudiced Mr. Schlangen's right to a fair trial.

A person is prejudiced by her attorney's deficient performance if there is a reasonable probability of a different outcome absent the deficient performance, but the defense need not show counsel's conduct altered the result of the case. *Tilton*, 149 Wn.2d at 784. "[A] 'reasonable probability' is lower than a preponderance standard," and reflects "a probability sufficient to undermine confidence in the outcome." *State v. Lopez*, 190 Wn.2d 104, 116, 410 P.3d 1117 (2018) (internal citations omitted) (quoting *Strickland*, 466 U.S. at 694).

A court may find prejudice in an ineffective assistance of counsel claim when the cumulative impact of multiple deficiencies prejudiced the defendant, even if on its own, no individual error would have required reversal. *Harris By & Through Ramseyer v. Wood*, 64 F.3d 1432, 1438-39 (9th Cir. 1995) (reversing for cumulative error).

In *Kyllo*, there was conflicting testimony at trial, potentially justifying a self-defense claim. *Kyllo*, 166 Wn.2d at 869. The erroneous instruction and counsel's argument may have convinced the jury Mr. Kyllo "was not entitled to claim self-defense." *Id.* The Court reversed, holding "a reasonable probability [existed] that but for counsel's deficient performance[,] the outcome of the proceedings would have been different." *Id.* at 870.

Here, there was conflicting evidence regarding whether Mr. Schlangen knew the firearm was in his car. He told the sergeant and testified at trial that he had bought the car from his aunt the night before and he had not known the gun was buried under his aunt's belongings. RP 129, 156. He testified

he was taking the items in the car to his aunt's storage unit and had not looked through all of them. RP 160-61. The sergeant testified the gun was not visible until the items burying it were moved, and that he found an ammunition case in Mr. Schlangen's pocket. RP 18-19.

Mr. Schlangen had expected his aunt to testify that the gun and the items burying it were hers. RP 14. However, she did not appear at trial because she had two warrants and did not want to be arrested. RP 35.

In this trial, knowledge was the sole contested element. *See* RP 183-86, 88. Lack of knowledge was Mr. Schlangen's only defense; his attorney conceded the other elements and stated the defense was "whether or not Mr. Schlangen knowingly possessed that firearm." RP 186.

The State's closing argument focused on knowledge, dismissing the other elements as conceded. *See* RP 183 ("So then, the question becomes unwitting possession."). He enthusiastically endorsed the erroneous instruction no 11, repeatedly referring to Mr. Schlangen's burden to prove lack

of knowledge. *See Kyllö*, 166 Wn.2d at 869 (listing fact that both counsel argued an incorrect standard of law as a factor in finding prejudice); RP 183, 184, 185, 188.²

The trial court and the both attorneys' arguments uniformly and repeatedly instructed the jury that Mr. Schlangen had the burden to prove the lack of this essential element. The conflicting evidence on knowledge and the strong emphasis placed on the erroneous burden "undermine confidence in the outcome" of the trial. *Lopez*, 190 Wn.2d at 116; *Kyllö*, 166 Wn.2d at 869. There is "a reasonable probability ... that but for counsel's deficient performance[,] the outcome of the proceedings would have been different." *Kyllö*, 166 Wn.2d at 870; *see Tilton*, 149 Wn.2d at 784.

Further, counsel's additional instructional errors and his failure to object to misconduct further contribute to a

² RP 183 ("Now, the defense unwitting possession requires that the defendant prove by a preponderance of the evidence. So, to a certain extent the burden shifts.... Fifty-one percent, more likely than not.... [I]t's upon the defendant to prove it.")

RP 184 ([W]hen you think about preponderance of the evidence, you know, proving something, you know, where's his aunt?").

RP 185 ("Apply your common sense. He hasn't met the burden of [f] proof by a preponderance of the evidence.")

RP 188 ("The defendant's burden by a preponderance to prove....").

reasonable probability that his deficient performance affected the verdict. *See Harris*, 64 F.3d at 1438-39. The cumulative impact of these deficiencies prejudiced Mr. Schlangen; he did not receive constitutionally adequate representation. *See id.*

The Court should reverse Mr. Schlangen's conviction and remand for a new trial with competent counsel who does not violate his due process rights. *See Kyllö*, 166 Wn.2d at 871.

2. The prosecutor committed ill-intentioned, flagrant misconduct by deliberately misleading the jury, in violation of Mr. Schlangen's right to a fair trial.

The prosecutor deliberately misled the jurors by suggesting a potential defense witness was absent because she would not corroborate Mr. Schlangen's defense. The prosecutor knew the real reason was that she would be arrested by the court if she were to appear. This was ill intentioned and flagrant misconduct. A new trial should be granted.

a. The prosecution may not use improper tactics to deny an accused person a fair trial.

Trial proceedings must not only be fair, they must “appear fair to all who observe them.” *Wheat v. United States*, 486 U.S. 153, 160, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988); U.S. Const. amend. VI, XIV; Const. art. I, §§ 3, 22.

Prosecutors play a central and influential role in protecting the fundamental fairness of the criminal justice system, and have a duty to ensure a defendant’s rights are upheld at trial. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551, 555 (2011). “A prosecutor ... functions as the representative of the people in a quasijudicial capacity in a search for justice.” *Id.* Prosecutors have a duty to act impartially and to seek a verdict based upon reason. *State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993); *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968).

As a representative of the State, the prosecutor’s “interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed.

1314 (1935). The State has a “duty to refrain from improper methods.” *Id.* A prosecutor “has a special duty not to mislead.” *United States v. Universita*, 298 F.2d 365, 367 (2d Cir. 1962); *see State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). It is improper for prosecutor to misrepresent issues to the jury; the government has a “special duty not to impede the truth.” *U.S. v. Reyes*, 577 F.3d 1069, 1077 (9th Cir. 2009).

Prosecutorial misconduct may deprive the accused of his or her constitutional right to a fair trial. *In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012); *Monday*, 171 Wn.2d at 676-77. To establish reversible misconduct, the defense must show the prosecutor engaged in improper, prejudicial conduct. *Glasmann*, 175 Wn.2d at 704.

b. The prosecutor intentionally misled the jury about why a witness was absent.

In the instant case, the State misled the jury about the reason for Sandra Sorenson’s absence. The prosecutor had known for months that Ms. Sorenson would testify as to “her ownership of the vehicle and the contents,” including the gun found in the vehicle. RP 14. The prosecutor had sufficient

opportunity to interview her and put her on his own witness list, were her testimony likely to favor his case over Mr. Schlangen's. RP 14; Supp. CP __ (Sub No. 31). Nothing in the record suggests Mr. Schlangen at any point had changed his mind about wanting Ms. Sorenson to testify.

The prosecutor also knew before the court convened the day of trial that Ms. Sorenson had two warrants. RP 35. That morning, Mr. Schlangen informed the court that she would not appear due to the warrants. *Id.* The State confirmed the warrants, and Ms. Sorenson did not testify after the court said it would "pick her up on any warrant." RP 35-36.

Despite his knowledge of the circumstances, the prosecutor repeatedly argued to the jury in closing that Mr. Schlangen would have presented Ms. Sorenson's testimony if it would have corroborated his own explanation. *See* RP 184 ("[W]here's his aunt? His aunt could have said it was my gun. I left it in the car, but we didn't hear that."); RP 188 ("[H]e says... [m]y aunt owns the gun, but we don't have the aunt's testimony."); RP 189 ("[I]f [he] didn't know [he] had

possession of the gun, ... we could have heard from the aunt, but we didn't.”).

The prosecutor violated his duty to act impartially. *See Echevarria*, 71 Wn. App. at 598; *Huson*, 73 Wn.2d at 663. He was required to have no interest in winning a case, and forbidden to use improper means to do so, yet he did so. *See Berger*, 295 U.S. at 88. Particularly given his status “as the representative of the people in a quasijudicial capacity in a search for justice,” it was improper for the prosecutor to deliberately mislead the jury and use artifice to improve his own odds of winning the trial. *Monday*, 171 Wn.2d at 676; *see Berger*, 295 U.S. at 88; *Universita*, 298 F.2d at 367; *Davenport*, 100 Wn.2d at 763.

c. The prosecutor's ill intentioned, flagrant misconduct is substantially likely to have affected the verdict and could not have been cured by an instruction.

The prosecutor repeatedly and willfully misled the jury about why a witness was absent to strengthen his case. This error prejudiced Mr. Schlagen's right to a fair trial.

To establish prejudice, the defense must “show a substantial likelihood that the misconduct affected the jury verdict.” *Glasmann*, 175 Wn.2d 704; *State v. Lindsay*, 180 Wn.2d 423, 440, 326 P.3d 125 (2014). In this analysis, courts must consider the improprieties in the context of the entire case, including arguments, issues, and evidence as a whole. *State v. Walker*, 182 Wn.2d 463, 477, 341 P.3d 976 (2015); *State v. Allen*, 182 Wn.2d 364, 376, 341 P.3d 268 (2015) (court must consider cumulative effect of repetitive misconduct).

A prosecutor “carries a special aura of legitimacy” as a representative of the government. *United States v. Bess*, 593 F.2d 749, 755 (6th Cir. 1979). A “prosecutor’s opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government’s judgment rather than its own.” *United States v. Young*, 470 U.S. 1, 18-19, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985). The prosecution’s “position of public trust and experience in criminal trials may induce the jury to accord some unwarranted weight to” the prosecutor’s

opinions regarding the evidence. *United States v. Splain*, 545 F.2d 1131, 1135 (8th Cir. 1976).

However, the Court’s determination of prejudice “does not rely on a review of sufficiency of the evidence.” *Walker*, 182 Wn.2d at 479 (citing *Glasmann*, 175 Wn.2d at 711 (“The focus must be on the misconduct and its impact, not on the evidence that was properly admitted.”)). To do so would disregard our constitutional mandate that convictions may stand “only when the State proves guilt beyond a reasonable doubt as determined by an *impartial jury* based on evidence presented at a *fair trial*.” *Id.* at 480 (emphasis added).

A defendant’s “failure to object will not prevent a reviewing court from protecting a defendant’s constitutional right to a fair trial.” *Walker*, 182 Wn.2d at 477 (reversing conviction for misconduct despite absence of defense objection). Even without an objection, misconduct requires reversal when it is “so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice.” *Lindsay*, 180 Wn.2d at 430; *Glasmann*, 175 Wn.2d at 704.

This Court must consider the case as a whole in assessing prejudice to Mr. Schlangen. *See Walker*, 182 Wn.2d at 477. First, Mr. Schlangen's knowledge of a gun hidden in the over-stuffed car was the one element at issue. RP 183-86, 88. He had expected his aunt to testify to her ownership of the gun and the items concealing it. RP 14.

Second, the State's misleading argument suggested not only that Mr. Schlangen was lying about what his aunt would say, but also that he had a burden to call his aunt as a witness. *See* RP 184, 188, 189. This overlapped with and compounded his improper arguments shifting the burden on the issue of knowledge, *see* RP 183, 184, 185, 188, magnifying the effect of defense counsel's proposal of the erroneous jury instruction no. 11. These errors worked together to make this trial unfair to Mr. Schlangen.

Third, the prosecutor repeatedly insisted in closing argument that Mr. Schlangen would have called Ms. Sorenson as a witness had she supported his defense, implying Mr. Schlangen was lying. *See* RP 184, 188, 189. The

repetitive nature of this improper argument likely had a cumulative effect greater than the effect of saying it once. *See Allen*, 182 Wn.2d at 376.

Fourth, given the State's authority, it is likely the jurors gave ample or unwarranted credence to its improper argument. *See Young*, 470 U.S. at 18-19; *Bess*, 593 F.2d at 755; *Splain*, 545 F.2d at 1135.

Finally, the repeated misleading statements were conveyed to the jury along with the other errors in closing argument and instruction right before the jury deliberated. *See Walker*, 182 Wn.2d at 479. The statements were prejudicial. *See id.* There is a substantial likelihood this repetitive misconduct affected the trial's outcome. *See Glasmann*, 175 Wn.2d at 710.

Mr. Schlangen's attorney did not object to the State's deliberate deception, performing deficiently, but this Court must still protect Mr. Schlangen's right to a fair trial. *See Walker*, 182 Wn.2d at 477.

The State intentionally misled the jury; deliberate deception is inherently ill intentioned. Employing improper, deceptive tactics to win a case when its duty is to seek justice and have no interest in winning is flagrant misconduct. *See Berger*, 295 U.S. at 88. Given the repetition, the focus on the sole contested issue, and the connection to burden-shifting errors, an instruction would not have cured it. *See Glasmann*, 175 Wn.2d at 707. This Court should reverse and remand for a new trial. *See Monday*, 171 Wn.2d at 676.

F. CONCLUSION

Improper actions by both attorneys worked together to deny Mr. Schlangen a fair trial. His conviction should be reversed and a new trial with competent counsel ordered.

DATED this 16th day of September 2019.

Respectfully submitted,



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