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NO. 36936-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

LISA MUNRO,
Appellant.

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

Lincoln County Cause No. 19-1-00013-6

The Honorable John F. Strohmaier, Judge

BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. Ms. Munro was denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Ms. Munro's attorney provided ineffective assistance of counsel by failing to conduct necessary investigation into her case.
3. Ms. Munro was prejudiced by her attorney's deficient performance.

ISSUE 1: The constitutional right to counsel requires a defense attorney to conduct investigation into a case, as necessary to evaluate the strength of the state's evidence and to mount a defense. Did Ms. Munro's defense attorney provide ineffective assistance of counsel by failing to investigate her bank records when those records were necessary to weigh the strength of the state's case and would have strongly corroborated Ms. Munro's testimony and the defense theory?

4. The trial court violated Wash. Const. art. IV, § 16 by making an improper judicial comment on the evidence.
5. The judge's comment on the evidence at Ms. Munro's trial requires reversal of her conviction.

ISSUE 2: The Washington constitution prohibits a trial judge from making a statement to the jury that communicates his/her opinion on the truth value of the evidence or attitude toward the merits of the case. Did the judge at Ms. Munro's trial make an improper comment on the evidence by making a statement to the jury that undermined Ms. Munro's credibility and aligned the court with the state's theory of the case?

6. Prosecutorial misconduct deprived Ms. Munro of her Fourteenth Amendment right to a fair trial.
7. Prosecutorial misconduct deprived Ms. Munro of her Wash. Const. art. I, § 22 right to a fair trial.
8. The prosecutor committed misconduct at Ms. Munro's trial by "testifying" to "facts" that had not been admitted into evidence.
9. Ms. Munro was prejudiced by the prosecutor's improper argument.
10. The prosecutor's misconduct was flagrant and ill-intentioned.

ISSUE 3: A prosecutor commits misconduct by injecting “facts” that have not been admitted into evidence into closing argument. Did the prosecutor commit misconduct at Ms. Munro’s trial by arguing un-admitted “facts” that directly undermined Ms. Munro’s testimony?

11. The cumulative effect of the errors at Ms. Munro’s trial deprived her of her Sixth and Fourteenth Amendment right to a fair trial.
12. The cumulative effect of the errors at trial requires reversal of Ms. Munro’s conviction.

ISSUE 4: The cumulative effect of errors during a trial can require reversal when, taken together, they deprive the accused of a fair trial. Does the doctrine of cumulative error require reversal of Ms. Munro’s conviction when ineffective assistance of counsel, an improper judicial comment on the evidence, and prosecutorial misconduct all led the jury to be deprived of critical defense evidence and informed of un-admitted “facts” and the judge’s personal opinion regarding the key factual issue in the case?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Lisa Munro volunteered as a host to a total of five foreign exchange students in her home over the course of two years. RP 106. She provided those students with room and board with no expectation of repayment. RP 165. One of the students told the court that Ms. Munro “opened her home and heart” to the exchange students. RP 145.

One of the exchange students who lived with Ms. Munro was K.N., a sixteen-year-old from Vietnam. RP 117-18. After K.N. misplaced a large amount of cash that he had brought with him to the United States,¹ his parents wired \$600 dollars to Ms. Munro’s bank account. RP 123, 168. Ms. Munro gave K.N. \$300 dollars in cash but he asked her to hold on to the rest of the money until he asked for it. RP 169.

K.N. never asked Ms. Munro to give him the rest of the \$600. RP 171. Instead, he alleged that Ms. Munro had stolen it from him. *See* RP 123-25. The state charged Ms. Munro with third degree theft. CP 8-9.

At trial, K.N. testified that Ms. Munro told him that she needed to go to a bank branch in Spokane before she could give him the remainder of his \$600. RP 124. He said that she went to Spokane several times but never gave him the rest of the cash. RP 124-25.

¹ K.N. alleged that Ms. Munro had stolen the misplaced money, but the jury acquitted her of that charge. *See* RP 120-22; CP 36.

K.N. testified that Ms. Munro had only given him \$200 in cash, but his written statement said that she had given him \$300. RP 132.

K.N. did not testify one way or the other regarding whether he had asked Ms. Munro to hold on to the rest of his money until he asked her for it. *See* RP 117-39. He just said that he never got the rest of the \$600. RP 125.

Two other exchange students testified for the state but neither of them said anything about the \$600. RP 142-55.

Ms. Munro testified that she never gave K.N. the remainder of the \$600 because he never asked her for it. RP 171. She said that she would have been happy to give him the money at any time, but she was not allowed to do so after the charges were filed because a no-contact order was put in place, barring her from getting in touch with him. RP 171.

In response to this line of testimony, during closing, the prosecutor argued that Ms. Munro would have been able to give the money to K.N. if she had really wanted to:

Well, she could have given it to him in January, February, March and then the court case started and she said she's not allowed. That's not exactly true. There are ways. If she really wanted to give him that money, she could have found a way. She could have given the money to her attorney to give to him. She could have asked the Court.
RP 203.

Ms. Munro's defense attorney objected, noting that the rules would have prevented her from contacting K.N. through a third party once the no-contact order was in place. RP 203.

In response, the judge informed the jury that: "Although the evidence not (sic) presented but asking the Court would be an option." RP 203.

The prosecutor seized on that comment from the judge, arguing repeatedly to the jury that Ms. Munro could have given the rest of the money to K.N., if she had wanted to. *See* RP 203, 221.

The jury convicted Ms. Munro of third-degree theft. CP 37.

Later, at sentencing, the judge expressed an interest in reducing Ms. Munro's sentence if she could prove that she actually did keep the remainder of K.N.'s \$600 in her bank account the entire time, rather than converting it to her own use. RP 253.

Ms. Munro was able to provide bank records proving that that the remainder of the money that K.N.'s parents had wired to her had remained in her account and was, in fact, still there. *See* RP 264-70, 273-74. She had to obtain those bank records on her own, after the trial was completed. *See e.g.* RP 264, 267-68, 270, 274. It was apparent at the hearing that Ms. Munro's defense attorney had never seen her bank records before the time of sentencing. RP 264.

The judge expressed surprise at the evidence that Ms. Munro had not converted the remainder of the \$600 for her own use and, as a result, reduced her sentence by more than half. RP 273-74.

This timely appeal follows. CP 46.

ARGUMENT

I. MS. MUNRO’S DEFENSE ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO CONDUCT NECESSARY INVESTIGATION. ADEQUATE INVESTIGATION WOULD HAVE UNCOVERED SIGNIFICANT EXCULPATORY EVIDENCE, WHICH THE JURY DID NOT OTHERWISE HAVE THE OPPORTUNITY TO CONSIDER.

During sentencing, the judge stated that he would be willing to reduce Ms. Munro’s sentence if she could provide documents proving that she had the remainder of K.N.’s \$600 in her bank account since she received it, rather than having spent that money herself. RP 253.

As a result of this exchange, Ms. Munro obtained copies of bank records demonstrating that the remaining money was, in fact, waiting in her account the entire time. *See e.g.* RP 264, 267-68, 270, 274.

Defense counsel never obtained those records on his own and had not seen them until after trial was finished. *See e.g.* RP 264, 267-68, 270, 274. This was true even though the entire theory of the defense to the third-degree theft charge was that Ms. Munro had simply held onto the rest of K.N.’s money for him until he asked for it. *See* RP 171.

Because defense counsel never investigated Ms. Munro’s bank records, the jury did not have the advantage of those records, which significantly corroborated Ms. Munro’s testimony and the defense theory of the case. *See RP generally*. Defense counsel provided ineffective assistance of counsel by failing to conduct necessary investigation into Ms. Munro’s case.

The state and federal constitutions both protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; art. I, § 22; *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015) (*Jones I*).² In order to demonstrate ineffective assistance of counsel, the accused must show deficient performance and prejudice. *Id.* Performance is deficient if it falls below an objective standard of reasonableness. *Id.* The accused is prejudiced by counsel’s deficient performance if there is a reasonable probability that counsel’s mistakes affected the outcome of the proceedings. *Id.*

A “reasonable probability” under the prejudice standard for ineffective assistance requires less than the preponderance of the evidence standard. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017); *State v. Lopez*, 190 Wn.2d 104, 116, 410 P.3d 1117 (2018). Rather, a reasonable

² Ineffective assistance of counsel claims are reviewed *de novo*. *Jones*, 183 Wn.2d at 338.

probability “is a probability sufficient to undermine confidence in the outcome.” *Id.*; *see also Jones I*, 183 Wn.2d at 339.

The right to the effective assistance of counsel includes the right to reasonable investigation by counsel. *Lopez*, 190 Wn.2d at 116 (*citing State v. Boyd*, 160 Wn.2d 424, 434, 158 P.3d 54 (2007); *Strickland v. Washington*, 466 U.S. 668, 684, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Jones I*, 183 Wn.2d at 339–40). Reasonable investigation requires looking to the merits of the state’s case and possible defenses. *See State v. Fedoruk*, 184 Wn. App. 866, 880, 339 P.3d 233 (2014).

The presumption that defense counsel’s conduct meets constitutional muster is rebutted if “no conceivable legitimate tactic explains counsel’s performance.” *Fedoruk*, 184 Wn. App. at 880 (*quoting State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). Likewise, any strategic choices made “after less than complete investigation” are permissible only “to the extent that reasonable professional judgments support the limitations on investigation.” *Id.* (*quoting Strickland* 466 U.S. at 690-91).

Accordingly, a defense attorney has a duty to “make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Id.* (*quoting Strickland*, 466 U.S. at 691); *See also Jones I*, 183 Wn.2d at 340; *Estes*, 188 Wn.2d at 462–63 (“A

defendant can overcome the presumption of effective representation by demonstrating that counsel failed to conduct appropriate investigations”).

The degree and extent of constitutionally required defense investigation “will vary depending on the issues and facts of each case.” *State v. A.N.J.*, 168 Wn.2d 91, 110–12, 225 P.3d 956 (2010). But, at the very least, defense counsel must conduct the level of investigation necessary to “reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial...” *Id.* Defense counsel must also conduct any investigation necessary to uncover readily-apparent evidence which may be helpful to the defense. *See e.g. Jones I*, 183 Wn.2d 327.

In Ms. Munro’s case, defense counsel failed to investigate the bank records regarding: the wiring of the \$600 into Ms. Munro’s account by K.N.’s parents; the withdraw of part of that amount, which Ms. Munro gave to K.N. in cash; or the fact that the remainder of the money remained in Ms. Munro’s account up until the time of sentencing.³

³ It is not clear from the record what, if any, investigation defense counsel conducted into the facts of Ms. Munro’s case. But it is clear that Ms. Munro had to obtain the relevant bank records on her own (without the help of counsel), which did not happen until the time of sentencing. *See e.g.* RP 264, 267-68, 270, 274. It is also clear that defense counsel had not seen those records until Ms. Munro gave them to him, shortly before sentencing. RP 264.

The record is sufficient to conclude that Ms. Munro’s defense attorney did not conduct the investigative step of obtaining her bank records. *See Fedoruk*, 184 Wn. App. at 881 (concluding that the record was sufficient to review a failure to investigate claim in that case

(Continued)

As a result, defense counsel did not know whether his theory of the defense – that Ms. Munro had simply been keeping the money for K.N. until he asked for it -- was supported by those records or not. Had counsel conducted the investigation, however, he would have uncovered strong evidence, wholly corroborating Ms. Munro’s testimony that she had not converted K.N.’s money to her own use. Counsel’s failure to conduct any investigation into those critical bank records was not reasonable. Without knowing what the records contained, Ms. Munro’s attorney was unable to reasonably evaluate the strength of the state’s evidence or of his own defense theory. *Jones I*, 183 Wn.2d 327.

While the presentation of Ms. Munro’s bank records to the jury would also have corroborated the fact that \$600 had been wired into Ms. Munro’s account in the first place, Ms. Munro readily admitted that fact at trial. RP 168. There was no legitimate strategic justification for counsel’s failure to investigate Ms. Munro’s bank records. Without conducting adequate investigation, defense counsel was unable to make an informed decision regarding whether to offer Ms. Munro’s bank records into evidence or not. More importantly, however, the lack of adequate investigation in this case deprived the jury (and Ms. Munro) of the benefit

because it was apparent that defense counsel had *not* done, even though there was no record indicating that investigation he *had* done).

of the evidence, which strongly corroborated Ms. Munro's testimony and her theory of the defense.

Ms. Munro's defense attorney provided deficient performance by failing to conduct necessary investigation into his client's relevant bank records.

Failure to investigate results in prejudice to the accused when it results in failure to uncover readily available evidence that would have corroborated the defense theory of the case. *See e.g. Jones I*, 183 Wn.2d at 341–42. This is particularly true when the case “involves a credibility contest.” *Id.* at 344.

In Ms. Munro's case, the third-degree theft charge hinged on the credibility of K.N.'s testimony (that Ms. Munro said she would give him the rest of the \$600 but never did) versus Ms. Munro's testimony (that she was simply waiting for K.N. to ask for the remainder of the money). RP 124-25, 171. There was no other evidence – from either the state or the defense – regarding the charge. *See RP generally*. The case was a pure “credibility contest.”

The other evidence against Ms. Munro was also far from overwhelming. K.N. changed his story regarding how much cash Ms. Munro had given him initially. RP 132. He also did not testify one way or another regarding whether he had, in fact, asked Ms. Munro to hold on to

the remainder of the \$600 until he asked her for it. *See* RP 117-39. He just said that he never got the rest of the money. RP 125.

The bank record evidence, demonstrating that Ms. Munro actually did hold on to the remainder of K.N.'s \$600 during the entire period (rather than converting it to her own use), would have strongly corroborated her testimony and may well have tipped the scales for the jury. The fact that defense counsel's failure to investigate left the jury without the benefit of that evidence is "sufficient to undermine confidence in the outcome" of Ms. Munro's trial. *Estes*, 188 Wn.2d at 458.

There is a reasonable probability that defense counsel's unreasonable failure to investigate Ms. Munro's bank records affected the outcome of her trial. *Jones I*, 183 Wn.2d at 344. Ms. Munro was prejudiced by her attorney's deficient performance. *Id.*

Ms. Munro's defense attorney provided ineffective assistance of counsel by failing to conduct necessary investigation into her bank records. *Id.* Ms. Munro's conviction must be reversed. *Id.*

II. THE JUDGE AT MS. MUNRO'S TRIAL MADE AN IMPROPER JUDICIAL COMMENT ON THE EVIDENCE BY MAKING A STATEMENT TO THE JURY THAT ALIGNED THE COURT WITH THE STATE'S THEORY OF THE CASE AND UNDERMINED MS. MUNRO'S CREDIBILITY.

During the state's closing argument, the state relied on the theory that Ms. Munro could have given the remainder of the \$600 to K.N. –

even after the charge had been filed – if she had really wanted to. RP 203, 221.

In response to the evidence that Ms. Munro had been unable to contact K.N. because of a court order, the prosecutor claimed that she could have given him the money through her attorney or by asking for permission from the court. RP 203.

When Ms. Munro objected, rather than admonishing the prosecutor to limit her arguments to the properly admitted evidence, the judge made a statement corroborating the state’s theory of the case. RP 203.

Specifically, the judge informed the jury that: “Although the evidence not (sic) presented but asking the Court would be an option.” RP 203.

The judge violated Ms. Munro’s constitutional rights by making an improper judicial comment on the evidence. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

The state constitutional prohibits a judge from “conveying to the jury his or her personal attitudes toward the merits of the case” or instructing a jury that “matters of fact have been established as a matter of law.” *Id.*; art. IV, § 16.⁴

⁴ A claim that a judge has made an impermissible comment on the evidence constitutes manifest error affecting a constitutional right, which may be raised for the first time on appeal under RAP 2.5(a)(3). *Levy*, 156 Wn.2d at 719-20.

A judge violates this mandate 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.” *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

The inquiry focuses on whether the judge’s comment indicates his/her opinion on the credibility of the evidence in the case:

The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury.

Id.; *See also State v. Brush*, 183 Wn.2d 550, 559, 353 P.3d 213 (2015).

This is because:

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

Id. (quoting *State v. Crotts*, 22 Wash. 245, 250–51, 60 P. 403 (1900)).

The Washington Supreme Court has “demonstrate[d] adherence to a rigorous standard when reviewing alleged violations of Const. art. 4, § 16.” *Id.*

The judge’s comment to the jury at Ms. Munro’s trial violated art. IV, § 16. The statement aligned the court with the state’s theory of the

case by corroborating the prosecutor's argument.⁵ The court's "evaluation relative to the disputed issue [was] inferable from the statement." *Lane*, 125 Wn.2d at 889.

Additionally, the judge's statement undermined Ms. Munro's credibility regarding the central factual question in the case: whether she had simply been holding on to K.N.'s money for him until he asked for it. The statement communicated the judge's opinion on the "truth value" of Ms. Munro's testimony and expressed the judge's opinion on a disputed issue of fact. *Lane*, 125 Wn.2d at 838.

The judge's statement constituted an improper comment on the evidence in Ms. Munro's case. *Lane*, 125 Wn.2d at 838; *Brush*, 183 Wn.2d at 559.

Improper judicial comments on the evidence are presumed to be prejudicial. *Brush*, 183 Wn.2d at 559. Reversal is required unless the state can affirmatively demonstrate that no prejudice could have resulted. *Id.*; *See also Levy*, 156 Wn.2d at 725.

The state cannot overcome the presumption of prejudice in Ms. Munro's case. The evidence against her was far from overwhelming and the judge's improper comment on the evidence directly undermined her

⁵ As argued below, the prosecutor's argument also constituted misconduct.

credibility on the key issue in the case: whether she had simply been holding K.N.'s money for him until he asked her for it. The judge's comment on the evidence requires reversal of Ms. Munro's conviction. *Id.*

The judge made an improper comment on the evidence at Ms. Munro's trial by making a statement to the jury which directly undermined Ms. Munro's credibility and aligned the court with the state's theory of the case. *Lane*, 125 Wn.2d at 838; *Brush*, 183 Wn.2d at 559. Ms. Munro's conviction must be reversed. *Id.*

III. THE PROSECUTOR COMMITTED MISCONDUCT AT MS. MUNRO'S TRIAL BY ARGUING "FACTS" TO THE JURY THAT HAD NOT BEEN ADMITTED INTO EVIDENCE.

A key part of the prosecutor's theory regarding the third-degree theft charge was that Ms. Munro's testimony (that she did not convert K.N.'s money to her own use but was simply waiting for him to ask for it) could not have been true because she had the opportunity to give him the remainder of the \$600 even after the charge was filed against her but never did. RP 203.

In her defense, Ms. Munro testified that a no-contact order prohibited Ms. Munro from contacting K.N. after she learned that he was accusing her of stealing his money. RP 171.

The state never offered any evidence to rebut that claim. *See* RP *generally*. Instead, the prosecutor countered Ms. Munro's testimony in

closing by informing the jury that Ms. Munro’s claim was “not exactly true.” RP 203.

The prosecutor told the jury that Ms. Munro could have gotten the money to K.N. by giving it to her attorney or by asking the court for permission to give it to him. RP 203. The judge permitted the prosecutor to continue this line of argument, even over Ms. Munro’s objection. RP 203.⁶ The prosecutor also reiterated those “facts” during her rebuttal argument. RP 221.

The prosecutor committed reversible misconduct by “testifying” during closing to “facts” that had not been admitted into evidence. *See State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008) (*Jones II*).

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, art. I, § 22. To determine whether a prosecutor’s misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor’s improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected.

⁶ As outlined above, the judge also made an impermissible comment on the evidence during this exchange, which served to reinforce bolster the “facts” that the prosecutor offered during her closing argument.

Glasmann, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

A prosecutor commits misconduct by arguing “facts” to the jury that have not been admitted into evidence. *Jones II*, 144 Wn. App. at 293 (citing *State v. Weber*, 159 Wn.2d 252, 276, 149 P.3d 646 (2006)).

Prosecutorial misconduct during closing argument can be particularly prejudicial because of the risk that the jury will lend it special weight “not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.” Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

Here, the prosecutor did not elicit any evidence to rebut Ms. Munro’s claim that she had simply been waiting for K.N. to ask her for the rest of his money. The prosecutor did not even call K.N. in rebuttal to ask him whether he had, in fact, asked Ms. Munro to hold on to the remainder of the \$600 for him. As a result, K.N. never testified regarding that issue one way or another. *See RP generally.*

Nor did the prosecutor seek to have evidence admitted or the jury instructed on the law regarding the circumstances in which someone with a no-contact order in place may, nonetheless, send money to the protected party. *See RP generally.*

Instead of properly rebutting Ms. Munro's testimony, the prosecutor committed misconduct by arguing "facts" to the jury that had not been admitted into evidence, claiming that there were ways for Ms. Munro to give K.N. the rest of his money, even after the charge had been filed, if she had wanted to. RP 203, 221. The prosecutor's argument was improper. *Jones II*, 144 Wn. App. at 293.

There is a substantial likelihood that the prosecutor's improper argument affected the outcome of Ms. Munro's trial. *Glasmann*, 175 Wn.2d at 704. The evidence against Ms. Munro was not overwhelming, the case being a pure "credibility contest" between her testimony and that of K.N. The prosecutor's improper argument directly impugned Ms. Munro's credibility by leading the jury to believe that she had lied when she claimed to have been unable to give the remainder of the \$600 to K.N. after the charge against her was filed. RP 203.

Furthermore, because of the "fact-finding facilities presumably available to the [prosecutor's] office," the jury likely believed that the prosecutor was correct in her claim that Ms. Munro's testimony had been inaccurate. *Glasmann*, 175 Wn.2d at 706. Ms. Munro was prejudiced by the prosecutor's misconduct. *Id.*

Ms. Munro objected to the prosecutor's improper argument, stating that it was not accurate that she could have contacted K.N. through a third

party. RP 203. Not only did the court fail to rule on that objection, the judge reinforced and bolstered the prosecutor's improper argument with an impermissible judicial comment on the evidence.

Because she lodged a timely objection, reversal of Ms. Munro's conviction is required because she has demonstrated that the prosecutor's argument constituted prejudicial misconduct. *Id.*

In the alternative, however, because Ms. Munro did not specifically raise prosecutorial misconduct in her objection, reversal is nonetheless required because the prosecutor's misconduct was flagrant and ill-intentioned. *Id.* at 704. Even absent objection, reversal is required when misconduct is "so flagrant and ill-intentioned that an instruction would not have cured the prejudice." *Glasmann*, 175 Wn.2d at 704.

Misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time of the improper statement. *Glasmann*, 175 Wn.2d at 707. Here, the prosecutor had access to longstanding case law prohibiting the introduction of "facts" outside the evidence into closing argument. *See e.g. Jones II*, 144 Wn. App. at 293. Recognizing a key problem with the state's case after Ms. Munro's testimony, the prosecutor chose to inject such "facts" into her closing, rather than presenting any rebuttal evidence.

The prosecutor's improper argument requires reversal of Ms. Munro's conviction even absent an objection below. *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed misconduct at Ms. Munro's trial by "testifying" to "facts" that had not been admitted into evidence, but which went to the very heart of the issue for the jury in the case. *Id.*; *Jones II*, 144 Wn. App. at 293. Ms. Munro's conviction must be reversed. *Id.*

IV. THE CUMULATIVE EFFECT OF THE ERRORS AT MS. MUNRO'S TRIAL DEPRIVED HER OF HER CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Under the doctrine of cumulative error, an appellate court may reverse a conviction when "the combined effect of errors during trial effectively denied the defendant [his/]her right to a fair trial even if each error standing alone would be harmless." *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010); U.S. Const. Amends. VI, XIV.

In Ms. Munro's case, the cumulative effect of the violations of her constitutional rights to the effective assistance of counsel and to a trial free from judicial comments on the evidence and prosecutorial misconduct requires reversal of her conviction. Each of these errors went to the heart of the factual issue for the jury regarding the third-degree theft charge: whether Ms. Munro had simply been holding on to the remainder of K.N.'s \$600 until he asked her for it. Taken together, the three errors

deprived the jury of key evidence, while also conveying the judge's personal opinion and injecting "facts" that had not been admitted – all regarding that single key issue. The cumulative effect of the errors at Ms. Munro's trial deprived her of a fair trial and requires reversal of her conviction. *Id.*

CONCLUSION

Ms. Munro was denied her right a counsel when her defense attorney failed to conduct necessary investigation into her case. The trial judge violated the state constitution by making an impermissible judicial comment on the evidence. The prosecutor committed misconduct by arguing "facts" that had not been admitted into evidence.

Whether considered individually or cumulatively, the errors at Ms. Munro's trial require reversal of her conviction.

Respectfully submitted on January 10, 2020,



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Lisa Munro
16200 N. Rocklyn Road
Harrington, WA 99134

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Lincoln County Prosecuting Attorney
jbarkdull@co.lincoln.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on January 10, 2020.



Skylar T. Brett, WSBA No. 45475
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LAW OFFICE OF SKYLAR BRETT

January 10, 2020 - 11:10 AM

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