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NO. 36979-0-III

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

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD A. VEDDER,

Appellant.

---

BRIEF OF APPELLANT,  
RICHARD A. VEDDER

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR BENTON COUNTY  
THE HONORABLE SAMUEL P. SWANBERG, JUDGE

---

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## I. INTRODUCTION

In January 2018, Richard A. Vedder attempted to cash a check at a Money Tree in Kennewick, WA. The teller noticed some irregularities but could not confirm whether the check was forged. She copied the check, gave the original back to Mr. Vedder, and later called the police. Mr. Vedder was charged with forgery, and a jury convicted him in July 2019.

This Court should reverse and remand for a new trial, for three reasons. First, the prosecutor committed misconduct during closing argument by misstating the reasonable doubt standard and by implying that Mr. Vedder had a burden to produce evidence of his innocence. Second, Mr. Vedder's counsel provided ineffective assistance by failing to object. Third, the state presented insufficient evidence to prove that Mr. Vedder knew the check was forged.

## II. ASSIGNMENT OF ERROR

Assignment of Error 1: The prosecutor committed misconduct by arguing in closing that the jury must have a reason justifying reasonable doubt.

Assignment of Error 2: The prosecutor committed misconduct by implying in closing rebuttal that Mr. Vedder must produce evidence of the envelope that the check was mailed in, reversing the burden of proof.

Assignment of Error 3: Mr. Vedder's trial counsel provided ineffective assistance by failing to object to the state's closing or rebuttal arguments.

Assignment of Error 4: The state failed to prove beyond a reasonable doubt that Mr. Vedder knew the check was forged or acted with intent to injure or defraud.

### **III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

Issue 1: Did the prosecutor commit prejudicial misconduct, that could not be corrected by an instruction, by misstating the reasonable doubt standard and implying that Mr. Vedder had a burden of production?

Issue 2: Did Mr. Vedder's trial counsel perform deficiently, prejudicing Mr. Vedder, by failing to object to the state's closing?

Issue 3: Was there insufficient evidence to support Mr. Vedder's conviction when a trained bank teller could not determine whether the check was authentic?

### **IV. STATEMENT OF THE CASE**

On January 29, 2018, Richard Anthony Vedder attempted to cash a check for \$673.54 from the Franklin County Prisoners' Fund. RP at 71, 86. He went to a Money Tree in Kennewick, WA. RP at 35-36. The teller suspected that the check was fraudulent and refused to cash it. RP at 38-39. Mr. Vedder left the Money Tree. RP at 44. The state charged Mr. Vedder with forgery. CP 1-2. Five witnesses testified at trial: a police officer, two Money Tree employees, the account manager for the Franklin County Prisoners' Fund, and Mr. Vedder. RP at 14, 20, 32, 60, 79.

The Money Tree manager, Steven Schuster, testified that all employees are trained to recognize suspicious checks. RP at 21. Employees have ongoing trainings where they review forged checks and look for inconsistencies. *Id.* He also testified about the procedures taken when an employee encounters a suspicious check. The employee will make a copy of the check and fill out a form with information about the person trying to cash it. RP at 29. The employee will also try to contact the payor. *Id.* Unless the payor instructs otherwise, the teller will return the check to the person who presented it at the bank. *Id.*

That process was followed in this case. Marina Centeno, a teller at Money Tree, testified about her interactions with Mr. Vedder in January 2018. RP at 35-36. She said that Mr. Vedder gave her the check and his picture ID. RP at 36. Ms. Centeno had concerns about the check's authenticity. RP at 41.

Ms. Centeno testified about her specialized training to recognize questionable checks. She is trained to look for discrepancies in font, size of the check, and payee details. RP at 33. She also looks at the date and the check number and compares the check to others received from that same account. RP at 33-34. Checks that are fraudulent often do not scan into the Money Tree computers. *Id.* If a check raises red flags, the teller attempts

to verify whether the check is authentic before rejecting it outright. RP at 34-35.

Ms. Centeno noticed red flags about the check that Mr. Vedder presented. She noticed a discrepancy with the phone number at the bottom. RP at 41. The check was not signed. *Id.* It also appeared different from other checks she has seen from this payor. *Id.* Mr. Vedder's name was spelled incorrectly on the check. *Id.* The check also would not scan into the Money Tree computer system. RP at 41-42. She manually typed in the check's information, but Money Tree had never cashed a check from this account. *Id.* Ms. Centeno knew this was incorrect because Money Tree routinely cashes checks from the Franklin County Prisoners' Fund. RP at 42.

Ms. Centeno attempted to call the phone numbers listed on the check, but they were disconnected. RP at 42-43. She tried searching online for a phone number for the Franklin County Prisoners' Fund. RP at 43. Ms. Centeno let Mr. Vedder know what she was doing. *Id.* According to Ms. Centeno, he started acting "very nervous" and impatient. RP at 43-44. Mr. Vedder asked what bank the check was drawn from, so that he could cash the check at that bank. RP at 43. Ms. Centeno made a copy of the check. *Id.* She gave the original back to Mr. Vedder because she "could not

confirm that it was a counterfeit.” RP at 44. Mr. Vedder quickly left the Money Tree. *Id.*

Ms. Centeno testified that she was able to recognize the red flags about the check because of her specialized training. RP at 52-53. She acknowledged that the check was not endorsed, but it did list routing and account numbers. RP at 53. Despite her training, Ms. Centeno was not able to confirm that this check was fraudulent. RP at 54. She testified that she could not cash the check based on the incorrect account and routing numbers. RP at 55. She also needed to conduct additional research before cashing the check, to confirm its authenticity. RP at 54.

After Mr. Vedder left the bank, Ms. Centeno continued trying to call the payor. RP at 45. About 30 minutes later, she reached the Franklin County Corrections Center. *Id.* Ms. Centeno also called the police. RP at 35. Money Tree supplied the police with the copy of the check and security video of the bank and the parking lot. RP at 16.

Margo Wilder, a Franklin County Corrections Center employee, also testified at trial. RP at 60. Ms. Wilder is the account manager for the Franklin County Prisoners’ Fund. RP at 61. She testified about how checks from the Fund are created, stored, and tracked. RP at 61-62. Checks are usually given to prisoners when they are released but are sometimes mailed, usually within a day or two. RP at 63.

Ms. Wilder testified that the check presented by Mr. Vedder was not a valid check from the Franklin County Prisoners' Fund. RP at 69-71. The check number matched a valid check issued by the Fund, but that valid check was for a different amount and was issued to a different person. RP at 70-71. The Fund did not issue Mr. Vedder a check in 2017, 2018, or 2019. RP at 71.

Mr. Vedder testified that he received the check in question in the mail. RP at 80. The check came in an ordinary envelope, which he did not save. *Id.* Mr. Vedder testified that he believed the check was valid and tried to cash it at Money Tree. RP at 82. He acknowledged that he was not expecting a check from the Franklin County Prisoners' Fund. RP at 84-85. Mr. Vedder noticed that his name was spelled incorrectly but still believed the check was intended for him because it arrived at his address. RP at 104.

At the Money Tree, Mr. Vedder waited for the teller to cash the check. RP at 83. When she could not, he waited for her to copy the check, call the phone numbers on the check, and look up the phone number on the internet. RP at 83-84. He testified that he was not nervous or agitated. RP at 83. When the teller could not cash the check, Mr. Vedder took the check and left. RP at 84. In the parking lot, he tried to call the numbers for the bank on the check. *Id.*

Mr. Vedder had previously received a check from the Franklin County Prisoners' Fund. RP at 87. In 2016, he received a check for \$0.41 when he was released from custody. *Id.* He did not cash the check. RP at 102-03. During trial, he found the old check, and it was admitted into evidence. RP at 102; Ex. 8. The check for \$0.41 did not resemble the check for \$673.54. RP at 105.

Mr. Vedder also had a previous conviction, for receiving stolen property, in California in 2010. RP at 88-89. The state relied on this conviction to argue that Mr. Vedder was not credible. RP at 125-26. The court instructed the jury that the conviction could only be considered for evaluating Mr. Vedder's credibility. RP at 112.

At the conclusion of testimony, the court instructed the jury, including on reasonable doubt. RP at 111. Then the parties delivered closing arguments. RP at 117. The prosecutor discussed reasonable doubt, arguing that "there actually has to be a reasonable thing" justifying it:

Now I want to talk about reasonable doubt, because it's something we talked about a lot during jury selection and I think that it's really relevant here. Reasonable doubt is a doubt for which a reason exists. And I know that is sort of circular, but it's something that there has to actually be a reasonable thing.

RP at 121. He described Mr. Vedder's testimony as "wildly unreasonable and unbelievable." *Id.* Mr. Vedder's attorney did not object. *Id.*

In rebuttal, the prosecutor emphasized the fact that Mr. Vedder did not produce the envelope the check was mailed in, but had the old check for \$0.41:

And I bring this up that he brought the check in here today to submit his evidence not to say that people have to keep checks or people have to keep these sorts of things; but isn't it very convenient that Mr. Vedder has that check today? He kept it for \$.41. But the envelope? Just gone. The envelope doesn't exist.

...

And the reason that Mr. Vedder doesn't have that envelope today but he has the check that he kept for apparently three years is because the envelope doesn't exist. The check wasn't mailed to him.

RP at 137-38. The prosecutor argued again that Mr. Vedder was not credible, characterizing his testimony as "unreasonable" and "unbelievable." *Id.* Mr. Vedder's attorney also did not object during rebuttal. *Id.*

The jury convicted Mr. Vedder of forgery. RP at 143. At sentencing, the trial court noted Mr. Vedder's criminal history, including his history of dealing in counterfeit checks. 8-1-19 RP at 10-11. The judge sentenced him to 27 months incarceration. 8-1-19 RP at 11. Mr. Vedder appeals. CP 93.

## V. ARGUMENT

Numerous errors denied Mr. Vedder a fair trial and require reversal. First, the prosecutor committed misconduct during closing argument. The

prosecutor misstated the reasonable doubt standard and implied that Mr. Vedder had a burden to produce evidence of his innocence. RP at 121, 137-38. Second, Mr. Vedder was denied effective assistance of counsel because his attorney failed to object to the state's closing. *Id.* Third, the state failed to meet its burden of proof. No rational jury would find beyond a reasonable doubt that Mr. Vedder knew the check was forged or acted with intent to injure or defraud. This Court should reverse and remand for a new trial.

**A. The Prosecutor Committed Flagrant Misconduct During Closing Argument.**

This Court must reverse due to prosecutorial misconduct during closing argument. The prosecutor committed misconduct in two ways: first, by arguing that Mr. Vedder had to provide a "reason" for the jury to acquit; and second, by implying that Mr. Vedder had the burden of producing the envelope containing the check. RP at 121, 137-38. This misconduct prejudiced Mr. Vedder by reversing the burden of proof, and could not have been cured by an instruction.

The right to a fair trial is a fundamental liberty secured by the United State and Washington Constitutions. U.S. Const. amend.s VI, XIV; Wash. Const. art. I, § 22; *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Prosecutorial misconduct may deprive a defendant of his constitutional

right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). In order to prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Both requirements are met here.

**1. The prosecutor committed misconduct by reversing the burden of proof in closing argument.**

The prosecutor committed misconduct in this case by misstating the reasonable doubt standard and by implying that Mr. Vedder had a burden to produce evidence of his innocence. RP at 121, 137-38. These statements amounted to misconduct because they reversed the burden of proof and violated Mr. Vedder's right to due process.

Due process requires the state to bear the burden of proof beyond a reasonable doubt. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 713, 286 P.3d 673 (2012) (citing *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068 (1970)). The defense has no obligation to produce evidence and no obligation to articulate reasons to doubt the state's case. *State v. Kalebaugh*, 183 Wn.2d 578, 585, 355 P.3d 253 (2015) ("[T]he law does not require that a reason be given for a juror's doubt."); *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) ("[T]he State bears the burden of proving its case beyond a reasonable doubt, and the defendant bears no burden.").

A prosecutor commits misconduct by misstating the reasonable doubt standard or shifting the burden of proof to the accused. *State v. Lindsay*, 180 Wn.2d 423, 434, 326 P.3d 125, 127 (2014). For this reason, arguments “that shift or misstate the State’s burden to prove the defendant’s guilt beyond a reasonable doubt constitute misconduct.” *Id.*; *see also Glasmann*, 175 Wn.2d at 713 (“Misstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant’s guilt beyond a reasonable doubt.”).

Washington Courts have routinely held that burden shifting during closing argument constitutes misconduct. In *State v. Anderson*, the prosecutor argued that reasonable doubt “means, in order to find the defendant not guilty, you have to say, ‘I don’t believe the defendant is guilty because,’ and then you have to fill in the blank. It is not something made up. ***It is something real, with a reason to it.***” 153 Wn. App. 417, 424, 220 P.3d 1273 (2009) (emphasis added). The Court concluded that this argument was improper because “[t]he jury need not engage in any such thought process.” *Id.* at 431. The Court explained: “By implying that the jury had to find a reason in order to find Anderson not guilty, the prosecutor made it seem as though the jury had to find Anderson guilty unless it could come up with a reason not to.” *Id.* The argument improperly implied the

accused was responsible for supplying such a reason in order to avoid a conviction. *Id.*

Similarly, in *State v. Johnson*, the prosecutor argued: “In order to find the defendant not guilty, you have to say, ‘I doubt the defendant is guilty and my reason is . . . .’ To be able to find a reason to doubt, you have to fill in the blank; that’s your job.” 158 Wn. App. 677, 682, 243 P.3d 936 (2010). The Court found this to be flagrant and ill-intentioned misconduct because “it subverted the presumption of innocence by implying that the jury had an affirmative duty to convict, and that the accused bore the burden of providing a reason for the jury not to convict him.” *Id.* at 684.

The Washington Supreme Court denounced these “fill-in-the-blank” arguments in *Emery*. 174 Wn.2d 741. The argument “improperly implies that the jury must be able to articulate its reasonable doubt,” thereby “subtly shift[ing] the burden to the defense.” *Id.* at 760. The state bears the burden of proving its case beyond a reasonable doubt, and the accused bears no burden. *Id.* Such arguments “misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence.” *Id.* at 759. Instead, “a jury need do nothing to find a defendant not guilty.” *Id.*

Here, like in *Anderson*, *Johnson*, and *Emery*, the prosecutor reversed the burden of proof, in two ways. First, the prosecutor misstated the reasonable doubt standard, stating: “Reasonable doubt is a doubt for which

a reason exists. And I know that is sort of circular, but it's something that ***there has to actually be a reasonable thing.***" RP at 121 (emphasis added). This is similar to the inappropriate statement in *Anderson*, where the prosecutor said that reasonable doubt "***is something real, with a reason to it.***" 153 Wn. App. at 424 (emphasis added). Here, like in *Anderson*, the prosecutor implied that "the jury had to find a reason in order to find [the accused] not guilty." *Id.* at 431. The prosecutor committed misconduct because "the law does not require that a reason be given for a juror's doubt." *Kalebaugh*, 183 Wn.2d at 585.

Second, the prosecutor committed misconduct by implying that Mr. Vedder had the burden of producing evidence of his innocence. Specifically, the prosecutor pointed out that Mr. Vedder had the old check for \$0.41. RP at 137. He used this point to argue that Mr. Vedder should have produced the envelope that contained the check for \$673.54:

And I bring this up that he brought the check [for \$0.41] in here today to submit his evidence not to say that people have to keep checks or people have to keep these sorts of things; but isn't it very convenient that Mr. Vedder has that check today? He kept it for \$.41. But the envelope? Just gone. The envelope doesn't exist.

...

And the reason that Mr. Vedder doesn't have that envelope today but he has the check that he kept for apparently three years is because the envelope doesn't exist. The check wasn't mailed to him.

RP at 137-38. The prosecutor used the lack of the envelope to argue that Mr. Vedder was not credible. *Id.*

Mr. Vedder did not have the burden of proving his innocence. He did not bear the burden of producing evidence before the jury could issue a verdict of not guilty. *See Emery*, 174 Wn.2d at 760. Like in *Johnson*, the prosecutor's misconduct was flagrant and ill-intentioned because "it subverted the presumption of innocence by implying that the jury had an affirmative duty to convict, and that the accused bore the burden of providing a reason for the jury not to convict him." 158 Wn. App. at 684.

**2. The prosecutor's misconduct prejudiced Mr. Vedder and could not be corrected by an instruction.**

The prosecutor's misconduct also prejudiced Mr. Vedder, requiring reversal. Prejudice requires showing a substantial likelihood that the misconduct affected the jury verdict. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). A defendant cannot establish prejudice where a curative instruction could have cured any error. *State v. Corbett*, 158 Wn. App. 576, 594, 242 P.3d 52 (2010). However, "the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

Here, Mr. Vedder’s attorney did not object to the statements made by the prosecutor during closing argument. Reversal is required, even without defense objection, when a prosecutor’s misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). “In other words, if the misconduct cannot be remedied and is material to the outcome of the trial, the defendant has been denied his due process right to a fair trial.” *State v. Suarez-Bravo*, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

In evaluating claims of prosecutorial misconduct, it “is not a matter of determining whether there is sufficient evidence to convict the defendant.” *Glasmann*, 175 Wn.2d at 710. Instead, “[t]he issue is whether the comments deliberately appealed to the jury’s passion and prejudice and encouraged the jury to base the verdict on the improper argument ‘rather than properly admitted evidence.’” *Id.* at 711 (quoting *State v. Furman*, 122 Wn.2d 440, 468-69, 858 P.2d 1092 (1993)). Put another way, “[t]he focus must be on the misconduct and its impact, not on the evidence that was properly admitted.” *Id.*

In *Johnson*, the Court of Appeals held that the prosecutor’s misconduct was “flagrant and ill-intentioned and incurable by a trial court’s instruction in response to a defense objection.” 158 Wn. App at 685 (citing

*State v. Venegas*, 155 Wn. App. 507, 523 n. 16, 228 P.3d 813 (2010)). The Court noted that “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.” *Id.* Despite these instructions, the Court held that “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. *Id.* at 685-86 (citing *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007); *Anderson*, 153 Wn. App. at 432).

Here, the prosecutor misstated the reasonable doubt standard and implied that Mr. Vedder had the burden of producing evidence of his innocence. RP at 121, 137-38. These statements “reduce[d] the State’s burden and undermine[d]” Mr. Vedder’s “due process rights.” *Johnson*, 158 Wn. App at 685-86. Like in *Johnson*, a curative instruction would not have alleviated the prejudice. *Id.* This Court should reverse.

**B. Trial Counsel was Ineffective by Failing to Object to the State’s Closing Argument.**

Even if an instruction could have cured the prejudice caused by the prosecutor’s misconduct, this Court should reverse because Mr. Vedder’s

trial counsel failed to object to the state's closing. RP at 121, 137-38. This failure deprived Mr. Vedder of his right to effective assistance of counsel.

Defendants have the right to effective assistance of counsel at every critical stage of a criminal proceeding. U.S. Const. amend. VI; Wash. Const. art. I, § 22; *United States v. Cronin*, 466 U.S. 648, 654, 104 S.Ct. 2039 (1984); *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, (1984); *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Closing argument is a "critical stage" of a criminal proceeding. *People v. Luu*, 813 P.2d 826, 828 (Colo. App. 1991), aff'd, 841 P.2d 271 (Colo. 1992) (citing *Larson v. Tansy*, 911 F.2d 392 (10th Cir.1990)).

A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26. Both requirements are met here.

**1. Trial counsel performed deficiently.**

Mr. Vedder's trial counsel performed deficiently by failing to object to the state's closing. As explained above, the prosecutor misstated the law regarding reasonable doubt and implied that Mr. Vedder had the burden of

producing evidence of his innocence. RP at 121, 137-38. Mr. Vedder's counsel failed to object, letting the prosecutor's burden-easing misstatement stand in the minds of the jurors. *Id.*

Generally, defense counsel's failure to object during closing argument will not constitute deficient performance because lawyers "do not commonly object during closing argument 'absent egregious misstatements.'" *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 717, 101 P.3d 1 (2004) (quoting *United States v. Necochea*, 986 F.2d 1273, 1281 (9th Cir.1993)). However, "this does not mean that all failures to object are decidedly reasonable under *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. If a prosecutor's remark is improper and prejudicial, failure to object may be deficient performance." *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 721, 327 P.3d 660 (2014) (quoting *State v. Gentry*, 125 Wn.2d 570, 643-44, 888 P.2d 1105 (1995)), abrogated on other grounds by *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018).

Here, the prosecutor's statement that "there has to actually be a reasonable thing" justifying reasonable doubt was a misstatement of the law. RP at 121. It told jurors that they must convict Mr. Vedder unless they found a reason to find him not guilty. The prosecutor also implied that Mr. Vedder bore the burden of producing the envelope in order to establish his innocence. RP at 137-38. This is in direct violation of Mr. Vedder's due

process rights. Due process requires that the state bear the burden of proving every element of a criminal offense beyond a reasonable doubt and does not place any burden on the defendant. *Glasmann*, 175 Wn.2d at 713; *In re Winship*, 397 U.S. at 361. The prosecutor’s remarks were clearly improper and warranted objection by defense counsel. Defense counsel’s failure to do so amounted to deficient performance. *See Cross* 180 Wn.2d at 721; *Gentry*, 125 Wn.2d at 643-44.

**2. Counsel’s deficient performance prejudiced Mr. Vedder.**

Counsel’s failure to object also prejudiced Mr. Vedder. Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A “reasonable probability” is lower than a preponderance but more than a “conceivable effect on the outcome.” *Strickland*, 466 U.S. at 693-94. It exists when there is a probability “sufficient to undermine confidence in the outcome.” *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017).

Here, the prosecutor’s misconduct reversed the burden of proof and undermined Mr. Vedder’s presumption of innocence. RP at 121, 137-38. These misstatements of the law needed to be brought to the attention of the jurors and corrected by the court, but that opportunity passed when counsel failed to object. *Id.* As explained below, the state failed to present sufficient

evidence that Mr. Vedder knew the check was forged or acted with intent to injure or defraud. Absent the prosecutor's misstatement of law, there is a strong possibility that the jury could have reached a different verdict. This Court must reverse because Mr. Vedder received ineffective assistance of counsel.

**C. No Rational Jury Could Have Convicted Mr. Vedder of Forgery Beyond a Reasonable Doubt.**

The state also presented insufficient evidence to support Mr. Vedder's conviction. Specifically, the state failed to prove beyond a reasonable doubt that Mr. Vedder knew the check was forged or that he acted with the intent to injure or defraud. *See* RCW 9A.60.020.

“The State must prove every element of a crime beyond a reasonable doubt for a conviction to be upheld.” *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010) (quoting *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995)). To determine whether sufficient evidence supports a conviction, courts view the evidence in the light most favorable to the state and determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182, 185 (2014).

A claim of insufficient evidence admits the truth of the state's evidence and all reasonable inferences that can be drawn therefrom. *State*

*v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Appellate courts defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

A person commits forgery when, “with intent to injure or defraud,” he “possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged.” RCW 9A.60.020(1)(b). A person “knows” or “acts knowingly” under two circumstances: first, when he is “aware” of the fact that an instrument is forged, and second when he “has information which would lead a reasonable person in the same situation” to reach that conclusion. RCW 9A.08.010(1)(b). Possession alone is not sufficient to establish knowledge, but possession together with “slight corroborating evidence” may be sufficient. *State v. Scoby*, 117 Wn.2d 55, 61-62, 810 P.2d 1358 (1991) (citing *State v. Douglas*, 71 Wn.2d 303, 428 P.2d 535 (1967); *State v. Ladely*, 82 Wn.2d 172, 175, 509 P.2d 658 (1973)).

The Washington Supreme Court examined the knowledge requirement for forgery in *Scoby*. 117 Wn.2d at 61-63. In that case, the defendant attempted to use a \$1 bill with the corners of a \$20 bill pasted onto it at a gas station. *Id.* at 56-57. He was convicted of forgery and

appealed. *Id.* at 57. The Court held that there was enough corroborating evidence to establish beyond a reasonable doubt that Mr. Scoby knew of the alteration. *Id.* at 63. First, the alteration to the bill was “obvious.” *Id.* at 62. The cashier testified that she “knew it wasn’t right in a second.” *Id.* Second, Mr. Scoby had both a \$20 bill with the corners torn off and the corners, which were pasted onto the \$1 bill. *Id.* Because the torn corners were identical, the Court found it “unlikely that Scoby possessed both the altered \$1 and the torn \$20 without being aware of the alteration.” *Id.*

Here, the evidence supporting knowledge was far less substantial. The state argued that Mr. Vedder knew that the check was forged because his name was spelled incorrectly, the check was not signed, and he appeared nervous or impatient at the bank. RP at 118, 120. The state also argued that Mr. Vedder previously received a check for \$0.41 from the Franklin County Prisoners’ Fund and he could not produce the envelope he said contained the check when it arrived in the mail. RP at 137-38. Finally, the state argued that there was no other logical explanation for how this check arrived in Mr. Vedder’s possession. RP at 121-22.

Based on this circumstantial evidence, no rational jury could conclude beyond a reasonable doubt that Mr. Vedder knew the check was forged, for three reasons. First, even the bank teller could not confirm that the check was a forgery. RP at 54. Ms. Centeno testified that she has

specialized training to assess potentially fraudulent checks, training she relied on when evaluating the check in this case. RP at 52-53. Ms. Centeno also had access to all of the information Mr. Vedder had, including the lack of a signature and the misspelling of his name. RP at 41. She specifically noted these and other red flags on the check. RP at 41-42. Despite this evidence and her training, she could not confirm whether this check was authentic. RP at 54.

Second, the evidence relied upon by the state was equivocal at best. If Mr. Vedder conspired to create a forged check, it is far more likely that he would have spelled his name correctly or ensured that the check was signed. *See* RP at 81. It is also not surprising that Mr. Vedder was impatient at the bank. The transaction took longer than expected. RP at 50. However, he stayed at the counter while the teller tried to scan the check, manually entered the check's information, copied the check, called the phone numbers, and looked up the phone number online. RP at 51-52. The old check for \$0.41 also provides little useful information about knowledge. Few people remember a check for \$0.41, and Mr. Vedder did not attempt to cash it. RP at 102-03. Additionally, if he was involved in forging checks, it is far more probable he would use this old check as a template.

Third, there is a reasonable explanation for why Mr. Vedder could innocently possess this check. Another person could have used him as a

patsy to test their forgery operation. That person could have put the check in Mr. Vedder's mailbox, counting on him attempting to cash it, so that they could see whether their forgery was sufficient to pass off as authentic. Mr. Vedder had good reason to believe the check was authentic—it arrived at his address and it was obviously made out to him, although his name was misspelled. RP at 81. Given that a trained bank teller could not determine if the check was forged, the state failed to prove beyond a reasonable doubt that Mr. Vedder knew or should have known that the check was unauthentic.

## VI. CONCLUSION

For the foregoing reasons, Mr. Vedder respectfully requests that this Court reverse his conviction and remand for a new trial.

RESPECTFULLY SUBMITTED this 2nd day of March, 2020.



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No. 36979-0-III

CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On March 2, 2020, I electronically filed a true and correct copy of the Brief of Appellant, Richard A. Vedder, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division III. I also served said document as indicated below:

Andrew Kelvin Miller ( X ) via email to:  
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SIGNED in Port Orchard, Washington, this 2nd day of March, 2020.



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