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Court of Appeals
Division I
State of Washington

NO. 73121-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH PROCK,

Appellant.

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

The Honorable Anita L. Farris, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Substantive Facts</u>	2
C. <u>ARGUMENT</u>	6
THE PROSECUTOR’S MISCONDUCT DURING CLOSING ARGUMENT VIOLATED PROCK’S RIGHT TO A FAIR TRIAL.....	6
a. <u>Reversal Is Required Because the Prosecutor Committed Flagrant and Ill-Intentioned Misconduct by Shifting the Burden of Proof.</u>	6
b. <u>Alternatively, Reversal Is Required Because Prock’s Attorney Was Ineffective in Failing to Object When the Prosecutor Undermined the Burden of Proof</u>	10
D. <u>CONCLUSION</u>	12

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>In re Pers. Restraint of Fleming</u> 142 Wn.2d 853, 16 P.3d 610 (2001)	11
<u>In re Pers. Restraint of Glasmann</u> 175 Wn.2d 696, 286 P.3d 673 (2012).....	6, 7, 9
<u>State v. Aho</u> 137 Wn.2d 736, 975 P.2d 512 (1999).....	11
<u>State v. Allen</u> 150 Wn. App. 300, 207 P.3d 483 (2009).....	11
<u>State v. Crawford</u> 159 Wn.2d 86, 147 P.3d 1288 (2006).....	11
<u>State v. Davenport</u> 100 Wn.2d 757, 675 P.2d 1213 (1984).....	7
<u>State v. Emery</u> 174 Wn.2d 741, 278 P.3d 653 (2012).....	7
<u>State v. Ermert</u> 94 Wn.2d 839, 621 P.2d 121 (1980).....	11
<u>State v. Fisher</u> 165 Wn.2d 727, 202 P.3d 937 (2009).....	6
<u>State v. Fleming</u> 83 Wn. App. 209, 921 P.2d 1076 (1996).....	7, 8, 9, 10
<u>State v. Huson</u> 73 Wn.2d 660, 440 P.2d 192 (1968).....	6
<u>State v. Johnson</u> 158 Wn. App. 677, 243 P.3d 936 (2010).....	10

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Miles</u> 139 Wn. App. 879, 162 P.3d 1169 (2007).....	10
<u>State v. Monday</u> 171 Wn.2d 667, 257 P.3d 551 (2011).....	6
<u>State v. Nichols</u> 161 Wn.2d 1, 162 P.3d 1122 (2007)	11
<u>State v. Pierce</u> 169 Wn. App. 533, 280 P.3d 1158 (2012).....	7
<u>State v. Rich</u> 186 Wn. App. 632, 347 P.3d 72 <u>rev. granted</u> , 355 P.3d 1153 (2015)	9
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	11
<u>State v. Vassar</u> 188 Wn. App. 251, 352 P.3d 856 (2015).....	8
<u>State v. Wright</u> 76 Wn. App. 811, 888 P.2d 1214 (1995).....	9
 <u>FEDERAL CASES</u>	
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	11

A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct that shifted the burden of proof during closing argument violated appellant's right to a fair trial.

2. Ineffective assistance of counsel in failing to object to improper burden shifting during closing argument violated appellant's right to a fair trial.

Issues Pertaining to Assignments of Error

The State may not attempt to undermine the burden of proof during closing argument. Did the prosecutor commit reversible misconduct by arguing the jury had a legal obligation to find appellant guilty if it believed his story was not reasonable? Alternatively, was appellant prejudiced by counsel's deficient performance in failing to object?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Snohomish County prosecutor charged appellant Kenneth Prock with residential burglary. CP 85. The jury found him guilty as charged, and the court imposed a standard range sentence. CP 15-16, 28. Notice of appeal was timely filed. CP 1.

2. Substantive Facts

Prock testified he regularly passed by a house that appeared to be abandoned and vacant in Marysville across from the library. 2RP¹ 179. When he met a man in a bar who confirmed this was true, he decided to check it out because he and his girlfriend were looking for a place to rent. 2RP 163, 182. At the time, he was living on his uncle's boat at the Everett Marina, but wanted a place in Marysville to be closer to his children. 2RP 162.

He parked in the driveway and made several phone calls to try to find out who owned the house. 2RP 167. In the recycle bin he found an overdue bill for a Casey Robinette, and a Facebook search located a person by that name in Florida. 2RP 168-69. From this investigation, he concluded the occupant must have moved to Florida. 2RP 168-69. He also knocked on the door of a neighbor, who told him she did not think anyone lived in the house. 2RP 167-68.

Through the windows he could see boxes and crumpled paper like moving materials in the bedroom, old picture frames that looked like the pictures had been removed, a torn up couch in the living room, and a broken down table with a garbage can on top in the kitchen. 2RP 166-67, 169-70.

¹ There are three volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Nov. 21, 2014; 2RP – Jan. 12-13, 2015; 3RP – Jan. 13-14, Feb. 12, 2015.

The back door was standing wide open, so he went inside to find out the true condition of the interior. 2RP 170-71.

Prock testified that, while he could see a part of a cage through the window, he did not actually see the dog until he was inside. 2RP 166. Since there was no food and the dog appeared skinny, he assumed the dog had also been abandoned. 2RP 171. He phoned his girlfriend to contact animal control. 2RP 171. Just as he reached the bedroom, he heard someone calling, "Who's there?" 2RP 172. At this point, he realized the house was occupied and quickly made his exit while trying to explain and apologize. 2RP 201-02. He said he had been told the place was abandoned and needed to be cleaned up and he was looking for a place to rent. 2RP 172. He took nothing and testified he had no intent to take anything. 2RP 171-73.

Casey Robinette and Monica Certain testified they had been renting the house and living there for nearly five months. 2RP 52, 100-01. Robinette and Certain testified the house contained furniture, clothing, dishes, and toiletries. 2RP 108-13. In a kennel in the living room was their dog. 2RP 98. Having been burglarized before, they always locked the doors before leaving. 2RP 59, 104. When they arrived home on May 8, 2014, they saw an unfamiliar car in the driveway. 2RP 55, 102. Through the front window, they could see that the back door was open. 2RP 58. Certain remained by the car and called 911. 2RP 102.

Robinette walked around the house, and found the back door open. 2RP 61. There was no sign of damage to the door or doorframe. 2RP 64. He went inside after grabbing a hammer. 2RP 63. He called out asking who was in the house. 2RP 64. He heard a man's voice say, "I'm here," as Prock walked out of the bedroom. 2RP 72-73. He claimed Prock told him the landlord in Arlington had sent him to clean out the house. 2RP 77. Robinette responded that was not true; he knew the landlord, who lived in Marysville. 2RP 78. Robinette asked, "Who sent you," and claimed Prock said a friend in Arlington but did not know the friend's name. 2RP 78-79.

Certain testified Prock walked past her on his way to his car, and she asked him why he broke into their house. 2RP 117. There was no answer, and Prock testified he did not hear her say anything. 2RP 117. Robinette and Certain did not know Prock and had not given him permission to be in the house. 2RP 93, 118.

The police responded quickly, as the house was approximately one half mile from the police station. 2RP 135. On the way, Officer Charles Smith saw a car matching the description he had received from dispatch. 2RP 137. He watched it turn down a side street as he made a U-turn to follow. 2RP 142-44. Prock testified he saw the police car with lights and sirens but did not think it had anything to do with him because he saw police cars on that road often. 2RP 203. Smith pulled over the car and detained

Prock. 2RP 144. Another officer brought Robinette and Certain, who identified Prock. 2RP 119, 127.

After being advised of his constitutional rights, Prock told Smith he had permission from Steve to be in the house. 2RP 146. Smith asked for Steve's last name, phone number or address, but Prock could not provide it. 2RP 146. He told Smith someone had moved out and Steve told him he could take what he wanted from the house. 2RP 146-47. Smith claimed he said he had been there only three minutes and had no time to take anything. 2RP 147. Prock's car was full of items, but none of them belonged to Certain or Robinette. 2RP 92. The car was never searched and was later released back to Prock. 2RP 153. Certain and Robinette testified nothing was missing from the house. 2RP 81-82. However, a jewelry box had been moved and the clothes were pushed to one side in the closet. 2RP 81-88.

Prock's girlfriend testified she prepared an email to animal control right away, but was interrupted and did not actually hit send on her email until several hours later. 3RP 16-17. By that time, she was aware Prock was in jail on suspicion of burglary. 3RP 16-17.

During closing argument, the prosecutor argued that Prock's account of what happened was not reasonable, and told the jury, "If that is not reasonable to you, if, based upon your life experiences, that is not

reasonable, find him guilty. That's not a request. That's your obligation under the law. Find him not guilty if that's reasonable." 3RP 101-02.

C. ARGUMENT

THE PROSECUTOR'S MISCONDUCT DURING CLOSING ARGUMENT VIOLATED PROCK'S RIGHT TO A FAIR TRIAL.

By arguing that the law required the jury to convict if Prock's testimony was not reasonable, the prosecutor misled the jury and diminished the burden of proof. Shifting the burden of proof is flagrant and ill-intentioned misconduct. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 713, 286 P.3d 673 (2012). This misconduct, or alternatively, counsel's ineffective failure to object, requires reversal of Prock's conviction.

a. Reversal Is Required Because the Prosecutor Committed Flagrant and Ill-Intentioned Misconduct by Shifting the Burden of Proof.

A prosecutor is a quasi-judicial officer who shares in the court's duty to ensure that every accused person receives a fair trial. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). A prosecutor who subverts or evades the constitutional safeguards protecting the rights of accused persons can render a criminal trial unfair. Glasmann, 175 Wn.2d at 703-04. In reviewing prosecutorial misconduct, courts consider the context of the entire trial. Id. at 704. Prosecutorial

misconduct requires reversal of the conviction when the prosecutor's argument was improper and there is a substantial likelihood the misconduct affected the verdict. Id. at 703-04.

Prosecutorial misconduct is a serious irregularity because it may violate the defendant's constitutional right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Even when there was no objection at trial, reversal is required when the misconduct was so flagrant and ill intentioned as to be incurable by instruction. Id. The focus of this inquiry is on whether the effect of the argument could be cured. State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012) (citing State v. Emery, 174 Wn.2d 741, 759-61, 278 P.3d 653 (2012)).

The burden rests on the State to prove every element of the crime beyond a reasonable doubt. Glasmann, 175 Wn.2d at 713. The defendant bears no burden at trial. Any reason to doubt an element of the State's case requires the jury vote to find the defendant not guilty. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). A prosecutor commits misconduct by attempting to minimize this burden or mislead the jury regarding its duty to acquit: "By misstating the basis on which a jury can acquit, the State 'insidiously shifts the requirement that [it] prove the defendant's guilt beyond a reasonable doubt.'" State v. Vassar, 188 Wn.

App. 251, 260, 352 P.3d 856 (2015) (quoting Glasmann, 175 Wn.2d at 713).

Here, the prosecutor committed misconduct by “misstating the basis” on which the jury could acquit. Vassar, 352 P.3d at 861. The prosecutor argued that the jury need not assess the other evidence, but must find Prock guilty if it found his own testimony was not reasonable. 3RP 101-02. But the mere fact that the jury might find reason to doubt the defense’s case does not mean there is not also reason to doubt the State’s case. Regardless of the defense testimony, when there is reason to doubt the State’s evidence, the jury must acquit. But the prosecutor told the jury just the opposite. He told the jury it must convict Prock if it found his account not reasonable. 3RP 101-02. He told the jury, “That’s not a request. That’s your obligation under the law. Find him not guilty if that’s reasonable.” 3RP 101-02. This argument blatantly misstates the law and reverses the burden of proof.

The jury was not required to convict if it disbelieved Prock. On the contrary, the jury “was *required* to acquit *unless* it had an abiding conviction in the truth” of the State’s case. Fleming, 83 Wn. App. at 213. If the jury were unsure of any aspect of the State’s case, it would have to acquit, regardless of how it assessed Prock’s testimony. See id. (“[I]f the jury were unsure whether D.S. was telling the truth, or unsure of her

ability to accurately recall and recount what happened in light of her level of intoxication on the night in question, it was required to acquit. In neither of these instances would the jury also have to find that D.S. was lying or mistaken, in order to acquit.”).

By shifting this fundamental burden, the prosecutor committed flagrant and ill-intentioned misconduct. See Glasmann, 175 Wn.2d at 713 (shifting the burden of proof is flagrant and ill-intentioned misconduct). It is well-established that prosecutors may not argue that, in order to acquit, the jury must find that either the defendant is telling the truth or the State’s witnesses are lying. See, e.g., State v. Rich, 186 Wn. App. 632, 649, 347 P.3d 72, rev. granted, 355 P.3d 1153 (2015) (citing Fleming, 83 Wn. App. at 214 and State v. Wright, 76 Wn. App. 811, 824–26, 888 P.2d 1214 (1995)). Such argument is improper because it “misrepresents the role of the jury and the burden of proof by telling jurors they must decide who is telling the truth and who is lying before deciding if the State has met its burden of proof.” Rich, 186 Wn. App. at 649. The argument made in this case was improper for the very same reason. The prosecutor directly linked the verdict to the jury’s determination of Prock’s truthfulness instead of to the State’s burden of proof.

Improper arguments are flagrant and ill-intentioned when the argument has been declared improper by previous published opinion.

State v. Johnson, 158 Wn. App. 677, 685, 243 P.3d 936 (2010) (citing Fleming, 83 Wn. App. at 214). That is the case here. Because the prosecutor's argument was flagrant and ill-intentioned, the lack of an objection below does not preclude this Court's review. Fleming, 83 Wn. App. at 214. In State v. Miles, 139 Wn. App. 879, 890, 162 P.3d 1169, (2007), this Court declared, "it is flagrant misconduct to shift the burden of proof to the defendant." And in Johnson, this Court concluded that, despite correct written jury instructions on the burden of proof, a misstatement of the burden of proof "constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." 158 Wn. App. at 685-86. Prock's conviction should be reversed because prosecutorial misconduct undermined the presumption of innocence and the burden of proof, thereby depriving him of a fair trial.

b. Alternatively, Reversal Is Required Because Prock's Attorney Was Ineffective in Failing to Object When the Prosecutor Undermined the Burden of Proof.

In the event that this Court finds the jury's confusion could have been dispelled by a curative instruction from the judge, Prock's attorney was constitutionally ineffective in failing to request such an instruction. Whether counsel provided ineffective assistance is a mixed question of fact and law reviewed de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853,

865, 16 P.3d 610 (2001). “A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude.” State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

Defense counsel is constitutionally ineffective where (1) the attorney’s performance was unreasonably deficient and (2) the deficiency prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The presumption of competent performance is overcome by demonstrating “the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” State v. Crawford, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). Failure to preserve error can also constitute ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980); see State v. Allen, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (addressing ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing).

Counsel was ineffective in failing to object or move for mistrial based on the rebuttal argument that improperly shifted the burden of proof and suggested the jury had a duty to convict if it did not believe Prock’s

testimony, rather than a duty to acquit unless it found every element proved beyond a reasonable doubt. Without that argument, the jury would have been far more likely to find reasonable doubt as to the element of Prock's intent, since he did not take anything from the house. Prock's conviction should be reversed either due to prosecutorial misconduct that violated his constitutional rights or ineffective assistance of counsel.

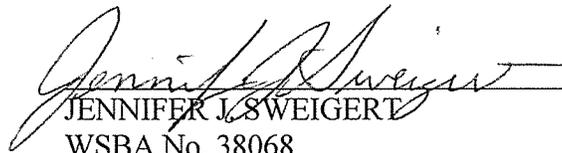
D. CONCLUSION

Prock requests this Court reverse his conviction due to flagrant prosecutor misconduct and/or ineffective assistance of counsel that violated his constitutional right to a fair trial.

DATED this 9th day of October, 2015.

Respectfully submitted,

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DIVISION ONE

STATE OF WASHINGTON)	
)	
Respondent,)	
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v.)	COA NO. 73121-1-I
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KENNETH PROCK,)	
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Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 9TH DAY OF OCTOBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KENNETH PROCK
DOC NO. 925841
BISHOP LEWIS WORK RELEASE
703 8TH AVENUE
SEATTLE, WA 98104

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF OCTOBER 2015.

X *Patrick Mayovsky*