No. 43658-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOEL E. LEWIS
RICHARD MICKELSON,

Appellants.

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

The Honorable Wm. Thomas McPhee, Judge
Cause Nos. 11-1-01979-2, 11-1-01981-4

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 1

1. Both appellants maintain that the prosecutor committed misconduct during closing arguments in several different ways. The appellants mischaracterize the State's arguments. There was no misconduct 1

2. The appellants did not receive ineffective assistance of counsel. They have established neither defective performance or prejudice 22

3. There was no cumulative error 27

D. CONCLUSION 27

TABLE OF AUTHORITIES

U.S. Supreme Court Decisions

Miranda v. Arizona,
384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) 13

Powell v. Alabama,
287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932) 24

Strickland v. Washington,
466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984) 23-25

Federal Court Decisions

United States v. Necoechea,
986 F.2d 1273, 1281 (1993) 23

Washington Supreme Court Decisions

State v. Adams,
91 Wn.2d 86, 586 P.2d 1168 (1978)...24

State v. Belgarde,
110 Wn.2d 504, 755 P.2d 174 (1988)...18

State v. Brown,
132 Wn.2d 529, 940 P.2d 546 (1997), *cert. denied*,
523 U.S. 1007, 140 L. Ed. 2d 322, 118 S. Ct. 1192 (1998).............3

State v. Burke,
163 Wn.2d 204, 181 P.3d 1 (2008)...17

State v. Dhaliwal,
150 Wn.2d 559, 79 P.3d 432 (2003)... 1-2

State v. Greiff,
141 Wn.2d 910, 10 P.3d 390 (2000)..27

State v. Hendrickson,
129 Wn.2d 61, 917 P.2d 563 (1996)...23

State v. Hoffman,
116 Wn.2d 51, 804 P.2d 577 (1991) 3

State v. Lewis,
130 Wn.2d 700, 927 P.2d 235 (1996) 17

State v. McFarland,
127 Wn.2d 332, 899 P.2d 1251 (1995) 23, 25-26

State v. Piche,
71 Wn.2d 583, 430 P.2d 522, 527 (1967) 26

State v. Pirtle,
127 Wn.2d 628, 904 P.2d 245 (1995) 1

State v. Russell,
125 Wn.2d 24, 882 P.2d 747 (1994) 2, 11

State v. Smith,
104 Wn.2d 497, 707 P.2d 1306 (1985) 4

State v. Stenson,
132 Wn.2d 668, 940 P.2d 1239 (1997),
cert. denied, 523 U.S. 1008 (1998) 23

State v. Swan,
114 Wn.2d 613, 790 P.2d 610 (1990) 2

State v. Thomas,
71 Wn.2d 470, 429 P.2d 231 (1967) 24

State v. Thomas,
109 Wn.2d 222, 743 P.2d 816 (1987) 24

State v. Thorgerson,
172 Wn.2d 438, 258 P.3d 43 (2011) 21

State v. White,
81 Wn.2d 223, 500 P.2d 1242 (1972) 24

Decisions Of The Court Of Appeals

Spokane County v. Bates,
96 Wn. App. 893, 982 P.2d 642 (1999)..3

State v. Bradbury,
38 Wn. App. 367, 685 P.2d 623 (1984)..24

State v. Dykstra,
127 Wn. App. 1, 110 P.3d 758 (2005) 3

State v. Fredrick,
45 Wn. App. 916, 729 P.2d 56 (1989) 25

State v. Graham,
59 Wn. App. 418, 798 P.2d 314 (1990)....................................3, 10

State v. Green,
46 Wn. App. 92, 730 P.2d 1350 (1986)..10

State v. James,
104 Wn. App. 25, 15 P.3d 1041 (2000)..3

State v. Miles,
139 Wn. App. 879, 162 P.3d 1169 (2007)....................................20

Statutes and Rules

Sixth Amendment to United States Constitution 23-24

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the deputy prosecutor's closing arguments constituted prosecutorial misconduct.

2. Whether defense counsel were ineffective for failing to object to the prosecutor's argument

.

3. Whether there was cumulative error.

B. STATEMENT OF THE CASE.

The State accepts the appellants' statements of the case. There are additional facts relevant to the State's argument that will be included in the argument section below.

C. ARGUMENT.

1. Both appellants maintain that the prosecutor committed misconduct during closing arguments in several different ways. The appellants mischaracterize the State's arguments. There was no misconduct.

In this consolidated appeal, both Lewis and Mickelson claim that the prosecutor committed misconduct in closing argument in several ways. The State disagrees.

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). "Any allegedly improper statements should be viewed within the context of the

prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a "substantial likelihood the instances of misconduct affected the jury's verdict." Id. A defendant's failure to object to improper arguments constitutes a waiver unless the statements are "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id. The absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Rebuttal argument is treated slightly differently than the initial closing argument. Even if improper, a prosecutor's remarks are not grounds for reversal when invited or provoked by defense counsel unless they were not a pertinent reply or were so prejudicial that a curative instruction would be ineffective. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) "Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request." Id., at 85. While it is

true that a prosecutor must act in a manner worthy of his office, a prosecutor is an advocate and entitled to make a fair response to a defense counsel's arguments. Id., at 87. *See also* State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005). A prosecutor has a duty to advocate the State's case against an individual. State v. James, 104 Wn. App. 25, 34, 15 P.3d 1041 (2000). It is not error for the prosecutor to argue that the evidence does not support the defense theory. State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990). A prosecutor's use of the words "I think" and "I believe" in closing argument does not necessarily indicate misconduct. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence. State v. Brown, 132 Wn.2d 529, 565, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 140 L. Ed. 2d 322, 118 S. Ct. 1192 (1998). It is not misconduct to argue facts in evidence and suggest reasonable inferences from them. Unless he unmistakably expresses a personal opinion, there is no error. Spokane County v. Bates, 96 Wn. App. 893, 901, 982 P.2d 642 (1999). A prosecutor may comment on the veracity of a witness as long as he does not express a personal opinion or argue

facts not in the record. State v. Smith, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985).

a. Attacks on the credibility of the defendants.

Both appellants take issue with certain language of the prosecutor during rebuttal argument. Closing arguments in this trial were lengthy. The prosecutor's initial closing argument took 44 minutes and covered 30 pages of transcript. Lewis's CP 20, RP 1376-1401, 1406-10.[1] The closing argument for Lewis took 47 minutes, Mickelson's 44 minutes, Lewis's CP 20; Lewis's argument is at RP 1412-38 and Mickelson's is at RP 1439-69. The State rebuttal was another 25 minutes. Lewis's CP 21, RP 1470-86.

Both appellants object to the prosecutor's "underbelly of society" remark. Mickelson's Opening Brief at 10-11, Lewis's Opening Brief at 14-15. Mickelson complains that the prosecutor was stating a personal opinion, Lewis that he argued facts not in evidence. In context, that portion of the prosecutor's argument is as follows.

> Here're some questions. And these are, I think, the rudimentary questions that you should consider in this case. Why did these three people go over there at 12:00 a.m.? Counsel has just said that I

[1] All references to the Verbatim Report of Proceedings, unless otherwise noted, are to the eight-volume, sequentially paginated trial transcript.

> must be disparaging these people because they don't have jobs and live in Tenino. Is that what I was doing? That's for you to decide.
>
> But what I am attempting to show you is that these people don't live under the same rules of society, the same way that most of us live. They don't think the same way that a citizen that you probably interact with a lot lives. This is kind of the underbelly of society. I don't mean that in a bad way. It's just a side of society that I'd suspect that most of you don't see very often. We see it all the time, but you don't. So I'm trying to present that evidence to you so that you understand.
>
> These are people that don't have jobs. They work under the table. They live hand to mouth. They are engaged in drinking all day. They get upset with one another. They fight. That is the type of people we're talking about.
>
> Why did Mickelson, Lewis, Hadley he (sic) run when Mr. Lewis said "The cops are coming"? I mean, if I heard—if I was just run over and heard "The cops are coming," what are you going to do? Hoorah. Yes, I'm saved. I'm going to wait. Let's see what happens.
>
> The other part of that could be—and I won't quarrel with this now—is that that part of society doesn't like cops. I don't like the cops no matter what. And that's this part of society.

RP 1477-78.

Neither Lewis nor Mickelson claims that anything the prosecutor said was untrue. The victim, Nathaniel Abbett, had worked in Leavenworth for two and a half months in the summer of 2011. RP 528-29. Otherwise he did not work. RP 761. Lewis worked odd jobs under the table, RP 1043, 1050, and he lived with

Hadley rent-free. RP 757-58, 993-94. Lewis said that Mickelson also worked odd jobs, RP 1049. Mickelson himself said he was collecting unemployment in December of 2011. RP 1344. Neither was working at the time of the assault in December of 2011. RP 760. Lewis had previously lived rent free with Abbett and Rasmussen. RP 1060. Mickelson paid rent in the amount of $100 to $300 a month, or whatever he could afford. RP 1229. Hadley was collecting unemployment. RP 1049. Of the people living in the Stage Street address, only Rasmussen had a job. RP 1050.

The defendants' social lives involved alcohol. RP 1064. Before they left the house the night of the assault Mickelson had one to one and a half beers, and Lewis drank a beer or two. RP 794, 1049. Lewis drank on a nearly-daily basis and on the 22nd of December, 2011, began drinking between 7:00 and 8:00 p.m., possibly earlier. RP 994, 1044. Mickelson testified his drinking day began around 5:00 to 6:00 p.m., he had had two or three beers during the day, and was buzzed but not drunk on the night of the assault. RP 1233-34, 1236. Deputy Steve Hamilton, who took Mickelson to jail in the early morning hours of December 23, described him as highly intoxicated; he testified that Mickelson passed out while Hamilton was talking to him. RP 180.

The household kept unusual hours. It was not uncommon for people to stop in at Hadley's residence, where both defendants lived, at two o'clock in the morning on a Thursday. RP 816.

The altercation between Abbett, Lewis, and Mickelson ended when Lewis yelled that the cops were coming. Lewis testified that he made this statement because yelling "stop" wasn't working. RP 1162-63, 1198-99. Hadley and the defendants left the scene, RP 787, and none of them contacted the police. When the police did arrive later, Hadley not only gave false statements to the officers but declined to contact law enforcement between that time and the time of trial to give accurate information. RP 768-69, 776-77. Mickelson, who was released from prison less than ten years before trial, for second degree assault, RP 1310-11, 1317, testified that he wouldn't "necessarily" say that snitches were disliked in his circles. RP 1315. Lewis had three felony convictions in the ten years before the trial. RP 1156-57.

There was ample evidence that the people involved had disputes. Abbett and Rasmussen clearly had their problems. RP 333, 337, 540. Lewis and Kuntz had a falling out. RP 691. Lewis and Mickelson had a major fight with Abbett, the subject of the criminal charges.

The record, therefore, supported the statements of the prosecutor. Contrary to Lewis's assertion, the prosecutor did not simply refer to the defendants as bad people. He was explaining why the jury should consider their lifestyle in determining their credibility. People who live the lifestyle of the people residing in the Stage Street address would be very likely to do the things the State alleged the defendants did. People who live a more mainstream lifestyle, presumably that lived by the jurors, would not behave in such a manner. A prosecutor has the right to argue reasonable inferences from the evidence.

Further, this was rebuttal in direct response to the defendants' arguments. "Counsel has just said that I must be disparaging these people because they don't have jobs and live in Tenino." RP 1477. Following are some examples from Mickelson's counsel's closing argument.

> [The prosecutor] is going to try his best after I sit down using drama, using name calling, trying to pull rabbits out of his hat from this other evidence, to make you believe that you must believe Nate Abbett. It simply isn't there.

RP 1445.

> I'm going to ask you to not excuse the lies of the accuser in this case.

RP 1445-46.

> The entire State's case, in light of the overwhelming evidence that Mr. Abbett was a liar and lied to you here and lied to the police about this, the State is attempting to overcome by engaging in some kind of hyper-geometry using chairs and using spontaneous handwritten drawings from witnesses in the witness stand.

RP 1447.

> You know, the burden of proof is squarely upon the State. And it's really interesting to hear how smoothly and how casually [the prosecutor] can kind of, sort of pull that to the side for you.

RP 1449.

> The only person denying it happened that way is Nate Abbett, a known liar, because of the evidence of it in this case that's been brought forth to you.

RP 1456.

> So, you know, out of—what?—six, eight people from Tenino that have testified, you know, several have had felonies. That must mean the whole town lies, you know? And if they don't live in nice places, you know, where everybody has jobs, you know, they—why does it matter who has a regular job at Jaime Hadley's house? Why does that matter? Why is the prosecutor asking you to listen to those kinds of questions, when all you have is one liar who comes in and just a bunch of pictures. You're not left with much to meet your burden of proof beyond a reasonable doubt. That is why.

RP 1459.

> Why is [Abbett] lying to you?

RP 1462.

> [The prosecutor] can jump up and down and scream all he wants, but who admitted to being a liar? Well, Nathan Abbett admitted to that. . . One of the hardest things to have happen in the criminal justice system is to pin the tail on the liar. That is really difficult. But you don't have to worry about that.

RP 1464.

> Well, [the prosecutor] wants you to obviously have the same emotional reaction to this that Jesse Eubanks did.

RP 1465.

> You don't need to engage in geometric hi jinks and speculate about angles and all of that. That's what the State is forced to do because that is the best the evidence gets for them.

RP 1469.

While Lewis's counsel also called the victim a liar a number of times, RP 1422, 1423, 1426, 1427, 1430, 1432, 1434, he did not make his argument a personal attack against the prosecutor as did Mickelson's counsel. Arguments claimed to be improper are reviewed in the context of the total argument, the issues, the evidence addressed, and the instructions given the jury. Graham, 59 Wn. App. at 428; State v. Green, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986). "Remarks of the prosecutor, even if they are

improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective. " Russell, 125 Wn.2d at 85-86.

The argument complained of here was in direct response to Mickelson's closing argument. "[W]hy does it matter who has a regular job at Jaime Hadley's house? Why does that matter? Why is the prosecutor asking you to listen to those kinds of questions . . .?" RP 1459 It did not refer to facts not in evidence and was not an attempt to smear the defendants' characters. It was an explanation to the jury of the mindset of the defendants and their friends, in an effort to convey that their actions made sense in their world. It was not improper, and certainly not reversible. Neither defendant objected to the comments now challenged. Mickelson's counsel objected at another point during the State's rebuttal, RP 1476, but not to this part of the argument. The comments would not be likely to cause a jury to ignore the evidence, disregard the jury instructions, and abandon its common sense to convict the defendants just because they didn't have jobs, or they drank beer, or they fought. It was entirely proper for the prosecutor to address

the credibility of the defendants. There was no error. Even if it were, common sense tells us a curative instruction would have reminded the jury of their duty to decide on the facts, not sympathy or prejudice, and would not have been useless.

Mickelson also claims that the prosecutor's comments were somehow an "extrajudicial opinion." Mickelson's Opening Brief at 12. It is unclear how this can be an individual opinion of the prosecutor as opposed to pointing out the obvious differences between the lifestyles of the defendants and their associates and those of mainstream society. While the State does not dispute that a prosecutor may not put forth his personal opinions as the guilt of the defendants, the challenged remarks are simply not personal opinions.

b. Comment on right to remain silent.

Both appellants claim that the prosecutor impermissibly commented on their right to remain silent. Lewis's Opening Brief at 9-11, Mickelson's Opening Brief at 13-15. That is not correct. Mickelson at least did not assert his right to remain silent, he did in fact speak to the police, and the prosecutor properly commented on what he said as well as the fact that he said something entirely different on the witness stand. The record is silent as to Lewis's

post-arrest conduct, but on the stand he told the same story that Mickelson and Hadley did.

Deputy Steve Hamilton detained Mickelson at approximately 2:39 a.m. on December 23, 2011, and read him the Miranda[2] warnings. RP 178, 184. Mickelson was willing to talk to Hamilton. RP 178-79. He told Hamilton that he did not know a Nathaniel Abbett, denied assaulting him, said he had not left the Stage Street address the entire evening, and claimed to have been sleeping the entire night. RP 179-81, 236. He did not tell Hamilton that he had been hit by a car and did not complain of any injuries. RP 181.

After arresting Mickelson, Hamilton then detained Lewis. RP 170. Both were placed under arrest, RP 174, both were placed into Hamilton's patrol car, and both were taken to the Thurston County Jail. RP 182. It was Hamilton's observation that Mickelson was highly intoxicated and was passing out or going to sleep while speaking with Hamilton. RP 180. On cross-examination, counsel for Mickelson asked Hamilton if Mickelson had the right not to speak to him, and Hamilton replied, "Absolutely. And I—but he wasn't saying, necessarily, that." RP 223. On re-

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[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

cross, the prosecutor asked Hamilton if he understood Mickelson's nodding off during their conversation as an invocation of his right to remain silent, Hamilton said, "Possibly. I think that—I—it's a far stretch to say he was being disrespectful. He might have just been nervous. I don't know. I'm not sure. But he was awake, and he was asleep, and then he was awake." RP 235.

There was nothing in Hamilton's testimony about speaking with Lewis. RP 157-243. There was no evidence offered at trial that Lewis had invoked his right to remain silent. There was no pretrial CrR 3.5 motion to suppress any statements by either defendant.

Sgt. Rudloff spoke to Jaime Hadley and offered her the opportunity to make a statement about the events of the evening. She declined. RP 70-71. She testified at trial that she had spoken to two or three officers but had given truthful statements to none of them. RP 769. She explained she had not come forward after the incident and before trial with the truth because she was afraid she'd get into trouble for lying to the police about not being there. RP 776-77. On the witness stand, she gave an account of the incident consistent with that of the two defendants. RP 701-850.

At trial, Lewis testified extensively about the events. RP 992-1175. He testified about being at the scene, seeing Mickelson hit with Abbett's vehicle, the fight inside the Jeep, and fleeing the scene back to Hadley's house. Mickelson also testified at length to the same version of the incident. RP 1180-1345. On cross-examination, this exchange took place:

> Q. And when you were asked about this on December 23rd, what did you tell the police happened?
>
> A. Nothing happened.
>
> Q: That's right. You told them nothing happened. So we don't have that statement that you gave them, right?
>
> A. I didn't give a statement. No.
>
> Q. That's right. Because you lied to them.
>
> A. I did lie to them. Yes.
>
> . . . .
>
> Q. But you told the police officer, you don't know Nate Abbett. That wasn't true.
>
> A. Yes. That was not true.
>
> Q. Okay. You told the police you didn't know anything about the event, correct?
>
> A. Correct.
>
> Q. That was a lie.

> A. That was a lie.
>
> Q. You also told the police that you never left the house that night; you were asleep the whole time. Isn't that true?
>
> A. That's true.
>
> Q. So that's three lies.
>
> A. Yeah. I did lie.

RP 1273-74.

Lewis notes that the prosecutor did not refer directly to the fact that Lewis invoked his right to remain silent. Lewis's Opening Brief at 11. There is nothing in the record to indicate that Lewis did. He objects to the following portion of the State's rebuttal argument:

> Think about the violence of the scene. Think about the mindset of Mr. Abbett in that situation. He says he didn't hit anyone really. These guys don't have any injuries. Now, he gave two statements to the police and did a defense interview. So [Mickelson's defense attorney] wants to criticize, why did I spend so much time with these defendants dissecting what they said. Because they never said it before. I don't have something to pin them down on, do I? I don't have a transcript to go, didn't you say at page 3, line 12, six months ago that this happened? Did I have that ability? I didn't. Why didn't I? Because they never gave statements.
>
> Hadley never gave a statement. Mickelson never gave a statement. These witnesses never gave a statement to the police, either. So he wants to criticize that. But it is my job to pin down their

> statements. And I have to do that in my job, because they never spoke about these events. Because this was the first time, wasn't it? The first time anyone heard this story.

RP 1483-84. The prosecutor made no reference to Lewis unless one construes "they never said it before" as referring to Lewis. But the prosecutor named Mickelson and Hadley, who together form a "they." There was no objection from Lewis.

It is obvious from the context that when he referred to the failure of the defendants and the witnesses to give a statement it was not because they had invoked any constitutional right to remain silent. It was because they had said they weren't there, knew nothing about anything, and had nothing to tell the police because they had no information. That is entirely different from refusing to talk at all.

The State may not comment on a defendant's silence. "A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence is an admission of guilt." State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). A mere reference to the defendant's silence is not necessarily a violation of his right to remain silent. State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1

(2008). Here the State was quite properly attacking the credibility of the witnesses because Mickelson, as well as Hadley, testified to something different than what they told the police at the time of the incident. The prosecutor's comments were not made to suggest that they exercised their right to remain silent and that therefore they were guilty. The remarks were made to show the defendants were lying at trial.

Once a defendant waives his right to remain silent and makes a statement to the police, the State may use that statement to impeach the defendant's inconsistent trial testimony. State v. Belgarde, 110 Wn.2d 504, 511, 755 P.2d 174 (1988). "In particular, the State may question a defendant's failure to incorporate the events related at trial into the statement given police or it may challenge inconsistent assertions. Id.

Because Mickelson in particular had already testified at some length that he had lied to the police when he was arrested, there is no chance that the jury would have been left with the impression that the defendants invoked their right to remain silent and that the State was asking it to consider that evidence of guilt. It would indeed be unfair for defendants to be able to tell a story on the witness stand different from the story they told before, and the

State be unable to question their credibility because they had "remained silent" about the new story when arrested. The appellants' arguments take the prosecutor's words out of context and twist their meaning.

c. False choice and shifting the burden of proof.

Lewis argues that the prosecutor presented a "false choice" to the jury by misleading the jurors into thinking they could choose the version they believed and convict on less than proof beyond a reasonable doubt. Lewis's Opening Brief at 11-13. Once again, Lewis is mischaracterizing the prosecutor's comments. The first portion of the State's closing argument which Lewis challenges is as follows:

> Now, think about—the physical dynamics of how he could have gotten run over. And I will just say this at the outset, and I'll repeat this a couple of times. Either you folks believe that this was an Assault in the Second Degree or it was self-defense. And you shouldn't consider any other charge. Because either it happened the way they said it happened, or it happened the way Nate Abbot told you. There is no in between.

RP 1392. Both before and after these comments, the prosecutor was discussing Mickelson's testimony about the relative positions of Hadley's and Abbett's cars. RP 1391-92. It is clear that the prosecutor was referring to the fact that there were two versions of

how the events happened and although both of them could not be true, neither account supported a conviction for the lesser-included degree of assault. There is no suggestion that the jury could convict simply because they believed Abbett's version regardless of whether they found sufficient evidence that the crime had been committed.

The second challenged portion of the argument occurred during the State's rebuttal. In context, it is as follows:

> I'll finish as I started. This is the simple facts. Ms. Hadley took Joel Lewis and Richard Mickelson from her house on Stage Street up old Highway 99 to Angus Road looking for Mr. Abbett. It was 12:00 a.m. They had a bat, maybe two. And this is what Mr. Abbett looked like afterwards.
>
> This is all I have to prove is that these two defendants committed an assault, either that they assaulted him and recklessly inflicted substantial bodily harm, or they assaulted him with a deadly weapon. That's it. If you find that I've met that burden of proof, then it is your duty to find them guilty.
>
> If you do not believe Mr. Abbett and you believe Mr. Mickelson and Mr. Lewis, that they were acting in self-defense, then you are equally obligated to find them not guilty of anything. That's this case. Thank you.

RP 1485-86.

Lewis cites to State v. Miles, 139 Wn. App. 879, 162 P.3d 1169 (2007), for his claim that the prosecutor here misled the jury. In Miles, the court construed the prosecutor's argument as

presenting the jury with a false choice—that it could acquit Miles only if it believed his evidence. Id. at 890. What the prosecutor in this case told the jury is that if it believed Lewis and Michelson, it *must acquit.* He did not tell the jury that if it believed Abbett it must convict, or that to acquit it must believe Abbett was lying. The State is entitled to argue that if the jury believes its witnesses, the State has proved its case, and that does not present the jury with a false choice or shift the burden of proof.

To establish prosecutorial misconduct, the defendant must show not only that there was misconduct, but that it resulted in prejudice that "had a substantial likelihood of affecting the jury verdict" and that no curative instruction would have obviated the prejudicial effect on the jury. State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). No objection was made to the argument now challenged. Lewis does not even attempt to explain why a curative instruction would have been useless.

The jury was correctly instructed that it was to decide the facts in the case based on the evidence presented at trial, CP 37, and that it was the sole judge of the credibility of the witnesses. CP 41. It was instructed on the presumption of innocence and the burden of proof. CP 43. It was told that the lawyer's remarks were

not evidence. CP 38. Even if somehow the jury could have gotten the impression from the prosecutor's argument that if it believed one or the other version it could convict without finding guilt beyond a reasonable doubt, the instructions would have corrected that misapprehension.

The prosecutor's argument was not improper. Apparently the defendants did not think so at the time, either, since neither objected. One would expect them to do so if they construed the remarks as Lewis does now; that would be critical to make clear to the jury what the burden of proof actually is. The fact that neither defendant objected leads to the conclusion that nobody construed the argument in that manner.

2. The appellants did not receive ineffective assistance of counsel. They have established neither defective performance or prejudice.

Both appellants claim ineffective assistance of counsel because their attorneys did not object to the arguments of the prosecutor discussed above. Lewis's Opening Brief at 16-18 (although he refers to the prosecutor's comments as testimony); Mickelson's Opening Brief at 16-18.

Deficient performance occurs when counsel's performance "[falls] below an objective standard of reasonableness." State v.

Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). As the Supreme Court noted, "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 688. An appellant cannot rely on matters of legitimate trial strategy or tactics to establish that deficiency. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Moreover, "judicial scrutiny of counsel's performance must be highly deferential." Strickland at 689; *See also* State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

> "Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the 'wide range' of permissible professional legal conduct."

United States v. Necoechea, 986 F.2d 1273, 1281 (1993), *citing to* Strickland, 466 U.S. at 689.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation", but rather to ensure defense counsel functions in a manner "as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688-689; *See* Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which "make[s] the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Id. at 696. A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . [then] that course should be followed [first]." Strickland, 466 U.S. at 697.

The defendants have the burden of first showing that their counsel at trial were deficient, meaning that their performance "fell below an objective standard of reasonableness based on consideration of all the circumstances." McFarland, 127 Wn.2d at 334-35. They argue that there is no tactical or strategic reason for counsel not to have objected to the argument, and that his counsel

was therefore deficient. While there may have been no strategic reason for defense counsel to refrain from objecting, the competency of counsel must be judged from the record as a whole, and not from an isolated segment. State v. Piche, 71 Wn.2d 583, 591, 430 P.2d 522, 527 (1967).

Even if, however, the defendants could show that their counsel were deficient, they still have the burden of showing prejudice, meaning that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." McFarland, 127 Wn.2d at 335.

Trial counsel most likely did not object to the prosecutor's closing arguments challenged on appeal because the arguments were not objectionable and were not the errors that the defendants now claim. However, even if they were, it cannot be said that trial counsel were not functioning as counsel. They vigorously and doggedly defended their clients. Nor is prejudice self-evident, as Lewis claims. Lewis's Opening Brief at 17. The appellants have mischaracterized the prosecutor's arguments; there was nothing to which to object.

3. There was no cumulative error.

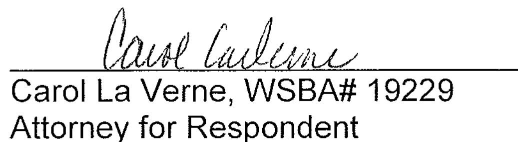
The cumulative error doctrine "is limited to instances where there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

The claimed errors in this case were not errors; there was no cumulative error. Had they been correct, any one of their claims would be reversible error. They are not.

D. CONCLUSION.

There was no prosecutorial misconduct, no ineffective assistance of counsel, and no cumulative error. The State respectfully asks this court to affirm the convictions of both defendants.

Respectfully submitted this 19th day of February, 2013.



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THURSTON COUNTY PROSECUTOR

February 19, 2013 - 4:36 PM

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