NO. 43987-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

JASON FITZGERALD,

Appellant.

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

The Honorable Gary R. Tabor, Judge

AMENDED BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES (CONT'D)

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct in closing argument by urging the jury to convict based on guilt by association, appealing to the jury's passion or prejudice, minimizing the burden of proof beyond a reasonable doubt, and disparaging the role of defense counsel.

2. Appellant's attorney was constitutionally ineffective in failing to object to repeated misconduct.

3. The trial court violated appellant's constitutional right to a public trial by hearing challenges to potential jurors in a proceeding closed from public view.

4. The trial court violated appellant's constitutional right to be present at all critical stages of trial.

Issues Pertaining to Assignments of Error

1. The prosecutor used a PowerPoint presentation showing photographs of appellant juxtaposed with two men seen at the burglary and the caption "birds of a feather flock together." The prosecutor argued jurors should use their common sense and determine what they would think if they heard this story in a coffee shop. The prosecutor argued defense counsel was merely putting up roadblocks to reality. Did the prosecutor commit flagrant and ill-intentioned misconduct by arguing guilt

by association, diminishing the burden of proof beyond a reasonable doubt, and disparaging the role of defense counsel?

2. The constitutional right to effective assistance of counsel is violated when the attorney performs deficiently and there is a reasonable probability the error affected the outcome of the trial. Was appellant's attorney ineffective in failing to object to repeated instances of prosecutorial misconduct that was likely to affect the jury's assessment of the circumstantial evidence in this case?

3. During jury selection, the parties apparently exercised all challenges, both peremptory and for cause, during a private sidebar proceeding at the clerk's desk. Because the trial court did not analyze the Bone-Club[1] factors before conducting this important portion of jury selection privately, did the court violate appellant's constitutional right to a public trial?

4. Did appellant's absence from exercise of challenges to potential jurors violate his constitutional right to be present at all critical stages of trial?

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[1] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

B. STATEMENT OF THE CASE

1. Procedural Facts

The Thurston County prosecutor charged appellant Jason Fitzgerald with second-degree burglary, attempted residential burglary, and second-degree theft. CP 17-18. The prosecutor also alleged the attempted residential burglary was committed with the victim present in the home and Fitzgerald's high offender score and multiple current offenses resulted in some offenses going unpunished. CP 17.

After general voir dire in open court, the trial judge called the attorneys forward to select the jury in a sidebar. Supp. RP at 70-71. Exercise of challenges for cause and peremptory challenges apparently occurred during this sidebar. Aside from a mention of the number of challenges by each party in the minutes, the proceedings at this sidebar were not made part of the record.

The jury found Fitzgerald guilty on all charges and answered yes to a special verdict about whether the victim was present during the attempted residential burglary. CP 33-37. The court found some current offenses would otherwise go unpunished and imposed exceptional consecutive sentences for the attempted residential burglary and second-degree theft for a total of 89 months. CP 54, 61. A standard range sentence for second-degree

burglary is to run concurrently. CP 54, 61. Notice of appeal was timely filed. CP 38.

2. Substantive Facts

Fitzgerald was found in a car with two men seen at a burglary in rural Thurston County. 2RP[2] 51-52. In.closing argument, the State argued, "birds of a feather flock together." 2RP 304. The prosecutor displayed photographs of Fitzgerald juxtaposed with photographs of the other two men, all apparently in handcuffs at the time of their arrest. CP 67, 101. Beneath the photographs was the phrase, "Birds of a feather flock together." Id.

Evidence that Fitzgerald was involved in the incident was circumstantial. Levi Thompson was awakened one morning by his girlfriend's six-year-old son, who ran into the bedroom yelling, "We're being robbered!" 2RP 110. Thompson ran to the window and saw one man tying down a tarp covering Thompson's generator in the bed of a pickup truck Thompson had never seen before. 2RP 110-11. He saw a second man running from the back of the house where the child's bedroom was located. 2RP 111, 114. The truck sped away as Thompson pursued on foot as far as

[2] There are five volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Sept. 13, 2012; 2RP – Sept. 19-20, 2012 (two volumes consecutively paginated); 3RP – Sept. 25, 2012; Supp. RP – Sept. 19-20, 2012 (voir dire and opening statements).

the end of the driveway. 2RP 115. Thompson returned to the house to call 911. 2RP 117.

Thurston County sheriffs responded to the home and also to nearby roads in hopes of finding the truck Thompson described. 2RP 34-40, 173-74, 184-85. At least 15 minutes later and roughly four miles away, Deputies stopped a truck matching Thompson's description. 2RP 34-35, 187. Inside were Ty Martin, Michael Cairns, and Fitzgerald. 2RP 51-53.

Thompson identified Martin and Cairns as the two men he saw at his home. 2RP 51-52, 128-30. He testified he did not see Fitzgerald at his home. 2RP 129. However, he was acquainted with Fitzgerald, a friend of Thompson's cousin. 2RP 107-08. Thompson testified his cousin had been at his home a couple of days earlier asking odd questions about what time he left for work and what he kept in his garage. 2RP 108-09. Thompson testified he never invited any of the three men to his house or gave them permission to take any of his property. 2RP 130.

The evidence was disputed as to who was driving the truck when the deputies stopped it. Deputy Cole testified Fitzgerald got out of the driver's side door when he ordered the driver out of the truck. 2RP 191-94. However, the other two occupants also subsequently exited via the same door. 2RP 194-96. Cole claimed he could see that the first person to get out had been behind the wheel and someone else was in the rear part of the cab

behind the driver's seat. 2RP 196. He admitted he could have been mistaken because the truck's windows were tinted very dark. 2RP 215. The booking forms describing property found on the men conflicted with Cole's report. Cole had described Fitzgerald as having a walled with identification and a pocketknife. 2RP 210. Yet the property reports list no property found on Fitzgerald, but identification for Martin and a pocketknife found on Cairns. 2RP 211-13. Deputy Holden testified he assumed Martin was the driver because it was Martin who was placed in the first available patrol car, but he conceded he had no independent memory of seeing who was in the driver's seat. 2RP 239-40.

The truck contained numerous items Thompson testified belonged to him. 2RP 131-43. His estimate of the values of the stolen property amounted to between $2575 and $2,640. 2RP 131-142

Thompson testified his girlfriend's six-year-old son was traumatized by the event. 2RP 118. He testified the child was "really scared" and the incident has had a lasting impact on him. 2RP 118. He testified the child no longer wants to go to bed. 2RP 118. The family moved the bed away from the window and let the dog sleep under his bed, but he is still often too scared to sleep in his own bed. 2RP 118. Thompson testified this was a significant change because the child had previously gone to bed readily every night at 9:30. 2RP 118. No objection was made to this evidence.

However, when the prosecutor attempted to elicit similar testimony from Thompson's girlfriend regarding her trauma, the court sustained the objection and ruled the evidence irrelevant. 2RP 169. At sentencing, the court specifically stated that trauma was irrelevant to the aggravating factor (that the victims of the burglary were present at the time). 3RP 31-32. But at trial, the jury was not instructed it could not consider the trauma to the child, and the prosecutor specifically argued the child "has been traumatized by these events." 2RP 317.

The jury was instructed regarding accomplice liability. CP 26. The State's theory was that, whether or not he was the driver, Fitzgerald's presence in the truck was circumstantial evidence he must also have been ready to assist at the burglary. 2RP 316. The State argued Fitzgerald was the only connection between the two identified burglars and Levi Thompson. 2RP 319. The theme was "birds of a feather flock together." 2RP 304. The prosecutor began his closing argument by telling the jury, "I want you to have that kind of mind set about these three individuals." 2RP 304.

The prosecutor also hewed to the theme that the jury should use common sense. 2RP 310, 322, 341-42. He first explained the circumstantial evidence instruction means jurors can apply common sense. 2RP 310. He compared the jurors' decision to what they would think if someone told them this story in their daily lives. 3RP 322. In rebuttal, he described the jury's

role in terms of "circumstantial evidence and the reasonable inferences you can draw from it." 2RP 344; CP 98. He asked the jury what they would think if they heard this story in a coffee shop. 2RP 322, 347.

The prosecutor urged the jury to look at the big picture, and described defense counsel's closing argument as merely putting up "roadblocks," "because they don't want you to see what is there. 2RP 341; CP 96. They don't want you to see what you can see when you use your common sense." 2RP 341-42. He argued defense counsel wanted the jury to "suspend reality." 2RP 347-48.

C. ARGUMENT

1. PROSECUTORIAL MISCONDUCT VIOLATED FITZGERALD'S RIGHT TO A FAIR TRIAL.

A prosecutor is a quasi-judicial officer with an independent duty to ensure a fair trial. State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). Misconduct by a prosecutor can deprive a defendant of his constitutionally guaranteed right to a fair trial. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). Even when there is no objection at the time, prosecutorial misconduct requires reversal when it is so flagrant and ill intentioned that the resulting prejudice could not have been cured by instructing the jury. Id.

Without an eyewitness placing him at the scene, the State was forced to rely on circumstantial evidence to prove Fitzgerald's involvement in the charged crimes. The jury was properly instructed that circumstantial evidence is not necessarily any less valuable than direct evidence. CP 24. But apparently not trusting either that instruction or the strength of its evidence, the prosecutor felt the need to ratchet down the burden of proof and lay a thumb on the scales of justice.

First, the prosecutor committed misconduct by encouraging the jury to rely on the intuitive appeal of guilt by association with known burglars and using evidence that was not admitted. Second, he committed misconduct by urging a verdict based on the emotional appeal of a traumatized child. Third, the prosecutor committed misconduct by trying to reduce the burden of proof beyond a reasonable doubt to the common sense one would apply during a casual conversation at a coffee shop. Finally, the prosecutor committed misconduct by characterizing defense counsel's arguments on reasons to doubt as attempts to hide the truth. Alone or cumulatively, these incidents rendered Fitzgerald's trial unfair.

a. The Prosecutor Committed Misconduct by Urging a Verdict Based on Guilt by Association and Unadmitted Evidence.

Prosecutors must not urge guilty verdicts on improper grounds. State v. Belgarde, 110 Wn.2d 504, 507-508, 755 P.2d 174 (1988). A prosecutor's

latitude in closing argument is limited to arguments "'based on probative evidence and sound reason.'" Glasmann, 175 Wn.2d at 704 (quoting State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)). The intuitive notion of guilt by association does not meet this standard.

Courts around the country have condemned prosecutorial argument based on the proverb that "birds of a feather flock together." See, e.g., United States v. Smith, 806 F.2d 971, 975 (10th Cir. 1986) (arguments and comments to the jury that "birds of a feather flock together," were plain error adversely affecting the right to a fair trial); United States v. Sturgis, 578 F.2d 1296, 1299 (9th Cir. 1978) ("strongly condemning" prosecutor's argument that "birds of a feather flock together"); People v. Ong, 94 Ill. App. 3d 780, 790, 419 N.E.2d 97 (1981) (prosecutorial argument that "birds of a feather flock together" compounded jury confusion related to accomplice liability); State v. Harrington, 27 Ariz. App. 663, 667, 558 P.2d 28, 32 (1976) (argument that birds of a feather flock together "transcended the boundaries of permissible argument").

The "birds of a feather" slide also was misconduct because it presented to the jury evidence that was not admitted. In Glasmann, the prosecutor used a PowerPoint presentation to illustrate his closing argument with booking photographs altered by the addition of phrases "calculated to influence the jury's assessment of Glasmann's guilt." 175 Wn.2d at 705.

Although the booking photograph was admitted, the court held, "modification of photographs by adding captions was the equivalent of unadmitted evidence." Id. at 706. "[A] prosecutor must be held to know that it is improper to present evidence that has been deliberately altered in order to influence the jury's deliberations." Id. Noting that "highly prejudicial images may sway a jury in ways that words cannot," the court concluded the use of the slide show in Glasmann was flagrant, ill-intentioned, and could not have been cured by instruction." Id. at 707.

Here, the photographs were also admitted but altered. CP 67, 101; Exs. 31-37. The slide juxtaposes the photographs of Fitzgerald, Cairns, and Martin, all with their hands behind their backs apparently in handcuffs, and adds a caption reading, "birds of a feather flock together." CP 67, 101. As in Glasmann, these alterations created a powerful visual that was never admitted into evidence. This slide, which began and ended the prosecutor's closing argument, was calculated to urge the jury to think that because Martin and Cairns were guilty, Fitzgerald must be guilty as well. The prosecutor painted Fitzgerald with the same brush as the others in hopes the jury would overlook the fact that no one saw him at the scene and the other reasons to doubt his involvement. This was flagrant misconduct under Glasmann. 175 Wn.2d at 704-06.

b. The Prosecutor Committed Misconduct by Urging a Verdict Based on the Impact on a Traumatized Child Victim.

"The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." Id. at 704 (quoting American Bar Association, Standards for Criminal Justice std. 3–5.8(c) (2d ed. 1980)). Additionally, every trial advocate has a duty not to intentionally introduce prejudicial inadmissible evidence. State v. Montgomery, 163 Wn.2d 577, 593, 183 P.3d 267 (2008). "A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). Victim impact testimony is improper because it is irrelevant to any question properly before the jury and instead encourages the jury to render a verdict based on emotion or sympathy. ER 401, 402, 403; City of Auburn v. Hedlund, 165 Wn. 2d 645, 654, 201 P.3d 315, 319 (2009).

Evidence that this crime resulted in lasting trauma to a six-year-old child was irrelevant to any material issue in this case. The fact that he was later too frightened to sleep alone could only have been calculated to arouse the jury's sympathy for the family and outrage at Fitzgerald. Although initially no objection was made, well before closing argument, the trial court made clear the impact on the child was irrelevant. 2RP 169, 226. Nevertheless, the prosecutor continued to rely on it in closing argument and

in the accompanying slide presentation, which read, "Jacob has been traumatized by these events of seeing a stranger trying to come into his room as he slept in bed. It still is affecting him and changed the way he previously lived." RP 317; CP 87.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401. Even relevant evidence may be excluded when the danger of unfair prejudice substantially outweighs any minimal probative value. ER 403; Fisher, 165 Wn.2d at 745. Evidence causes unfair prejudice when it is "'more likely to arouse an emotional response than a rational decision by the jury.'" Hedlund, 165 Wn. 2d at 654 (2009) (quoting State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000)). Evidence that is only relevant to the impact of the offense on the victim or others has no place in the guilt phase of a criminal trial.

Here, the prosecutor attempted to argue the impact on the child was relevant because the State charged the aggravating factor that the victims of the burglary were present in the home at the time. 2RP 226. But the court clearly pointed out that the only fact relevant to this aggravator is presence. RP 226; RCW 9.94A.535(3)(u); see also State v. Smith, 123 Wn.2d 51, 56-57, 864 P.2d 1371 (1993) (mere presence of burglary victim is proper aggravating factor because of increased risk of injury), overruled on other

grounds by State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005); 11A Washington Practice: Pattern Jury Instructions, Criminal WPIC 300.30, cmt (3d Ed. 2008) (2005 statute designed to codify existing common law aggravator). No particular impact on the victim is required. The fact that the child was later too frightened to sleep alone in his bed was utterly irrelevant to the offenses and the aggravators and was likely to incite the jury to decide the case based on an emotional response. It was misconduct to elicit this testimony and then to rely on it in closing argument.

c. The Prosecutor Committed Misconduct by Diminishing the Burden of Proof Beyond a Reasonable Doubt.

The presumption of innocence and the corresponding burden of proof beyond a reasonable doubt is the "bedrock upon which [our] criminal justice system stands." State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). To mislead the jury regarding these fundamental principles constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights. State v. Johnson, 158 Wn. App. 677, 685-86, 243 P.3d 936, 940 (2010) (citing Bennett, 161 Wn.2d at 315), rev. denied, 171 Wn.2d 1013 (2011).

It is well-established that prosecutors may not trivialize the jury's role or the burden of proof. Johnson, 158 Wn. App. at 684. Specifically, courts have condemned arguments that focus the jury's attention "on the

degree of certainty the jurors would have to have to be willing to act, rather than that which would cause them to hesitate to act." Id.

In 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 I believed his testimony that he just borrowed that . . . sweatshirt . . . and he didn't know that the cocaine was in there, and he didn't know what cocaine was.'" Id. at 682. The prosecutor continued, "To be able to find reason to doubt, you have to fill in the blank." Id.

The court held this so-called "fill in the blank" argument was unquestionably improper because it "subverted the presumption of innocence." Id. at 684 (discussing State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009)). It did so by implying "that the jury had an initial affirmative duty to convict and that the defendant bore the burden of providing a reason for the jury not to convict him." Johnson, 158 Wn. App. at 684. The "fill in the blank" argument "trivializes" the jury's role in assessing the State's case by focusing on the certainty required to convict rather than the reasons for doubt. Id.

The prosecutor's argument in this case also trivialized the jury's role. The theme of his closing argument was that, if the State's version of events made sense, Fitzgerald must be guilty. 2RP 310-11, 322, 341-42, 347; CP 94, 99. The prosecutor first argued circumstantial evidence instruction

means the jury can use common sense. 2RP 310; CP 99. While this alone might be unobjectionable, the prosecutor did not stop there. Instead he compared the jury's role to making everyday decisions:

> If someone had come up to you and told you, you know, my house just got burglarized, the cops were there within ten minutes, they pulled over the truck with three guys in it and all of the stolen property, wouldn't you almost automatically say, yeah, all three of those guys, yeah, they must have burgled your house, because that makes sense.

2RP 322. He argued the jury's job was to decide, " What is the circumstantial evidence and the reasonable inferences that can be drawn from it?" 2RP 344. The prosecutor compared the jury's role in assessing the State's case to the standard they would use in assessing a story told by an acquaintance in a coffee shop: "If someone walked into a coffee shop and said, hey, I want to tell you this story, this, this, and this happened, I mean, what would you logically conclude?" 2RP 347. Like the "fill in the blank" argument in Johnson, the prosecutor's argument here focused the jury on "the degree of certainty the jurors would have to have to be willing to act, rather than that which would cause them to hesitate to act." 158 Wn. App. at 684.

Anderson also discussed the impropriety of arguments that compare reasonable doubt to decisions made in every day life, declaring:

> By comparing the certainty required to convict with the certainty people often require when they make everyday

> decisions—both important decisions and relatively minor ones—the prosecutor trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case against Anderson. This was improper.

Anderson, 153 Wn. App. at 431; see also State v. Lindsay, ____ Wn. App. ____, 288 P.3d 641, 652 (2012) (Explanations of reasonable doubt that involve "comparisons to every day decision making" are improper). Together, the arguments in this case implied to jurors that the only requirement for a conviction was a reasonable conclusion from circumstantial evidence, such as they would make in a casual situation like a coffee shop. 2RP 344, 347. These arguments misled the jury by trivializing the burden of proof beyond a reasonable doubt. Johnson, 158 Wn. App. at 684; Anderson, 153 Wn. App. at 431; Lindsay, 288 P.3d at 652. Given the plethora of cases in recent years decrying this type of argument, this should be held to be flagrant and ill intentioned. See, e.g., State v. Walker, 164 Wn. App. 724, 732, 265 P.3d 191 (2011) (citing Anderson, 153 Wn. App. at 431 and holding prosecutor's comments improper where they minimized burden of proof by comparing reasonable doubt to everyday decision-making).

d. The Prosecutor Committed Misconduct by Disparaging Defense Counsel's Role as Putting Up Roadblocks to Reality.

"[D]enigrating counsel is prosecutorial misconduct." Lindsay, ____ Wn. App. at ____, 288 P.3d at 651. Comments by the prosecutor that permit the jury to nurture suspicions about defense counsel's integrity violate the

rights to a fair trial and to effective assistance of counsel. Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983); State v. Neslund, 50 Wn. App. 531, 562, 749 P.2d 725 (1988). It is therefore blatant misconduct for the prosecutor to disparage defense counsel or defense counsel's role. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); Bruno, 721 F.2d at 1195. Such improper argument severely damages the defendant's opportunity to present his case before the jury. Bruno, 721 F.2d at 1195. Courts have long viewed any abridgment of this principle as "'particularly unacceptable.'" Lindsay, ____ Wn. App. at ____, 288 P.3d at 651 (quoting Bruno, 721 F.2d at 1195).

The court found improper disparagement of defense counsel in State v. Thorgerson, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011), where the prosecutor characterized defense counsel's argument as "sleight of hand" and "bogus." These arguments were ill intentioned because they were planned out ahead of time and implied deception by defense counsel. Id. Similarly, in State v. Warren, the court found the prosecutor's argument improper when he described defense counsel's argument as a "'classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing.'" State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008) (quoting court proceedings).

The prosecutor's comments here were in the same vein as those in Thorgerson and Warren; the prosecutor described defense counsel as putting up "roadblocks" to the jury using common sense to see what really happened. 2RP 341-42. He accused defense counsel of wanting jurors to "suspend reality." 2RP 347-48. These comments improperly implied counsel was using deception to prevent the jury from getting at the truth. Thorgerson, 172 Wn.2d 438, 451-52; Warren, 165 Wn.2d at 17. These comments must have been planned ahead of time because they were illustrated by the PowerPoint slide showing road signs. CP 96. This Court should find the prosecutor's comments disparaging defense counsel were flagrant and ill intentioned misconduct. Thorgerson, 172 Wn.2d at 542.

e. Taken Alone or Cumulatively, the Misconduct in this Case Denied Fitzgerald a Fair Trial.

Once it is established a prosecutor's conduct was improper, the court considers the likely effect and whether instruction could have cured it. State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). The focus is on whether the misconduct has created a "feeling of prejudice" that would prevent a fair trial. Id. Misconduct that merely confuses the jury about the burden of proof may be curable by instruction; but "inflammatory" comments appealing to emotions rather than reason can engender a "feeling of prejudice" that contaminates the entire trial. Id. at 762-63. "'[T]he

cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.'" Glasmann, 175 Wn.2d at 707 (quoting Walker, 164 Wn. App. at 737).

In Walker, the court held the cumulative effect of the numerous instances of misconduct required reversal, despite the lack of objection. 164 Wn. App. at 737. In that case, the prosecutor improperly argued the jury had to fill in the blank with a reason to find reasonable doubt, compared the reasonable doubt standard to every-day decision-making, argued the jury's role was to declare the truth of what happened, and misstated the law regarding the defense of others defense. Id. at 730-36. Each of these arguments was illustrated by a PowerPoint slide. Id. at 729. There were no objections to any of the comments except the misstatement of law regarding the defense. Id. at 731-35.

Nevertheless, the court held the prosecutor's misconduct was flagrant and ill intentioned and the cumulative effect required a new trial. Id. at 739. The court reasoned that the case largely came down to a "credibility contest in which the prosecutor's improper arguments could easily serve as the deciding factor." Id. at 738. The court also noted the prosecutor made improper arguments "not just once or twice but frequently," and used them to develop themes throughout closing argument. Id. The repeated

comments were then further emphasized by the PowerPoint slides. Id. The court concluded that, in light of the conflicting evidence, the frequent improper statements were likely to have affected the jury in ways that could not be cured by instruction. Id. at 738-39.

The court also reversed for prosecutorial misconduct despite the lack of objection in Glasmann. 175 Wn.2d at 702. There, the court focused on the difficult-to-dispel subconscious effect created by the dramatic and inflammatory visuals of the PowerPoint presentation captioning Glasmann's booking photo with the word "Guilty." Id. at 707-08.

Like Walker and Glasmann, this case also involves repeated improper comments used to create themes and illustrated with PowerPoint slides. The comments regarding the lasting impact on a six-year-old child were calculated to be inflammatory and resonate with the jury emotionally. The "birds of a feather" slide was also calculated to trigger subconscious connections, tying Fitzgerald to the guilt of the two established burglars. Similarly, the "roadblocks" comments about defense counsel were designed to paint the defense's argument as mere obfuscation, rather than something that need be considered seriously.

The misconduct was substantially likely to affect the verdict because this was a case of circumstantial evidence. There was no direct evidence of how Fitzgerald came to be in the truck with Martin and Cairns. There was

conflicting evidence about whether he could have been driving the truck. The jury was left to decide whether these gaps in the State's case were substantial enough to amount to a reasonable doubt. The improper comments were likely to affect how the jury assessed the evidence because jurors were told that the attempts to point out reasonable doubt were mere roadblocks to the truth and that they could convict if the State's explanation made sense. 2RP 341-42, 344, 347. The "birds of a feather" theme was likely to sway the jury to disregard the gaps in proof based on the intuitive appeal of guilt by association.

All of this was incurable by instruction because the prosecutor combined comments designed to minimize the State's burden, similar to those found prejudicial in Walker, with emotional appeals and visuals that can influence the jury on a subconscious level like those in Glasmann. Glasmann, 175 Wn.2d at 707-08; Walker, 164 Wn. App. at 738. Even if this Court concludes the prosecutor's misleading comments about the burden of proof could have been cured by a jury instruction, the remaining inflammatory comments and emotional appeals could not.

2. COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE PROSECUTOR'S MISCONDUCT.

Alternatively, if this Court concludes this issue was not preserved, Fitzgerald was denied his right to effective assistance of counsel when his

attorney failed to object. A conviction should be reversed for ineffective assistance of counsel when counsel's performance was deficient and there is a reasonable probability the error affected the outcome. Strickland v. Washington, 466 U.S. 668, 685-87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). "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).

Counsel's performance was deficient because he failed to object when the prosecutor elicited Thompson's testimony about the lasting impact of this incident on the child and to the numerous instances of misconduct during closing argument discussed above. 2RP 118, 304, 310, 316, 322, 341-42, 344, 347-48.

Failing to object when Thompson testified the child was traumatized and afraid to sleep in his own bed was unreasonably deficient. That evidence was irrelevant to any issue properly before the jury and was likely to arouse the jury's sympathy against Fitzgerald. There was no strategic reason for failing to object, because later, when the prosecutor attempted to elicit similar testimony from the child's mother, counsel objected and the objection was sustained. 2RP 169. After the objection was sustained, there

was no reason not to object to the prosecutor's use of this fact in closing argument.

It was also unreasonably deficient performance not to object to the prosecutor's closing argument that undermined the integrity of the trial by trivializing the burden of proof beyond a reasonable doubt and cast aspersions on defense counsel's constitutionally mandated role. Counsel was ineffective in failing to preserve these errors for appellate review. See State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980) (Failure to preserve error can constitute ineffective assistance and justifies examining the error on appeal); 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).

Prejudice from deficient performance occurs when there is a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. Put another way, prejudice from deficient attorney performance requires reversal whenever the error undermines confidence in the outcome. Id. That confidence is undermined here.

The evidence against Fitzgerald was circumstantial. No one saw him at the burglary. No stolen property was found on his person. The testimony did not make clear whether he was driving the truck. The prosecutor's

arguments diminishing the burden of proof, casting defense counsel as a mere obstruction to the truth, appealing to the jury's sympathy for a small child, and intuition that "birds of a feather flock together," were likely to tip the scales in favor of a guilty verdict.

3. THE TRIAL COURT VIOLATED FITZGERALD'S RIGHT TO A PUBLIC TRIAL BY SELECTING THE JURY IN A PRIVATE PROCEEDING AT SIDEBAR.

Jury selection in this case occurred on September 19, 2012. Supp. RP at 18. After questioning was complete, the court directed counsel, but not Fitzgerald, to the clerk's desk to select the jury at sidebar. Supp. RP at 70-71. After the sidebar, the court then announced that the jury had been selected and called the names and numbers of those selected. Supp. RP at 71-72.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the accused a public trial by an impartial jury.[3] Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 629 (1995). Additionally, article I, section 10 of the Washington Constitution provides that "[j]ustice in all cases shall be

[3] The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." Article I, section 22 provides that "[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury . . . ."

administered openly, and without unnecessary delay." This provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

While the right to a public trial is not absolute, a trial court may restrict the right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before a trial judge can close any part of a trial, it must first apply on the record the five factors set forth in Bone-Club. In re Pers. Restraint of Orange, 152 Wn.2d 795, 806-07, 809, 100 P.3d 291 (2004). A violation is presumed prejudicial and is not subject to harmless error analysis. State v. Wise, 176 Wn.2d 1, 16-19, 288 P.3d 1113 (2012); State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); Orange, 152 Wn.2d at 814.

The public trial right applies to "'the process of juror selection,' which 'is itself a matter of importance, not simply to the adversaries but to the criminal justice system.'" Orange, 152 Wn.2d at 804 (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). The right to a public trial includes "'circumstances in which the public's mere presence passively contributes to the fairness of the proceedings, such as deterring deviations from established procedures,

reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny." State v. Slert, 169 Wn. App. 766, 772, 282 P.3d 101 (2012)[4] (quoting State v. Bennett, 168 Wn. App. 197, 204, 275 P.3d 1224 (2012)).

The process of exercising challenges for cause and peremptory challenges is an integral part of jury selection,[5] and is a process in which public presence contributes to fairness, as discussed in Slert. Challenges for cause are one of the primary methods of ensuring the jury is fair and impartial. Even if no party exercises a challenge for cause, the court has an independent duty to excuse jurors it believes cannot be fair. CrR 6.4(c)(1). While peremptory challenges may be exercised based on subjective feelings and opinions, there are important constitutional limits on both parties' exercise of such challenges. Georgia v. McCollum, 505 U.S. 42, 49, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Based on these crucial constitutional concerns and limitations, public scrutiny of the challenges is required by the constitution. See Slert, 169 Wn. App. at 772 (explaining need for public scrutiny of proceedings).

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[4] In Slert, this Court reversed Slert's conviction, holding that an in-chambers conference at which various jurors were dismissed based on their answers to a questionnaire violated his right to a public trial. 169 Wn. App. at 778-79.

[5] People v. Harris, 10 Cal. App. 4th 672, 684, 12 Cal. Rptr. 2d 758 (1992).

The procedure in this case violated the right to a public trial to the same extent as any in-chambers conference or other courtroom closure would have. Though the courtroom itself remained open to the public, the proceedings at sidebar were not. A sidebar occurs outside of the public's scrutiny and thus violates the appellant's right to a fair and public trial. Slert, 169 Wn. App. at 774 n. 11 (rejecting argument that no violation occurred if jurors were actually dismissed not in chambers but at a sidebar and stating "if a side-bar conference was used to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview"); see also Harris, 10 Cal. App. 4th at 684, (exercise of peremptory challenges in chambers violates defendant's right to a public trial); cf. People v. Williams, 26 Cal. App. 4th Supp. 1, 7-8, 31 Cal. Rptr. 2d 769 (1994) (peremptory challenges could be held at sidebar to permit party opponent to make motion based on state version of Batson, 476 U.S. 79, if challenges and party making them were then announced in open court).

The trial court violated appellant's constitutional right to a public trial by hearing all challenges, both peremptory and for cause, during a private proceeding at the clerk's desk. While there is no Washington case with identical facts, the private proceeding was no less a violation of the

right to a public trial than the closed voir dire sessions that Washington courts have repeatedly held violate the public trial right. Because the error is structural, prejudice is presumed, and reversal is required. Wise, 176 Wn.2d at 16-19.

4. THE TRIAL COURT VIOLATED FITZGERALD'S RIGHT TO BE PRESENT AT ALL CRITICAL STAGES WHEN IT SELECTED THE JURY AT THE CLERK'S DESK.

"A criminal defendant has a fundamental right to be present at all critical stages of a trial." State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). This includes the right to be present during voir dire and empanelling of the jury. Diaz v. United States, 223 U.S. 442, 455, 32 S. Ct. 250, 56 L. Ed. 500 (1912). The right to be present derives from the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. Id.[6]

Jury selection is "'the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability.'" Irby, 170 Wn.2d at 884 (quoting Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989)). "[A] defendant's

[6] In situations in which the accused is not actually confronting witnesses or evidence against him, this right is protected by the Due Process Clause. Irby, 170 Wn.2d at 880-81 (quoting United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)).

presence at jury selection 'bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend' because 'it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether.'" Irby, 170 Wn.2d at 883 (quoting Snyder v. Massachusetts. 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), overruled on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964))). This right attaches from the time empanelment of the jury begins. Irby, 170 Wn.2d at 883.

Irby requires reversal in this case. In Irby, the parties agreed to the trial court's suggestion that neither party attend the first day of jury selection and that they appear and begin questioning jurors the following day. Id. at 877.

As agreed, on the first day of jury selection, the judge swore in the venire members and gave them a jury questionnaire. After the potential jurors completed questionnaires, the judge sent an email to the prosecutor and defense counsel suggesting that 10 venire members be removed from the panel for various reasons. The judge asked for input, indicating that if any jurors were going to be released, he would like to do it that day. Id.

Irby's counsel agreed to release all ten potential jurors. The prosecutor objected to the release of three. The court then released the remaining seven. Irby, however, was in custody at the time of the

exchange and there was no indication he was consulted about the dismissal of any potential jurors. Id. at 878-79.

Jury selection continued the following day in Irby's presence. Id. at 878. After he was convicted at trial, Irby appealed, arguing the dismissal of seven potential jurors via email exchange violated his right to be present at all critical stages of the proceedings. This Court agreed, and the Supreme Court affirmed. Id. at 887.

This case is like Irby in all relevant respects. Counsel apparently exercised all challenges, both peremptory and for cause, at sidebar at the clerk's desk, and there is no indication Fitzgerald was present or permitted to participate.[7] See Lewis v. United States, 146 U.S. 370, 372, 13 S. Ct. 136, 36 L. Ed. 1011 (1892) ("[W]here the [defendant's] personal presence is necessary in point of law, the record must show the fact."); see also People v. Williams, 858 N.Y.S.2d 147, 52 A.D.3d 94, 96-97 (2008) (exclusion of defendant from sidebar conference where jurors excused by agreement violates right to be present; court refuses to speculate that defendant could overhear conversations). The fundamental purpose of a defendant's right to be present during jury selection, including the exercise of peremptory challenges, is to allow him to give advice or suggestions to counsel or even to supersede counsel's decisions. Here, as

[7] Supp. RP at 70-71.

in Irby, because Fitzgerald was not present for this portion of jury selection, he was unable to exercise that right. See Commonwealth v. Owens, 414 Mass. 595, 602, 609 N.E.2d 1208 (1993) (defendant "has a right to be present when jurors are being examined in order to aid his counsel in the selection of jurors and in the exercise of his peremptory challenges") (citing Lewis, 146 U.S. at 372).

A violation of the right to be present requires reversal unless the State can prove beyond a reasonable doubt that the error is harmless. Irby, 170 Wn.2d at 885-86. In Irby, the State could not meet that burden:

> [T]he State has not and cannot show that three of the jurors who were excused in Irby's absence . . . had no chance to sit on Irby's jury. Those jurors fell within the range of jurors who ultimately comprised the jury, and their alleged inability to serve was never tested by questioning in Irby's presence . . . . Had [those jurors] been subjected to questioning in Irby's presence . . . the questioning might have revealed that one or more of these potential jurors were not prevented by reasons of hardship from participating on Irby's jury . . . . Therefore, the State cannot show beyond a reasonable doubt that the removal of several potential jurors in Irby's absence [was harmless].

Id. at 886-87. Thus, the Irby Court asked whether the same jurors would have inevitably served on the jury regardless of Irby's participation and concluded the answer was no. Id. As in Irby, the State cannot show that the venire members excused during the sidebar had no chance to sit on this jury; indeed, peremptory challenges are largely based on subjective

decision-making, albeit with some obvious limitations as set forth in Batson and its progeny.

It is difficult to imagine a portion of jury selection more appropriate for the input of an accused than during the exercise of peremptory challenges. Such challenges are "a tool that may be wielded in a highly subjective and seemingly arbitrary fashion, based upon mere impressions and hunches." State v. Evans, 100 Wn. App. 757, 774, 998 P.2d 373 (2000) (quoting United States v. Annigoni, 96 F.3d 1132, 1144-45 (9th Cir. 1996)). The State cannot show Fitzgerald's absence during this critical stage was harmless beyond a reasonable doubt.

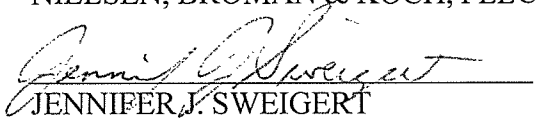
D. CONCLUSION

Fitzgerald's trial was tainted by prosecutorial misconduct and ineffective assistance of counsel. Additionally, the court violated his constitutional rights to a public trial and to be present at all critical stages of the proceedings. He therefore requests this Court reverse his convictions.

DATED this 21st day of March, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051
Attorney for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 43987-5-II
	)	
JASON FITZGERALD,	)	
	)	
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 21ST DAY OF MARCH 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JASON FITZGERALD
DOC NO. 721703
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF MARCH 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

March 21, 2013 - 2:26 PM

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Court of Appeals Case Number: 43987-5

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