No. 46998-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Robert Ford,

Appellant.

Pierce County Superior Court Cause No. 13-1-00932-5

The Honorable Judge John R. Hickman

Appellant's Opening Brief

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20. The court erred by ordering Mr. Ford to pay $1,800 in legal financial obligations absent any inquiry into whether he had the means to do so.

21. The court erred by entering finding of fact 2.5. CP 126.

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

It was Thanksgiving Day. RP 173. Robert Ford needed gas money to drive his family from Ruston to their home in Yakima. RP 333.

He went into the Washing Well Laundromat, pried open the soap dispensing machine, and took out the coins. RR 322. Because he still did not have enough money for gas, he pried off the coin boxes of three laundry machines and took the coins from them as well. RP 322-323.

Joan Searls, the owner of the laundromat, saw Mr. Ford from the video monitor in her adjoining home. RP 175. She went into the business to confront him. RP 176.

Mr. Ford tried to leave once he saw Searls. RP 325. She attempted to block his path on the way out. RP 325. Mr. Ford ran around her, but she grabbed his sweatshirt as he went by. RP 326-27. Searls fell down as Mr. Ford continued to run. RP 327.

Searls told the police that Mr. Ford had pushed her backwards as he was leaving. RP 178. The police only documented mild injuries to the front of her body – a small scrape on her knee and some redness on the front of her shoulder. RP 179; Ex. 21.

The investigating officer noted damage to the soap machine, and saw that three laundry machines had their coin boxes removed. RP 399,

404. He also noted that seven other machines had scratches around the coin slots. RP 393. He did not see any other damage. RP 239.

The officer estimated the amount of damage at $2,400. RP 240.

Searls reported the incident to her insurance company. RP 247. When the insurance adjustor first arrived at the laundromat three weeks after the incident, the damage was much worse. RP 345.

Because many of the machines were 40 to 50 years old, they could not be repaired and had to be replaced. RP 187, 192. The repair process also caused additional damage to the laundromat's floors and walls. RP 187, 263; Ex. 17, pp. 11-12. The laundromat was closed for over three months. RP 186. In the end, the insurance company paid Searls over $33,000 for her claim. RP 259-263.

The state charged Mr. Ford with first degree robbery and first degree malicious mischief. CP 1-2.

At trial, Searls testified that Mr. Ford had damaged twenty-eight machines. RP 194.

The police officer testified regarding his observations from the day of the incident. He told jurors that he saw damage to only ten laundry machines. RP 403. Three machines had their coin boxes removed, and seven others had pry marks. RP 403

Mr. Ford testified at trial. RP 319-347. He admitted that he had caused the damage to the soap machine and stolen the coins out of three laundry machines. RP 322-323. But he said that the damage documented by the insurance adjustor was far worse than that he had caused. RP 328.

Searls's insurance adjustor also testified. RP 246-287. He described the damage that the insurance company paid for. RP 246-287. He did not say anything about what happens when a client reports more damage than was actually caused by a claimable incident. RP 246-287.

The insurance company estimated that Mr. Ford had stolen $300 from the machines. RP 263.

Throughout the trial, the prosecutor had each state witnesses use a laser pointer to point out portions of projected exhibits. RP 184-185, 249, 252, 254-255, 391, 393-394, 396. He did not request permission from the court before giving the laser pointer to those witnesses. RP 184-185, 249, 252, 254-255, 391, 393-394, 396.

During Mr. Ford's testimony, however, the prosecutor consulted with the court instead of handing the laser pointer to Mr. Ford. RP 339. The following exchange took place in the presence of the jury:

> PROSECUTOR: Can the witness be permitted to have a laser pointer?
> COURT: it's up to security.
> JAIL: I would prefer not.
> COURT: All right.

RP 339.

Instead of the laser pointer, the prosecutor then asked if Mr. Ford could use a pencil or pen to circle portions of an exhibit:

> PROSECUTOR: Could the witness be permitted to have a pen or pencil to mark the exhibit with?
> COURT: I would allow him to have a pen, not a pencil.
> RP 339-340.

At the close of evidence, Mr. Ford's attorney proposed an instruction defining reasonable doubt and outlining the burden of proof. CP 23. The proposed instruction differed from the pattern instruction. CP 23. Defense counsel's proposed instruction did not include the sentence providing that "The defendant has no burden of proving that a reasonable doubt exists." CP 23. The court gave an instruction identical to the one defense counsel had proposed. CP 90.

In closing, defense counsel argued that Searls had fabricated additional damage to the laundromat facility to "pad" her insurance claim and replace her aging machines. RP 464-483. He also pointed out that Searls's injuries to the front of her body were not consistent with Mr. Ford pushing her as she faced him. RP 476.

The prosecutor, during rebuttal, paraphrased Mr. Ford's defense theory as:

> Look over here, not over here because over here is where the evidence lies. And if you look at that, you might convict the guy, so please look at all these other things over here instead.
> RP 485.

Mr. Ford objected to this argument, but the court did not rule on the objection. RP 485.

The prosecutor told the jury that Searls would not have reported more damage to the insurance company than Mr. Ford actually caused because doing so would have jeopardized her valid claim:

> She's been damaged. She knows that it can be made whole and fixed. What happens if she screws with that? If she tries to fraudulently do something with the insurance company, what happens? Nothing. Now she's screwed, isn't she? Is she going to put that at risk?
> RP 489.

The prosecutor also told jurors not to "get hypertechnical on us" when determining whether the elements of the offenses had been met. RP 490. The prosecutor ended his argument by explaining reasonable doubt as follows: "What I suggest to you is if you believe it in your heart, if you believe it in your mind, if you believe it in your gut, you're convinced beyond a reasonable doubt." RP 492.

The jury convicted Mr. Ford of second degree robbery and first degree malicious mischief. CP 124.

The sentencing court included three out-of-state convictions in its calculation of Mr. Ford's offender score. CP 125. Mr. Ford's attorney

stipulated to his prior criminal record and did not address the comparability of any of those offenses. RP 510-522.

The court ordered Mr. Ford to pay $1,800 in legal financial obligations (LFOs), including $1,000 in attorney's fees. CP 126-127. The court also ordered Mr. Ford to pay over $33,000 in restitution. CP 138-139.

Defense counsel asked the sentencing court to take Mr. Ford's indigency into account in ordering LFOs. RP 515. But the court did not address Mr. Ford's financial circumstances in any way. RP 510-522.

This timely appeal follows. CP 140.

ARGUMENT

I. THE COURT UNDERMINED THE PRESUMPTION OF INNOCENCE AND VIOLATED MR. FORD'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY BY MAKING HIM APPEAR TOO DANGEROUS TO BE TRUSTED WITH A LASER POINTER OR A PENCIL.

Each of the state's three witnesses used the prosecutor's laser pointer throughout their testimony to highlight certain areas of projected exhibits. RP 184-185, 249, 252, 254-255, 391, 393-394, 396. The prosecutor did not ask the court for permission before handing the laser pointer to any of those witnesses. RP 184-185, 249, 252, 254-255, 391, 393-394, 396.

During Mr. Ford's testimony, however, the prosecutor addressed the situation differently. RP 339. Before letting Mr. Ford use the laser pointer, he asked the court if it was okay. RP 339. The court responded that it was "up to security." RP 339. The security officer replied "I would prefer not." RP 339. As a result, the court did not permit Mr. Ford to use the laser pointer. RP 339.

Because he couldn't use the laser pointer, the prosecutor tried to have Mr. Ford circle a specific part of an exhibit. RP 339. The judge told the prosecutor that he would permit Mr. Ford to use a pen but not a pencil. RP 339-340.

These measures undermined the presumption of innocence. *State v. Jaime*, 168 Wn.2d 857, 860, 233 P.3d 554 (2010). They violated Mr. Ford's right to a fair trial and to an impartial jury by singling him out among all of the witnesses as particularly dangerous. *Id.*, at 862.

An accused person is entitled to a fair trial by an impartial jury. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§ 3, 21, 22. *State v. Gonzalez*, 129 Wn. App. 895, 900, 120 P.3d 645 (2005). This right includes the right to the presumption of innocence.[1] *Gonzalez*, 129 Wn.

[1] Violations of the right to an impartial jury are reviewed de novo. *Gonzalez*, 129 Wn. App. at 900. Manifest error affecting a constitutional right can be raised for the first time on appeal. RAP 2.5(a)(3). To raise a manifest error, an appellant need only make "a plausible showing that the error… had practical and identifiable consequences in the trial." *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). The showing required under RAP

App. at 900. The constitutional presumption of innocence is the bedrock foundation of any criminal trial. *Id.* (citing *Morissette v. United States,* 342 U.S. 246, 275, 72 S.Ct. 240, 96 L.Ed. 288 (1952)).

It is the court's duty to give effect to the presumption of innocence by "being alert to any factor that could undermine the fairness of the fact-finding process." *Gonzalez*, 129 Wn. App. at 900 (*citing Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976)).

Measures suggesting that the accused is particularly dangerous threaten the right to a fair trial. *Jaime*, 168 Wn.2d at 862. Such practices undermine the presumption of innocence and are inherently prejudicial. *Id.*

Whether a courtroom event has negatively affected the presumption of innocence receives "close judicial scrutiny." *Gonzalez*, 129 Wn. App. at 900-01 (*citing Estelle,* 425 U.S. at 504; *Estes v. Texas,* 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); *In re Murchison,* 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955)). The analysis looks to "reason, principle, and common human experience." *Estelle,* 425 U.S. at 504.

2.5(a)(3) "should not be confused with the requirements for establishing an actual violation of a constitutional right." *Id.* An error has practical and identifiable consequences if "given what the trial court knew at that time, the court could have corrected the error." *State v. O'Hara,* 167 Wn.2d 91, 100, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010).

Here, the trial court treated Mr. Ford differently than all of the other witnesses. In the jury's presence, the court did not permit Mr. Ford to use a laser pointer despite the fact that every other witness had done so. RP 184-185, 249, 252, 254-255, 339, 391, 393-394, 396.

"Reason, principle, and common human experience" dictate that the jury would have noticed the discrepancy. *Estelle*, 425 U.S. at 504. Because the decision to disallow Mr. Ford from using the laser pointer came from the corrections officer, the jury would have understood that it was because the officer and the court considered Mr. Ford to be particularly dangerous when compared to the other witnesses.

The court then exacerbated the problem by ruling that Mr. Ford could not be trusted with a pencil either. RP 339-340.

A trial court may only enact prejudicial security measures upon an accused person at his/her trial when necessary to prevent escape or injury to those in the courtroom. *Jaime*, 168 Wn.2d at 865-66. The court's decision must consider "specific facts relating to the individual" and must be "founded upon a factual basis set forth *in the record.*" *Id.* (internal citation omitted) (emphasis added by the court).

In *Jaime*, the Supreme Court held that the record did not support security measures even when the prosecutor had informed the court that the accused presented both a security concern and an escape risk. *Id.* at

866. This was because the court failed to uphold its duty to conduct its own fact-finding on the issue. *Id.*

Here, there is nothing in the record – not even a bald assertion by the prosecutor – supporting an inference that Mr. Ford was too dangerous to be entrusted with a laser pointer or a pen. The court certainly did not conduct its own fact-finding on the matter or set forth the basis for its ruling on the record. *Jaime*, 168 Wn.2d at 865-66.

The court abused its discretion by enacting security measures that made Mr. Ford appear particularly dangerous without any reason for doing so. *Id.* Reversal is required, and Mr. Ford need not demonstrate prejudice. *Jaime*, 168 Wn.2d at 862.

Still, two key issues for the jury in Mr. Ford's case were (1) whether he had pushed Searls over on purpose or whether she had fallen on accident and (2) whether he was just a petty coin thief or guilty of robbery and felony malicious mischief. The court's actions made him appear far more dangerous than any of the other witnesses, and likely affected the jury's thinking on both of those matters. They also encouraged the jury to consider his testimony in a different light than that of the state's witnesses.

The court undermined the presumption of innocence, and violated Mr. Ford's rights to a fair trial and to an impartial jury by making him

appear particularly dangerous in the jurors' eyes. *Estelle,* 425 U.S. at 504; *Jaime*, 168 Wn.2d at 865-66. His convictions must be reversed and his case remanded for a new trial. *Id.*

II. PROSECUTORIAL MISCONDUCT DEPRIVED MR. FORD OF A FAIR TRIAL.

Mr. Ford presented evidence – including officer testimony -- that the damage he caused was much less extensive than that reported by Searls to her insurance company three weeks later. RP 240, 345. In closing, however, the prosecutor characterized his defense theory as asking the jury to "look over here, not over there." RP 485.

The prosecutor also told jurors that Searls would not fabricate additional damage because then she would lose any valid claim. RP 489. The prosecutor ended his argument by saying "if you believe it in your heart, if you believe it in your mind, if you believe it in your gut, you're convinced beyond a reasonable doubt." RP 492

These arguments were improper. They mischaracterized and disparaged the defense theory, bolstered Searls's testimony with "facts" not in evidence, and minimized the state's burden of proof. The improper arguments went directly to the key issue– whether evidence that Searls had contrived additional damage raised a reasonable doubt. The misconduct deprived Mr. Ford of a fair trial.

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

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

Prosecutorial misconduct requires reversal, even absent an objection below, if it is so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012). The misconduct here was flagrant and ill-intentioned, and could not have been cured.

A. The prosecutor committed flagrant and ill-intentioned misconduct by bolstering Searls's testimony with facts not in evidence

Searls's insurance adjustor did not say anything about what would happen to her legitimate claim if she "padded" it with fraudulently-created damage. RP 246-287. Still, the prosecutor argued in closing that Searls would not have manipulated her claim to get more money because she would have lost her chance at compensation for the damage that Mr. Ford actually caused. RP 489.

The prosecutor committed flagrant and ill-intentioned misconduct by bolstering Searls's testimony with "facts" that were not in evidence. *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008). A prosecutor commits misconduct by "testifying" during closing argument to "facts" not in evidence. *Glasmann*, 175 Wn.2d at 705. Furthermore, a prosecutor may not make arguments bolstering the credibility of a witness even if the evidence supports such an argument. *Jones*, 144 Wn. App. at 293; U.S. Const. Amends. VI, XIV; art. I, § 22.[2] Accordingly, a prosecutor commits misconduct by attempting to bolster a witness's credibility with prejudicial "facts" not in evidence. *Jones*, 144 Wn. App. at 292-94.

In *Jones*, the prosecutor argued that the police would not trust unreliable informants because they would be putting their jobs on the line.

[2] This violation of Mr. Ford's right to a fair trial created manifest error affecting a constitutional right, which may be raised for the first time on appeal. RAP 2.5(a)(3).

Id. at 293. The *Jones* court reversed. based, in part, on that improper argument. *Id.* at 302.

Similarly, here, the prosecutor at Mr. Ford's trial argued that Searls would not fabricate additional damage because she would lose her legitimate claim if she did so. However, no facts in the record supported this argument. RP 489. The prosecutor's argument was improper. *Id.*

Prosecutorial misconduct is most prejudicial when it addresses a key issue in a case. *State v. Thierry*, No. 45379-7-II, --- Wn. App. ---, --- P.3d ---, at *14 (October 20, 2015).

The possibility that Searls had contrived additional damage for the insurance money was the primary issue in the case. There is a substantial likelihood that the prosecutor's improper bolstering of her credibility with un-admitted "facts" affected the outcome of Mr. Ford's trial. *Glasmann*, 175 Wn.2d at 704.

Prosecutorial misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time of the improper statement. *Glasmann*, 175 Wn.2d at 707. Here, the prosecutor had access to long-standing case law proscribing the type of argument he made in Mr. Ford's case. *See e.g. Jones*, 144 Wn. App. at 292-94.

Furthermore, the additional "evidence" would have been difficult to cure with an instruction, once the bell had been rung. Reversal is required because the prosecutor's improper argument was flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed flagrant and ill-intentioned misconduct by bolstering Searls's testimony with "facts" that were not in evidence. *Jones*, 144 Wn. App. at 292-94. Mr. Ford's convictions must be reversed.

B. The prosecutor misrepresented the state's burden by telling jurors "If you believe it in your heart, if you believe it in your mind, if you believe it in your gut, you're convinced beyond a reasonable doubt."

The prosecutor at Mr. Ford's trial finished his argument by telling the jury that:

> If you believe it in your heart, if you believe it in your mind, if you believe it in your gut, you're convinced beyond a reasonable doubt. RP 492.

This argument mischaracterized the state's burden of proof and constituted flagrant, ill-intentioned, and prejudicial misconduct.

A prosecutor commits misconduct by minimizing the state's burden of proof to the jury. *State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010) *review denied,* 171 Wn.2d 1013, 249 P.3d 1029 (2011). Here, the prosecutor committed misconduct by mischaracterizing

the state's burden. *Id.* Belief in one's heart, mind, and gut is not the same as being convinced beyond a reasonable doubt.

Jurors could believe in their hearts, minds, and guts that Mr. Ford was guilty while still harboring a reasonable doubt based on the evidence or lack of evidence. The prosecutor's argument was improper. *Id.*

A prosecutor's misstatement of the state's burden of proof "constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." *Johnson*, 158 Wn. App. at 685-86. Here, there is a substantial likelihood that the prosecutor's mischaracterization of the state's burden affected the outcome of Mr. Ford's trial. *Glasmann*, 175 Wn.2d at 704.

The evidence against Mr. Ford was not overwhelming. The state could not explain the discrepancy between the damage as described in the police report and the much more severe damage observed by the insurance adjustor three weeks later. Nor did Searls's injuries align with her claim that Mr. Ford pushed her down as she faced him. RP 178-179; Ex. 21.

Still, some jurors may have believed in their "heart", "mind", and "gut" that he was guilty even if they felt the state had not proved each element of each charge.

The improper argument was the last thing the jury heard before deliberation. This likely enhanced its importance in their minds. It was

also the characterization of the state's burden that they took with them when they began deliberations. Mr. Ford was prejudiced by the prosecutor's improper argument.

Again, the prosecutor had access to established precedent prohibiting the kind of argument made in this case. *See e.g. Johnson*, 158 Wn. App. at 677, 685-86. The misconduct was flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed flagrant and ill-intentioned misconduct by misrepresenting the state's burden of proof during closing argument. *Johnson*, 144 Wn. App. at 292. Mr. Ford's convictions must be reversed. *Id.*

C. Over objection, the prosecutor committed misconduct by disparaging and mischaracterizing the defense theory, improperly "creating a straw man easily destroyed in the minds of the jury."

> In closing, the prosecutor described Mr. Ford's defense theory:
>
> Look over here, not over here because over here is where the evidence lies. And if you look at that, you might convict the guy, so please look at all these other things over here instead. RP 485.

In short, the prosecutor chose to respond to significant pieces of evidence supporting the defense by mischaracterizing and disparaging defense counsel's theory rather than by arguing that the state's evidence was

stronger. This argument constituted prejudicial misconduct. *State v. Thorgerson*, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011).

The Supreme Court has held that an almost identical argument constitutes misconduct because it "went beyond the bounds of acceptable behavior in disparaging defense counsel." *Thorgerson*, 172 Wn.2d at 451-52. [3] In *Thorgerson*, the prosecutor described the defense theory to the jury as:

> Look over here, but don't pay attention to there. Pay attention to relatives that didn't testify that have nothing to do with the case.... Don't pay attention to the evidence....

Id. Such an argument is improper because it mischaracterizes the defense theory in order to invalidate it. This "tactic of misrepresenting defense counsel's argument in rebuttal, effectively creating a straw man easily destroyed in the minds of the jury, does not comport with the prosecutor's duty to 'seek convictions based only on probative evidence and sound reason.'" *Thierry*, at *14 (quoting *State v. Casteneda-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)).

The prosecutor's argument at Mr. Ford's trial constituted misconduct. The state asked the jury to discount the defense theory based

[3] The *Thorgerson* court held that reversal was not required in that case because a curative instruction could have resoled the prejudice. *Thorgerson*, 172 Wn.2d at 452. But the court failed to rule on Mr. Ford's timely objection. RP 485. Accordingly Mr. Ford need not demonstrate that no instruction could have cured the effect of the improper argument. *Thierry* at *13.

on a mischaracterization instead of on the evidence. Indeed, the argument was almost identical to that found improper in *Thorgerson*. *Thorgerson*, 172 Wn.2d at 451-52.

There is also a substantial likelihood that the prosecutor's improper argument affected the outcome of Mr. Ford's trial. *Glasmann*, 175 Wn.2d at 704. Mr. Ford presented significant evidence that the damage he caused to the laundry machines was not as significant as that the insurance adjustor found three weeks later. RP 319-347, 398-403.

Instead of making proper arguments, the prosecutor mischaracterized Mr. Ford's theory to such a degree that the jury likely discounted it altogether. The prosecutor's argument was prejudicial because it went to the key issue in Mr. Ford's case. *Thierry* at *13.

The prosecutor committed prejudicial misconduct by turning Mr. Ford's defense theory into a "straw man easily destroyed in the minds of the jury.: *Thierry* at *14. Mr. Ford's convictions must be reversed. *Id.*

D. The cumulative effect of the prosecutor's misconduct deprived Mr. Ford of a fair trial

The cumulative effect of repeated instances of prosecutorial misconduct can be "so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *State v. Walker*, 164 Wn.

App. 724, 737, 265 P.3d 191 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded,* 175 Wn.2d 1022, 295 P.3d 728 (2012).

The prosecutor committed extensive misconduct at Mr. Ford's trial by bolstering Searls's testimony with "facts" not in evidence, mischaracterizing and disparaging Mr. Ford's defense theory, and minimizing the state's burden of proof. RP 485, 489, 492.

Each of these instances of misconduct was directly relevant to the key factual issue in Mr. Ford's case: whether the evidence that Searls had exacerbated the minimal damage that Mr. Ford actually caused raised a reasonable doubt as to his guilt.

Whether considered individually or in the aggregate, the prosecutor's improper arguments require reversal of Mr. Ford's convictions. *Walker*, 164 Wn. App. at 737.

III. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. FORD OF FIRST-DEGREE MALICIOUS MISCHIEF.

Even if accepted wholly as true, the state's evidence demonstrated at most that Mr. Ford damaged only the coin boxes and coin slots of the laundry machines. RP 246-287. The officer estimated the damage on the day of the incident at $2,400. RP 240.

Nonetheless, the alleged damage amounted to over $33,000 because many of the machines were too old to be repaired, because the

laundromat was closed for over three months, and because the repair process caused additional damage to the floor and walls. RP 246-287.

The state did not present any evidence that Mr. Ford knew that his actions would cause damage exceeding $5,000. Accordingly, no rational jury could have found him guilty of first degree malicious mischief.

1. Malicious mischief requires proof that the accused knew s/he was causing more than $5,000 in damage.

To convict Mr. Ford of first-degree malicious mischief, the state was required to prove that he "knowingly and maliciously [] cause[d] physical damage to the property of another in an amount exceeding five thousand dollars." RCW 9A.48.070(1)(a).

The term "knowingly" is interpreted to modify the entire verb phrase it precedes. *State v. Killingsworth*, 166 Wn. App. 283, 289, 269 P.3d 1064 (2012). Accordingly, the element of "knowingly traffick[ing] in stolen property" requires proof that the accused both knew s/he was trafficking and that s/he knew the property was stolen. *Id.*; *see also State v. Mohamed*, 175 Wn. App. 45, 52, 301 P.3d 504 *review denied,* 178 Wn.2d 1019, 312 P.3d 651 (2013) (addressing "knowingly" in indecent liberties statute).[4]

[4] The term "verb phrase" has two alternate definitions: "1. A phrase consisting of a single-word verb on its own, or a group of verbs which functions in the same way as a single-word verb;" and "2. A sequence of words normally containing a lexical verb together with

Likewise, in the malicious mischief statute, the word "knowingly" modifies "causes physical damage to the property of another in an amount exceeding five thousand dollars." RCW 9A.48.070(1)(a). The state must prove that a person accused of malicious mischief knew that the damage was "in an amount exceeding five thousand dollars." RCW 9A.48.070(1)(a); *see Killingsworth*, 166 Wn. App. at 289; *Mohamed*, 175 Wn. App. at 52.[5]

To convict Mr. Ford of first degree malicious mischief, the state was required to prove that he knew he was causing more than $5,000 worth of damage to the laundromat. RCW 9A.48.070(1)(a).

2. The state failed to prove that Mr. Ford "knowingly" caused more than $5,000 worth of damage.

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact

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any complements and adjuncts, but excluding the subject..." Oxford Dictionary of English Grammar (2 ed.) (2014), available at: *http://www.oxfordreference.com.ezproxy.spl.org:2048/view/10.1093/acref/9780199658237.001.0001/acref-9780199658237-e-1587?rskey=X8q1Ui&result=1* (last visited 10/23/15). *Killingsworth* and *Mohamed* make clear that Washington courts employ the second definition when interpreting criminal statutes. *Killingsworth*, 166 Wn. App. at 289; *Mohamed*, 175 Wn. App. at 52.

[5] The rule of lenity compels the same result. The court must construe an ambiguous criminal statute in favor of the accused. *State v. Slattum*, 173 Wn. App. 640, 643, 295 P.3d 788 (2013) *review denied,* 178 Wn.2d 1010, 308 P.3d 643 (2013). A statute is ambiguous if it is subject to more than one reasonable interpretation. *Id.* at 600-01. If it is unclear which definition of "verb phrase" applies to the interpretation of the malicious mischief statute, then lenity compels the same result as *Killingsworth* and *Mohamed*. The court must apply the second definition, whereby "knowingly" modifies the entire remainder of the sentence, including that the damage was in an amount exceeding $5,000. *Id.*

could have found each element met beyond a reasonable doubt. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied,* 176 Wn.2d 1003, 297 P.3d 67 (2013).

Even taken in the light most favorable to the state, the evidence does not show that Mr. Ford knew he was causing more than $5,000 in damages. At worst, the state proved that he damaged the coin boxes and coin slots of laundry machines and a soap dispenser. RP 246-287. The state did not present any evidence that he knew that many of the machines would be unrepairable, that the repairs would cause additional expensive damage to the laundromat facility, or that the business would have to be closed for several months. Indeed, the investigating officer estimated that Mr. Ford caused only $2,400 in damage. RP 240.

No rational jury could have concluded that Mr. Ford "knowingly" caused more than $5,000 worth of damage.

The state presented insufficient evidence to convict Mr. Ford of first degree malicious mischief. *Chouinard*, 169 Wn. App. at 899. His conviction must be reversed. *Id.*

IV. MR. FORD'S ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE BY PROPOSING A NON-STANDARD REASONABLE DOUBT INSTRUCTION THAT RELIEVED THE STATE OF ITS BURDEN OF PROOF.

The jury instruction defining reasonable doubt deviated from the pattern instruction. It did not specify that Mr. Ford had no burden of proving the existence of a reasonable doubt. CP 90; *cf.* WPIC 4.01.

In addition, the state argued to the jury that they should believe Searls's version of events over Mr. Ford's. RP 439-452. Accordingly, the jury could have misunderstood its role. Some jurors may have believed their job was to weigh the evidence to decide which to believe more, rather than to determine whether the state had proved each element beyond a reasonable doubt.

Mr. Ford's attorney provided ineffective assistance of counsel by proposing the instruction that relieved the state of its burden of proof. The instruction permitted the jury to convict him simply because they were skeptical of the defense evidence. CP 23.

Due process requires jurors to presume an accused person's innocence. U.S. Const. Amend. XIV. The presumption of innocence is "the bedrock upon which the criminal justice system stands." *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007).

A court commits reversible error when it instructs the jury in a manner relieving the state of its burden of proving each element beyond a

reasonable doubt. *State v. Peters*, 163 Wn. App. 836, 847, 261 P.3d 199 (2011). Although the constitution does not require specific wording, jury instructions "must define reasonable doubt and clearly communicate that the state carries the burden of proof." *Bennett*, 161 Wn.2d at 307 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 280–81, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). To that end, the Washington Supreme Court has used its inherent supervisory authority to order lower courts to instruct juries on the burden of proof using WPIC 4.01. That instruction reads as follows:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. *The defendant has no burden of proving that a reasonable doubt exists.*
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

WPIC 4.01 (certain bracketed material omitted; emphasis added); *Bennett*, 161 Wn.2d at 308.

A trial court may not give a reasonable doubt instruction that differs from the WPIC. *State v. Castillo*, 150 Wn. App. 466, 472, 208 P.3d

1201 (2009); *State v. Lundy*, 162 Wn. App. 865, 870-871, 256 P.3d 466 (2011).

Here, Mr. Ford's attorney proposed – and the court gave – an instruction omitting the sentence reading: "The defendant has no burden of proving that a reasonable doubt exists." CP 23. This instruction presents the same error at issue in *Castillo.*

Instruction No. 3 provided an incomplete statement regarding the burden of proof. The trial court in this case neglected to tell jurors that Mr. Ford had no burden. The instruction did not make the relevant standard manifestly apparent to the average juror, as required. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). Instead, it left open the possibility that Mr. Ford had the burden of raising a reasonable doubt.

The same error persuaded the *Castillo* court to reverse.[6] *Castillo,* 150 Wn. App. at 473.

The right to counsel includes the right to the effective assistance of counsel.[7] U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's

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[6] The instruction in *Castillo* suffered from other flaws as well.

[7] Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *Kyllo*, 166 Wn.2d at 862; RAP 2.5(a).

An ineffective assistance claim presents a mixed question of law and fact, reviewed *de novo*. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

performance is deficient if it falls below an objective standard of reasonableness. *Kyllo*, 166 Wn.2d at 862. Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

Reasonable conduct for an attorney includes researching the relevant law. *Id.* With proper research, Mr. Ford's attorney would have discovered that the Supreme Court has mandated the use of an instruction different than the one he proposed. *Bennett*, 161 Wn.2d at 308. Proposing a jury instruction that fails to make the state's burden clear to the jury constitutes deficient performance and cannot be justified as a tactical choice. *See Kyllo*, 166 Wn.2d at 868-69.

There is a reasonable probability that the faulty instruction affected the outcome of Mr. Ford's trial. *Id.* at 862. The prosecutor's rebuttal focused on arguing that Mr. Ford's defense was not believable. RP 485-489. Absent an instruction clarifying that he had no burden, the jury likely believed that it had to convict unless it found the evidence he presented more reliable than the state's evidence. To the contrary, the jury was required to acquit Mr. Ford unless they found that the state's burden had been met, regardless of his choice to put on evidence in his defense.

Mr. Ford was prejudiced by his attorney's deficient performance. *Id.*

Mr. Ford's defense attorney provided ineffective assistance of counsel by proposing a reasonable doubt instruction that different from the one mandated by the Supreme Court and relieved the state of its burden of proof. *Id.* Mr. Ford's convictions must be reversed.

V. THE COURT MISCALCULATED MR. FORD'S OFFENDER SCORE BY ADDING A POINT FOR A FLORIDA CONVICTION THAT IS NOT COMPARABLE TO A WASHINGTON FELONY.

The court added a point to Mr. Ford's offender score for his Florida burglary conviction. CP 125. In Florida, however, burglary includes unlawful entry into a vehicle, which is only a misdemeanor in Washington. FL ST § 810.02 (1987); RCW 9A.52.100.

Even so, Mr. Ford's attorney did not object and did not raise comparability. RP 510-522. Mr. Ford received ineffective assistance of counsel.[8] *State v. Thiefault*, 160 Wn.2d 409, 417, 158 P.3d 580 (2007).

If an out-of-state conviction is not "comparable" to a Washington felony, then it cannot be used to increase an offender score at sentencing. *Id.* at 415. To determine whether an out-of-state conviction is comparable to a Washington offense, the court must compare the elements of the out-

[8] Even if Mr. Ford's attorney did not provide ineffective assistance, counsel cannot stipulate to a conclusion of law. *State v. Cosgaya-Alvarez*, 172 Wash. App. 785, 790, 291 P.3d 939, 942 *review denied*, 177 Wash. 2d 1017, 304 P.3d 114 (2013). The court's legal error in adding a point to Mr. Ford's offender score based on a non-comparable foreign conviction may be reviewed for the first time on appeal as part of an illegal sentence. *Id.*

of-state conviction to the elements of potentially comparable Washington statutes in effect when the foreign crime was committed. *Id.*[9]

Defense counsel provides ineffective assistance by failing to raise a valid comparability issue at sentencing. *Id.* at 417. Counsel was ineffective here.

Mr. Ford's Florida burglary conviction is from 1987. At that time, Washington had only two degrees of burglary: first and second degree. RCW 9A.52.020 (1987); RCW 9A.52.030 (1987). First degree burglary required unlawful entry into a dwelling. RCW 9A.52.020 (1987). Second degree burglary prohibited entry into a "building other than a vehicle." RCW 9A.52.030 (1987).

In Florida, however, burglary prohibits entering or remaining in a structure or a "conveyance." FL ST § 810.02 (1987). The term "conveyance" includes "any motor vehicle, ship, vessel, railroad vehicle or car, trailer, aircraft, or sleeping car." FL ST § 810.011 (1987). Accordingly, the Florida burglary statute specifically includes entry into a vehicle, including one that is not a dwelling. FL ST § 810.011 (1987). In

[9] If the elements of the out-of-state statute are broader than its Washington counterpart, it would "(at least) raise serious Sixth Amendment concerns" to attempt to discern the underlying facts that were not found by a court or jury. *Descamps v. United States*, 133 S.Ct. 2276, 2288, 186 L.Ed.2d 438 (2013) *reh'g denied,* 134 S.Ct. 41, 186 L.Ed.2d 955 (2013).

Washington, unlawful entry into a vehicle constitutes misdemeanor vehicle prowling, not felony burglary. RCW 9A.52.100.[10]

Because the statute of Mr. Ford's Florida burglary conviction encompasses conduct that is not a felony in Washington, it is not legally comparable for sentencing purposes. *Thiefault*, 160 Wn.2d at 415. The court should not have added a point to Mr. Ford's offender score based on that prior conviction. *Id.*

Mr. Ford's attorney provided ineffective assistance of counsel by failing to argue that his Florida burglary conviction was not legally comparable to a Washington felony. *Thiefault*, 160 Wn.2d at 417. Mr. Ford's case must be remanded for resentencing. *Id.* at 420.

VI. THE COURT EXCEEDED ITS STATUTORY AUTHORITY BY ORDERING MR. FORD TO PAY RESTITUTION IN AN AMOUNT THAT "EXCEED[S] DOUBLE THE AMOUNT OF THE OFFENDER'S GAIN."

The court ordered Mr. Ford to pay over $33,000 in restitution. CP 138-139. But Mr. Ford only gained $300 (at most) as a result of his offenses. RP 263. The court exceeded its statutory authority by ordering Mr. Ford to pay restitution in an amount that "exceeded double the amount of [his] gain." RCW9.94A.753.

[10] Unlawful entry into a motorhome or other vehicle with sleeping quarters is a felony in Washington. RCW 9A.52.095. But the Florida burglary statute specifically includes all vehicles, whether equipped with sleeping quarters or not. FL ST § 810.011 (1987). The

A court's authority to order restitution is derived solely from statute. *State v. Gray*, 174 Wn.2d 920, 924, 280 P.3d 1110 (2012).[11] The legislature has limited a court's power to impose restitution by providing that:

> The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime.

RCW 9.94A.753.

Statutes are construed according to their "plain language and ordinary meaning." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). When the plain language is unambiguous, the court may not construe it otherwise because it would be contrary to legislative intent. *Id.*

The language of the restitution statute is clear. The court may not order an amount of restitution that is higher than double the amount that the offender gained *or* higher than double the amount that the victim lost. RCW 9.94A.753. Accordingly, the lower of the two amounts must control the court's restitution order.

Florida statute is broad enough to include conduct that would only constitute misdemeanor vehicle prowling in Washington.

[11] Mr. Ford's defense attorney did not challenge the court's restitution award at sentencing. RP 515. Nonetheless, Mr. Ford may raise the issue for the first time on appeal because addresses a legal error. *State v. Cosgaya-Alvarez*, 172 Wn. App. 785, 790, 291 P.3d 939 *review denied*, 177 Wn.2d 1017, 304 P.3d 114 (2013). An accused person "always had standing to challenge the illegality of a sentence." *Id.* (internal citation omitted).

For example, if an offender gains $100 and a victim loses $125, the court is limited to ordering $200 – double the amount that the offender gained -- in restitution. Any amount higher than $200 would impermissibly "exceed double the amount of the offender's gain." RCW 9.94A.753.

A court may not rewrite a statute even if the legislature intended something else but failed to express it adequately. *In re Detention of Martin*, 163 Wn.2d 501, 503, 182 P.3d 951 (2008). The judiciary may only correct inconsistencies that render a statute meaningless. *Martin*, 163 Wn.2d at 512-513.

Because the language of RCW 9.94A.753 is unambiguous, the court may not construe it contrary to that plain language. *Id.*

Here, the state's evidence demonstrated that Mr. Ford gained, at most, $300 in coins from the machines. RP 263. Still, the sentencing court ordered over $33,000 in restitution. CP 138-139. The court overstepped its authority by ordering Mr. Ford to pay restitution in an amount that "exceeded double the amount of [his] gain." RCW 9.94A.753.

The court exceeded its authority by ordering Mr. Ford to pay over $33,000 in restitution. RCW 9.94A.753. The restitution order must be stricken.

VII. THE TRIAL COURT ERRED BY ORDERING MR. FORD TO PAY $1,800 IN LEGAL FINANCIAL OBLIGATIONS WITHOUT INQUIRING INTO HIS ABILITY TO PAY.

Mr. Ford was found indigent at the end of trial. CP 141-143. Still, the court ordered him to pay $1,800 in legal financial obligations (LFOs), over his objection. CP 126-127.

The court appeared to rely on boilerplate language in the Judgment and Sentence stating, essentially, that every offender has the ability to pay LFOs. CP 126. But the court did not conduct any particularized inquiry into Mr. Ford's financial situation at sentencing or at any other time. RP 510-522. The court erred by ordering Mr. Ford to pay LFOs absent any indication that he had the means to do so.

The legislature has mandated that "[t]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3); *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (March 12, 2015) (emphasis added by court).

This imperative language prohibits a trial court form ordering LFOs absent an individualized inquiry into the person's ability to pay. *Id.* Boilerplate language in the Judgment and Sentence is inadequate because it does not demonstrate that the court engaged in an individualized analysis. *Id.*

The court must consider personal factors such as incarceration and the person's other debts, including restitution. *Id.* Here, the court failed to conduct any meaningful inquiry into Mr. Ford's ability to pay LFOs. RP 510-522. The court did not consider his financial status in any way. Indeed, the court also found Mr. Ford indigent the same day that it imposed $1,800 in LFOs. CP 141-143. It also ordered him to pay over $33,000 in restitution at the same time. CP 128-139.

Had the court considered the factors mandated by the Supreme Court in *Blazina*, Mr. Ford's lengthy incarceration and extremely high restitution order would have weighted heavily against a finding that he had the ability to pay LFOs. In fact, the *Blazina* court suggested that an indigent person would likely never be able to pay LFOs. *Id.* ("[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs").

The court erred by ordering Mr. Ford to pay $1,800 in LFOs absent any showing that he had the means to do so. *Blazina,* 182 Wn.2d at 838. The order must be vacated and the case remanded for a new sentencing hearing. *Id.*

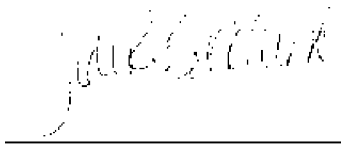
CONCLUSION

The court violated Mr. Ford's rights to a fair trial and to an impartial jury by making him appear particularly dangerous in the eyes of the jurors. The prosecutor committed prejudicial, flagrant, and ill-intentioned misconduct by bolstering Searls's testimony with "facts" not in evidence, mischaracterizing and disparaging Mr. Ford's defense theory, and minimizing the state's burden of proof. The state presented insufficient evidence to convict Mr. Ford of first-degree malicious mischief. Mr. Ford's defense attorney provided ineffective assistance of counsel by proposing an insufficient instruction defining the state's burden. Mr. Ford's convictions must be reversed.

In the alternative, the court should not have added a point to Mr. Ford's offender score based on his Florida burglary conviction, which is not comparable to a Washington felony. Then court exceeded its authority by ordering Mr. Ford to pay restitution in an amount exceeding double his gains. The court also erred by ordering Mr. Ford to pay LFOs absent any inquiry into his ability to do so. Mr. Ford's case must be remanded for resentencing.

Respectfully submitted on November 3, 2015,

BACKLUND AND MISTRY



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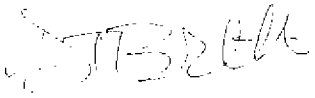

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CERTIFICATE OF SERVICE

I certify that on today's date:

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

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

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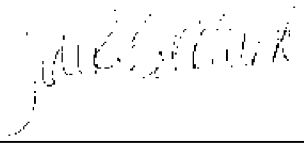
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on November 3, 2015.



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