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Court of Appeals
Division I
State of Washington

NO. 73461-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

JACOB HARRISON,

Appellant.

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

The Honorable George F. Appel, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant's constitutional right to confront the witnesses against him was violated when the court admitted a recording of a 911 call, but the caller did not testify.

2. The prosecutor's misconduct in misstating the law during closing argument denied appellant a fair trial.

3. Appellant's constitutional right to effective assistance of counsel was violated when his attorney failed to object to the prosecutor's misstatements.

Issues Pertaining to Assignments of Error

1. After being robbed in their motel room, the victims assured the perpetrators had left the scene and then went to the motel office to call 911. The caller was not available to testify at trial. Did the court err in admitting the recorded 911 call in violation of appellant's constitutional right to confront the witnesses against him?

2. During closing argument, the prosecutor told the jury repeatedly that DNA evidence was not necessary and declaring, "I'm not telling you that. The judge is telling you that." Did the prosecutor misstate the law and mislead the jury in violation of appellant's right to a fair trial?

3. Was counsel constitutionally ineffective in failing to object to the prosecutor's misstatement of the law in closing argument?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Snohomish County prosecutor charged appellant Jacob Harrison with one count of first-degree robbery, one count of possession of heroin, and one count of first-degree unlawful possession of a firearm. CP 187. On the first two counts, the State alleged Harrison or an accomplice was armed with a firearm. CP 187. The jury found Harrison guilty as charged. CP 125-29. The court imposed concurrent standard range sentences along with the mandatory consecutive firearm sentencing enhancements for a total of 180 months. CP 87. Notice of appeal was timely filed. CP 64.

2. Substantive Facts

a. Morcom's Account of the Robbery

Shana Morcom testified that she and her boyfriend Brett Losey were robbed at gunpoint in their room at a Motel 6 in Everett. 3RP 182-83. The couple had essentially rented their motel room to someone called J.T. 3RP 313. They left around noon, not intending to come back. 3RP 183, 313-14. Later that afternoon, however, they returned. 3RP 184-85, 313-14. She could not recall why. 3RP 313-14.

Morcom testified the door was opened for them from the inside, and after they went in, a gun was pointed at them. 3RP 185-86. The second man then stood up and told them, "Give us all your stuff." 3RP 266. They were told to put their wallets, keys, phones and money on the bed and go into the bathroom. 3RP 185-86. One of the robbers told them, when asking for their keys, "Don't worry, we're not taking your car." 3RP 271-72. Morcom testified she could see the gun and could tell it was loaded. 3RP 285-86. They did as instructed and waited until they heard the motel room door close. 3RP 186. Then they looked out and, seeing no one, went to the motel office to call 911. 3RP 181-82, 186.

At trial, Morcom testified the robbers were two men she'd never seen before. 3RP 186. She also testified J.T.'s companion was a female, which she did not tell police at the time. 3RP 189. Morcom testified the robbers stole her i-phone, her car keys which were on a sparkly pink lanyard, and Losey's wallet, containing pre-paid Fred Meyer store debit cards, one in her name, and one in Losey's. 3RP 190, 209, 272-73.

b. Police Investigation

Shortly after the 911 call, Officer John Sadro and other police began to arrive at the Motel 6. 3RP 442-44, 510-12, 603-04. They took statements from Morcom and Losey in the motel office. 3RP 605, 610-11. She told police J.T. held the gun while another male sat. 3RP 189. In her written

statement, Morcom said the man with the gun was the same J.T. who paid them to use the room. 3RP 187-88. Police testified that, after Morcom and Losey's reports, they were on the lookout for J.T. as well as a bald male with a teardrop tattoo and camouflage shorts. 3RP 448-49, 514-15. Morcom testified she did not recall any tattoo, but did recall Losey mentioning it. 3RP 268. At the time, however, she told police the second robber was bald and had a tattoo on his face. 3RP 268. Police testified neither Morcom nor Losey appeared to be obviously under the influence. 3RP 445, 513-14, 592, 610-11.

Juan Escalante, a motel employee, told police he saw two men run from a room on the second floor and get into two different cars. 3RP 362-63. He testified at trial that one of the men was black and the other had a Mohawk hairstyle. 3RP 363-64. He did not mention either of those details to the police at the time. 3RP 363-65.

Morcom also gave police her username and password for her i-phone, so they could use Apple's "find my i-phone" application. 3RP 211, 445-46. Police tracked the phone to the home of Ryan Kelley. 3RP 450-53.

After police surrounded the Kelley home, Harrison came out. 3RP 454-55, 496-97. He had a shaved head, tattoos near his eyes, and a black shirt, so they arrested him. 3RP 455-56, 516-17, 543. Police took Morcom to view Harrison, and, after moving closer to get a better look, Morcom told

police she was 95 percent certain he was the second robber. 3RP 277-80, 641-44.

Kelley also came out of the house; since he did not meet the description, he was detained briefly for questioning and then released. 3RP 518. As police were entering the home, Kelley's then-girlfriend Amber Mark finally followed the repeated order to come out. 3RP 416-17. Harrison cooperated with police, giving his correct name. 3RP 497. When asked about the robbery, he denied knowing anything about it. 3RP 523. When informed he was being charged with robbery, he asked if that was the only charge. 3RP 646. He told police he had been in room 227 at the Motel 6, but was only there smoking meth. 3RP 648.

Police obtained a search warrant and searched Kelley's home. 3RP 524. Kelley had no key to the garage, and police had to kick the door open. 3RP 525. Inside the garage was a wooden table with a pair of camouflage shorts near a purple bag and a lanyard with keys. 3RP 527-29. Inside the bag police, found a metal box, containing a loaded .38 caliber revolver, a small bag of heroin,¹ and Morcom's cell phone. 3RP 283-85, 529-31, 674-75. The revolver was later fired and found to be in working order. 3RP 598-602. Morcom identified it as the one used in the robbery. 3RP 285-86. Losey's brown wallet was not recovered. 3RP 563-64.

¹ Harrison stipulated the substance was heroin. 3RP 674-75.

Several days later, J.T. Garcia was arrested on outstanding warrants, and a search of his person revealed Morcom and Losey's Fred Meyer debit cards. 3RP 581-82. When shown a photo montage, Morcom said she was 100 percent certain J.T. Garcia was the gun-wielding robber. 3RP 655-59.

The only DNA retrieved from the crime scene matched J.T. Garcia and an unidentified female person. 3RP 671-72.

c. Kelley's Testimony

Kelley testified that Harrison arrived at Kelley's home that afternoon wearing camouflage print shorts and carrying a purple cloth grocery bag. 3RP 370-73, 387. Kelley knew Harrison only because Kelley's then-girlfriend Amber Mark had introduced the two men a few days earlier. 3RP 370. When he arrived, Kelley testified, Harrison did not seem panicked or out of breath and asked if he could change out of his camouflage shorts because it was cold out. 3RP 384.

Within a few minutes of Harrison's arrival, Kelley could see police outside the house. 3RP 370-71. Kelley told Harrison, "If they're here for you, you need to go outside and take care of it." 3RP 372. He claimed Harrison responded, "I'm screwed then." 3RP 377.

d. Mark's Testimony

Amber Mark was also in Kelley's house that afternoon and testified Harrison came over unexpectedly to change his clothes. 3RP 402, 405-06.

She testified she asked him to leave because she could tell something was wrong. 3RP 406. She claimed he was trying to turn on a phone she had not seen before. 3RP 412-13. When she asked where he had gotten it, he did not answer. 3RP 412-13.

Mark also testified that, in the weeks prior to October 12, Harrison had been looking for a .38 and asked if she could help him find one. 3RP 418-19. Shortly before October 12, Harrison arrived at the house, she claimed, and showed her a .38 he had obtained. 3RP 419.

e. Morcom's Doubts About Her Testimony

Morcom testified her early accounts of what happened on October 12 are not to be believed because she was, at the time, using heroin frequently and, she realized after she got sober, her memory was quite bad. 3RP 190-91, 305. She testified Losey also occasionally drank alcohol and used drugs and was under the influence at the time of the events in this case. 3RP 311-12. In addition to the drugs, Morcom testified, another reason she doubted her earlier statements was that a friend of J.T.'s later told her J.T. simply was not capable of doing something like that. 3RP 204. She testified she did not actually recognize Harrison as the second robber, but identified him only because she saw a tattoo, (which she had heard Losey mention) and because she knew police must have tracked her i-phone to him. 3RP 279-82, 319-20.

f. The 911 Call

At the beginning of the trial, defense counsel stipulated that Losey's 911 call was admissible. 3RP 104, 106. At that time, both sides anticipated the State would call Losey as a witness. However, the next morning, the prosecutor reported Losey had been hospitalized for asthma and might not be able to testify. 3RP 162. Two days later, the prosecutor reported Losey was still in the hospital. 3RP 471. Defense counsel agreed it would be fine to either proceed without him or continue the trial until the following week. 3RP 471-72. The next day, Losey, Officer Sadro, and the victim advocate were in a car accident on their way from the hospital to the courthouse. 3RP 762-63. The defense did not object to recessing until the following Monday. 3RP 765.

On Monday, the prosecutor reported Losey was incoherent from pain medication and would not testify. 3RP 771-75. At that point, defense counsel objected to the 911 call, arguing the Confrontation Clause would be violated because she could not cross-examine Losey. 3RP 780-81.

The court ruled the excited utterance exception to the hearsay rule permitted admission Losey's statements to the 911 operator. 3RP 791. The court reasoned Losey was still under the stress of the robbery and did not have time to fabricate. 3RP 794-96. The court specifically relied on Losey's

apparent fear that he might be shot for snitching to find the 911 call apparently reliable. 3RP 796, 798.

The prosecutor and court appeared to believe that, if the 911 call met the requirements for the excited utterance exception to the hearsay rule, then it automatically survived scrutiny under the Confrontation Clause. 3RP 789-97. Defense counsel argued this was not so. 3RP 791. The court's only on-the-record analysis of the Confrontation Clause was to declare, "I think it is an excited utterance, and I don't think the *Crawford* case keeps it from the jury." 3RP 797. As a second reason for admission, the court declared it would not revisit its earlier decision admitting the 911 call by agreement of the parties. 3RP 797-98.

In the admitted portion of the 911 call, Losey described J.T. as a white male with long brown hair, a light colored jersey, and a red hat. Ex. 2A. He described the gun as a .38 or .357. Ex. 2A. He assumed the robbers left in a car, but did not know what kind. Ex. 2A. In a mumbling voice, he is heard to say something like "probably gonna shoot me" and "I'm snitching." Ex. 2A.

C. ARGUMENT

1. ADMISSION OF THE 911 CALL VIOLATED HARRISON'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

a. Out-of-Court Statements to Police Must Generally Be Excluded Under the Confrontation Clause Unless the Primary Purpose Is to Respond to an Ongoing Emergency.

Both our state and federal constitutions guarantee accused persons the right to confront the government's witnesses at trial. U.S. Const. amend. VI; Const. art. I § 22. The Sixth Amendment Confrontation Clause aims to prevent substitutes for live testimony that deny defendants the opportunity to test an accuser's claims "in the crucible of cross-examination." State v. Hurtado, 173 Wn. App. 592, 598, 294 P.3d 838, rev. denied, 177 Wn.2d 1021 (2013) (quoting Crawford v. Washington, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)). Testimonial statements by a witness who does not testify are inadmissible unless the witness is unavailable and there has been a prior opportunity for cross-examination. Crawford, 541 U.S. at 59. Violations of the Confrontation Clause are reviewed de novo, and the constitutional error requires reversal unless the State proves it harmless beyond a reasonable doubt. Hurtado, 173 Wn. App. at 598 (citing State v. Jasper, 174 Wn.2d 96, 108, 271 P.3d 876 (2012)).

Crawford's categorical requirement of cross-examination or exclusion applies to all out-of-court statements that are deemed testimonial.

541 U.S. at 59. “The State has the burden of establishing that a statement is nontestimonial.” Hurtado, 173 Wn. App. at 600 (citing State v. Koslowski, 166 Wn.2d 409, 417 n. 3, 209 P.3d 479 (2009)).

Statements made in response to questioning by a police officer are likely to be testimonial. Crawford, 541 U.S. at 53 n. 4. The exception to this general rule is when the primary purpose of the statement is to enable police to meet an ongoing emergency, rather than to establish or prove past events relevant to a criminal prosecution.² Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

Washington courts have distilled the Davis analysis into four factors to consider in determining whether a statement is testimonial:

- (1) Was the speaker speaking about current events as they were actually occurring, requiring police assistance, or was he or she describing past events? The amount of time that has elapsed (if any) is relevant.
- (2) Would a “reasonable listener” conclude that the speaker was facing an ongoing emergency that required help? A plain call for help against a bona fide physical threat is a clear example where a reasonable listener would recognize that the speaker was facing such an emergency.
- (3) What was the nature of what was asked and answered? Do the questions and answers show, when viewed objectively, that the elicited statements were necessary to

² The United States Supreme Court later clarified that there may be purposes other than an ongoing emergency that may render the statements non-testimonial so long as the primary purpose is something other than establishing past facts relevant to a criminal prosecution. Michigan v. Bryant, 562 U.S. 344, 358-59, 131 S. Ct. 1143, 1155, 179 L. Ed. 2d 93 (2011).

resolve the present emergency or do they show, instead, what had happened in the past? For example, a 911 operator's effort to establish the identity of an assailant's name so that officers might know whether they would be encountering a violent felon would indicate the elicited statements were nontestimonial.

(4) What was the level of formality of the interrogation? The greater the formality, the more likely the statement was testimonial. For example, was the caller frantic and in an environment that was not tranquil or safe?

State v. Robinson, ___ Wn. App. ___, ___ P.3d ___, 2015 WL 5098707, at *4-5 (No. 71929-7-I, filed Aug. 31, 2015) (citing Koslowski, 166 Wn.2d at 417).

The existence of an ongoing emergency is the single most important factor in determining whether the primary purpose of a statement to law enforcement is testimonial. Bryant, 562 U.S. at 361. This is because the emergency is presumed to focus the participants on more immediate needs than criminal prosecution. Id. (discussing Davis, 547 U.S. at 822). The focus is, instead, on “end[ing] a threatening situation.” Id. (quoting Davis, 547 U.S. at 832).

b. There Was No Ongoing Emergency at the Time of the 911 Call Because the Robbery Had Ended, the Robbers Had Fled, and Morcom and Losey Were Not in Danger.

The Confrontation Clause is violated by admission of a robbery victim's statements to police after the emergency has ended. Koslowski, 166 Wn.2d at 432-33. Here, Losey's statements in the 911 call were testimonial

because the emergency was over and the primary purpose was to report and solve a completed robbery.

Koslowski involved a home invasion robbery, wherein a Ms. Alvarez was forced into her home at gunpoint and tied up while robbers took her valuables. 166 Wn.2d at 415. After the men left, she freed herself and called 911. Id. In discussing Davis, the court explained, “where the statements are neither a cry for help nor provision of information that will enable officers immediately to end a threatening situation, it is immaterial that the statements were given at an alleged crime scene and were ‘initial inquiries.’” Koslowski, 166 Wn.2d at 421 (citing Davis, 547 U.S. at 832). The court determined that, although Ms. Alvarez was frightened, her statements to the responding officer were testimonial because there was no ongoing threat or emergency at the time. Id. at 423-32.

The same is true here. Losey, like Ms. Alvarez, was reporting events that had already ended. Losey answered the 911 operator’s questions by describing his assailant, identifying the type of gun used, and verifying that only his keys had been taken, not the car. Ex. 2A. These statements were not a “cry for help” and there was, at the time, no threatening situation. Losey and Morcom had left the motel room where the robbery occurred and were calling from the motel’s office five minutes later. 3RP 186, 782. Thus, they were removed from the scene of the crime, both spatially and

temporarily. There was no indication the robbers would return to the motel room, and if they did, Losey and Morcom were no longer there. Like Ms. Alvarez in Koslowski, they were “not in any apparent immediate danger.” 166 Wn.2d at 426.

Like the Koslowski court, this Court should reject any argument that there was an ongoing emergency merely because the robbers were at large and the 911 operator relayed Losey’s description to officers in the field:

Contrary to the State’s argument, the mere fact that the suspects were at large and that Sergeant Wentz relayed the information he learned from Ms. Alvarez to officers in the field is not enough to show the questions asked and answered were necessary to resolve a present emergency situation.

166 Wn.2d at 426-27.

The fact that no one was injured also weighs against any finding of a danger to the public. See Bryant, 562 U.S. at 363-64. In Bryant, the victim declarant lay dying from a gunshot wound and police had not yet determined whether he was the only target or how far away the shooter might be. Id. at 373-74. The court found the victim’s severe injuries were relevant to whether there was an ongoing threat to the general public. Id. at 365. Here, although a gun was used, the robbers did not actually harm anyone. Ex. 2A.

The absence of physical injury is also relevant, under Bryant, to whether Losey was reasonably able to have a testimonial purpose. 562 U.S. at 364-65. The fact that Losey was uninjured makes a testimonial purpose

more likely. Moreover, Losey's own statements show he was aware of the potential for prosecutorial use of his statements. He described himself not as calling for help, but as "snitching." Ex. 2A.

The Bryant court noted that, even if someone had been injured, there might well be no ongoing emergency if, for example, the perpetrator, "flees with little prospect of posing a threat to the public." 562 U.S. at 365. Here, Escalante testified the robbers fled the scene at a run. 3RP 362, 366. These facts parallel Koslowski, where the court reasoned that the robbers, "had fled the scene in a car before police arrived and there is no evidence suggesting they might return or that they posed any further danger to any identifiable person." 166 Wn.2d at 432. In short, "The emergency had passed." Id.

When Losey spoke to the 911 operator from the motel office after the robbers fled, there was no sign of an ongoing emergency. There was, however, a sign that Losey anticipated prosecutorial use of his statements. Ex. 2A. Under these facts, the State cannot meet its burden to show the statements were not testimonial.

c. Admission of the 911 Call Violated the Confrontation Clause and Requires Reversal.

Testimonial hearsay must be excluded unless the witness is unavailable and the defense has had a prior opportunity to cross-examine

him. Crawford, 541 U.S. at 59. No such opportunity existed in this case, and Losey's statements should have been excluded.

This violation of Harrison's right to confront witnesses is presumed prejudicial. State v. Fraser, 170 Wn. App. 13, 23-24, 282 P.3d 152 (2012) (citing State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)). Reversal is required unless the State can show beyond a reasonable doubt that the error did not contribute to the jury's verdict. Id. (citing Jasper, 174 Wn.2d at 117). This is yet another burden the State cannot meet.

Although Harrison was found at the house where Morcom's phone ended up, Ryan Kelley was there as well, as was Amber Marks. 3RP 454-59. The only DNA results linked to J.T. Garcia and an unidentified female. 3RP 671-72. Morcom was the only witness to identify Harrison as one of the robbers, and she testified her identification was wrong because she was on drugs at the time and was influenced by her assumption that her phone had been found. 3RP at 190-91, 277-82, 305. Losey's description of J.T. tended to corroborate the credibility of Morcom's early statements, on which the State's case largely rested. The State cannot show beyond a reasonable doubt that this apparent corroboration did not contribute to the verdict.

Finally, the State may argue the error was not preserved for review. This argument should be rejected because Harrison's attorney retracted her initial agreement that the 911 call was admissible. 3RP 780-81. The

concerns that require a party to raise a Confrontation Clause issue in the trial court were satisfied by counsel's objection in the trial court before the 911 call was played for the jury. See State v. O'Cain, 169 Wn. App. 228, 251-52, 279 P.3d 926 (2012) (discussing reasons why Confrontation Clause violation may be waived by failure to raise the issue at trial). As soon as it became clear Losey would not testify, counsel vehemently objected citing Harrison's right to confront witnesses under Crawford. 3RP 780-81, 784-86. Counsel did not gamble on a not-guilty verdict and wait to object until after the verdict. Because of counsel's objection, the trial court was not deprived of an opportunity to rule on the issue, and the error was preserved for this Court's review.

2. THE PROSECUTOR COMMITTED MISCONDUCT WHEN HE TOLD THE JURY "YOU DON'T NEED THE DNA. I'M NOT TELLING YOU THAT. THE JUDGE IS TELLING YOU THAT."

No DNA evidence tied Harrison to this robbery. In fact, the only DNA that was found was linked to J.T. Garcia and an unidentified female. 3RP 671-72. Unsurprisingly, defense counsel used the lack of a DNA link to argue the jury should find a reasonable doubt and return a "not guilty" verdict. 3RP 863. The prosecutor responded by arguing the DNA evidence was unnecessary, telling the jury, "But the truth about it is that you don't need the DNA. I'm not telling you that. The judge is telling you that." 3RP

881. After reading from the instruction regarding circumstantial evidence, the prosecutor continued, saying “The judge is telling you you do not need that DNA.” 3RP 881. He further told the jury, “The weight of the DNA is the same as the weight of the circumstantial evidence that you use your common sense to infer. The judge has told you that.” 3RP 882. This argument was misconduct because it misstated the law, unfairly used the judge to vouch for the prosecutor’s case, and misled the jury.

A prosecutor is a quasi-judicial officer who shares in the court’s duty to ensure that every accused person receives a fair trial. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). A fair trial is one where the verdict is based on the evidence, the law, and reason. Fisher, 165 Wn.2d at 746-47. Therefore, prosecutors must refrain from using the prestige of their elected office to sway the jury. Monday, 171 Wn.2d at 677. Nor may a prosecutor misstate the law to the jury. State v. Swanson, 181 Wn. App. 953, 959, 327 P.3d 67, review denied, 339 P.3d 635 (2014).

A prosecutor who subverts or evades the constitutional safeguards protecting the rights of accused persons can render a criminal trial unfair. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). In reviewing prosecutorial misconduct, courts consider the context

of the entire trial. Id. at 704. Prosecutorial misconduct requires reversal of the conviction when the prosecutor's argument was improper and there is a substantial likelihood the misconduct affected the verdict. Id. at 703-04.

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

The prosecutor's entire argument about the DNA evidence rested on impermissible vouching and misstating the law. Twice the prosecutor told the jury they did not need the DNA because "the judge is telling you" that. 3RP 881. Then the prosecutor told the jury, "The weight of the DNA is the same as the weight of the circumstantial evidence that you use your common sense to infer. The judge has told you that." 3RP 882. This argument was a subtle and powerful misstatement of the law that also placed the prestige of the judge on the side of the State.

"The jury is the sole and exclusive judge of the weight of evidence." State v. Randecker, 79 Wn.2d 512, 517, 487 P.2d 1295 (1971). Trial courts

may not weigh the evidence to determine whether an element of a crime has been proved. Id. “[W]hether the circumstances tending to connect the defendant with the crime, or tending to establish intent exclude, to a moral certainty, every other reasonable hypothesis than that of the defendant's guilt, is, again, a question for the jury.” Id. (citing, inter alia, State v. White, 74 Wn.2d 386, 444 P.2d 661 (1968)). Thus, only the jury could decide whether the remaining evidence in the case, without any DNA linking Harrison to the scene, was enough to convict. Only the jury could decide whether it “needed” the DNA to convict.

While the law does not distinguish between direct and circumstantial evidence, that does not mean the weight is automatically the same. See State v. Gosby, 85 Wn.2d 758, 766-67, 539 P.2d 680 (1975) (whether direct or circumstantial evidence is more probative or reliable can only be determined based on the facts of the case; “no generalizations realistically can be made”). The relative weight is for the jury to decide. Randecker, 79 Wn.2d at 517. In direct contravention of these fundamental principles, the prosecutor argued that, as a matter of law, DNA evidence was unnecessary for a conviction and the circumstantial evidence presented by the State was of equal weight. 3RP 881-82. This argument was misconduct because it was a misstatement of the law. It was additionally improper because the

prosecutor did not merely misstate the law himself but used the judge's prestige to bolster his misstatement.

Under these circumstances, the misconduct was likely to mislead the jury. Prosecutors, in their quasi-judicial capacity, usually exercise a great deal of influence over jurors. State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). Statements made during closing argument are presumably intended to influence the jury. State v. Reed, 102 Wn.2d 140, 146, 684 P.2d 699 (1984). Otherwise, there would be no point in making them. Although jurors are instructed to disregard any argument not supported by the court's instructions, they are also instructed to consider the lawyers' remarks because they are "intended to help you understand the evidence and apply the law." CP 133 (Instruction 1). The prosecutor's argument was likely to cause jurors to convict even in the face of any reasonable doubts they may have otherwise entertained based on the lack of any DNA tying Harrison to the scene. Whether DNA evidence was necessary under the circumstances to prove guilt beyond a reasonable doubt was a decision for the jury, not the prosecutor or the judge. Gosby, 85 Wn.2d at 766-67; Randecker, 79 Wn.2d at 517. Harrison's convictions should be reversed because the prosecutor's misstatements of the law deprived him of a fair trial.

3. INEFFECTIVE ASSISTANCE OF COUNSEL DEPRIVED HARRISON OF A FAIR TRIAL.

Alternatively, in the event this Court finds the misconduct could have been cured by instruction, counsel was constitutionally ineffective in failing to object and request such an instruction. “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). The right to effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution is violated when the attorney’s deficient performance prejudices the defendant such that confidence in the outcome is undermined. 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, 225-26, 229, 743 P.2d 816 (1987).

There was no possible strategic reason for not objecting to the prosecutor’s misstatement of the law. Pointing out that the weight of the evidence is for the jury, not the judge, to decide, could only have helped Harrison, because the prosecutor’s misstatement essentially placed out of bounds an entire area of possible reasonable doubt. It was unreasonably deficient performance not to protect Harrison’s right to a fair trial by objecting.

The failure to object and correct the jury's likely misperception undermines confidence in the outcome and requires reversal under the Strickland standard. 466 U.S. at 685-87. If the jury's likely misperception were corrected, it is reasonably probable a different outcome would ensue. A jury that was properly allowed to consider the lack of DNA evidence could have found that Kelley or someone working with him was the other robber. It could have found the unidentified female DNA belonged to Marks and she was the other robber. In short, there were other plausible explanations for the presence of Morcom and Losey's property in Kelley's garage. Under these facts, misstating the jury's ability to consider the lack of DNA evidence undermines confidence in the outcome. Ineffective assistance of counsel provides an additional basis for reversal of Harrison's convictions.

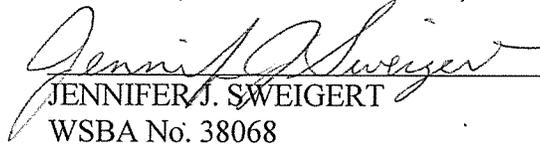
D. CONCLUSION

For the foregoing reasons, Harrison requests this Court reverse his convictions.

DATED this 23rd day of November, 2015.

Respectfully submitted,

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Attorney for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 73461-0-1
)	
JACOB HARRISON,)	
)	
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 23rd DAY OF NOVEMBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JACOB HARRISON
DOC NO. 366219
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 23rd DAY OF NOVEMBER 2015.

X *Patrick Mayovsky*