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Court of Appeals  
Division I  
State of Washington

No. 73954-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

DONNA GREEN,

Appellant.

---

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

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BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

After Donna Green's mother died, the Social Security Administration continued to deposit benefits into her mother's bank account. Ms. Green accessed those funds to pay for her mother's cremation and her own monthly expenses, believing the benefits were hers to use as long as the Social Security Administration continued to deposit the payments. Approximately two years after her mother's death, the agency realized its error and the State prosecuted Ms. Green for theft and forgery.

Ms. Green's defense at trial was good faith claim of title. Despite the fact that the theft statute specifically authorizes this defense, the trial court erroneously found she was not entitled to the instruction as a matter of law. The trial court also erroneously denied Ms. Green's request for a supplemental instruction on knowledge after it incorrectly found the analysis in *State v. Allen*<sup>1</sup> was inapplicable to Ms. Green's case. Finally, Ms. Green was denied the right to a fair trial by the State's improper comments during closing argument, and was denied the right to counsel when the trial court refused her repeated

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<sup>1</sup> 182 Wn.2d 364, 374, 341 P.3d 268 (2015).

requests for the substitution of appointed counsel. For all of these reasons, this Court should reverse.

**B. ASSIGNMENTS OF ERROR**

1. The trial court erred when it refused to instruct the jury on good faith claim of title.

2. Ms. Green's right to Due Process was violated by the trial court's refusal to instruct the jury on good faith claim of title.

3. The trial court's denial of Ms. Green's request for a supplemental knowledge instruction was error.

4. Ms. Green was denied her constitutional right to a fair trial when the prosecuting attorney shifted the burden to Ms. Green, mischaracterized its burden, and appealed to the passion and prejudice of the jury.

5. The trial court erred when it denied Ms. Green's repeated motions for substitution of counsel.

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The theft statute specifically provides for the defense of good faith claim of title, and this defense negates the defendant's alleged intent. Despite the plain language of the statute, the trial court found, as a matter of law, that Ms. Green was not entitled to a jury instruction

on good faith claim of title. Is reversal required where the trial court declined to follow the statute and, by doing so, relieved the State of its burden, thereby violating Ms. Green's right to due process?

2. The State was required to prove Ms. Green had the actual knowledge necessary for the commission of the crimes of theft and forgery. While actual knowledge may be proven by circumstantial evidence, our supreme court has recognized that the pattern instruction for knowledge allows jurors to "understandably misinterpret Washington's culpability statute to allow a finding of 'knowledge'" if the defendant "should have known."<sup>2</sup> Where the trial court rejected Ms. Green's supplemental instruction, which provided the jurors with a correct and complete statement of the law, is reversal required?

3. A defendant may be denied her constitutional right to a fair trial when the prosecuting attorney acts improperly and the defendant is prejudiced. The State made a number of improper arguments in its rebuttal that shifted the burden to Ms. Green, mischaracterized its burden, and appealed to the passion and prejudice of the jurors. Where Ms. Green was prejudiced by the State's improper conduct, must this Court reverse?

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<sup>2</sup> *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015).

4. The Sixth Amendment right to counsel entitles a defendant to conflict-free representation, and a defendant is constructively denied the right to counsel when she is forced to proceed to trial represented by an attorney with whom she has an irreconcilable conflict. Ms. Green asked for the substitution of appointed counsel because her current counsel failed to meet with her over a period of eight months prior to trial despite her repeated requests to do so. Was Ms. Green's constitutional right to counsel violated when the court denied her motions?

D. STATEMENT OF THE CASE

Donna Mae Green<sup>3</sup> passed away in May of 2012. 2 RP 9.<sup>4</sup> Before she died, she received a monthly benefit of approximately \$700 from the Social Security Administration (SSA). 2 RP 10. Her husband's death preceded hers, and she was entitled to this benefit as his surviving spouse. 2 RP 12.

For approximately two years after Donna Mae Green's death, the SSA continued to deposit the monthly benefit into her bank

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<sup>3</sup> To avoid confusion, the appellant's mother, Donna Mae Green, will be referred to using her full name or as Ms. Green's mother. All references to "Ms. Green" refer to the appellant.

<sup>4</sup> The verbatim report of proceedings are divided into two unnumbered volumes. Here, volume 1 refers to the volume beginning on July 24, 2014, and volume 2 refers to the volume beginning on June 23, 2015.

account. 2 RP 10. Scott Henderson, a federal agent with the SSA, admitted this type of error is not uncommon, particularly in cases where the benefit is provided to a surviving spouse rather than the original recipient. 2 RP 11.

When the SSA recognized its error, it contacted Bank of America, where the direct deposits had been made, in an attempt to reclaim the funds. 2 RP 11. However, it learned from the bank that the remaining balance on the account was approximately \$2,000. 2 RP 12.

Agent Henderson reached out to Donna Mae Green's daughter, also named Donna Green. Ms. Green, the daughter, met with Agent Henderson and explained that she had cared for her mother toward the end of her mother's life and that after her mother's death, she used the funds in her mother's account to pay for her mother's cremation and for her own monthly expenses. 2 RP 26-27. It had not occurred to her she was doing anything wrong because her mother had given her permission to access the account and she assumed the SSA would terminate the benefits at the appropriate time. 2 RP 27, 35.

Ms. Green had obtained the funds in her mother's account by writing checks on the account to herself, and signing her own name, Donna Green. 2 RP 31. When the agent questioned whether Ms.

Green had attempted to confuse or mislead the bank by signing the checks “Donna Green,” Ms. Green explained that she presented her own debit card with the checks, and had informed the teller the account did not belong to her. 2 RP 37.

The State charged Ms. Green with one count of first degree theft and five counts of forgery. CP 7-8. Prior to trial, Ms. Green repeatedly moved for the substitution of her appointed counsel, explaining that he had not taken the time to meet with her outside of court. 1 RP 5, 10, 15. Each time, the trial court denied her motion. 1 RP 7, 14, 16.

Ms. Green’s defense at trial was good faith claim of title. 1 RP 177. In opening statement, defense counsel told the jury that Ms. Green had not tried to hide her actions, and did not believe that she was committing theft. 1 RP 177-78. However, the trial court denied Ms. Green’s request for a jury instruction on good faith claim of title. 2 RP 70. It also denied her request for a supplemental instruction explaining that the jury must find Ms. Green had the actual knowledge required to commit the deception and forgery, even if the jury relied upon circumstantial evidence to make this determination. 2 RP 70.

In its closing argument, the State told the jury that the defense was wrong to fault the State for missing evidence, because defense

counsel could have elicited this information on cross-examination. 2 RP 134-35. It also suggested that asking the jury to find reasonable doubt in Ms. Green’s case was a request for the jurors to “bend over backwards,” and that this case was not about Ms. Green, but about holding people accountable more generally. 2 RP 136-37. In each instance, defense counsel objected, but his objections were overruled. 2 RP 134-37.

During deliberations, the jury submitted a question, asking why the case against Ms. Green was criminal, rather than civil. CP 121. Despite these apparent reservations, it returned a guilty verdict on all six counts. CP 132, 138. Ms. Green was sentenced to six months of community custody, with 100 hours of community restitution, in addition to the monetary restitution to be later ordered by the court. CP 134-35.

E. ARGUMENT

**1. Ms. Green was entitled to have the jury instructed on her defense of good faith claim of title.**

- a. The statute specifically allows for a good faith claim of title defense to theft.

Ms. Green was charged with one count of theft in the first degree and five related counts of forgery. CP 7-8. An individual may

commit theft in one of three ways. RCW 9A.56.020(1). Under the statute:

(1) "Theft" means:

(a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

RCW 9A.56.020.

The statute also specifically provides for a defense to theft.

RCW 9A.56.020(2). The legislature directed:

(2) In any prosecution for theft, it shall be a sufficient defense that:

(a) The property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable[.]

RCW 9A.56.020.

By providing that a defendant cannot be guilty of theft if the defendant takes property from another under the good faith belief that she is entitled to possession of the property, this defense negates the

element of intent to steal. *State v. Ager*, 128 Wn.2d 85, 92, 904 P.2d 715 (1995); *State v. Hicks*, 102 Wn.2d 182, 184, 683 P.2d 186 (1984). A defendant is entitled to have the jury instructed on good faith claim of title when she presents some evidence of a legal or factual basis for her good faith belief of entitlement to the property at issue. *Ager*, 128 Wn.2d at 96-97.

Some evidence requires more than a vague assertion by the defendant. *Id.* at 95. However, she need only “present evidence (1) that the taking of property was open and avowed and (2) showing circumstances which arguably support an inference that the defendant has some legal or factual basis for a good faith belief that he or she has title to the property taken.” *Id.* at 97.

Where the evidence supports a good faith claim of title defense, a trial court’s refusal to give the instruction is reversible error. *Hicks*, 102 Wn.2d at 187. This Court reviews a trial court’s refusal to grant an instruction, based on a question of law, de novo. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996) (overruled on other grounds by *State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997)).

- b. The trial court's refusal to instruct the jury on good faith claim of title was contrary to the plain language of the statute.
  - i. *Evidence was presented at trial that Ms. Green acted openly and believed she was entitled to the money.*

Scott Henderson, the federal agent who interviewed Ms. Green, testified at trial about the statements she made to him. 1 RP 180; 2 RP 25. According to Agent Henderson, Ms. Green explained she used the money at issue to pay for her mother's cremation and for her own monthly bills. 2 RP 27. She was not familiar with how social security benefits worked and assumed the agency would terminate the benefits when they were no longer authorized. 2 RP 27. Since the benefits had not been terminated, she assumed that she and her son were entitled to them. 2 RP 31.

When asked about why she believed it was acceptable to write checks on her mother's account, she explained her mother had given her permission to access the account. 2 RP 35. Agent Henderson questioned whether Ms. Green was attempting to confuse the bank when she wrote the checks on her mother's account, but Ms. Green explained she had been upfront with the bank that it was her mother's account, and had presented her own debit card when cashing the checks. 1 RP 37. While a Bank of America vice president testified that

it was against the bank's policy to allow an individual to write checks against another person's account, the State did not present evidence from a teller who was actually present for the transactions at issue. 2 RP 52. At the very minimum, there was some evidence that Ms. Green was open about her actions and believed she was entitled to the money in her mother's account. *Ager*, 128 Wn.2d at 96-97.

ii. *The trial court erroneously found Ms. Green was not entitled to the instruction as a matter of law.*

Based on the evidence presented at trial, Ms. Green requested the jury be instructed on good faith claim of title. 2 RP 62. The State claimed Ms. Green was not legally entitled to the instruction because the State was only proceeding under RCW 9A.56.020(1)(b), which required it to prove Ms. Green acted "[b]y color or aid of deception" in order to obtain the money. 2 RP 66.

In support of its claim, the State cited *State v. Casey*, where this Court determined a defendant was not entitled to a good faith claim of title instruction where the State was alleging theft by deception, because in such cases "it is logically impossible to convict without implicitly rejecting any claim of good faith." 81 Wn. App. 524, 527, 915 P.2d 587 (1996). The trial court acknowledged there was evidence that Ms. Green had acted under the belief she was entitled to the

money, saying “[s]he, you know, if true, she went to an account and acted on a belief, false or otherwise, that she was entitled to it.” 2 RP 68. However, the court denied Ms. Green’s request, apparently persuaded by the State’s reliance on *Casey*. 2 RP 70.

This Court’s holding in *Casey* is inconsistent with *Ager* and the plain language of the statute. “When interpreting a statute, ‘the Court’s objective is to determine the legislature’s intent.’” *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (quoting *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)). Because “[t]he surest indication of legislative intent is the language enacted by the legislature,” this Court must give effect to the plain meaning of the text where the statute is plain on its face. *Ervin*, 169 Wn.2d at 820.

Here, the language of the statute is plain on its face. It provides three different ways of committing theft, and states that “[i]n any prosecution for theft, it *shall* be a sufficient defense that... [t]he property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable.” RCW 9A.56.020 (emphasis added). It is well established that the use of the word “shall” indicates a mandatory obligation. *Blueshield v. State Office of Ins. Com’r*, 131 Wn. App. 639, 650, 128 P.3d 640

(2006). Thus, when this Court carved out an exception for theft committed by deception, it violated the basic principles of statutory construction. *Ervin*, 169 Wn.2d at 820.

In addition, the Court's efforts to distinguish its holding in *Casey* from the supreme court's holding in *Ager* was misguided. *Casey*, 81 Wn. App. at 589. In *Ager*, the defendant was charged with embezzlement, proscribed under the first definitional prong of the statute, RCW 9A.56.020(1)(a). *Ager*, 128 Wn.2d at 91. Although the court found the trial court properly denied the good faith claim of title instruction, its decision was based on the fact that there was "no evidence" presented at trial from which a jury could infer good faith claim of title by the defendants. *Id.* at 96 (emphasis original). Had such evidence been presented, the defendants would have been entitled to the instruction. *Id.*

In *Casey*, this Court recognized the apparent conflict with *Ager*, and stated:

Nor is our decision inconsistent with *Ager*, in which the Supreme Court approved an instruction on the good faith claim of title defense in a trial for theft by embezzlement. In the case of a theft by deception, a good faith claim of title would negate a specific element of the crime, namely deprivation "[b]y color or aid of deception." In contrast, the good faith claim of title is an affirmative defense to theft by embezzlement, but does not negate

any particular element of that charge. *Ager* is thus not controlling here.

81 Wn. App. at 527.

The distinction drawn in *Casey* finds no support in *Ager*. First, in *Ager*, the court relied on its prior decision in *Hicks* to find that the statutory defense negated the element of intent, directly contradicting the Court's contention in *Casey* that RCW 9A.56.020(2)(a) does not negate an element of embezzlement. *Ager*, 128 Wn.2d at 92; *Hicks*, 102 Wn.2d at 184.

Second, even if the Court's discussion of *Ager* was correct, our supreme court has repeatedly found that defendants are entitled to an instruction where the defense negates an element. For example, when examining a self-defense claim, our supreme court has found that self-defense negates an element of the charged crime because it is "impossible for one who acts in self-defense to be aware of facts or circumstances 'described by a statute defining an offense.'" *State v. Acosta*, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984) (citing *State v. McCullum*, 98 Wn.2d 484, 492, 656 P.2d 1064 (1983); *State v. Hanton*, 94 Wn.2d 129, 132, 614 P.2d 1280 (1980)). Once some evidence of self-defense is presented at trial, she is entitled to the instruction. *Acosta*, 101 Wn.2d at 619.

In this instance, the plain language of the statute directs that good faith claim of title “shall be a sufficient defense.” RCW 9A.56.020(2)(a). Ms. Green’s statements to the agent provided evidence of this defense, and it was error for the trial court to deny her request for the instruction.

- c. The court’s denial of the instruction was constitutional error because it relieved the State of its burden to prove its case against Ms. Green.

Due Process requires the State prove “beyond a reasonable doubt... every fact necessary to constitute the crime with which [a defendant] is charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. Amend. XIV; Const. art. I, § 3. “A corollary rule is that the State cannot require the defendant to disprove any fact that constitutes the crime charged.” *State v. W.R., Jr.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014).

The State is not constitutionally required “to disprove every possible fact that would mitigate or excuse the defendant’s culpability.” *Id.* (citing *Smith v. United States*, \_\_\_ U.S. \_\_\_, 133 S.Ct. 714, 762, 184 L.Ed.2d 570 (2013)). When an affirmative defense merely excuses conduct that would be punishable otherwise, the burden of proof may be allocated to the defendant. *W.R.*, 181 Wn.2d at 762. However,

“when a defense necessarily negates an element of the crime, it violates due process to place the burden of proof on the defendant.” *Id.* at 765; *Smith v. United States*, \_\_\_ U.S. \_\_\_, 133 S.Ct. 714, 184 L.Ed.2d 570 (2013).

In order to determine whether the defense negates an essential element of the crime, it is necessary to analyze each element of the crime charged. *Acosta*, 101 Wn.2d at 616. Similar to a claim of self-defense, the good faith claim of title defense negates the requisite intent to steal in a charge of theft. *Hicks*, 102 Wn.2d at 187. As the court found in *Hicks*, the State therefore bears the burden of proving the absence of the defense beyond a reasonable doubt. *Id.* This duty is triggered once the defendant asserts the defense and evidence is presented to create a reasonable doubt as to the defendant’s guilt. *W.R.*, 181 Wn.2d at 762.

Ms. Green’s defense to the State’s accusations was good faith claim of title, and her statements to the agent supported this defense, creating a reasonable doubt as to her guilt. 2 RP 27, 31, 35, 37. When the trial court denied Ms. Green’s request for the instruction, it relieved the State of its burden to prove its case against Ms. Green and violated her right to Due Process. *W.R.*, 181 Wn.2d at 765; Supp. CP \_\_\_ (sub

no. 70); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 19.08 (3d ed. 2014).

d. Reversal of Ms. Green's convictions is required.

Where the trial court commits a constitutional error, reversal is required unless the State can prove the error was harmless beyond a reasonable doubt. *W.R.*, 181 at 770. The State cannot meet that burden here.

When the agent contacted Ms. Green to interview her, Ms. Green arranged to meet with him in person. 2 RP 21. She answered all of his questions and told him how she had used the money, why she believed she was entitled to it, and her assumption that the SSA would take action to terminate the benefits at the proper time. 2 RP 27. In closing argument, defense counsel argued Ms. Green had acted in good faith, even if she was ultimately mistaken in her beliefs. 2 RP 110-11. During deliberations, the jury submitted a question to the court, asking why Ms. Green's case was being pursued criminally instead of civilly. CP 121.

Had the jury been instructed on the statutory defense to theft, and been told that the State had the burden of proving the absence of this defense beyond a reasonable doubt, the outcome of Ms. Green's

trial may have been different. This is true not only as the theft charge, but also as to the counts of forgery.

Forgery requires a specific intent to defraud. *State v. Conklin*, 79 Wn.2d 805, 807, 489 P.2d 1130 (1971) RCW 9A.60.020. Ms. Green told the agent that her mother gave her permission to access the bank account, and no evidence was presented at trial to refute her statement. 2 RP 35. Had the jury been properly instructed, and determined Ms. Green had a good faith claim of title to the money in her mother's account, it is likely the jury would have also found her not guilty of forgery for writing checks on the account. Reversal of all six counts is required.

**2. The trial court erroneously denied Ms. Green's request to have the jury properly instructed on knowledge.**

- a. The State was required to prove Ms. Green had the actual knowledge necessary to commit the crimes of theft and forgery.

In order to render its verdicts on the charges against Ms. Green, the jury was required to determine whether Ms. Green had knowledge of certain facts. As defense counsel informed the jury in opening, "really the trial is going to be about my client and what she knew." 1 RP 177.

As to the charge of theft, the jury needed to find the following in order to conclude Ms. Green had engaged in deception:

Deception occurs when an actor knowingly creates or confirms another's false impression which the actor knows to be false or fails to correct another's impression which the actor previously has created or confirmed.

CP 100; RCW 9A.56.010(5)(a). As to the charges of forgery, the jury was instructed:

A person commits the crime of forgery when, with intent to injure or defraud, he or she possesses, offers, disposes of or puts off as true, a written instrument which he or she knows to be forged.

CP 102; RCW 9A.60.020(1)(1)(b). Thus, to reach its decision, the jury needed to evaluate what the State proved Ms. Green knew.

Under the general culpability statute, an individual must have actual knowledge, but the State may rely on circumstantial evidence to demonstrate the actual knowledge. *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015); RCW 9A.08.010(1)(b). The pattern knowledge instruction explains this to the jury by stating:

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

CP 108; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.02 (3d ed. 2014).

The State, however, cannot satisfy a knowledge requirement by a showing that the defendant should have known the requisite fact.

*Allen*, 182 Wn.2d at 374; *State v. Shipp*, 93 Wn.2d 510, 514, 610 P.2d 1322 (1980). As our supreme court explained in *Allen*:

Although subtle, the distinction between finding actual knowledge through circumstantial evidence and finding knowledge because the defendant ‘should have known’ is critical. We have recognized that a juror could understandably misinterpret Washington’s culpability statute to allow a finding of knowledge “if an ordinary person in the defendant’s situation would have known” the fact in question, or in other words, if the defendant “should have known.”

182 Wn.2d at 374 (citing *Shipp*, 93 Wn.2d at 514).

b. The trial court erred when it denied Ms. Green’s request for a supplemental knowledge instruction.

Concerned that the jury would fail to appreciate this subtle distinction, defense counsel moved in limine to preclude any argument by the State that Ms. Green “should have known she was misleading the bank.” 1 RP 35. The State immediately expressed its intention to do exactly that, and the trial court indicated it would read *Allen* but that it believed “should have known” was a reasonable inference that the jury was permitted to draw. 1 RP 35-36. After hearing Ms. Green’s argument, the court reserved its ruling. 1 RP 37.

Ms. Green addressed this issue again when she sought to augment the pattern knowledge instruction with an additional instruction. 2 RP 63, 73. Defense counsel proposed two instructions, one of which correctly stated the law under *Allen*. Supp. CP \_\_ (sub no. 70). The proposed instruction stated:

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury may only find that the person acted with knowledge of that fact if based on the evidence the jury is satisfied that the person had actual knowledge of that fact.

Supp. CP \_\_ (sub no. 70). This instruction clarified the language in the pattern instruction, which *Allen* acknowledged could mislead the average juror. 182 Wn.2d at 374.

The trial court denied Ms. Green's request, finding that *Allen* was inapplicable because it involved accomplice liability, and "that the jury, through the standard instruction, can determine whether reasonable person [sic] can in fact believe that they're – or know a fact which constitutes a crime." 2 RP 71. The court's ruling was error.

Although the defendant in *Allen* was charged as an accomplice, the court's analysis is not limited by that fact. The court addressed the general culpability statute, which is relevant in Ms. Green's case because, like in *Allen*, the jury was required to find she acted with

knowledge. 182 Wn.2d at 374. In addition, the court's explanation as to why the pattern instruction was sufficient demonstrates its failure to recognize Ms. Green's concern, which is that the jurors might be misled by the pattern instruction to find that, because a reasonable person would know, Ms. Green should have known. CP 108.

Taken as a whole, jury instructions "must make the relevant legal standard manifestly apparent to the average juror." *State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009) (quoting *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)). In *Allen*, the prosecuting attorney used the pattern knowledge instruction to argue the jury should convict the defendant if it found he should have known he was facilitating a crime. 182 Wn.2d at 374. While this was a misstatement of the law, it highlighted the confusion that can arise from the pattern knowledge instruction, which does not articulate that a jury is permitted to rely on circumstantial evidence only to find that the defendant had actual knowledge, not that the defendant should have known.

The supplemental instruction proposed by the defense stated the law correctly and addressed this ambiguity in the pattern instruction. Without this instruction, the correct legal standard was not manifestly

apparent to the jurors. When the trial court denied Ms. Green's request to properly instruct the jury, it erred.

c. Reversal is required.

When a jury instruction misstates the law, it impermissibly relieves the State of its burden to prove the charges against the defendant beyond a reasonable doubt. *State v. Brown*, 147 Wn.2d 330, 332, 58 P.3d 889 (2002). In order to find the error harmless, the State must demonstrate, beyond a reasonable doubt, that the jury verdict would have been the same absent the error. *Id.*

While the pattern knowledge instruction does not explicitly misstate the law, a juror could "understandably misinterpret" its language to direct a finding of guilt if the evidence suggested Ms. Green should have had knowledge of certain facts. *Allen*, 182 Wn.2d at 374. This is of particular concern in this case, where the evidence suggested Ms. Green did not act with knowledge but a jury may have believed she should have had a more sophisticated understanding of social security benefits. 2 RP 27, 35. Because the State cannot show beyond a reasonable doubt that the outcome of the trial would have been unchanged had the trial court included Ms. Green's proposed instruction, reversal is required. *Brown*, 147 Wn.2d at 332.

**3. Ms. Green was denied a fair trial when the deputy prosecutor improperly shifted the burden to Ms. Green, mischaracterized the State’s burden, and appealed to the passion and prejudice of the jurors in his closing argument.**

A prosecutor is obligated to perform two functions: “enforce the law by prosecuting those who have violated the peace and dignity of the state” and serve “as the representative of the people in a quasijudicial capacity in a search for justice.” *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Because the defendant is among the people the prosecutor represents, the prosecutor “owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated.” *Id.*; see also *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

“[W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones.” *Berger*, 295 U.S. at 88. “It is as much [the prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” *Id.* A prosecutor’s misconduct may deny a defendant his right to a fair trial and is grounds for reversal if the conduct was improper and prejudicial. *State v. Swanson*, 181 Wn. App.

1953, 327 P.3d 67, 69-70 (2014) (citing *In re Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012); *Monday*, 171 Wn.2d at 675).

- a. The prosecuting attorney improperly shifted the burden to Ms. Green during closing argument.

A prosecutor may not comment on the lack of defense evidence because the defense has no duty to present evidence. *State v. Thorgerson*, 172 Wn.2d 438, 467, 258 P.3d 43 (2011). The “State bears the entire burden of proving each element of its case beyond a reasonable doubt.” *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). “Arguments by the prosecution that shift the burden of proof onto the defense constitute misconduct.” *Thorgerson*, 172 Wn.2d at 466.

In *Fleming*, the prosecuting attorney shifted the burden to the defendants in closing argument, arguing that they had failed to offer explanations for the State’s evidence against them. 83 Wn. App. 214. The court reversed, finding that the misconduct was not harmless beyond a reasonable doubt and agreeing with appellate counsel’s characterization that “trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.” *Id.* at 215.

In his rebuttal argument, the deputy prosecutor similarly shifted the burden to Ms. Green. The State presented her mother's bank records, including a "Personal Signature Card" document, from 2011, which indicated that only Ms. Green's mother was authorized to sign on the account. Ex. 3. During defense counsel's closing argument, he properly directed the jury to the fact that this signature card was a few years old, and that the witness from the bank acknowledged the records may not be complete. 2 RP 116. On rebuttal, the deputy prosecuting attorney argued that it was defense counsel's duty to question the State's witness about whether this particular record was complete, and that he had failed to do that because he was afraid of the answer. 2 RP 134-35.

Ms. Green immediately objected to each statement. 2 RP 134-35. The State responded that it was "[j]ust rebuttal" and the trial court overruled the objections. 2 RP 134-35. This ruling was error. The burden remains on the State to prove each element of its case beyond a reasonable doubt. *Fleming*, 83 Wn. App. at 215. Defense counsel is not obligated to develop the State's case, but to point the jury to where the State has failed to meet its burden. The State's suggestion to the

contrary was improper, and the trial court erred when it overruled Ms. Green's objection.

b. The prosecuting attorney mischaracterized the State's burden.

A prosecuting attorney acts improperly when he implies the jury must find the defendant guilty unless it can come up with a reason not to. *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). The State's argument is also improper when it fails to convey the gravity of the State's burden. *State v. Johnson*, 158 Wn. App. 677, 685, 243 P.3d 936 (2010).

In its final statements to the jury, the State argued Ms. Green was asking the jury to "bend over backwards" to find reasonable doubt and stated:

When you are asked to bend over backwards pretty soon the whole world is upside down and nothing makes any sense. And if that's the standard for proving things beyond a reasonable doubt, bend over backwards so far that you have see [sic] the world in a completely upside down light in order to find someone not guilty, then no one's going to be guilty of anything.

2 RP 136-37. Defense counsel objected, but the objection was overruled. 2 RP 137.

The term “bend over backwards” is used to convey the sentiment that one should make extreme efforts to do something.<sup>5</sup> Used in this context, the State’s comments suggested that when Ms. Green asked the jurors to hold the State to its burden of proof, she was asking something extraordinary of them. This trivialized the State’s burden and suggested they should convict unless they engaged in the arduous task of engaging in extreme efforts to find her not guilty.

In addition, our courts have long-recognized the impropriety of the “in order to find the defendant not guilty” argument. *Anderson*, 153 Wn. App. at 443 (Quinn-Brintnall, J concurring) (citing *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)); *Fleming*, 83 Wn. App. at 213. The jury was required to acquit Ms. Green unless it was convinced of her guilt beyond a reasonable doubt. *Fleming*, 83 Wn. App. at 213. The State’s suggestion to the contrary, that the jury should convict unless it could find a reason not to, by bending over backwards, constituted misconduct.

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<sup>5</sup> See the full definition of bend, including the phrase “bend over backward” at <http://www.merriam-webster.com/dictionary/bend%20over%20backwards> (last accessed May 11, 2016).

- c. The prosecuting attorney improperly argued Ms. Green's case was really about holding people accountable.

After Ms. Green objected to the State's mischaracterization of reasonable doubt, the State cited the correct jury instruction but then immediately told the jury:

This is not personal. It's not about Donna Green. It's not about the Social Security Administration's anger. It's not about any of that. It's about holding people accountable for the things that they do.

2 RP 137. Defense counsel again objected and the trial court again overruled the objection. 2 RP 137.

Mere appeals to the jury's passion or prejudice during argument are improper. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012). A prosecutor retains the duty to ensure a verdict based on reason and free of prejudice. *Id.* at 553. In addition, the State commits reversible misconduct when it urges the jury to consider evidence outside the record and pure appeals to passion and prejudice are typically based on matters outside the record. *Id.*

In the State's final comments to the jury, it suggested that the case was about something bigger than Ms. Green. Similar to a statement that the jury should "send a message" by returning a guilty verdict, the prosecuting attorney's statement that the jury needed to find

Ms. Green guilty in order to hold people accountable, was an improper appeal to prejudice and patriotism. *See State v. Perez-Mejia*, 134 Wn. App. 907, 918, 143 P.3d 838 (2006).

d. The prosecuting attorney's improper comments prejudiced Ms. Green.

Reversal is required because, given the facts of this case, there is a substantial likelihood the State's misconduct affected the jury's verdict. *Glasmann*, 175 Wn.2d at 704. Indeed, the State may have resorted to these improper tactics in its rebuttal because it feared the evidence demonstrated Ms. Green had made an honest mistake about her mother's social security benefits and her right to access them after her mother's death. Under these circumstances, the State's improper comments cannot be deemed harmless. Ms. Green was denied a fair trial and this Court should reverse.

**4. Ms. Green's constitutional right to counsel was violated when the trial court repeatedly denied her motions for substitution of her court-appointed attorney.**

a. Ms. Green had the right to conflict-free counsel.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI; Const. art. I, § 22. This right entitles a defendant to conflict-free representation. *Daniels*

*v. Woodford*, 428 F.3d 1181, 1196 (9<sup>th</sup> Cir. 2005), *cert. denied* 550 U.S. 968 (2007). While the Sixth Amendment does not guarantee a “meaningful relationship” between a client and his attorney, forcing a defendant to proceed to trial represented by an attorney with whom she has an irreconcilable conflict amounts to constructive denial of the right to counsel. *Stenson v. Lambert*, 504 F.3d 873, 886 (9<sup>th</sup> Cir. 2007) (citing *Morris v. Slappy*, 461 U.S. 1, 14, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983); *Brown v. Craven*, 424 F.2d 1166, 1170 (9<sup>th</sup> Cir. 1970)).

When a defendant moves for substitution of her appointed counsel, this Court applies a three-part test to determine whether the trial court erred in denying the motion. *Daniels*, 428 F.3d at 1197; *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 724, 16 P.3d 1 (2001). This Court should examine: (1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion. *Stenson*, 142 Wn.2d at 724. The denial of a defendant’s motion for substitution of counsel is reviewed for an abuse of discretion. *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 777 (9<sup>th</sup> Cir. 2001).

b. The trial court improperly denied Ms. Green’s request for new counsel.

i. *Ms. Green had completely lost trust in her attorney.*

“Where a criminal defendant has, with legitimate reason, completely lost trust in his attorney, and the trial court refuses to remove the attorney, the defendant is constructively denied counsel.” *Daniels*, 428 F.3d at 1198 (citing *Adelzo-Gonzalez*, 268 F.3d at 779). Even if the trial court determines that present counsel is competent, a serious breakdown in communications can result in an inadequate defense. *United States v. Nguyen*, 262 F.3d 998, 1003 (9<sup>th</sup> Cir. 2001).

Ms. Green moved three times to discharge her attorney and have new counsel appointed. 268 F.3d at 777; 1 RP 5, 10, 15. In her first motion, Ms. Green explained that even though almost three months had passed since her arraignment, she had not had the opportunity to meet with her attorney. 1 RP 5. The trial court instructed Ms. Green to select a date and time to meet with defense counsel before leaving the courthouse. 1 RP 6. However, Ms. Green explained that regardless of whether they could successfully arrange a meeting, communication between her and defense counsel had broken down to such an extent that she no longer trusted him. 1 RP 7. The court denied Ms. Green’s motion, but informed her it would “seriously consider” a similar

motion after she had the opportunity to meet with her attorney in person. 1 RP 7.

Approximately five months later, Ms. Green had still not been able to arrange a meeting with defense counsel. 1 RP 13. She moved for substitution of appointed counsel again, but the trial court found that, because there had been several hearing dates since her last motion, defense counsel had been working hard on the case. 1 RP 13. The court dismissed Ms. Green's concerns as nervousness about her upcoming trial date. 1 RP 13. Ms. Green informed the court that was untrue, except to the extent that anyone would be nervous about going to trial with an attorney they had never met outside of court. 1 RP 13-14. She told the court:

[Defense counsel] just told me out there that he has tried to contact me several times to get me to come in, something about emails and stuff, and that is untrue. It doesn't have anything to do with being nervous about the trial or not being nervous about it.

I've not refused to meet with him. I've not refused to have any information. So, yes, [y]our honor, you're correct that a person would be getting more nervous when you're getting close to trial and you're still having the same issue that you were at the beginning, where to get in touch with the public defender that you're having to contact their boss. And we're not talking about a response within a couple of minutes. We're talking about after you wait 5 days to get a response and stuff.

1 RP 14.

The trial court denied the motion, instructing Ms. Green to meet with her defense counsel “again.” 1 RP 14; CP 10. However, there was no showing they had ever met in person to discuss the case outside of the court hearings.

Three months later, Ms. Green moved for substitution of counsel for a third time, telling the court that nothing had changed. 1 RP 15. The trial court denied her motion again, based on its finding that defense counsel was prepared for trial. 1 RP 16. When Ms. Green asked if she could provide more information, the court denied her request and told her she could talk to the judge assigned to the trial. 1 RP 16.

The court’s denial of Ms. Green’s motions constructively denied her right to counsel. *Daniels*, 428 F.3d at 1198. Defense counsel may have been working hard on Ms. Green’s case, as the trial court found, but he was obligated not only to work toward Ms. Green’s objectives, but also to consult with her about how he planned to do that. RPC 1.4(a)(2). Ms. Green was entitled to have counsel who was willing to meet with her to discuss her case, and when her attorney failed in this duty, she understandably no longer trusted him.

ii. *The trial court's inquiry was inadequate.*

Before ruling on a motion to substitute counsel, the trial court must conduct “such necessary inquiry as might ease the defendant’s dissatisfaction, distrust, and concern.” *Adelzo-Gonzalez*, 268 F.3d at 777 (quoting *United States v. Garcia*, 924 F.2d 925, 926 (9<sup>th</sup> Cir. 1991)). This inquiry must also provide the court with a sufficient basis for reaching an informed decision, so the court should evaluate “the depth of any conflict between defendant and counsel, the extent of any breakdown in communication, how much time may be necessary for a new attorney to prepare, and any delay or inconvenience that may result from substitution.” *Adelzo-Gonzalez*, 268 F.3d at 777.

The trial court failed to make the required inquiry. Instead, it repeatedly found reasons to dismiss her concerns: it denied the first motion because there was still plenty of time to remedy the issue by arranging a meeting, it denied her second motion because the trial court surmised defense counsel had been working hard on the case and Ms. Green was just nervous about going to trial, and it denied her third motion because defense counsel was prepared for trial. 1 RP 7, 14, 16.

When Ms. Green informed the trial court that she no longer trusted her attorney and their ability to communicate had broken down,

the court was required to question Ms. Green or her counsel “privately and in depth” and inquire of any available witnesses. *Daniels*, 428 F.3d at 1200. “[I]n most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions.” *Adelzo-Gonzalez*, 268 F.3d at 777-78. When the trial court failed to do this, it erred.

iii. *Ms. Green’s motions were timely.*

In *Adelzo-Gonzalez*, the Ninth Circuit held that when a defendant moved for the substitution of counsel six weeks before trial, and then made this motion twice more, including once on the eve of trial, all such motions were timely. 268 F.3d at 780. Here, Ms. Green made her first motion on October 13, 2014, and her case did not go to trial until eight months later, on June 9, 2015. Even when addressing her third motion, on the day of trial, a motion to substitute is timely where the trial court was aware of the conflict months before but did not conduct the required inquiry. *Daniels*, 428 F.3d at 1200.

In addition, a motion to substitute appointed counsel should not be denied simply because it may result in delay. *Adelzo-Gonzalez*, 268 F.3d at 780. Ms. Green’s motions were timely and the court’s denials of the motions were not justified by any potential delay.

c. Reversal is required.

The erroneous denial of a motion for substitute counsel is presumptively prejudicial. *Daniels*, 428 F.3d at 1199; *Nguyen*, 262 F.3d at 1005. Ms. Green's convictions should be reversed and remanded for a new trial.

F. CONCLUSION

This Court should reverse Mr. Green's convictions because the trial court erroneously denied her request for a good faith claim of title instruction and the supplemental instruction on knowledge. In addition, this Court should reverse because the prosecutor repeatedly committed misconduct during closing argument. Finally, reversal is required because the trial court improperly denied Ms. Green's request for substitute counsel.

DATED this 18<sup>th</sup> day of May, 2016.

Respectfully submitted,



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

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|----------------------|---|---------------|
| STATE OF WASHINGTON, | ) |               |
|                      | ) |               |
| Respondent,          | ) |               |
|                      | ) |               |
| v.                   | ) | NO. 73954-9-I |
|                      | ) |               |
| DONNA GREEN,         | ) |               |
|                      | ) |               |
| Appellant.           | ) |               |

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19<sup>TH</sup> DAY OF MAY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

|                                       |     |                  |
|---------------------------------------|-----|------------------|
| [X] KING COUNTY PROSECUTING ATTORNEY  | ( ) | U.S. MAIL        |
| [paoappellateunitmail@kingcounty.gov] | ( ) | HAND DELIVERY    |
| APPELLATE UNIT                        | (X) | AGREED E-SERVICE |
| KING COUNTY COURTHOUSE                |     | VIA COA PORTAL   |
| 516 THIRD AVENUE, W-554               |     |                  |
| SEATTLE, WA 98104                     |     |                  |
| <br>                                  |     |                  |
| [X] DONNA GREEN                       | (X) | U.S. MAIL        |
| 13226 SE 187 <sup>TH</sup> PL         | ( ) | HAND DELIVERY    |
| RENTON, WA 98058                      | ( ) | _____            |

**SIGNED** IN SEATTLE, WASHINGTON THIS 19<sup>TH</sup> DAY OF MAY, 2016.

X \_\_\_\_\_ 

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