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JUN 29 2011
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NO. 34156-5-II
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent,

v.

DAN WILLIAM COLLINS,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF LEWIS COUNTY

Before the Honorable H. John Hall, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State failed to present sufficient evidence to support a conviction for Attempting to Elude a Pursuing Police Vehicle.

2. The deputy prosecutor committed misconduct by shifting the burden of proof to the defendant by asking several witnesses during cross-examination if they brought documentation to support their testimony.

3. The deputy prosecuting attorney committed misconduct by asking a witness—Wendy Collins—why her daughter and husband did not testify at trial.

4. The deputy prosecuting attorney committed misconduct by shifting the burden of proof to the defense by arguing during closing that the defense had not provided witnesses or evidence to support the defense version of events.

5. The Appellant's defense attorney provided ineffective assistance of counsel by failing to object to repeated questions by the prosecution during cross-examination if they had documentation to support their testimony.

6. The Appellant's defense counsel provided ineffective assistance of counsel by failing to object during closing to the deputy prosecutor's argument that the defendant did not provided witnesses or

evidence to support the defense version of events.

7. The cumulative error of the acts of prosecutorial misconduct prejudicial error by the trial court, and errors committed by defense counsel prejudiced the Appellant and materially affected the outcome at the trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the State presented sufficient evidence to prove beyond a reasonable doubt that the Appellant was guilty of attempting to elude a pursuing police vehicle where none of the evidence presented to the jury established the essential element that the officers were in uniform at the time of the pursuit? Assignment of Error No. 1.

2. Whether the State provided sufficient evidence to convict the Appellant of attempting to elude a pursuing police vehicle where a deputy sheriff received a description of the motorcycle from dispatch that was a different color, make and model of motorcycle seen by the deputy, where only the pursuit was ended did law enforcement conclude that it was a 1993 Honda registered to Dan Collins, and where the deputy saw only a small portion of the rider's face, a pony tail, the helmet, the motorcycle, his shoes, and his general build, and where Dan Collins owned a similar motorcycle until September, 2004 and then sold it, and later repossessed on February 10, approximately two weeks after the pursuit, and where the Appellant testified that he was not in the area at the time of the pursuit? Assignment of Error

No. 1.

3. Whether the deputy prosecutor committed flagrant or ill-intentioned prosecutorial misconduct by implying during cross-examination and closing argument that the defense was responsible for producing witnesses and evidence, shifting the burden of proof to the defense? Assignments of Error No. 2, 3 and 4.

4. Whether the trial court erred in permitting Mr. Collins to be represented by counsel who provided ineffective assistance by failing to object to cross-examination and closing argument by the prosecution implying that the defense was responsible for producing witnesses and evidence? Assignments of Error No. 5 and 6.

4. Whether the cumulative errors by defense counsel, the deputy prosecutor and the trial court prejudiced the Appellant and materially affect the outcome of the trial? Assignment of Error No. 7.

C. STATEMENT OF THE CASE¹

Dan Collins, an apprentice sheet metal worker at Todd Shipyards, owned a 1993 Honda motorcycle. At trial, he testified that he sold the motorcycle to Aaron Peterson on September 6, 2004 for \$3800.00. A monthly payment of \$275.00 was to be made until the balance of \$1800 was

¹This Statement of the Case addresses the facts related to the issues presented in accord with

paid. Report of Proceedings [RP] II at 125, 126, 130.² In early February, 2005 Mr. Collins received a call while he was at work from Mr. Peterson, stating that he was not able to afford to make payments on the motorcycle any longer and that he would leave it at a truck stop on Interstate 5 for Mr. Collins to repossess. RP II at 127. On February 10 or 11, 2005, Mr. Collins drove to the truck stop in a Rancho, but found that the motorcycle would not start. He loaded in the Rancho and drove it to the house of his mother—Wendy Collins—with whom he resides. RP II at 127. Once the motorcycle was at her house, he worked on it for approximately twenty minutes and was able to get it running. RP II at 127. He took it for a ride, but the bike was still not running correctly and he left at the residence of Gary and Sharon Teitzel. RP II at 128. He left the motorcycle at the Teitzel's house for two days and then took it to the house of his girlfriend—Roberta Backstrom. RP II at 128.

At trial, Ms. Backstrom testified that Mr. Collins sold the motorcycle during the summer of 2004. RP II at 61. Wendy Collins stated that her son got the motorcycle back on February 10, 2005, because the person he sold it to gave her son notice that he was not going to make any more payments and

RAP 10.3(a)(4).

² Report of Proceedings I refers to trial transcript of October 13, 2005. RP II refers to

left the bike at the truck stop for him to retrieve. RP II at 104. She testified that he rode it that day and left it at the Teitzel's house. RP II at 105. Mr. Collins told the Teitzels that the motorcycle was not working correctly and that he was afraid to ride it any further. RP I at 45. He left in a carport behind their house for two days. RP I at 44, 45. Gary Teitzel drove him to his mother's house. RP I at 45, 49. The Teitzels know Mr. Collins through Ms. Backstrom, who works as a bartender at the Kit Carson restaurant in Chehalis and as a cashier at the Minute Stop Market convenience store. RP I at 41, 42; RP II at 48. Ms. Backstrom has been the girlfriend of Collins for approximately two years. RP II at 49.

Ms. Collins was contacted by law enforcement at his mother's house on February 21, 2005, and told that he was under arrest for attempting to elude a pursuing police vehicle. RP II at 34.

At about 6:00 p.m. on January 21, 2005, Lewis County Deputy Sheriff Dan Riordan was responding to a call regarding a traffic hazard. RP I at 57. He had the lights on his police vehicle activated in order to clear traffic to get to the scene of the hazard. RP I at 57. While on Highway 6 in Lewis County, Deputy Riordan pulled in behind a motorcycle, which did not yield. RP I at 57. He continued westbound on State Route 6 at 60 miles per hour. RP I at

October 14.

57. He wrote down the license plate number and attempted to get a registration check. RP I at 58. The motorcycle was registered to Michael Blackstone at 899 Middle Fork Road. RP I at 66.

The motorcyclist had a clear visor on his helmet, was “of large stature,” and had a ponytail. RP I at 62. He was wearing a white helmet and a racing jersey with No. 18 on back, blue jeans and high top tennis shoes. RP I at 65. Later, at Ms. Collins’ house on February 21, Deputy Riordan identified Mr. Collins as the person he saw on the motorcycle on January 21. RP I at 63.

The chase occurred in Lewis County on several back roads, Highway 6, and Interstate 5. RP I at 64. The chase was called off at one point, but resumed while eastbound on State Route 6. RP I at 64. The motorcycle got on southbound I-5 and the chase was terminated a second time. The motorcyclist was not apprehended. RP I at 64.

Lewis County Deputy Sheriff Matthew Wallace took part in the pursuit. RP II at 45. He stated that the motorcyclist came close to striking his car and that he “moved to the right side of the roadway to avoid a collision.” RP II at 46. Lewis County Deputy Sheriff Terry Conrad assisted in the pursuit. RP II at 21. He observed a motorcycle traveling eastbound

toward him on State Route 6 at approximately 100 miles per hour. RP II at 21. He turned his vehicle around and joined in the pursuit. RP II at 21.

After midnight, on January 22, 2005, Deputies Riordan and Conrad went to 899 Middle Fork Road in separate vehicles and contacted Wendy Collins and asked her about Michael Blackstone and the motorcycle they had seen earlier. RP I at 68. She reported that she did not know the motorcycle or the person named Michael Blackstone. RP I at 68; RP II at 22. The officers then left. RP I at 69. They were advised by dispatch that “the fraudulent claim” was on the name of the registered owner “and that there was a Dan Collins that was tied to that address.” RP I at 69. They returned to the house re-contacted Wendy Collins.³ RP I at 72. Deputy Riordan “asked her about Dan Collins and told her the aliases we had previously were her son’s.” RP I at 72. She said that Dan Collins was not there. They asked if they could come into the house and she did not let them, but did permit them to look through the windows of the house. RP I at 72, 83; RP II at 24, 92. A personalized license plate displayed in the window of a room of house read “DANNY.” RP I at 72, 83; RP II at 24. He said that through a partially opened window blind he saw “a white helmet that fit that fit the description

³ Deputy Conrad testified that Deputy Riordan saw the helmet during the first visit to the house that morning. RP II at 24.

of the one” worn by the person in the pursuit earlier that day. RP I at 72.

Wendy Collins said the police came to her house two times on the night of January 21 or early morning of January 22, 2005. RP II at 88, 89. She testified that there were three motorcycle helmets in the house—a helmet on an entertainment center in a spare bedroom, and two on the floor of a closet in the same room. RP II at 91, 93.

Dan Collins and his mother testified that they went to Leavenworth, Washington on January 20 and 21, 2005. RP II at 63, 101-03, 129. After staying in a rental house on Thursday night, they left Leavenworth at 5:00 or 5:30 p.m. on Friday, January 21, and got back to Centralia at 10:30 or 11:00 p.m. RP II at 103. Roberta Backstrom originally planned to go with them, but was not able to get time off from work. RP II at 63, 70.

Dan Collins’ driver’s license is suspended in the first degree. RP II at 25. Exhibit 4.

On February 17, 2005, Deputy Conrad contacted Roberta Backstrom. RP I at 51-52, 54. Earlier that day he noticed a high-lifted black and silver Blazer pickup truck parked at the Minute Stop convenience store. RP II at 29. He went inside the store and asked the clerk if she knew who was driving the truck. The clerk—Roberta Backstrom—said that it was her boyfriend Dan

Collins' truck and that she was driving it. RP II at 30. She said that Mr. Collins was at 899 Middle Fork Road. RP II at 30. Deputies Conrad and Riordan subsequently went to the house and knocked on the door. RP II at 31. Deputy Conrad stated after he knocked on the door, nobody answered, and that he then looked in a side window "and saw a man on his knees hiding behind a wall peeking around the corner at me." RP II at 31. He did not come out of the house, and stood inside the house behind a screen door. RP I at 74; RP II at 31. Deputy Riordan identified the man as Dan Collins and told him that he was under arrest. RP I at 74. He did not take him into custody at that time. RP I at 75. Dan Collins spoke to the police through a window, telling them that he was not driving the motorcycle they had seen on January 21 and that he had sold the motorcycle during the previous summer. RP II at 32. He had sold two motorcycles; the first was a multicolored bike. He sold the second one to a friend of the man to whom he had sold the first bike. The second motorcycle was white. RP II at 33.

After leaving the house, Deputy Conrad spoke with Ms. Backstrom a second time and went to her house, at which time she showed him a motorcycle in her garage. RP I at 75; RP II at 35, 51-52. Deputy Conrad took photographs of the motorcycle at that time. RP II at 35-36, 52. Exhibits

6 through 9. Ms. Backstrom said the motorcycle belongs to Mr. Collins. RP II at 53. She stated that Mr. Collins repossessed the motorcycle approximately a week and a half before it was photographed by Deputy Conrad. RP II at 66.

Wendy Collins described the sale of the motorcycle, testifying that her son sold the bike in September, 2004 to a man who was just over six feet tall with hair in a ponytail that was lighter colored than her son's and not quite as long as her son's hair. RP II at 97, 98. Ms. Collins stated that when her son rode his motorcycle, he always wore boots and tucked in his ponytail in a hooded sweatshirt with a helmet over that. RP II at 98. She stated that he did not own a jersey with the Number 18 on it. RP II at 103.

The State alleged in an Information filed May 10, 2005 that on January 21, 2005, Mr. Collins committed the offense of attempting to elude a pursuing police vehicle, in violation of RCW 46.61.024(1).⁴ Clerk's Papers

⁴ 46.61.024 provides:

(1) Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

(2) It is an affirmative defense to this section which must be established by a preponderance of the evidence that: (a) A reasonable person would not believe that the signal to stop was given by a police officer; and (b) driving after the signal to stop was

[CP] at 64-66.

The matter was tried to a jury on October 13 and 14, 2005, the Honorable H. John Hall presiding. On the second day of trial defense counsel stipulated to admissibility of statements made to law enforcement and waived a hearing to suppress statements pursuant to Criminal Rule 3.5. RP II at 1-2.

No objections to jury instructions given or exceptions to instructions proposed but not given were made by either counsel. RP II at 142. CP at 28-40. Following deliberation the jury returned a verdict of guilty on October 14. CP at 27.

The matter came for sentencing December 7, 2005. The State's counsel recommended 45 days. Sentencing RP at 2. The defense requested 30 days with an authorization for alternative sanctions. Sentencing RP at 2. Mr. Collins was given an opportunity for allocution. Sentencing RP at 3. The trial court followed the State's recommendation and sentenced Mr. Collins to 45 days in jail. Sentencing RP at 5. CP at 15-23.

Timely notice of appeal was filed on December 7, 2005. CP at 4-14. Sentencing RP at 9. This appeal follows.

reasonable under the circumstances.

(3) The license or permit to drive or any nonresident driving privilege of a person convicted of a violation of this section shall be revoked by the department of licensing.

D. ARGUMENT

I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT DAN COLLINS WAS GUILTY OF ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE

a. An essential element of RCW 46.61.024 is that the pursuing officer be in uniform

Dan Collins was convicted of attempted eluding of a pursuing police vehicle, in violation of RCW 46.61.024, a Class C felony. The facts of this case as contained in the Verbatim Report of Proceedings do not show that the State proved beyond a reasonable doubt the essential element that the officers were in uniform at the time of the pursuit.

In a review of a challenge to a conviction based on the sufficiency of the evidence, the issue is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). See also, *State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980).

Due process requires the State to prove its case beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *Green*, 94 Wn.2d at 221-22; *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071, 25 L. Ed. 2d 368 (1970). Therefore, sufficiency of the evidence is a

constitutional question that can be raised for the first time on appeal. *Baeza*, 100 Wn.2d at 488.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735. "A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably drawn therefrom." *Salinas*, 119 Wn.2d at 201. A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any inferences reasonably drawn. *State v. Gear*, 30 Wn. App. 307, 310, 633 P.2d 930, *review denied*, 96 Wn.2d 1021 (1981). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Joy*, 121 Wn.2d. at 338-39, 851 P.2d 654.

Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d at 638, 618 P.2d 99 (1990).

The statute under which Collins was charged, RCW 46.61.024, requires, as one of its elements, the "[t]he officer giving such a signal **shall be in uniform** and his vehicle shall be appropriately marked showing it to be a police vehicle." [Emphasis added.] In *State v. Hudson*, 85 Wn. App. 401, 932 P.2d 714 (1997), the court made clear that proof an officer in uniform is a necessary element of the crime of attempting to elude a pursuing police

vehicle, and unless there is sufficient proof of this particular fact, the proof is insufficient to support a conviction for this crime.

A thorough review of the evidence considered by the jury in this case indicates no proof that the officers involved in the pursuit were in uniform. The fact that the officers were in marked police vehicles, without more, is “insufficient to permit a rational trier of fact to infer beyond a reasonable doubt that these officers were in uniform.” *Hudson*, 85 Wn.App. at 405. Thus, there was insufficient evidence as to one of the essential elements of the crime, and the conviction must be reversed and dismissed.

b. The State did not present sufficient evidence to prove beyond a reasonable doubt that Dan Collins was the driver of the motorcycle seen by law enforcement on January 21, 2005

The facts of this case as contained in the Verbatim Report of Proceedings raise the issue of whether sufficient evidence exists to have convicted Mr. Collins of attempting to elude a pursuing police vehicle as charged in the Information.

In order to convict a defendant of attempted elude under RCW 46.61.024, the State must prove beyond a reasonable doubt the following as set forth in the original Information filed:

[t]hat defendant on or about January 21, 2005, in Lewis County, Washington, then and there after being given a visual or audible signal to bring his vehicle to a stop by a uniformed police officer in a vehicle equipped with lights and

siren, did willfully fail or refuse to immediately bring his motor vehicle to a stop and did drive his vehicle in a reckless manner while attempting to elude a pursuing police vehicle;

CP at 64-65.

The basic question is whether a jury could have found beyond a reasonable doubt that Mr. Collins was riding the motorcycle pursued by law enforcement on January 21. The evidence against Mr. Collins was simply too tenuous to support conviction. Most saliently of all, no one saw the rider's full face. The assertion that it was Mr. Collins was based on the belief that the rider was a tall white male with a pony tail. When Deputy Riordan called in the license plate number, dispatch initially returned a different color, make and model of motorcycle than the motorcycle seen by the deputy. The initial report received by the police is that the motorcycle was a blue 1991 Honda. Only after the chase was ended did they conclude that it was a 1993 Honda registered to Dan Collins.

Deputy Riordan did not see more than a small portion of the rider's face; only a pony tail, the helmet, his shoes, and his general build were clearly observed. Nevertheless, when he and Deputy Conrad went to Ms. Collins' house on February 17, he asserted that Mr. Collins was the motorcyclist he had seen three weeks earlier. Despite his confidence that Mr. Collins was the rider, he was not taken into custody at that time. The police did not seek a warrant to search the house.

Mr. Collins testified that not only was he not in possession of a white motorcycle at that time, but that he was not in town on January 21, and was returning from Leavenworth with his mother at the time of the chase in Lewis county.

As noted *surpa*, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably drawn therefrom." *Salinas*, 119 Wn.2d at 201. In this case even if the court evidence in a light most favorable to the State, the testimony of the deputy still does not place Mr. Collins as the rider on January 21. The evidence as a whole does not support the jury's finding that Mr. Collins was riding the motorcycle.

II. THE DEPUTY PROSECUTOR COMMITTED MISCONDUCT WHEN SHE IMPROPELY SHIFTED THE BURDEN OF PROOF TO THE DEFENSE DURING CROSS-EXAMINATION AND CLOSING ARGUMENT

A defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt. *State v. Traweck*, 43 Wn. App. 99, 107, 715 P.2d 1148, *review denied*, 106 Wn.2d 1007 (1986), *disapproved on other grounds by State v. Blair*, 117 Wn.2d 479, 491, 816 P.2d 718 (1991) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Generally, a prosecutor cannot comment on the lack of defense evidence because the defendant has no duty to present

evidence. *State v. Cleveland*, 58 Wn. App. 634, 647, 794 P.2d 546 (1990).

To prevail on an assignment of error of prosecutorial misconduct, a defendant must show (1) improper conduct and (2) prejudicial effect. *State v. Henderson*, 100 Wn. App. 794, 800, 998 P.2d 907 (2000). Prejudice is established by demonstrating a substantial likelihood that the misconduct affects the jury's verdict. *State v. Pirile*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

In the case at bar, the prosecutor's closing remarks improperly shifted the burden of proof. See e.g., *State v. Fleming*, 83 Wn.App. 209, 215, 921 P.2d 1076 (1996) (a prosecutor may not make statements tending to shift the State's burden of proving the defendant's guilt), *review denied*, 131 Wn.2d 1018, 936 P.2d 417 (1997).

Misconduct by a prosecutor may violate a defendant's due process right to a fair trial. *State v. Charlton*, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). To establish reversible error, a defendant must show misconduct and resulting prejudice. *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985); *State v. Henderson*, 100 Wn. App. 794, 800, 998 P.2d 907 (2000); *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established only where "there is a substantial likelihood the instances of

misconduct affected the jury's verdict." *Dhaliwal*, 150 Wn.2d at 578, 79 P.3d 432 (citing *Pirtle*, 127 Wn.2d at 672.)

The required showing for prejudice depends on whether the defense made a timely objection to the alleged misconduct. Objectionable testimony admitted after a valid objection is harmless unless "sufficiently damaging that we can say there is a reasonable probability it affected the outcome of the trial." *State v. Casteneda-Perez*, 61 Wn. App. 354, 364, 810 P.2d 74, review denied, 118 Wn.2d 1007, 822 P.2d 287 (1991).

Here, the deputy prosecutor engaged in an unmistakable pattern of shifting the burden of proof to the defendant. Roberta Backstrom testified that she asked for time off from work to go to Leavenworth with Wendy and Dan Collins. RP II at 70. During her cross-examination, the deputy prosecutor implied that it was the responsibility of the defense to produce evidence of Ms. Backstrom's request for time off to go to Leavenworth with Mr. Collins and his mother, and to produce telephone records.

Q: When the defendant asked you to accompany him to Leavenworth, you asked your employer for days off?

A: Yes.

Q: And you remember the specific dates of those days?

A: Yeah.

Q: Did you go to them and say, hey, did you have that copy of my request?

A: We don't make formal requests on paper if that's what you're --

Q: Some employers request that you write down --

A: No. It was kind of -- when I asked it was kind of I was, do you think I could possibly get this, and there was no way possible it being the time of year it was and me working. I kind of expected to be -- a lot of people put a lot on me at both my jobs at that time.

Q: But it is not really Christmastime at that point, you know, January 21st is more like Superbowl Sunday.

A: Yes.

Q: And you don't have anything to show?

A: No.

Q: What about your phone, you said you received several phone calls from the defendant?

A: Yeah, we have cell phones that are connected. Basically we

can talk to each other for free.

Q: Okay. I understand that's a good plan for people who talk a lot.

A: Yes.

Q: When you heard that this was coming to court and everything, did you get some phone records showing that you had received a phone call?

A: I don't pay for the cell phones they're Dan's.

Q: So that wouldn't be something you could do?

A: I don't get the bill. My home phone has no long distance so I'm strictly local.

Q: That's okay. So there is no way for you to get these things?

A: Yeah, I can't even call his cell phone from my home phone because his cell phone is long distance.

RP II at 70-71.

Wendy Collins testified that she and her son went to Leavenworth to stay on January 20 and 21. During her cross-examination, the deputy prosecutor implied that it was the responsibility of the defense to produce evidence of their stay in Leavenworth.

Q: What's the address of the house that you went to?

A: I'm sorry, I don't remember an actual address. I could take you there if I had the chance, but I don't remember an exact house number.

Q: So you don't know the address? Do you have the phone number or anything in regard to the person that you rented the place from?

A: No longer, no.

Q: Do you have any way to get a hold of this person?

A: From ten months ago, no.

RP II at 113.

The deputy asked Ms. Collins about what she purchased at Leavenworth. During her cross-examination, the deputy prosecutor implied that it was the responsibility of the defense to produce evidence of items purchased during their stay in Leavenworth and to produce relatives who were originally planning to go to Leavenworth but did not, as witnesses.

Q: And so do you have any sales receipts. A lot of times people keep sales receipts if someone doesn't like what they --

A: I understand that. When I buy Leavenworth gifts for

Christmas I keep in mind this is something that's not going to be able to be returned, they're not going to make a trip to Leavenworth to return a Christmas gift, I buy things appropriate for the house rather than personal items, things they might decorate with or even car accessories. Each time we go over each year our thing is to buy a hat. There is a hat shop there that deals with all kinds of outrageous hats and each year we go we bring home hats.

Q: Do these hats -- sometimes hats are for a specific year or specific event or commemorating a specific occasion?

A: Sure.

Q: And they are times specifically they often make them for certain years?

A: Sure.

Q: Did you pick up anything like that?

A: I'm sure I have two hats that we won't see this year or previous years, but as far as being dated, made on so and so, no.

Q: Did you bring any of those with you?

A: No, I did not.

Q: Your daughter and her husband, are they here today?

A: No, they are not.

RP II at 116-117.

The deputy prosecutor's form of questioning culminated during closing argument, when she told the jury:

Ms. Backstrom says that she loves the defendant very much and doesn't want him to get into any trouble. Said she wouldn't lie for him, she said. But she really had a hard time with the case and the dates and the times and when they happened except for occasionally an important date she remembered, but everything else she couldn't remember. **But she also didn't bring anything to back that up.**

Again, you are the sole judges of the credibility of the witnesses and as to what weight you want to give each and every person's testimony. This is what I have to prove [sic] happened. And this is a person I have to prove did it. The deputy is positive that is the person that be observed driving the motorcycle that evening. **All the time and all of the argument the defense witnesses testified to as far as where they were, how they got there, are unsubstantiated. They have relatives who aren't here, they have employers who aren't here, they have access to records that aren't here. But who is here, just the defendant's mother, his girlfriend from several years, and the defendant.**

RP II at 149-50. [Emphasis added].

Here, the defense did not object. If counsel did not object, then the alleged misconduct must be so "flagrant and ill-intentioned, and the prejudice

resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect." *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

An error may be raised for the first time on appeal if it is a manifest error involving a constitutional right. RAP 2.5(a)(3); *State v. McDonald*, 138 Wn.2d 680, 691, 981 P.2d 443 (1999). An error is "manifest" if it had " 'practical and identifiable consequences in the trial of the case.' " *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (quoting *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)). Where a defendant fails to object to an improper remark, he waives the right to assert prosecutorial misconduct unless the remark was so flagrant and ill-intentioned that it caused enduring and resulting prejudice that a curative instruction could not have remedied. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995). Here, the pervasive and repeated line of cross-examination by the State's counsel was both flagrant and ill-intentioned. The Appellant submits that this is a matter that may be raised for the first time on appeal, and that he was prejudiced by the State's closing argument and cross-examination, which shifted the burden of proof.

A state's advocate presumably does not risk appellate reversal of a hard-fought, time-consuming, labor intensive conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case. Here, the State's evidence was tenuous. The outcome of the trial was affected by the State's misconduct and reversal is mandated.

III. MR. COLLINS WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO OBJECT TO THE DEPUTY PROSECUTOR'S QUESTIONING AND CLOSING ARGUMENT REGARDING PRODUCTION OF DOCUMENTS AND WITNESSES, RESULTING IN BURDEN-SHIFTING⁵

As argued in section II of this brief, *supra*, Mr. Collins assigns error to the failure of defense counsel to object to questioning by the deputy prosecutor implying that it was the responsibility of the defense to submit evidence, and argument implying that specific persons should have been present to testify. Mr. Collins also assigns error to the deputy prosecutor's closing argument.

The Sixth Amendment to the United States Constitution guarantees to indigent defendants the assistance of counsel in criminal cases. The

⁵ While it has been argued in preceding section of this brief that the errors at issue constitute constitutional error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this Court disagree with this

Washington State Constitution also confers a right to counsel. Wash. Const. Art. I, § 22. “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Effective assistance of counsel is a constitutionally protected right. U.S. Const. Amend. VI; Washington Const. Art. I. § 22.

The standard for reviewing the effectiveness of counsel is set forth in *Strickland v. Washington, infra*. See also, *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987); *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). A criminal defendant claiming ineffective assistance must prove (1) that the attorney’s performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney’s unprofessional errors, the results of the proceedings would have been different. *State v. Early*, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); *State v. Graham*, 78 Wn. App. 44,

assessment.

56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. *State v. Tarica*, 59 Wn. App. 368, 374, 798 P.2d 296 (1990). A reviewing court indulges in a strong presumption that counsel's representation falls within the wide range of proper assistance. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). In making this determination, a reviewing court presumes that he received effective representation. *Tilton*, 149 Wn.2d at 784; *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). In order to overcome this presumption, the Appellant must show that counsel had no legitimate strategic or tactical rationale for his or her conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Representation is not deficient if trial counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Assuming, *arguendo*, this court finds that trial counsel waived the issues presented in the preceding section of this brief by failing to object at

trial and during closing, then elements of ineffective assistance of counsel have been established.

The record does not reveal any tactical or strategic reason why trial counsel would have failed to object. To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. *State v. Leavitt*, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." *Leavitt*, 49 Wn. App. at 359. The prejudice here is self-evident: there is no tactical advantage to failing to object, particularly when the deputy prosecutor engaged in a pervasive, repeated pattern of questioning that effectively shifted the burden of proof to the defense.

Mr. Collins argues that not only did counsel's omission constitute deficient performance, but he was prejudiced thereby, and that it is reasonable to surmise that the outcome of the trial would have been different if not for the error. Mr. Collins submits that he has satisfied both prongs of *Strickland* and that reversal is merited.

IV. THE ACTS OF PROSECUTORIAL MISCONDUCT AND OMISSIONS OF DEFENSE COUNSEL RESULTED IN CUMULATIVE ERROR REQUIRING REMAND

In cases where the cumulative effect of repetitive error may be so flagrant that no instruction can erase the error. *State v. Smith*, 144 Wn.2d 665, 30 P.2d 1245 (2001); *In re Personal Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified on other matters*, 123 Wn.2d 737, *cert. denied*, 513 U.S. 849 (1994). In this case, the cumulative effect of the trial counsel's error, the prosecutor's misconduct in questioning and closing, in conjunction with the instances of ineffective assistance cited *supra*, produced an unmistakable series of errors that prejudiced the Appellant and materially affected the outcome of the trial.

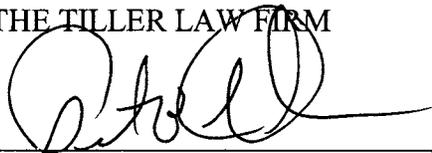
E. CONCLUSION

For the foregoing reasons, Dan Collins respectfully requests that this Court reverse and dismiss with prejudice his conviction for attempted eluding of a police vehicle.

DATED: June 12, 2006.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'Peter B. Tiller', written over a horizontal line.

PETER B. TILLER-WSBA 20835
Of Attorneys for Dan Collins