

No. 34493-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

MILES D. PARKISON,

Appellant.

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY MSC
DEPUTY

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Ronald Culpepper,
The Honorable Frank E. Cuthbertson,
The Honorable Beverly G. Grant, and
The Honorable James R. Orlando, Judges

APPELLANT'S OPENING BRIEF
corrected as to Clerk's Papers citations

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A. ASSIGNMENTS OF ERROR

1. Appellant was improperly deprived of his state and federal constitutional rights to self-representation.
2. The prosecutor committed flagrant, prejudicial misconduct.
3. Appellant was deprived of his rights to effective assistance of counsel under the Sixth Amendment and Article I, §22.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. If a defendant makes an unequivocal request for self-representation well prior to trial, the rights to self-representation attaches as a matter of law and it is reversible error for a court to deny the request.

Appellant signed a request to exercise his rights to self-representation more than a week before it was officially filed and about two weeks before trial. Did the court err in denying his request?

2. Where a defendant's request to exercise his rights to self-representation occurs just before trial is about to start, the court is only vested with limited discretion and must grant such a request unless the request is brought for the improper purpose of delay. Even if appellant's request to exercise his rights is deemed made when the document was filed two days before trial, did the trial court err in denying the request where the prosecutor's claims about the defendant's prior conduct were not supported by the record and appellant's request not brought for any improper purpose?

3. Deprivation of the rights to self-representation cannot be based upon the court's opinion that self-representation is unwise, because the defendant has the right to make even a bad choice. The request to

exercise the right must be granted if the defendant is competent to understand the nature of the charges against him and the court explains the risks of self-representation. A defendant competent to stand trial is competent to exercise the rights to self-representation.

Did the court err in depriving appellant of his rights to self-representation based on a concern about his competency to make an “informed” decision while at the same time finding him competent to stand trial and denying his motion for a competency evaluation?

4. Is reversal required where the prosecutor repeatedly misstated the burden of proof required to meet the “beyond a reasonable doubt” standard and relieved itself of the full weight of its constitutionally mandated burden? Further, was counsel ineffective in failing to object or make any effort to mitigate the harm the prosecutor’s misconduct caused?

5. Was counsel ineffective in failing to effectively deal with highly prejudicial, irrelevant evidence at both trials?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Miles Parkison was charged by amended information in Pierce County with five counts of first-degree robbery with firearm enhancements and one count of first-degree robbery with no enhancement. CP 24-28; RCW 9A.56.190, RCW 9A.56.200; RCW 9.41.010; former RCW 9.94A.310, former RCW 9.94A.370. After pretrial motions before the Honorable Beverly Grant and the Honorable James Orlando on July 14 and August 25, 2005, trial was held before the Honorable Ronald Culpepper on November 2, 7-9, 14-18 and 21, 2005, after which a mistrial

was granted. CP 48-49; RP 11.¹ After a second trial before the Honorable Frank Cuthbertson on January 11, 12, 18-19, 23-26, 30 and 31, 2006, the jury convicted on five counts of first-degree robbery and one count of the lesser included offense of second degree robbery. CP 236-43. The jury also acquitted on the firearm enhancement for one of the first-degree counts. CP 236-43.

On March 3, 2006, Judge Cuthbertson imposed standard range sentences to run concurrent and enhancements to run consecutively for a total of 309 months in custody. CP 399-411. Mr. Parkison appealed and this pleading follows. CP 412-15.

2. Overview of facts²

In December of 2004, several stores in Tacoma were robbed. On December 19, after 12 at night, a Shell station was robbed by a man described as a white, 6 foot 3 inches tall, with a full beard about a half inch long, medium build, weighing about 224, wearing a sweatshirt, a light “blue acid” colored jeans jacket, blue jeans, and a blue baseball cap and small, black, clear oval glasses. RP 50-51, 93-98, 115-17. The man came in, asked for cigarettes, and then, when the clerk stood back up after getting the cigarettes, demanded money while “reaching in his coat by his stomach” and “fidgeting with something.” RP 93-98. The man took about \$300, stuffed it into his pocket and walked out to a car the clerk said looked like a “grayish” four door Ford Taurus or Saturn. RP 101.

¹Explanation of the citations for the transcripts is provided in Appendix A, attached.

²More detailed discussion of the facts relevant to the issues is contained in the argument section of this brief, *infra*.

Although the Shell station clerk only remembered a "9" in the license plate, he testified at the second trial that he had written it down without realizing it on a work paper and later given it to 9-1-1 and to an officer who later responded. RP 102-104, 122-28.

On December 20, at around 9:45 or 10 p.m., a Subway sandwich shop was robbed by a man described as white, shorter than 6 feet four inches, with a goatee with a mustache and beard under the chin which was about as thick as a heavy day of growth but not something that would have been growing for more than that, a bandana under a baseball cap, a darker color jacket, rounded square tinted glasses, and medium build weighing less than 225. RP 60-62, 146-89, 203-225. He walked in, showed a silver "six shooter" kind of gun in his left hand and had the clerk open the register and give him ones, fives, tens and twenties. RP 149-75.

The robber left the store on foot and the clerk said he would have heard if a car had driven away. RP 67, 189. A "containment" was set up by police but no one was found. RP 68.

That same night, between 10 and 10:15 p.m., the Taco Del Mar was robbed. RP 193-225. One clerk at the store described the man as white, wearing big sunglasses that obscured his eyes, a flannel plaid reddish shirt or overcoat, a scruffy beard, around 6 feet 2 inches in height, "medium build," and a black hat with red writing. RP 193-225. 245-56. The man had a black gun and took between \$30 and \$40 in tips left on the counter. RP 249-54. Another clerk said the man was only about six feet, had round sunglasses, was white, had a baseball cap with red writing in the center, even "stubble" throughout his face which was scruffy but not a

“full on” beard, was not very skinny but not big RP 298-300. That clerk was sure the gun was shiny and silver. RP 302.

Also on December 20, after 10, a Walgreens store was robbed by a man described as having kind of a “chubby” face, about five foot nine to five foot 11 inches tall, dirty blond hair, a “straight” mustache, a dark baseball cap, a soft denim overcoat, about 35-45 years old. RP 346-55. The man came in, got a cookie, put the cookie on the counter, put a dollar on the counter, and displayed something that looked like a gun under a handkerchief, asked the clerk to open the cash drawer and then leaned over and grabbed the money, taking over \$200 after having the clerk lift the cash drawer to see whether there was money underneath. RP 346-73. The gun was white and silver. RP 352.

The Subway was about 2 ½ miles from the Taco Del Mar, and it was about ¾ miles from the Taco Del Mar to the Walgreens. RP 910-913. None of the witnesses at those three incidents reported hearing or seeing any cars that night. RP 307-308, 910-11.

On December 29, a Payless shoe store was robbed by a tall, medium build white man wearing a flannel red and black checkerboard button-up jacket, a maroon or dark red baseball cap, a scarf around the neck, blue jeans and boots, with a “scruffiness” in his cheeks that was not quite a beard and was a mixture of grey and a little bit of black. RP 210-27, 331-35. The man came into the store at about 5:30 p.m, walked up behind a clerk and said, “[a]re you going to cooperate with me and make this easy and give me all the money in the till,” reaching towards his belt area. RP 316-17. He never displayed a gun and the clerk never saw a

bulge or anything in the area he was reaching for. RP 317-18. He asked for the tens and the fives and had the clerk lift out the till drawer to see if anything was underneath. RP 318.

The same day, close to 9 that night, the Dollar Tree store was robbed by a man described by a clerk as 5 feet 8 or 5 feet 9 inches, having a longer mustache ending toward the bottom of his bottom lip, and long sideburns, wearing a baseball cap, jeans, large, kind of “mirrored” sunglasses covering his eyes, and a huge, puffy blue down coat, and was in his late twenties or early thirties.. RP 391-402. He stood in line behind other customers and then came up behind a clerk, pointed a black gun at her side, told her to hand him money and to hurry up, then ran out the door. RP 399-414. Another witness who said she was not a good judge of height said the man was about 5 feet 11 inches and maybe even six feet, the gun was silver, the jacket was “dark” and puffy, the glasses were goldrimmed and the robber was cleanshaven. RP 458-71. A third witness said the man was over six feet tall, had light dirty brown hair, was wearing square shaped glasses and a knit cap, was a little “stocky,” and had, at most, stubble. RP 498-507. A witness who saw the man leave the store watched him walk into the middle of the parking lot and did not see him get into or go near any cars. RP 468.

There were no fingerprints recovered at the Shell station and the surveillance cameras were not working. RP 104. Fingerprints were found on a display case at Subway but a search through the record of everyone who had been fingerprinted found no known matches. RP 775. The surveillance video at Taco del Mar was not working that day because no

tape was inside, and there were no fingerprints found. RP 307-308, 776, 843. The only fingerprint found at Walgreens was on the cookie wrapper and it matched those of the clerk. RP 776-77. Fingerprints found at the Payless store also were searched for all known fingerprints and did not match. RP 479-80, 494. No prints were found at the Dollar Tree, although a surveillance system was working and pictures from that system were artificially "enhanced" by use of a computer program. RP 444, 483-84.

Tacoma Police Department (TPD) officer Larry Andren was assigned the December 20 robberies on December 21. RP 838. He testified that he thought the same person was involved because he believed the physical descriptions were "very similar in all three robberies." RP 838. He admitted, however, that he also got a "tip" that a man named Miles Parkison was involved. RP 839-46. The "tip" came from Eric Lagerquist, who had been living Jennifer Lonborg for about 12 years. RP 689, 839-46. Mr. Lagerquist said Ms. Lonborg had come to him, pointed to a story about the robberies in the newspaper, and claimed that the person who had committed the crimes was Mr. Parkison. RP 689, 704.

Ms. Lonborg was with Mr. Parkison at the time, having left Mr. Lagerquist's home with some of her stuff. RP 708. At trial, Mr. Lagerquist admitted he was not happy about it, because he loved Ms. Lonborg still. RP 707-10. In fact, after she first left he confronted her about how unfair it was for her to be with Mr. Parkison but going "back and forth." RP 708-10. In the past, she had dated other people while living with him but she had never actually moved out of Mr. Lagerquist's

house to be with someone, before Mr. Parkison. RP 708.

Mr. Lagerquist knew that Ms. Lonborg had very serious mental health issues including being “bipolar.” RP 561-66, 712. He also knew she had been hospitalized for about a third of the month for those issues just shortly before, in the end of November. RP 561-66, 712. He also knew that she was drinking alcohol, and, as a counselor himself, knew that it was not at all a good idea for someone with her specific mental health issues to do so. RP 713. With all the prescription drugs she was taking, he was concerned that she was also using crack, because he thought it could cause a person such as Ms. Lonborg to have psychosis, become even more paranoid, and panic more easily, and that it could make her very likely irrational and suffering from distorted perceptions. RP 715.

Although he really did not like Ms. Lonborg being on crack, Mr. Lagerquist claimed not to have animosity towards Mr. Parkison even while believing Mr. Parkison guilty of introducing her to the drug. RP 729, 736.

At this same time, Mr. Lagerquist was himself in outpatient treatment for alcohol addiction. RP 700. He had been drinking so much he did not have a clear recollection of the time when Ms. Lonborg moved in with Mr. Parkison, but said he got sober on a date during that time. RP 722-23.

Ms. Lonborg testified that she told Mr. Lagerquist her story about Mr. Parkison and the robberies because she knew Mr. Lagerquist would call police and “do the right thing for” her. RP 547, 573. At the time of the alleged incidents, she was not working, and by trial had applied for disability because of her mental disorders. RP 576-77.

Ms. Lonberg declared that, on the morning of the 22nd when Mr. Parkison made the comments after seeing the paper, he said he had used her rental car and antique gun in the robberies. RP 545-46. She had gotten the gun from Mr. Lagerquist's home after Mr. Parkison's apartment had been broken into. RP 534-38, 618-19. At trial Ms. Lonberg admitted, however, that she had pawned the gun on December 24th in order to have money to get crack, so it could not have been used in any robberies on the 29th. RP 618-23, 640. Also pawned for crack were things like the VCR and microwave. RP 542-47.

Ms. Lonborg described her rental car as having a spoiler, a "pinkish hue" to it, and was gold, with four doors. RP 539, 543. She thought it was a Mitsubishi Eclipse, and she had it about 10 or 12 days, getting it sometime on the 11th or 12th of December. RP 571. She did not recall the license plate number and did not actually remember the date she got it. RP 571-72. She said Mr. Parkison had access to that car on the nights of December 19th and 20th. RP 544.

Mr. Lagerquist said the rental car was a four door Dodge or Plymouth Neon and was silver or metallic gray. RP 703. He only saw it, however, at nighttime. RP 703. An officer was told the car was silver and what the license plate was by the rental agency but never saw the car and did not get copies of paperwork on the rental. RP 838-64.

Ms. Lonborg testified that, in addition to the admissions she claimed Mr. Parkison made on the morning of December 22nd after seeing the newspaper, she remembered that, on the night of December 20th, she was taking a shower when Mr. Parkison came in at about 9 p.m. and

showed her his hands full of a “wad” of money in small bills. RP 540-41, 610-11. According to Ms. Lonborg, Mr. Parkison said he had “ripped off some crack addict up on the Hilltop, crack dealer.” RP 541. Ms. Lonborg had previously done the same thing so she was not surprised. RP 541.

Ms. Lonborg claimed that Mr. Parkison was wearing a bandana under his hat that night, even though he never wears bandanas. RP 554, 605. She also claimed she saw him “put mascara on his mustache.” RP 554, 605. On cross-examination, she admitted that, although she gave a very lengthy statement to police in January of 2005, she never once said anything in that statement about seeing Mr. Parkison wearing or even having a bandana. RP 568.

Ms. Lonborg also claimed to identify her gun in a few still photos from the various store security cameras. RP 549-51, 602. Later, however, she admitted identifying the gun in at least one photo by its “markings” and that no such markings were visible in the picture and another was too blurry. RP 549-50, 602. Although she said the picture in one of the photos looked like Mr. Parkison’s profile, she admitted that another picture of Mr. Parkison dated December 10 clearly showed that he had no sideburns or mustache at that time. RP 551-66. She had testified that he had both of those features and had not shaved them off until later and admitted that the picture proved her recollection of the events was not as “accurate” as she had thought. RP 551-68, 600-622.

Ms. Lonborg had a “nasty” breakup with Mr. Parkison on Christmas day a few days later. RP 551-55.

An officer testified that Mr. Parkison ultimately confessed to

committing the crimes and using Ms. Lonborg's car. RP 875-78. He said he used the plastic fake gun later found in his home. RP 870-98.

He explained to police that he was in over his head with drug dealers living in his complex and they were coming over and threatening him and his wife for money he owed and he was scared. RP 876. The officer said he also admitted telling Ms. Lonborg to get it off "his chest." RP 905.

Mr. Parkison testified that he did not make a confession but instead just finally agreed with everything the officers said and recited what they told him to for the taped statements. RP 1007-37. He never told Ms. Lonborg he had committed the robberies, and had not. RP 1013. He explained about Ms. Lonborg and how tumultuous their relationship was, especially when she drank and took drugs while on medication. RP 1013-31. Mr. Lagerquist had, one point, threatened Mr. Parkison and said he would do whatever it took to get him out of the picture and get the girlfriend back he had been with for ten years. RP 1027.

Mr. Parkison also has several mental issues and is on drugs for them. RP 1089.

Recovered from Mr. Parkison's home were a pair of light colored jeans, a green and black flannel "jacket or shirt," and a fake plastic toy pistol which was broken when found. RP 785-87. Police were unsuccessful in their search for bandanas, baseball or golf-type hats and puffy down jackets, although the six or eight officers thoroughly looked . RP 787-93. No drugs were found in Mr. Parkison's home, nor was there any drug paraphernalia, or white handkerchiefs like the used in the Walgreens robbery. RP 793.

D. ARGUMENT

1. APPELLANT'S STATE AND FEDERAL RIGHTS TO SELF-REPRESENTATION WERE VIOLATED AND COUNSEL WAS INEFFECTIVE

Both the state and federal constitutions guarantee every defendant the right to waive assistance of counsel and represent himself. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Woods, 143 Wn.2d 561, 585, 23 P.3d 1046, cert. denied, 534 U.S. 964 (2001); 6th Amend.; 14th Amend.; Art. 1, § 22. Where a defendant makes a request to exercise that right, the court must grant that request if it is knowing, intelligent, unequivocal and timely, and not made for an improper purpose, such as delay. State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995); see State v. Fritz, 21 Wn. App. 354, 358-64, 585 P.2d 173 (1978), review denied, 92 Wn.2d 1002 (1979). Erroneous deprivation of the right to self-representation compels automatic reversal, because it can never be said to be "harmless." Breedlove, 79 Wn. App. at 110; McKaskle v. Wiggins, 465 U.S. 168, 177 n. 8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984).

In this case, this Court should reverse, because Mr. Parkison was improperly deprived of his rights to self-representation.

As a threshold matter, because the first trial resulted in a hung jury and thus did not result in the conviction on appeal, only the denial of the right to self-representation at the second trial is at issue. See RP 11. In some situations, however, the propriety of the deprivation of the right will depend upon the history of all of the proceedings on the charges. See, e.g., Fritz, 21 Wn. App. at 358-64. In addition, the main reason Mr. Parkison

sought to exercise his rights to self-representation at the second trial was his continuing concern about counsel. The validity of that concern is explained, in part, by counsel's performance and admissions at the first trial. Finally, detailed information about the first trial is necessary in order to rebut any attempt the prosecution may make to claim that Mr.

Parkison's request at the second trial was made for any improper purpose.

a. Relevant facts

Early in his case, Mr. Parkison began to have concerns about the quality of the representation appointed counsel was providing. On July 14, 2005, before Judge Grant, he moved to have his first attorney dismissed, because he felt that attorney was trying to pressure him into signing a deal he did not like. 1RP 6-8. The court denied the motion but new counsel was later appointed and a continuance granted because Mr. Parkison had filed a bar complaint about his concerns with his first attorney. 1RP 9, 2RP 2-3.

At the first trial, after jury selection, the prosecutor raised a concern that counsel had appeared in voir dire to be raising a duress defense without having given notice to the state. 3RP 58. Counsel then admitted that 1) he was still conducting investigation into the defense, 2) he was still trying to locate witnesses for the defense, 3) he had not yet met with one of the crucial witnesses whose location he knew, 4) he had not yet decided who his witnesses would be, 5) he was still investigating in hopes of learning of other possible witnesses for the defense, 6) he still needed to get more information from Mr. Parkison's wife to give to the investigator to pursue, 7) he still had not spoken with or even gotten all the

information on the detectives his client was working with as an informant, even though those witnesses were crucial to the defense that counsel said he was going to raise, and 8) he still needed to get a cellular telephone from his client's storage to investigate the defense further. 3RP 62-63, 65, 72, 73, 76-77.

The court and the prosecution both expressed concern that it was "a little late" for counsel to be investigating the defense when trial had already started, especially because he had not given the prosecution any notice of the proposed defense or any of the names of potential defense witnesses. 3RP 65, 73-80. Counsel admitted "[t]hat's correct," then explained that he had assumed that, as he came into the case late, the initial attorney would have completed most of the investigation. 3RP 80. Current counsel had only discovered the problem of lack of complete investigation as he was "prepping the case for trial" "over the last week or so." 3RP 80. As a result, the investigator was only just beginning to investigate Mr. Parkison's possible defenses. 3RP 80.

During the discussion which ensued, the court repeatedly chastised counsel for disadvantaging the prosecution in its ability to prepare its case. 3RP 64-83. In addition, the court and the prosecutor questioned whether the defense of duress was even available in the case. 3RP 64-83.

Counsel admitted that, if he was not permitted to go forward with the defense, it would raise an issue of "effective assistance of counsel." 3RP 64. He gave a date later in trial by which he planned to complete investigation, stating his need to "certainly get this information and evaluate it," then provide it to the state. 3RP 83. He also stated that,

although he never waived opening argument and did not think it was good to do so, he was thinking he might be forced to do so in this case because his investigation was not done. 3RP 83-84.

Mr. Parkison then tried to speak to the court, citing a conflict with counsel over his defense. 3RP 88. The court told him he would have a chance to talk to his lawyer later, then started trial. 3RP 88.

After a few witnesses had testified and when the jury was out, counsel then told the court Mr. Parkison was disturbed by how the case was going, counsel's lack of investigation and that it appeared the prosecutor had found a potential defense witness in one day that the defense investigator could not find. 3RP 121. Counsel informed the court that his client was so unhappy that Mr. Parkison intended to tell the jury what was "going on" and his concerns about counsel's performance. 3RP 122-23. Mr. Parkison himself also told the court he had been waiting patiently for almost 11 months for his attorney to "get my evidence together" but it was not done by counsel. 3RP 124-29. The court wanted to go forward with the trial and told Mr. Parkison not to speak to the jurors himself. 3RP 129.

At that point, Mr. Parkison said he wanted to go "pro se," based on his conflict with his counsel, and also that he wanted to "go pro se to the jury what's going on here, because all the evidence isn't put together." 3RP 129. The court told Mr. Parkison to be quiet, and he complied. 3RP 130-212.

The next afternoon, outside the presence of the jury, the prosecutor raised a concern about "extremely last minute investigation going on" by

the defense and potential witness problems which might be caused “because the investigator is just now getting around to this.” 3RP 212-86. Counsel then admitted that he had not yet been successful in locating the prosecution’s major witness against his client, Ms. Lonborg, and that he still needed to do so before she testified. 3RP 286.

At that point, Mr. Parkison again expressed his frustration and stated his intent to inform the jury there was a “problem here.” 3RP 286. Although much of what he said focused on whether he had been given a chance to look at the discovery or the evidence, he also told the court that it was clear the prosecution was ready for trial but “when it comes to the defense of my case, we are not even ready. Nothing’s even ready on our case at all.” 3RP 286-87. In addressing Mr. Parkison’s complaints, the court focused only on whether the prosecutor could be held responsible for counsel’s failure to conduct investigation, then took no action. 3RP 296.

When the jurors were brought back in, Mr. Parkison tried to address them, saying he was “pro se” and sure that if the jurors were in the same situation as he was they would want “full investigation done to, you know, prove your innocence.” 3RP 297. Again, the jury was removed, and again the court admonished Mr. Parkison to stop trying to speak to the jury. 3RP 297. Discussion ensued in which options were discussed and Mr. Parkison again stated he wanted to represent himself because of counsel’s ineffectiveness. 3RP 300-308. He also repeatedly refused to agree to be quiet if the jurors were brought back in, saying he wanted the jury to know about counsel’s ineffectiveness and how Mr. Parkison was being forced to go to trial with such representation over his strong

objections. 3RP 308-309. The court told Mr. Parkison that the prosecution was also entitled to a fair trial and Mr. Parkison was depriving them of it by his actions. 3RP 311.

Again, the jurors were brought back in, Mr. Parkison again tried to speak to them. 3RP 319-21. They were again removed and there was discussion about options for how to keep Mr. Parkison quiet, including possibly taping his mouth shut. 3RP 319-25. Ultimately, however, Mr. Parkison agreed to be quiet, and trial went on normally until the jury hung 11 to 1 to convict. See RP 11.

On December 1, 2005, a scheduling order was entered, setting the retrial date for January 11, 2006. Supp. CP ____ (scheduling order, filed 12/01/05).³ On December 29, 2005, a document sent by Mr. Parkison from in custody was filed in the clerk's office, with a signature block indicating it was signed on December 23, 2005. CP 146-47. The document was a "Motion for Docket/Reason for Motion docket is to dismiss bono-attorney [sp]." CP 146. The "Motion" was to "fire" Mr. Parkison's attorney for "conflict of interest" and ineffective counsel." CP 146-47.

Another document, signed December 28th and filed January 9th, 2006, was a motion "for right to pro-se representation," in which Mr. Parkison stated he "elects pro se representation," "waives the constitutional right to be represented by counsel," and wanted to exercise the "right to self-representation" under both the state and federal

³A supplemental designation of clerk's papers is being filed for this document.

constitutions. CP 190-91. He also stated he was “mentally competent” and was exercising his right to self-representation “knowingly and intelligently.” CP 190-91.

The second trial was in front of a judge who had not presided at the first trial. Before jury selection in the second trial, some of Mr. Parkison’s pretrial pro se motions were discussed, including Mr. Parkison’s request to represent himself. RP 4-11. Mr. Parkison expressed his serious concerns about counsel’s performance, noting that counsel still had not finished investigating the case despite the first trial. RP 4-8. He also stated several concerns about how counsel had conducted the first trial. RP 4-8.

In addressing the motion to proceed pro se, the trial court first asked if Mr. Parkison had ever practiced law before or was familiar with evidence rules. RP 8-10. The court also told Mr. Parkison he was facing 30 years for a standard range and that was “not something you want to play with,” and asked if Mr. Parkison was on medication. RP 8-10. Mr. Parkison stated he was on medicine for physical and mental health issues due to “emotional stress.” RP 10. The court asked if there had been a suppression hearing and was told that the “issue that arose in the trial was whether or not that confession was an accurate telling” or he was coerced and the jury “hung” on that issue. RP 10-11.

The prosecutor characterized Mr. Parkison’s pretrial motions as “stalling,” “delaying” and “whining” and said it was the same “stuff” he had gone through with previous counsel. RP 14-15. He also noted that previous counsel had sent Mr. Parkison out for a psychological evaluation and told the prosecutor “we don’t have a motion regarding diminished

capacity, or anything like that.” RP 15. The prosecutor told the court that Mr. Parkison had engaged in “outbursts” at the previous trial “that almost resulted in him being duct-taped at counsel table,” and characterized this as evidence the trial would get “out of control” if Mr. Parkison were allowed to raise his hand and raise issues “despite being represented by counsel.” RP 15.

At that point, the court gave Mr. Parkison five minutes to talk to current counsel regarding his motions for self-representation and mental evaluation. RP 15-16. The court told Mr. Parkison:

[W]hile defendants in Washington generally have a right to proceed pro se or on their own, they also - - at least my understanding of the law is that they need to be able to knowingly, or I need to find that they can knowingly and voluntarily waive their right to counsel. At this point from our initial colloquy and I have further questions I may ask later, it doesn't appear, given your history, that you can make an informed decision to waive the right to counsel at this point.

RP 16.

The court also stated that it had no basis to find ineffective assistance or conflict of interest because Mr. Parkison was not “convicted at the trial before.” RP 16. The court concluded that, if it decided to order an evaluation at Western state to see if Mr. Parkison could adequately assist his attorney at trial, that once that had been established, “we’re going forward with trial and we are not going to be playing around and going back and forth and playing any games.” RP 16-17.

After a short recess, counsel admitted there were “some issues” between him and Mr. Parkison, that trial tactics were within counsel’s “purview,” that he was surprised to hear that his client was on medication

because he had no knowledge of that fact, and that he wanted the court to send Mr. Parkison for a competency evaluation “just to make sure we won’t have any setbacks in this case, just so that’s an issue I don’t have to deal with on appeal.” RP 18. He said he needed to know for sure that the drugs his client were on were not causing the conflict and would not affect Mr. Parkison’s ability to assist counsel. RP 18. He admitted he had “issues with Mr. Parkison” throughout the case and that there were “communication barriers” between them that were obvious to others. RP 18. He went on:

I will caution the Court as far as allowing Mr. Parkison [to] go pro se, I don’t think that that would be a good idea because Mr. Parkison’s highest level of education is the seventh grade. He left school when he was in the seventh grade, and he never completed school. He never obtained a GED whatsoever. Anything he’s learned, he’s learned on his own by reading, but other than that, his educational level is pretty much stunted at the seventh grade level. And that’s one of the main reasons why I have never made a motion to withdraw to allow Mr. Parkison to go pro se because of the concerns I have.

RP 19.

The prosecutor objected to a competency evaluation, declaring that Mr. Parkison had “set in his mind how this case should come out” and would “do anything and everything he possibly can” to interfere with counsel’s ability to proceed. RP 20. The prosecutor also stated his belief that counsel and Mr. Parkison had “no problem” communicating at trial and Mr. Parkison knew what was going on. RP 20-21. The court denied the request for a competency evaluation, instead stating it hoped the medications would be sufficient to address any concerns. RP 21.

b. Appellant was improperly deprived of his rights to self-representation

The court erred in refusing Mr. Parkison's request to exercise his rights to self-representation at the second trial. In general, the scope of the court's discretion to deny a request for self-representation depends upon when the request is made. Fritz, 21 Wn. App. at 361. If the request is made "well before trial" and not accompanied by any motion for continuance, "the right of self-representation exists as a matter of law." Id. If the request is made as the trial is about to commence, the court has a limited measure of discretion to deny it. Id.

In this case, Mr. Parkison signed his request to represent himself on December 28, 2005, and it was filed by the clerk's office on January 9, 2006. CP 190-91. Trial was not scheduled to begin until January 11, 2006. CP 190-91. He made no motion to continue.

Reversal is required whether the date used is that of signing or filing of the request. Under the signing date, about two weeks before trial, Mr. Parkison's state and federal constitutional rights to represent himself existed as a matter of law. See State v. Barker, 75 Wn. App. 236, 238, 241, 881 P.2d 1051 (1994).

Even if this Court applies the standard for when the request for self-representation is made just before trial, the result is still the same. A court's discretion in denying a request made just before trial is not absolute. Instead, its scope has been referred to in the context of deciding if a request was made "timely." See Fritz, 21 Wn. App. at 361. Some federal courts hold a request is "timely" and must be granted if it is made

before the jury is sworn and not brought for the purposes of delay, while some states refuse to adopt a “per se” rule about when something is “timely,” instead using factors to examine the nature of the request and its potential consequences at trial. See, State v. Stenson, 132 Wn.2d 668, 737-38, 940 P.2d 1239 (1997). Thus, in California, the courts do not automatically dismiss as untimely any request brought after the jury is sworn, or automatically grant a request brought before, but look at a number of factors instead. Id.

In Stenson, supra, our Supreme Court neither adopted the federal rule nor the one used in California, because it decided the case on other grounds. Recently, however, the Supreme Court has relied on the standard of timeliness set forth by the Court of Appeals in Fritz, supra, in deciding a self-representation case. See State v. Cross, 156 Wn.2d 580, 611, 132 P.3d 80 (2006). Fritz, one of the first Washington cases in this area after Faretta, set the standards for determining timeliness based upon examination of the application of the requirements of Faretta, and the standards used in California. Fritz, 21 Wn. App. at 361-62. Indeed, the bulk of the “rules” set forth in Fritz were taken directly from one of the seminal California cases, People v. Windham, 560 P.2d 1187 (Cal.1977), which the Fritz Court liberally quotes. Fritz, 21 Wn. App. at 361-62.

In Fritz, the language adopted held that even a request brought just before trial should be granted if “the very reason underlying the request for self-representation supplies a reasonable justification for the delayed motion.” Fritz, 12 Wn. App. at 362, quoting, Windham, 560 P.2d at 1191 n. 5. In such situations, the “request should be granted,” but if the

defendant “merely seeks to delay the orderly process of justice,” the trial court is not required to grant the request. Id.

Indeed, it is only when there is request for self-representation after trial has begun that the court is permitted to consider such things as the quality of counsel’s representation of the defendant, the defendant’s prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to result in making its decision. Id.

Here, because the request was made before trial started, the court was required to grant the request unless it specifically finds that the request was brought solely to delay justice.

There was no evidence of such a purpose here, despite the prosecutor’s claims to the contrary at the second trial.⁴ In front of the new judge, the prosecutor raised the specter of “outbursts” from Mr. Parkison and declared that Mr. Parkison would do anything to interfere with counsel’s ability to proceed with the case and delay trial. RP 15, 20. The prosecutor also claimed that Mr. Parkison’s behavior at the first trial showed that the current trial would get “out of control” if Mr. Parkison were allowed to raise his hand and raise issues “despite being represented by counsel.” RP 15.

These claims appear to have held sway below. Although not cited specifically during the ruling denying Mr. Parkison’s right to self-representation at the second trial, the judge’s comment during that

⁴Counsel’s ineffectiveness in relation to this issue is discussed, *infra*.

discussion that the trial would go forward and that “we are not going to be playing around and going back and forth and playing any games” indicates that the judge apparently believed the prosecution’s claims that such antics had already occurred. See RP 16-17.

The prosecutor’s representations of Mr. Parkison’s behavior, and the circumstances, gave the court several misapprehensions. First, the prosecution indicated that Mr. Parkison wanted to represent himself *and* be represented by counsel at the same time. But Mr. Parkison was not asking for hybrid representation. He was asking to fire counsel and represent himself. There was no proposal whatsoever which would have allowed him to “raise his hand” in addition to being represented by counsel, as the prosecutor claimed.

Second, the prosecutor led the court into the apparent belief that Mr. Parkison had engaged in “counsel shopping” or “going back and forth” between being represented by counsel and himself at the first trial. But Mr. Parkison had made only a single prior request for new counsel. While he took a drastic step in filing a bar complaint against that attorney, he did not later take any similar steps, request new counsel, or engage in any other acts relating to counsel that might support a belief that he was “going back and forth” simply to avoid facing justice or cause a delay.

Further, the prosecutor’s discussion of “outbursts” made it sound as if Mr. Parkison was wildly out of control and acting completely improperly or irrationally at the first trial. But he was not. When he initially raised the issue of self-representation and was shut down by the court, he did not engage in improper or disruptive behavior. He followed

the court's behest, and let trial progress in an orderly fashion. 3RP 88-21. When he then learned further details on the depth of counsel's lack of preparation and apparent inability to ensure minimally adequate investigation, Mr. Parkison was still respectful in speaking to the court, ultimately only speaking back slightly, outside the presence of the jury, after he stated his desire to represent himself and the court just told him to "be quiet." 3RP 129-30. And again, he did not disrupt the proceedings.

Only later, after the third big revelation about counsel's ineffectiveness and the court's apparent lack of understanding of Mr. Parkison's concerns that Mr. Parkison's frustration apparently got the better of him and he tried to tell the jury personally about violations of his very significant constitutional rights. 3RP 397-10. Even then, he specifically told the court he would not speak while a witness was testifying but would only talk to the jury where a witness was not on the stand. 3RP 308-33. Once the court's denial of the motions was made absolutely clear and Mr. Parkison ultimately agreed not to disrupt the proceedings further, he did not.

It is worth noting that Mr. Parkison had a very legitimate concern about counsel's ineffectiveness. Counsel has a duty to make reasonable investigations or reasonable decisions regarding investigation. See Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); In re Davis, 152 Wn.2d 647, 10 P.3d 1 (2004). To meet this duty, counsel must "at a minimum," conduct a "reasonable investigation" of all reasonable lines of defense, especially the one most important in the defendant's particular case. Davis, 152 Wn.2d at 721-22. Such

investigation is required for counsel to be able to make “informed decisions” about how to represent the client effectively at trial. Davis, 152 Wn.2d at 721-22.

Counsel who make choices about which defense to pursue commit ineffectiveness if they have “neither conducts[ed] a reasonable investigation nor ma[de] a showing of strategic reasons for failing to do so.” Davis, 152 Wn.2d at 721, quoting, Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002). And it is highly questionable whether counsel can raise a sufficient defense or introduce evidence to doubt the prosecution’s evidence when *he has not even spoken to the prosecution’s main witness against his client before trial*. See Lord v. Wood, 184 F.3d 1083, 1093 (9th Cir. 1999), cert. denied, 528 U.S. 1198 (2000) (ineffective to fail to adequately investigate in order to be able to challenge the prosecution’s case). Mr. Parkison had a very legitimate concern about counsel at the first trial.

The record at the first trial shows that Mr. Parkison was not someone who was just trying to cause trouble and delay. He was making his request, and acting out a little, out of a sincere effort to bring his concerns to the court’s attention. At the second trial, he was not asking for something improper, like, hybrid representation, nor was he trying to delay the trial. He was again stating his very real concerns about counsel and clearly invoking his rights to represent himself. The prosecutor’s declarations at the second trial misled the court into reaching an improper conclusion.

In addition to relying on the improper misrepresentations about the

first trial, the court also appears to have based its decision in part upon the concern that Mr. Parkison was not competent to make an “informed” decision about self-representation. RP 16. From the court’s comments, it appears clear it was concerned that Mr. Parkison’s exercise of the right to self-representation would be unwise. RP 16.

These were not proper grounds for depriving appellant of his right. At the outset, the mental competence to stand trial and that required to exercise the right to self-representation are the same. State v. Vermillion, 112 Wn. App. 844, 857, 51 P.3d 118 (2002), review denied, 148 Wn.2d 1022 (2003).

Further, there is no question that Mr. Parkison had not completed high school and had no legal training or knowledge. But “the right of self-representation is afforded a defendant *despite* the fact that its exercise will almost surely result in detriment to the defendant.” Vermillion, 112 Wn. App. at 858 (emphasis added). Nor does exercise of the right depend upon the defendant having “sufficient technical skill to represent himself.” Vermillion, 112 Wn. App. at 857. If Mr. Parkison was competent to stand trial, as the court held, he was competent to represent himself, regardless of his lack of education, understanding or experience with the law. Id.

The question is not whether the defendant *should* choose to exercise his right. It is whether the defendant “knows what he is doing and his choice is made with eyes open.” State v. Hahn, 106 Wn.2d 885, 889-90, 726 P.2d 25 (1986), quoting, Faretta, 422 U.S. at 835 (quotations omitted); see State v. DeWeese, 117 Wn.2d 369, 375, 816 P.2d 1 (1991) (inherent tension between right to self-representation and right to effective

assistance at trial). The court has a duty to advise the defendant making the choice of potential risks. DeWeese, 117 Wn.2d at 275. Once the court has done so, however, they are the defendant's risks to take.

Mr. Parkison had the right to use his "free will to make his own choice, in his hour of trial, to handle his own case." Breedlove, 79 Wn. App. at 110-11 (citations omitted). Deprivation of that right compels automatic reversal. Vermillion, 112 Wn. App. at 851; McKaskle, 465 U.S. at 177 n. 8.

Reversal could also easily be based upon counsel's ineffectiveness in failing to correct the court's misimpressions, fed by the prosecutor, below. Both the state and federal constitutions guarantee the accused the right to effective assistance of counsel. Strickland v. Washington, 366 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); 6th Amend; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). This is determined by showing that, but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different, reversal is required. Strickland, 466 U.S. at 694.

Here, counsel was ineffective in relation to the request at the second trial in several ways. The prosecutor's misstatements of Mr. Parkison's actions at the first trial and characterizations of Mr. Parkison as just trying to interfere with counsel or cause delay were crucial to the court's decision below. Yet counsel did not dispute a single one of those

claims. He never pointed out that Mr. Parkison's misbehavior had only occurred after repeated, more civilized efforts had been rebuffed. He never noted that he had admitted, on the record, that he was not done with investigation and had gone to trial anyway, without having completed what was necessary to even determine if a defense existed or know who his witnesses were, and without having even interviewed the prosecution's most crucial witness against his client.

Instead, counsel effectively sat back and let the court's impression of what had happened in front of the other judge be defined, incorrectly, by the prosecution, in a way that directly prejudiced Mr. Parkison in exercise of a constitutional right. Indeed, counsel went further, actually arguing *against* his client's ability to exercise his right and implying that he had previously refused his client's requests on that point because counsel did not think self-representation would be a "good idea." RP 19. But it was not counsel's decision to make, nor was it proper for counsel to argue to the court that it should deprive Mr. Parkison of his rights to self-representation on an improper basis. See, e.g., Vermillion, 112 Wn. App. at 849-51.

Because Mr. Parkison's request for self-representation at his second trial was timely, unequivocal, and not made for the purposes of delay, the request should have been granted. Reversal is required on that basis or, in the alternative, based upon counsel's failure to adequately represent his client and even advocating against his client below.

2. FLAGRANT, PREJUDICIAL MISCONDUCT
DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR
TRIAL AND COUNSEL WAS INEFFECTIVE

Reversal is also required based upon the very serious, significant and prejudicial prosecutorial misconduct and counsel's further ineffectiveness. It is well-settled that, as quasi-judicial officers, prosecutors must not just act as advocates but also have a duty to ensure that an accused receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). As part of that duty, prosecutors are required to refrain from engaging in conduct at trial which is likely "to produce a wrongful conviction." State v. Clafin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985). When a prosecutor commits misconduct, she does more than just violate a prosecutor's duties, she deprives the defendant of his state and federal constitutional due process rights to a fair trial. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); Suarez-Bravo, 72 Wn. App. at 367; 5th Amend.; 6th Amend.; 14th Amend.; Art. I, § 22. Even absent objection below, misconduct compels reversal where the misconduct is so flagrant and prejudicial it could not have been cured by instruction. State v. Brown, 132 Wn.2d 529, 561, 40 P.2d 545 (1997), cert. denied, 523 U.S. 1007 (1998).

In this case, the prosecutor committed misconduct which compels reversal by misstating the standard of the burden of proof in several ways.

a. Relevant facts

In rebuttal closing argument, the prosecutor's theme was that the

“measuring stick” for the entire case is the standard of proof beyond a reasonable doubt, and the instruction would tell the jury what beyond a reasonable doubt “is, but there’s some things to look at what it’s not.” RP 1163. The prosecutor stated it was not “beyond a shadow of a doubt,” “beyond all doubt,” “100 percent convinced,” or “absolute certainty” but rather a doubt “for which a reason exists, a reason that arises from the evidence or the lack of evidence.” RP 1164.

A moment later, the prosecutor told the jurors they were required to apply a “common sense measuring stick to the reasonableness of this doubt,” after which if they had an “abiding belief in the truth of the charge,” they were convinced beyond a reasonable doubt. RP 1165. The prosecutor went on:

Now, abiding belief. It had to have been a lawyer that came up with that one because there’s a word you probably use every single day in your life. You get up in the morning, you know, I have an abiding belief that I’m going to have a bowl of Cheerios this morning. Abiding belief: Abiding, lasting, strong, withstanding the test of time; something that’s not to be taken lightly. You know, I would submit to you that you make decisions every day and you have an abiding belief in the province of making that decision. Think about deciding to have major surgery, you know, you explore the issues; you explore all the options and you take that leap of faith and let the doctor do the surgery. Buying a house, is this the right house for us? You do everything you possibly can do to check it out, and at a certain point, you have to let go and just do it. It may be as simple as - - you know, you’re driving down crowded I-5 and you decide to change lanes. You look and it’s clear. You look again and it’s clear, and you start to go. You have an abiding belief in making that decision. And no, being a juror is not like driving down I-5 and changing lanes in heavy traffic, but these are terms - - the law that’s given to you are terms that you are familiar with; you’re just not familiar with them in that specific context.

RP 1166.

At that point, the prosecutor used a “jigsaw puzzle” metaphor to

describe reasonable doubt, telling the jury that the prosecution had met that burden of proof when there were enough pieces of the puzzle for jurors to “know what the picture is of,” even if “almost half of that picture is still missing.” RP 1166-68.

- b. The arguments misstating the standard were improper and relieved the prosecution of the full weight of its constitutional burden

These arguments were flagrant, prejudicial misconduct. Every attorney has a duty not to misstate the law. See State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). Misstatements of the law are especially egregious when they come from the prosecutor, because there is such an extreme potential for such misconduct to have great effect on the jury. See Davenport, 100 Wn.2d at 763; State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955).

Here, the prosecutor misstated the standard of proof beyond a reasonable doubt in several ways. First, the comparison of proof beyond a reasonable doubt to the certainty people use in important everyday decisions was improper. Many courts have recognized that using such examples misstates the constitutionally required burden of proof. This is because, while “[a] prudent person” acting in “an important business or family matter would certainly gravely weigh” the considerations and risks of such a decision, “such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment.” Scurry v. United States, 347 F.2d 468, 470 (U.S. App. D.C. 1965), cert denied sub nom Scurry v. Sard, 389 U.S. 883 (1967). As a result, “[b]eing convinced beyond a reasonable doubt cannot be equated with being ‘willing to act. . .

in the more weighty and important matters in your own affairs.” 347 F.2d at 470.

Thus, in Commonwealth v. Ferreira, 364 N.E.2d 1264 (Mass. 1977), the judge told the jury that proof beyond a reasonable doubt required the jury to be “as sure” as they would at any time in their own lives when they had to make “important decisions,” such as “whether to leave school or to get a job or to continue with your education, or to get married or stay single, or to stay married or get divorced, or to buy a house or continue to rent, or to pack up and leave the community where you were born and where your friends are.” In reversing, the Court stated that these examples “understated and tended to trivialized the awesome duty of the jury to determine whether the defendant’s guilt was proved beyond a reasonable doubt.” 364 N.E. 2d at 1272. Citing a case in which the prosecutor only used an example of the degree of “certainty” a juror would have to have in deciding whether to undergo heart surgery, the Court declared:

‘The inherent difficulty in using such examples is that, while they may assist in explaining the seriousness of the decision before the jury, they may not be illustrative of the degree of certainty required.’ We think the examples used here, far from emphasizing the seriousness of the decision before them, detracted both from the seriousness of the decision and the Commonwealth’s burden of proof. . . The degree of certainty required to convict is unique to the criminal law. We do not think that people customarily make private decisions according to this standard nor may it even be possible to do so. Indeed, we suspect that were this standard mandatory in private affairs the result would be massive inertia. Individuals may often have the luxury of undoing private mistakes; a verdict of guilty is frequently irrevocable.

364 N.E. 2d at 1273, quotation omitted.

The analogy thus “trivializes the proof-beyond-a-reasonable-doubt

standard.” State v. Francis, 561 A.2d 392, 396 (Vt. 1989). Indeed, it goes further, effectively reducing the standard of proof to something more akin to “proof by a fair preponderance of the evidence.” Commonwealth v. Rembiszewski, 461 N.E. 2d 201, 207 (Mass. 1984); see Scurry, supra, 347 F.2d at 470 (it denies the defendant the “benefit” of the reasonable doubt standard to make the comparison between finding a person guilty beyond a reasonable doubt and “making a judgment in a matter of personal importance”). The prosecutor’s comparison to the certainty required for important personal decisions was thus improper.

Further, the prosecutor’s comparison erroneously misstated the standard in another way, by focusing on the certitude the jury would need to take action, rather than to hesitate to act. The use of such analogies “has generally been condemned.” State v. Estes, 418 A.2d 1108, 1115 (Me. 1980). Indeed, “courts have consistently criticized” telling a jury that proof beyond a reasonable doubt is the kind of proof they rely on in their everyday lives in making a decision to “act.” Tillman v. Cook, 215 F.3d 1116, 1127 (10th Cir. 2000); Scurry, 347 F.2d at 470.

The analogy misstates the standard of proof because even the most important decisions in life “may involve a heavy element of uncertainty and risk-taking and are wholly unlike the decisions jurors ought to make in criminal cases.” United States v. Jaramillo-Suarez, 950 F.2d 1378, 1386 (9th Cir. 1991) (quotation omitted). The focus instead should be “in terms of the kind of doubt that would make a person hesitate to act, rather than the kind on which he would be willing to act.” Holland v. United States, 354 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150 (1954). The Supreme

Court has more recently declared that “the hesitate to act standard gives a commonsense benchmark for just how substantial [a reasonable] doubt must be.” Victor v. Nebraska, 511 U.S. 1, 20-21, 114 S. Ct. 1239, 127 L.E. 2d. 583 (1994).⁵

Here, the prosecutor told the jury that “abiding belief” in the charges was the standard for proof beyond a reasonable doubt, and that an “abiding belief” was the standard they used to make “decisions every day,” including deciding to have major surgery, buying a house, and even changing lanes in heavy traffic. RP 1166. Thus, all of the prosecutor’s comparisons were to the certainty needed to take an affirmative act, not the proper “hesitate to act” standard.

The prosecutor’s argument comparing certainty that the state’s case was proved beyond a reasonable doubt to the certainty used in making personal decisions was improper and misconduct.

The prosecutor also misstated the burden of proof beyond a reasonable doubt with his “jigsaw puzzle” metaphor and telling the jurors the burden was met when there were enough pieces of the puzzle for jurors to “know what the picture is of,” even if almost half of the picture was still missing. RP 1166-68. As with the analogy to important personal decisions, this analogy misstates the standard of proof beyond a reasonable doubt. The degree of certainty required to “know” what a puzzle picture is

⁵Indeed, Justice Ginsburg has gone even further, declaring concern about both the “affirmative act” language and the favored “hesitate to act language,” disfavoring the analogy itself as comparing apples and oranges because the very type of decisions involved in personal decisions and criminal cases are completely different. See Victor, 511 U.S. at 24 (Ginsburg, J., concurring), quoting, Federal Judicial Center, Pattern Criminal Jury Instructions 18-19 (1987) (commentary on instruction 21).

is nowhere near the degree of certainty required for proof beyond a reasonable doubt. Even more than the “personal decisions” analogy, this analogy trivializes the standard of proof beyond a reasonable doubt by comparing it to certainty in a completely unimportant aspect of daily life - putting together a puzzle and figuring out its picture before completion.

Further, here, by saying that the jury could have the required certainty when “almost half of the picture is still missing,” the prosecutor implied that the jury could find proof beyond a reasonable doubt even if a major portion of the prosecution’s proof was missing, so long as the jurors thought they “knew” what had happened, i.e., what the picture was on the puzzle.

Reversal is required. The correct standard of reasonable doubt is the very centerpiece of our entire criminal justice system, because it is the “prime instrument for reducing the risk of convictions resting on factual error.” Cage v. Louisiana, 498 U.S. 39, 40, 111 S. Ct. 475, 112 L. Ed. 2d 339 (1990) (quotations omitted), overruled in part and on other grounds by, Estelle v. McGuire, 502 U.S. 62, 73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). It is also the means of providing the “concrete substance for the presumption of innocence” guaranteed to all accused. In re Winship, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Indeed, the Washington Supreme Court has made it clear that failure to properly define the standard of reasonable doubt amounts to improperly relieving the prosecution of the full weight of its burden of proving each element of a crime by that standard and is such a serious error that it is “grievous constitutional failure.” State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d

188 (1977).

The prosecutor's misstatements of the burden of proof beyond a reasonable doubt were not limited to a single, isolated comment. They pervaded the entire rebuttal. See RP 165-68. Further, the use of examples of situations from everyday life likely resonated with jurors and made a very strong impression. One reason the comparison is so effective - and dangerous - is because it invokes in jurors immediate reference to personal experiences which likely had strong emotions attached. Once that damage had been done, there was no way a curative instruction could have cured it. It is especially difficult to correct an error with a subject already so hard to define, whose definition is so precise that years of litigation have been required to arrive at it. These arguments were misconduct which was so flagrant and prejudicial that no instruction could have cured it, and this Court should so hold and should reverse.

c. In the alternative, counsel was ineffective

In the alternative, in the unlikely event that the Court believes that the enduring prejudice caused by the misconduct could have been erased by a proper instruction, this Court should reverse based on counsel's ineffectiveness in failing to object and request such an instruction. While in general, the decision whether to object or request instruction is considered "trial tactics," that is not the case in egregious circumstances if there is no legitimate tactical reason for counsel's failure. State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989). Here, there could be no "tactical" reason for failing to object to such serious misstatements of the prosecution's burden of

proof. The result was to lessen the burden significantly and allow an unconstitutional conviction of counsel's client. While it is Mr. Parkison's position that the enduring, pervasive prejudice crafted by the prosecutor's words could not have been untangled with any curative instruction, if there was a possibility, counsel certainly should have requested that the court try. The failure to do so in this case was egregious, given the serious problems with the prosecution's case. Even if the prejudice could have been cured by instruction, this Court should reverse, based on counsel's prejudicial ineffectiveness on this point.

3. COUNSEL WAS INEFFECTIVE

Reversal is also required based upon counsel's other acts of prejudicial ineffectiveness.

a. Ineffectiveness relating to "dog track" evidence

1) Relevant facts

At the first trial, a number of officers testified about a K-9 unit being called and a "dog track" being conducted just after the robberies on the 20th from where they occurred to the Mark Twain apartments, where Mr. Parkison lived. 3RP 339-43, 768-79. The dog's trainer or handler did not testify and there was no testimony about the training the dog had undergone, whether it had successfully tracked before, or any other similar foundational facts. Counsel made no objection to the "dog track" evidence, on any basis. 3RP 339-42, 768-79.

At the second trial, the "dog track" evidence came up again, this time with defense counsel objecting that an officer who had not participated in or even witnessed the dog track that night could only

provide inadmissible “hearsay” as to the result. RP 509-517. The objection was overruled and the officer testified that he had no prior contact with the K-9 officer and no information on the dog’s reliability or training. RP 516-17. The officer testified at length about the dog track, and told the jury that he was “aware” the track had ended at the Mark Twain apartments, where appellant then lived. RP 508-12.

On cross-examination, after establishing that the officer had not been trained with the dog and that he did not have any specifics about the training of the particular team, counsel then asked for a sidebar conference. RP 519-20. With the jury out, counsel argued, *inter alia*, that the prosecution had failed to present sufficient foundation for the dog track evidence, noting there was no testimony about the dog’s reliability or the reliability of the dog track. RP 521, 525. He said that there was “specific case law in regards to dog tracks, that given the opportunity to,” he could provide briefing or caselaw on the topic, but that the testimony should be stricken and the jury instructed to disregard. RP 521-22. The prosecutor said he was not going to “waste this Court’s time or this jury’s time to bring in a K-9 officer in from Puyallup” to testify. RP 523.

After a break, the court denied the motion to strike the testimony regarding the track, because there was “sufficient indicia of reliability in the officer’s testimony” about the result of the track, the officer did not indicate “specifically” where the track ended but just in the “vicinity” of the Mark Twain apartments, and the defense had the opportunity to cross-examine the officer about the track and establish he did not have “firsthand knowledge” of what happened with the track. RP 525-26.

A short time later, the court raised the issue on its own, stating it had reviewed the transcript of the officer's testimony and was considering giving a curative instruction because of the officer's lack of "firsthand knowledge" of where the dog track had ended. RP 595. The court offered the prosecutor the opportunity to provide testimony of the relevant officers and said it would hear argument on the issue at that time. RP 595-96.

Later, TPD Officer Joe Bundy testified that he was "involved" in the track, as a "cover officer" to make sure the officer and dog were safe. RP 795-98-99. He was not trained as a K-9 "handler," did not have a "clue" about the dog's training, did not know if the dog was trained in tracking humans and drugs and could have been sidetracked from one by scenting the other, and had no idea whether the cold or wet could have affected the track. RP 804-806. He also said he had no personal knowledge as to the dog's reliability "whatsoever." RP 800-11.

Officer Bundy then testified in detail about where the track started, where it went, and that the dog "hit" on an area in a field where there were some items of clothing seen but, inexplicably, not kept as evidence. RP 800-807. The officer also testified that, after the dog "really focused" there, it went to the parking lot just adjacent to the H building of the parking lot at the Mark Twain Apartments, although he could not "recall" it stopping at a specific apartment. RP 802.

At the end of the state's case, counsel moved to strike all the testimony regarding the dog track, arguing the prosecution had failed to establish the required foundation of showing that the track was reliable. RP 1003. The prosecutor admitted that it "made no efforts whatsoever to

put any evidence forward regarding the reliability of the dog track,” but said it was irrelevant because counsel had “ample opportunity” to cross-examine on that issue. RP1003-1004. The court agreed and rejected the motion. RP 1004. When counsel again tried to explain that he was arguing about the “admissibility” of the dog track evidence and the lack of foundation for the testimony, the court again denied the motion. RP 1005.

2) Counsel was ineffective

Counsel was again ineffective in his handling of this “dog track” evidence. In general, before such evidence can be admitted, its proponent is required to meet very specific requirements. See State v. Loucks, 98 Wn.2d 563, 566, 656 P.2d 480 (1983). These foundational requirements are:

- (1) the handler was qualified by training and experience to use the dog,
- (2) the dog was adequately trained in tracking humans,
- (3) the dog has, in actual cases, been found by experience to be reliable in tracking humans,
- (4) the dog was placed on track where circumstances indicated the guilty party to have been, and
- (5) the trail had not become so stale or contaminated so as to be beyond the dog’s competency to follow.

98 Wn.2d at 566.

Only one of these foundational requirements were met in this case. There was no testimony about the handler, the dog’s training or experience, or the nature of trail which the dog was competent to follow. The only testimony was that the dog was placed on track where circumstances indicated the guilty party had been, i.e., the scene of the robberies. Thus, the “dog track” evidence was inadmissible under Loucks.

Trial counsel made no effort to put the prosecution to its burden of

proving foundation for the “dog track” evidence at the first trial. It is possible that he was unaware of the possible evidence, given his admissions during trial that he had yet not finished investigating the evidence and defense. But no such excuse exists for the trial at issue here, the *second* trial at which Mr. Parkison was convicted. By that time, counsel had clear notice that “dog track” evidence would be used by the state -it already had been. Most crucially, based upon the testimony at the first trial, counsel also knew that the prosecution’s witnesses had not been able to provide any of the crucial foundational requirements for admission of “dog track” evidence, so that the evidence was inadmissible if the state presented the same case.

Based on what happened at the first trial, counsel should have moved to exclude the evidence of the track, prior to the issue coming up at the second trial. The time to move to exclude unreliable evidence from being admitted is *before* trial, or at least before the relevant witness’ testimony, to prevent the far worse situation of trying to mitigate the damage done after the evidence is admitted. Yet counsel made no such motion before trial. Indeed, counsel’s initial objection was not for lack of foundation but for “hearsay.” It was only later that counsel noted the lack of foundation.

Even then, he did not present caselaw about or even cite the requirements for that foundation, simply offering to get it if given a chance. And later, when the issue had been continued, he still apparently had not gotten out any lawbooks, as he could not provide the court with a single citation even when the court was obviously seeking to know what

foundation was required. Had the caselaw or even argument been presented prior to the second trial, the prosecution would have been forced to either establish the required foundation or be precluded from using the evidence. Testimony regarding the foundation would have been taken outside the presence of the jury, in order to establish the admissibility of the evidence prior to its admission, and the jury might well never have heard it. At the very least, had counsel presented the caselaw even late, the court would likely have granted a motion for mistrial based the inability to erase the extensive testimony from the juror's minds at that late date. Counsel was again ineffective.

b. Ineffectiveness regarding evidence of other bad acts and curative instruction

1) Relevant facts

At the first trial, TPD officer John Bair testified that, when he was putting together a photo montage with Mr. Parkison's image, he obtained Mr. Parkison's "criminal information through our computer system and found that his last booking photo was in 1995." 3RP 393. Counsel did not object. 3RP 393.

At the second trial, Officer Bair again testified that he was given Mr. Parkison's name and "did a criminal check on him and found that our last booking photo showed a 1995 booking." RP 667, 670. Counsel did not object. RP 670. The court, however, interrupted the testimony, asked for a sidebar, then had the jury removed from the courtroom. RP 670. At that point, the court reported that, at the earlier sidebar, the court had asked "counsel to explain the testimony which potentially suggests prior

misconduct or bad acts or a prior conviction on the part of the defendant.”
RP 671.

Both counsel and the prosecutor claimed surprise at the testimony, with counsel telling the judge, who had not presided over the first trial, that such testimony had not occurred at the first trial. RP 672. The court then denied counsel’s request for a mistrial on the grounds that illegal conduct had already been discussed at trial in relation to drugs and the jury would be able to follow a curative instruction. RP 674.

During the discussion, the court stated that it was unaware that “criminal history” of the defendant would be an issue, told the prosecutor to direct his witness to “not reference any prior *convictions* involving Mr. Parkison,” referred to ER 609 which governs admission of a prior conviction, and then, again, told the prosecutor to direct witnesses “when answering not to reference any prior *convictions* involving Mr. Parkison.” RP 671-72 (emphasis added). When the court ruled, it relied in part on the “fact” that there was no particular crime identified in the testimony and the court still did not know what Mr. Parkison was “convicted of back in ‘95.” RP 673-74.

Counsel did not correct the court’s misimpression that the testimony had been about “convictions.” RP 671-74. He repeatedly referred to the issue as involving “criminal history” and discussed details of prior convictions and their admissibility in his arguments. RP 670-76. He did not ask for clarification from the court reporter of what the testimony actually said, did not ask the court to indicate what it intended to say as a curative instruction and did not suggest any wording. RP 670-74.

When the jury returned, the court gave the following instruction:

I want to give you what we call a curative instruction, and the detective, Detective Bair, was talking about how he got some information *and mentioned some conviction information*, and I'm going to ask you to disregard that testimony; the complete response that was given in its entirety.

RP 675 (emphasis added). After further direct and cross-examination, there was an unreported sidebar. RP 675-88. Only after another witness was taken and the court urged counsel to "supplement the record" with the sidebar did counsel indicate that the instruction had mentioned prior convictions but the evidence had only been of a prior booking photo, not a conviction. RP 740-42. His motion for a mistrial was denied. RP 742-43.

2) Counsel was ineffective

Counsel's failure to take appropriate steps to exclude this evidence and craft a proper curative instruction was ineffective assistance. The evidence improperly admitted was wholly irrelevant and of the most prejudicial kind. ER 404(b) prohibits the admission of evidence of other "crimes, wrongs or acts" except in very limited circumstances, because such evidence is "character" or "propensity" evidence. See State v. Kelly, 102 Wn.2d 188, 199, 685 P.2d 564 (1984). "Propensity evidence" is inadmissible because it is so likely to cause the jury to "prejudge" the defendant based upon that evidence and "deny him a fair opportunity to defend" himself against the charges. Michelson v. United States, 335 U.S. 469, 475-76, 93 L. Ed. 168, 69 S. Ct. 213 (1948). With such evidence, the jury will be swayed to believe the defendant "is by propensity a probable perpetrator of the crime," and convict on that ground, rather than based upon the evidence. Id.

For this reason, a court admitting such evidence must go through a specific analysis designed to ensure its admission only if it is “materially relevant” and the probative value of the evidence is so high and the potential prejudice from its admission so low that the former outweighs the latter. State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

Here, the jury first heard the highly prejudicial evidence that Mr. Parkison had at least once been booked into custody by police, and possibly more, because the officer referred to his “last” booking date, implying there was more than one. Next, the jury was told by the judge that the evidence was actually worse, and involved a prior conviction. And the jury only heard such evidence because counsel 1) was not paying close enough attention to his client’s case at the first trial to catch it and deal with it ahead of time, 2) did not notice that the court at the second trial was laboring under a misapprehension about what had actually been said and needed to be cured, 3) apparently did not hear the comment himself and seemed to be taking his cues from what the court was saying, rather than having the court reporter read back what the witness had said to ensure the right thing was “fixed,” and 4) did not ask the court to indicate the language it would use or propose language for the all-important curative instruction to ensure that it would be most beneficial to his client. In short, counsel made a series of significant missteps - not listening carefully at the first trial, not listening carefully at the second trial, not using due diligence if his attention strayed to have the testimony read back to ensure that the “cure” would be properly directed on his client’s behalf, and not using due diligence to either propose an appropriate curative

instruction or ensure the instruction that would be given would be in his client's interests as much as possible - that added up to a complete failure to adequately represent Mr. Parkison at this crucial point.

c. Reversal is required

Mr. Parkison was entitled to effective assistance of counsel. Instead, he got counsel who went to trial unprepared, not knowing the defense, still looking for evidence, and without having interviewed even the most crucial of the state's witnesses. His apparent lack of attention at the first trial is evidenced by his failure to have noticed admission of the improper ER 404(b) evidence and the inadmissible "dog track" evidence there.

Then, when a single juror refuses to convict, at the new trial, counsel not only failed to correct the judge's serious misapprehensions about Mr. Parkison's conduct at the first trial, counsel actually argues against his client's exercise of his right to self-representation, on an improper basis. Later, at trial, counsel failed to notice the admission of improper ER 404(b) evidence, leaving it up to the court to object. And then counsel failed to take the minimal steps required to ensure that the "cure" given would not, as happened here, be worse than the ill. Counsel also failed to move, in advance, to preclude admission of evidence damaging to his client when that evidence was *used at the first trial* despite a lack of foundation, then failed to provide the court with any authority for his objections as time went on.

Finally, after all that, counsel sat mute while the jury deciding his client's fate was repeatedly told it should convict on far less proof than

was actually required.

This is not a case where counsel made a single bad choice but was effective, in general, on the whole. Here, counsel's failures permeated the entire trial. Even the court and the prosecutor expressed concern, albeit much of that was regarding how counsel's failures would affect the progress of trial, not how they affected Mr. Parkison.

Given the myriad identifications, the failure of anyone at any of the robberies to identify Mr. Parkison as involved, the lack of incriminating evidence found at his house, the questions about Ms. Lonborg's motives and ability to perceive things accurately, the questions of proof about the car Ms. Lonborg had rented, and all of the other weaknesses in the prosecution's case, there can be no question that counsel's ineffectiveness prejudiced Mr. Parkison. There is more than a reasonable probability that, had counsel been even one half less ineffective than he was, the outcome would have been different. Strickland, 466 U.S. at 694. Counsel's ineffectiveness deprived Mr. Parkison of his rights to self-representation and to a fair trial. Reversal is required.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 26th day of January, 2007.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. P. Grace Kingman, Pierce County Prosecuting Attorney's Office, 946 County City Building, 930 Tacoma Avenue S., Tacoma, Washington, 98402;

to Mr. Miles Parkison, DOC 256851, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, Washington, 98520.

DATED this 26th day of January, 2007.



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The 23 volumes of the verbatim report of proceedings will be referred to as follows:

The pretrial proceedings of July 14, 2005, as "1RP;"

The pretrial proceedings of August 25, 2005, as "2RP;"

The trial proceedings of November 2, 7-9, 13-18, and 21, 2005, as "3RP;"

The trial proceedings of January 11, 12, 17-19, 23-26, 30 and 31 as "RP;"

and the sentencing of March 3, 2006, as "SRP."