

FILLS  
COURT OF APPEALS  
DIVISION II

03 OCT -2 17:18:29 No. 36960-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BY                       
DIVISION TWO  
DEPUTY

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STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY LANGFORD,

Appellant.

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

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The Honorable Kathryn J. Nelson, Judge

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*APPELLANT'S OPENING BRIEF*

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A ASSIGNMENTS OF ERROR

1. The prosecutor's flagrant, prejudicial misconduct unconstitutionally relieved him of his burden of proof and misstated the jury's role.

2. The prosecutor committed constitutionally offensive misconduct by inviting the jury to rely on Langford's exercise of his right to silence as evidence of guilt.

3. Mr. Langford did not receive effective assistance of counsel.

4. The trial court abused its discretion in improperly admitting irrelevant, prejudicial "bolstering" evidence of the good character of a crucial state's witness.

5. The cumulative effect of the errors compels reversal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is well-settled that it is flagrant, prejudicial misconduct for a prosecutor to tell the jury that they have to decide the state's witnesses are lying in order to acquit the defendant. The prosecutor here went further, telling the jurors they had to not only find the witnesses were lying but that they were doing so with the specific motive of trying to "set up" Mr. Langford. Is reversal required because this misconduct misstated the prosecutor's constitutionally mandated burden of proof and the jury's role and the prosecution cannot prove the error harmless?

2. It is constitutional misconduct for a prosecutor to imply that the jury should draw a negative inference from the defendant's exercise of

a constitutional right. The case involved a claim that Langford took a gun to a home where he assaulted a man named Cleary. Langford's defense was that Cleary had the gun and assaulted Langford. The prosecutor told the jury that it should believe Cleary was innocent and Langford was guilty because Cleary stayed and spoke to police after the incident while Langford did not. Is reversal required for this violation of Langford's right to pre-arrest silence where the prosecution cannot prove the constitutional error harmless?

3. Further, was counsel prejudicially ineffective in failing to object to the prosecutor's constitutional misconduct?

4. The crucial question in the case was how the jury would evaluate the credibility of the witnesses. One major issue was whether they would believe the prosecution's claim that Cleary and his girlfriend, Finney, did not have a gun at their home and instead Langford had brought the gun and therefore committed the crimes. Over defense objection, the prosecution was allowed to introduce evidence that Finney did not "believe" in guns and would never have a gun in the house because she did not believe they were safe and wanted to protect her young children. Is reversal required because the evidence was inadmissible, improper "good character" evidence which had the sole purpose of bolstering the credibility of the state's crucial witness and the state's case and there is more than a reasonable probability the error affected the verdict?

5. Is reversal required where the cumulative effect of the misconduct and the improper introduction of good character evidence

deprived Langford of his constitutionally protected right to a fair trial?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Timothy Langford was charged by amended information with first-degree assault with a firearm enhancement, second-degree assault with a firearm enhancement, first-degree unlawful possession of a firearm and first-degree burglary with a firearm enhancement. CP 17-19; RCW 9A.36.011(1)(a); RCW 9A.36.021(1)(c); RCW 9.41.010; RCW 9.94A.310; RCW 9.94A.370; RCW 9.94A.510; RCW 9.94A.525(17); RCW 9.94A.530. It was alleged on two of the counts that Langford had committed the crimes while on community custody. CP 18-19.

Trial was held before the Honorable Kathryn J. Nelson on September 20, 25-27, October 1-2, 2007, after which the jury found Langford guilty of first-degree assault but not of the firearm enhancement for that count, guilty of unlawful possession of a firearm and burglary but not of being armed with a firearm at the time of the burglary. CP 120-23.<sup>1</sup> The second-degree assault and firearm enhancement allegation were dismissed. RP 343.

On November 2, 2007, the court ordered Mr. Langford to serve standard range sentences based upon the prosecution's calculation of his

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<sup>1</sup>The verbatim report of proceedings consists of 12 volumes, which will be referred to as follows:

June 7, 2007, as "1RP;"

July 31, 2007, as "2RP;"

August 1, 2007, as "3RP;"

August 28, 2007, as "4RP;"

September 6, 2007, as "5RP;"

the seven chronologically paginated proceedings of the trial and sentencing of September 20, 25-27, October 1-2 and November 2, 2007, as "RP."

offender score, for a total of 238 months in custody. RP 340-51; CP 131-42. Langford appealed, and this pleading follows. See CP 143-71.

2. Testimony at trial

On April 16, 2007, Erin Finney and her boyfriend, Derrick Cleary, also known as “D,” were in their bed before 9 in the morning when there was a knocking on the door and the doorbell started ringing. RP 75, 124-28, 171. Finney put on a robe and answered the door. RP 127-28. The man at the door asked if “D” was there and Finney told him to wait a minute, shut and locked the door, and went upstairs, telling Cleary someone was there to see him. RP 127-28. Finney did not say who she thought it was because she did not recognize the man. RP 128-29.

Cleary got dressed and went downstairs, after which Finney heard some “commotion.” RP 129. According to Cleary, the man at the door was someone he knew as “ATL,” Timothy Langford. RP 173. Cleary and Finney knew Langford, had socialized with him occasionally and had let him stay at their home overnight when they had all been drinking. RP 142-44, 174-75. Cleary invited Langford in and, according to Cleary, Langford then threw something that “kind of” blinded Cleary, either salt or pepper or both. RP 177.

At that point, Cleary said, Langford then pushed Cleary backward. RP 177. Cleary could not see because his eyes were stinging but he heard a “click, click” sound and, when his vision came back, he saw Langford standing above him with a gun in one of his hands, pointed at Cleary. RP 178. Cleary grabbed Langford’s arm and they started wrestling. RP 178.

Cleary said he got the gun away and was yelling for Finney. RP 179-80

By this time, Finney was downstairs and she saw Cleary and Langford wrestling. RP 132. She now recognized the man on the ground as "ATL," based upon his "distinctive" dreadlocks. RP 133, 142-44.

Cleary yelled for Finney to grab the gun when it slid by, so she did. RP 180. According to Finney, Cleary also said to Finney that the man had "tried to kill him" and had "brought a gun." RP 135.

Cleary told Finney to open the door and Cleary then got Langford outside where the two men continued fighting on the front steps. RP 136, 180. At that point, Finney called police. RP 137-38. When she did so, she walked into the living room and lost sight of the two men for a moment. RP 137-38. A few minutes later, Finney said, Langford came in the house again, walked "really fastly" towards Finney, then reached for the gun Finney was still holding. RP 139.

Finney started screaming for Cleary to come and help. RP 139. According to Finney, Langford grabbed her hand, "kind of" shook it, hit it with his other hand and tried to grab and twist her arm in order to get the gun. RP 139. Cleary came inside and pulled Langford away and out the door again. RP 139. The 9-1-1 operator, still on the phone, told Finney to go close and lock the door, so she did. RP 140.

Once the men were outside again, Cleary said, they fought a little and then Langford said, "[p]lease let me go, please let me go." RP 181-83. Cleary apparently did so and Langford took off running, while Cleary went and knocked on the front door to see if Finney was okay. RP 140. When

he came inside, Cleary grabbed the gun from Finney. RP 140-41. Cleary then took the gun and went outside, followed by Finney. RP 140-41.

Cleary said he grabbed the gun because he wanted to use it to keep Langford there until police came. RP 182.

Cleary saw Langford jump a fence so Cleary tried to cut him off. RP 183-84. Cleary was unsuccessful and, when police arrived, they saw Cleary outside. RP 79, 83. They approached him and he convinced them he was not the guy they were looking for. RP 184, 234-49. Cleary also spoke to police, telling them he had the gun in his pocket. RP 234-49.

The gun was “jammed” and would not fire. RP 244-46. A forensic investigator later confirmed that the slide on the gun did not function and was jammed in the forward position, although a scientist at the Washington State Patrol lab was ultimately able to get the gun to fire a bullet. RP 206-15, 246, 257-60.

Both Cleary and Finney claimed they had no firearms in the home and said they had not seen the gun before. RP 130, 171-72, 184. Cleary admitted he had been convicted of a first-degree robbery in 2001 and had spent 7-8 years in prison as a result. RP 169-70. He conceded there was a weapon involved in that robbery but said he was not convicted of having had a weapon in that case. RP 192-93, 203.

For her part, Finney admitted that Cleary did not tell her anything about his criminal history until about a month and a half after they had started dating. RP 166.

At the time of the incident, Cleary was involved in a number of

business ventures and sometimes had thousands of dollars in his possession. RP 188-89, 203-204. He was operating on cash only, admittedly not paying taxes. RP 189. He said he had at least one "investor" and said he kept "tight" records on that but did not know the last name of the person he had invest "like \$10,000" with him. RP 189-92. He also had told the police that the woman had invested only \$5,000 with him and he had paid her back about \$7,000. RP 190-92.

Cleary was also working as a "promoter" for a club which was in a rough part of town. RP 205. Nevertheless, he claimed that it would not be "handy" to have some protection in light of that work. RP 205. As a former felon, he was not allowed to have guns. RP 183. A detective who searched the home did not find anything related to firearms inside. RP 218-26.

After police arrived, a K-9 unit was called and conducted a "track." RP 80, 84, 93-96. After following it for awhile, the dog was taken off leash and ultimately was found with a man on the ground, biting him with a "grip" on one of the man's legs. RP 106. The dog handler testified that her dog had started running after going through a fence and the handler came around a corner to see her dog on the man. RP 104-105. The man kicked the dog off but the dog bit him again. RP 104-105. The man started struggling with the dog and the handler then grabbed the man by his hair while another officer handcuffed the man. RP 84-89. That man was treated for his wounds and identified as Langford. RP 84-98, 106-108.

Langford gave a statement to police. RP 218-23. In it, he said he had gone to the home to get some clothes he had left there and Cleary had pulled a gun on him. RP 218-223. Police admitted they found several items of clothing similar to those Langford had described as his. RP 224. In addition, an officer admitted there were shoes similar to those Langford described as his but dismissed them because Langford had said his size was 11 and the shoes were 11½. RP 224-26. The same officer said that he thought Cleary had a larger build than Langford and was taller by a few inches. RP 225-26. That officer was satisfied when Cleary said that the clothing was his. RP 226.

None of the clothing was taken into evidence or otherwise tested to determine if it belonged to Langford by hair or other analysis. RP 225-26.

D. ARGUMENT

1. REVERSAL IS REQUIRED BECAUSE THE PROSECUTOR COMMITTED BOTH MISCONDUCT WHICH VIOLATED LANGFORD'S CONSTITUTIONAL RIGHTS AND MISCONDUCT WHICH WAS FLAGRANT AND PREJUDICIAL

Prosecutors are not like other attorneys. Instead, they are considered “quasi-judicial” officers, who are required to temper their interests in gaining a conviction with the higher duty of acting in the interests of justice. See State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192, cert. denied, 393 U.S. 1096 (1989); State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993). As a result, a prosecutor is required to refrain from acting as a “heated partisan” and must ensure that he or she does not act in a way which diminishes the defendant’s rights to a fair trial. See State v.

Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

In this case, the prosecutor failed in those duties by committing constitutionally offensive misconduct which the state cannot prove harmless.

a. Misstating his burden and the jury's role

i. Relevant facts

In his initial closing argument, the prosecutor told the jury that their task was to try to “filter” the evidence and decide what facts had been proven. RP 287. Once jurors had done that, the prosecutor said, “that’s going to represent the truth, what happened that day on April 16<sup>th</sup>.” RP 287. The prosecutor also told the jury several times that it had to render a “true and correct verdict.” RP 288, 304.

In his closing argument, counsel pointed to the lack of evidence such as proof of any substance such as the “salt” Cleary claimed was thrown. RP 309. He also noted the lack of Langford’s fingerprints being found anywhere on the gun. RP 309.

Counsel questioned the credibility of Cleary’s claim that he would not have a gun, given the money and area Cleary was hanging around in and the dealings in which Cleary might be involved. RP 310-12.

In rebuttal closing argument, the prosecutor told the jury to apply their “common sense” and ask themselves whether this was a case where Langford had committed “a number of very serious crimes” and then subsequently gotten caught:

Or is this a situation of Derrick Cleary and Erin Finney somehow having a bone to pick with Mr. Langford and trying to set him up?

Is this some kind of conspiracy? Well, let's think about the lengths that Derrick and Erin would have to go to try to set Mr. Langford up.

[DEFENSE]: Your Honor, I object. I didn't argue conspiracy. This is not proper rebuttal.

[PROSECUTOR]: Your Honor, this is argument.

THE COURT: I'll give you a little more leeway.

[PROSECUTOR]: Thank you, Your Honor. Think about the 911 tape. Is Derrick going to go to the lengths of huffing and puffing and saying stuff on the tape like he had a gun and so on and so forth? Is Erin going to be able to conjure up so much emotion on that 911 tape that she's screaming, that she's out of breath. That is not stuff that can be made up, and it sure is not stuff that can be made up on the spur of the moment. This is not a situation of two people trying to set up someone else. This is a situation of Mr. Langford committing a number of serious crimes and getting caught and trying to run from the police.

RP 319.

- ii. The arguments were prejudicial, improper misconduct which mandates reversal

The court erred in failing to sustain the objection and allowing the prosecutor's improper comments to stand unchecked, because those arguments misstated his constitutionally mandated burden of proof and misled the jurors as to their proper role.

Under both the state and federal due process clauses, the prosecution bears the constitutional burden of proving every element of the crime charged beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991). A prosecutor commits misconduct when he misstates the jury's role or his own constitutionally mandated burden of

proof. See State v. Miles, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007); State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997).

It is a misstatement of that burden and the jury's role when the prosecution tells the jury it has to determine who is telling the truth and who is lying in order to decide the case. See State v. Wright, 76 Wn. App. 811, 824-26, 888 P.2d 1214, review denied, 127 Wn.d 1010 (1995). The jury need not make such a determination in order to perform its duty but is only required to determine if the prosecution has proven its case beyond a reasonable doubt. Wright, 76 Wn. App. at 825. Further, the argument misstates the prosecutor's true burden of proving the defendant's guilt beyond a reasonable doubt, because it effectively tells the jury that they should find guilt unless they can find that the prosecutor's witnesses are lying. See, e.g., State v. Castaneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991). But in fact, "testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved," so that the prosecution's argument runs the risk of depriving the defendant of the benefit of a doubt about a witness' testimony by making it appear such doubts must be based in belief the witness is lying. Wright, 76 Wn. App. at 825-26; see Fleming, 83 Wn. App. at 213.

Fleming, supra, is instructive. In Fleming, the defendants were accused of having raped the victim in her own home. 83 Wn. App. at 211-212. The victim testified that she was raped but the defendants claimed

the sex was consensual. 83 Wn. App. at 213. On review, the Court found the prosecutor had committed misconduct when he told the jury that it would have to find that the victim lied, was confused or just fantasized being raped in order to acquit the defendants. 83 Wn. App. at 213. The Court admonished:

[t]he jury would not have had to find that [the victim] was mistaken or lying in order to acquit; instead, it was *required* to acquit *unless* it had an abiding conviction in the truth of her testimony. Thus, if the jury were unsure whether [the victim] was telling the truth, or unsure of her ability to accurately recall and recount what happened in light of her level of intoxication on the night in question, it was required to acquit. In neither of these instances would the jury also have to find that D.S. was lying or mistaken, in order to acquit.

83 Wn. App. at 213 (emphasis in original).

Here, even more than in Fleming, the prosecutor's argument misstated the jury's role and the prosecutor's burden of proof and gave the jury an improper "false choice" of either convicting or having to find the prosecutor's witnesses were lying. The argument here went even further, telling the jurors they had to find not only that Finney and Cleary were *lying* but that they were deliberately and maliciously *setting up an innocent man*, in order to acquit. The only other alternative the prosecutor gave the jury was that Langford was guilty of "committing a number of serious crimes and getting caught and trying to run from the police." RP 319.

The prosecutor's misconduct misstated the jury's role and relieved the prosecutor of the full weight of his constitutionally mandated burden of proof, and this Court should so hold.

b. Inviting the jury to find guilt based on silence

i. Relevant facts

In initial closing argument, the prosecutor argued that, if Langford “had been the victim in this case and he had been the one who had been assaulted,” he would not have run away and hid from police after the incident. RP 302. A few moments later, the prosecutor said:

Now, if [Langford] . . . had been the victim, if he had the dog right there, nipping at his heels, *he would have essentially done what Derrick did that day when Derrick was confronted by Sergeant Seymour, when Derrick went out to try to locate Mr. Langford. He immediately, immediately, makes it known that, hey, I've got a gun. I'm not the bad guy. Here you go. Take the gun. But no. Mr. Langford takes off, he runs. Why? Mr. Langford is not a victim. Mr. Langford was the perpetrator.*

RP 303 (emphasis added).

ii. The argument was improper, constitutionally offensive misconduct

It is grave misconduct for the prosecutor to argue that the jury should draw a negative inference from a defendant’s exercise of a constitutional right. State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984); see Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). Such argument amounts to a violation of the right in question and also violates due process because it “chills” the exercise of a right. See State v. Belgarde, 110 Wn.2d 504, 512, 755 P.2d 174 (1988); United States v. Jackson, 390 U.S. 570, 581, 88 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).

In this case, the prosecutor’s arguments violated Mr. Langford’s rights to remain silent, against self-incrimination, and to due process.

As a threshold matter, this issue is properly before the court. When a prosecutor commits serious, prejudicial and flagrant misconduct, the issue may be raised on appeal despite the failure of counsel to object below. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 11292 (1995).<sup>2</sup>

On review, this Court should reverse. Both the state and federal constitutions guarantee the accused the right to be free from self-incrimination and to remain silent. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1991); Doyle v. Ohio, 426 U.S. 610, 619-20, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); Fifth Amend.; Art. I, § 9.<sup>3</sup> Put another way, a defendant has a constitutional right to remain silent in the face of accusation. See State v. Earls, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991). As a result, it is completely improper, impermissible, and misconduct for the government to even suggest that a negative inference be drawn from exercise the right to remain silent, including when the defendant exercises that right pre-arrest. Easter, 130 Wn.2d at 243. Indeed, it is not just a violation of the right against self-incrimination; it is a violation of the right to due process. State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002); Doyle, 426 U.S. at 619; State v. Fricks, 91 Wn.2d 391, 395, 588 P.2d 1328 (1979).

In this case, the prosecutor's argument amounted to an effort to ask

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<sup>2</sup>Counsel's failure to object was also ineffective, as discussed, *infra*.

<sup>3</sup>The Fifth Amendment, made applicable to the states through the 14<sup>th</sup> Amendment, provides in relevant part, no person "shall be compelled in any criminal case to be a witness against himself." Article I, § 9 provides, in relevant part, "[n]o person shall be compelled in any criminal case to give evidence against himself."

the jury to draw a negative inference from Langford's exercise of his right to pre-arrest silence. With his comments, the prosecutor told the jury it should find Langford guilty because he had not done what Derrick Cleary had done, which was stay near the home and speak to police after the incident. RP 303. The clear implication was that Langford should be found guilty because he did not stick around to tell police he was *innocent*.

Notably, had the prosecutor limited his comments solely to Langford's flight, that might have been permissible, because flight may be relevant to consciousness of guilt. See, e.g., State v. Hebert, 33 Wn. App. 512, 515, 656 P.2d 1106 (1992). But by adding in the comparison to Cleary's staying and speaking to police and implying that those acts proved Cleary was guilty of nothing, the prosecutor impermissibly invoked Langford's silence and used that silence as evidence of his guilt. Such comments are improper. See Romero, 113 Wn. App. at 787; see also, State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996).

Nor was the prosecutor's argument proper under the theory of using silence as impeachment. See, State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008). Under that theory, where a defendant chooses to speak to police and does not tell them certain things, the prosecutor may comment on this "partial silence" if the silence amounts to an inconsistency in the defendant's story, sufficient to impeach his testimony at trial. 163 Wn.2d at 216-19. Washington courts, however, are "skeptical of the probative value of impeachment based on silence." Burke, 163 Wn.2d at 219. As a result, such impeachment is not permitted simply because the defendant

fails to disclose every detail of an event when first contacted by police. Burke, 163 Wn.2d at 219. And it must be limited solely to “impeachment,” not used as substantive evidence of guilt. Id.; see Belgarde, 110 Wn.2d at 511. The point is to allow the state to question a defendant’s “failure to incorporate the events related at trial into the statement given police” or the inconsistencies between his statements. 110 Wn.2d at 511-12.

Here, the prosecutor was not arguing about what Langford said or did not say in his later statement to police. Instead, he was arguing about Langford’s failure to *stay and talk with police after the incident*. And he was implying that the failure to stay and talk should be relied on the jury as evidence of Langford’s guilt.

Characterizing a defendant’s silence as somehow being “evasive and evidence of his guilt” amounts to improper use of that silence as “substantive evidence of guilt.” Easter, 130 Wn.2d at 235. As the Easter Court held: “[w]hen the State may later comment an accused did not speak up prior to an arrest, the accused effectively has lost the right to silence.” 130 Wn.2d at 238-39. And as this Court has held, even a single comment telling the jury it should consider whether someone who does not return police phone calls after having been told that failure to do so would result in potential prosecution constitutes an impermissible comment on the right to pre-arrest silence. State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997). This is so because simply asking the jury to consider whether those were the actions of an innocent man suggested that the failure to

contact police and given them a statement was “an admission of guilt.” 86 Wn. App. at 594.

The prosecutor’s comment here amounted to an improper comment on Langford’s exercise of his right to pre-arrest silence, and this Court should so hold.

c. Reversal is required

Reversal is required for both types of misconduct in which the prosecutor engaged. First, misconduct in misleading the jury as to the law is especially egregious when the attorney doing so is the prosecutor. See State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1994). This is so not only because of the prosecutor’s quasi-judicial duties to ensure a fair trial but also because such misstatements, coming from the public prosecutor, have a greater likelihood of having a strong impact on the jurors. 100 Wn.2d at 763; see State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955). Further, Washington courts have specifically recognized that this type of misconduct is, by definition, flagrant and prejudicial, because it is so well-recognized that the arguments are improper. See Fleming, 83 Wn. App. at 214.

In addition, counsel specifically objected to the prosecutor’s misconduct in misstating his burden by arguing the jury would have to find “conspiracy,” but the court overruled the objection. RP 319. Thus, even if the prosecutor’s misstatement of his constitutional burden and the jury’s role did not amount to constitutional misconduct subject to the “constitutional harmless error” test, this Court would still not apply the

standard commonly used when counsel fails to object to a prosecutor's misconduct below. That standard asks whether the misconduct was so flagrant and prejudicial that it could not have been cured by an instruction. Belgarde, 110 Wn.2d at 507-508.

Instead, because of counsel's objection, this Court applies a less forgiving standard for the prosecution, reversing if there is a "substantial likelihood" that the prosecutor's improper comments in any way affected the jury's verdict. See State v. Barrow, 60 Wn. App. 869, 877, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). This review examines the potential effect of the comments in the context of the evidence and circumstances of the trial. 60 Wn. App. at 877, quoting, State v. Green, 71 Wn.2d 372, 381, 428 P.2d 540 (1967).

Here, the circumstances and evidence indicate that there is more than a substantial likelihood that the prosecutor's arguments that the jury had to find that Finney and Cleary were deliberately conspiring to set up Langford in order to acquit affected the jury's verdict. Not only was the argument the type of argument specifically condemned as "flagrant and ill-intentioned" more than 10 years ago in Fleming. See Fleming, 83 Wn. App. at 214. In addition, here, the arguments went even further, telling jurors they had to find that Cleary and Finney were not just lying but doing so with the specific motive of conspiring to frame Langford. Thus, even the possibility that they were lying for the purposes of keeping Cleary out of trouble was foreclosed by the prosecutor's improper argument.

Further, the case depended upon whether the jury believed Cleary

and Finney or whether they believed Langford. This is especially true because of the weaknesses in the other evidence the prosecution put forward in support of its contention that Langford was the aggressor, rather than Cleary. For example, there was no evidence of any salt or sand or anything similar being found in the home or on Cleary's clothes, even though Cleary's version of events depended upon that substance being thrown at him there. See RP 292, 301, 308. There was no evidence of any chemical residue on Cleary's hands or face, nor was a spray can or sand or any salt found on Langford. See RP 100-308.

Nor were Langford's fingerprints found on the gun, despite Cleary's claims that Langford had pulled it on him and even Finney's claims regarding Langford grabbing the gun. See RP 100-208.

And the state's main witness, Cleary, was a convicted felon with some serious credibility issues, not the least of which was that he would himself have been subject to criminal charges if Langford's version of events was correct. As a felon, Cleary had his own motivations for wanting to deny having the gun and pulling it, as Langford said happened. Further, Cleary's testimony was often incredible and contradicted his previous statements and common sense. He admitted that he works in a dangerous area and is known to have large amounts of cash on his person, but claimed that he would nevertheless not carry a weapon in those areas in order to protect himself. He claimed to be a promoter of a club and to have business ventures going where he had investors who gave him thousands of dollars, but could not remember the name of the club he

claims he was promoting or all of the names of people who gave him thousands of dollars as “investors.” Nor did he recall the names of the people who ran the shop where he was supposedly working. And the money he said he collected from investors changed with each telling.

Finally, the prosecution’s response to Langford’s defense was not incredibly strong. The officer whose testimony indicated he did not believe that Langford was at the home to pick up clothing admitted that he found clothing similar to that Langford described as his and shoes similar to those Langford identified. RP 314. The officer’s dismissal of that evidence supporting Langford’s version of events was not based upon forensic analysis of the clothing but rather on Cleary’s claim the clothing was his and the officer’s general opinion that the clothing and shoes were a little bigger than Langford would likely wear. RP 314. Yet the officer did not gather any of the evidence which could have proven or disproven Langford’s defense.

Even where there are “weak areas” of a defendant’s version of events, where there is also questions about and little corroboration of the version of events of the state’s witnesses, the likelihood of the jury’s verdict being affected by this type of improper argument is “substantial.” See, e.g., State v. Padilla, 69 Wn. App. 295, 302, 846 P.2d 564 (1993). Because this case was a “swearing match,” the jury’s determination of credibility could have been affected by the improper argument. In addition, the improper “conspiracy” argument occurred in rebuttal closing argument, where it was most likely to have an injurious effect.

There is more than a substantial likelihood that the prosecutor's misconduct, going directly to the heart of the jury's decisionmaking which depended on credibility, affected the verdict in this case.

Reversal is also required based upon the prosecutor's improper comment on Langford's exercise of his right to pre-arrest silence. Where, as here, the prosecutor commits misconduct infringing on a constitutional right, the prosecution bears a very heavy burden in trying to prove those constitutional errors harmless. Easter, 130 Wn.2d at 242. It can only meet that burden if it can convince this Court that any reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). And that standard is only met if the untainted evidence was so overwhelming that it "necessarily" leads to a finding of guilt. 104 Wn.2d at 425.

The prosecution cannot meet that burden in this case. It is important to note that the "constitutional harmless error" test is not the same test as the one used when a defendant challenges the sufficiency on the evidence on appeal. In such cases, this Court applies a deferential standard of review, places the burden of proof on the defendant and will affirm if any reasonable trier of fact could have convicted, taking the evidence in the light most favorable to the state. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). For the constitutional harmless error test, it is the prosecution which bears the burden, which requires them to satisfy a higher standard of proof so that they must show the evidence of guilt was

so overwhelming that *no* reasonable trier of fact could have failed to convict, even if the error had not occurred. Burke, 163 Wn.2d at 222-23; Easter, 130 Wn.2d at 242.

Romero, supra, is instructive. In that case, the defendant was charged in relation to an incident where shots were fired at a mobile home park after dark. 113 Wn. App. at 782-83. Romero had been seen there by officers, ran when told to stop and was found hiding in a mobile home. In the mobile home the officers found a shotgun and shell casings were found on the ground next to that same mobile home's front porch. Romero, 113 Wn. App. at 783. Descriptions pointed to Romero and an eyewitness was "one hundred percent" sure it was Romero she had seen. 113 Wn. App. at 784. Although she remembered the man was wearing a different colored "checked" shirt (blue rather than gray), when shown the shirt Romero had on, the witness identified it as the one the shooter had worn. 113 Wn. App. at 784.

On appeal, Romero argued, *inter alia*, that there was insufficient evidence to prove Romero was the shooter. 113 Wn. App. at 784-93. The Court disagreed, applying the deferential standard of review used for such claims. 113 Wn. App. at 793. The Court then addressed the defendant's claim that an officer had improperly commented on Romero's exercise of the right to remain silent. 113 Wn. App. at 793-94. Applying the constitutional harmless error standard, the Court reversed, holding that, although there was significant evidence that Mr. Romero was guilty, that was still not sufficient to amount to "overwhelming" evidence of guilt.

113 Wn. App. at 795-96. Because the evidence was disputed, the jury was “[p]resented with a credibility contest,” and “could have been swayed” by the sergeant’s improper comment. 113 Wn. App. at 795-96. As a result, the Court could not conclusively “say that prejudice did not likely result due to the undercutting effect” the improper comment could have had on Mr. Romero’s defense.” 113 Wn. App. at 794; see also, Burke, 163 Wn.2d at 220-21.

Here, the evidence of Langford’s guilt was far thinner and his defense far stronger than in Romero. While there was evidence of Langford’s guilt, there was also evidence - or a lack of evidence - on certain crucial factors of the state’s case, as noted herein. The lack of evidence of sand, salt or spray, the serious problems with Cleary’s credibility, the fact Langford’s fingerprints were not on the gun, the motive both Cleary and Finney had to lie about what happened, and more - all cast doubt on the state’s case and made the jury’s determination of credibility crucial.

In addition, here, the offending comments deliberately insinuated Langford’s guilt based upon exercise of a constitutional right, by telling the jury it should believe Langford was guilty because he did not stay and talk to police like Cleary did.

Notably, the Supreme Court has noted that improper comments on the exercise of the right to pre-arrest silence are the kind of misconduct which is like a bell which, once rung, cannot be “unrung.” Easter, 130 Wn.2d at 238-39. It is an effective deprivation of the right to prearrest

silence when the state is allowed to comment on the defendant's failure to "speak up prior to an arrest." Id. The untainted evidence in this case was not so overwhelming that it necessarily led to a finding of guilt, sufficient to satisfy the constitutional harmless error standard.

It is axiomatic that "prosecutors presumably do not risk appellate reversal of hard-fought convictions by engaging in improper trial tactics unless the prosecutor feels those tactics are necessary to sway the jury in a close case." Fleming, 83 Wn. App. at 215. The prosecutor's misconduct in this case was both so flagrant and prejudicial that it could not be cured by an instruction and constitutionally offensive. This Court should so hold and should reverse.

d. In the alternative, counsel was ineffective

In Easter, the Supreme Court noted that improper comments on the defendant's failure to "speak up prior to an arrest" are the kind of comment which is like a bell which cannot be "unrung" once made. 130 Wn.2d at 238-39. Mr. Langford submits that the effect of the constitutionally offensive misconduct could not have been cured if counsel had objected and requested a curative instruction. If, however, this Court somehow decides to the contrary, this Court should reverse based upon counsel's failures to object and request such instruction. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Sixth 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). Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

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); see also Hendrickson, 129 Wn.2d at 77-78. In such cases, counsel is shown ineffective if there is no legitimate tactical reason for counsel's failure to object, an objection would likely have been sustained, and an objection would have affected the result of the trial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Here, there could be no "tactical" reason for failing to object to the prosecutor's urging the jury to find Langford guilty based upon his exercise of his right to pre-arrest silence. An objection to the misstatement would likely have been sustained, because any reasonable trial court would have recognized that the prosecution's argument was constitutionally improper. As a result of counsel's ineffectiveness, the jurors' minds were tainted with the belief that Langford's exercise of his rights was evidence upon which they could convict. Counsel's ineffectiveness provides yet

another ground upon which this Court could reverse.

2. THE TRIAL COURT ERRED IN IMPROPERLY  
ADMITTING GOOD CHARACTER EVIDENCE IN  
SUPPORT OF THE STATE'S WITNESSES

Evidence is only admissible if relevant to some question at issue in the trial. ER 401, 402. In addition, even relevant evidence can be improper, if its probative value is outweighed by its capacity for prejudice. See ER 403. Where a court erroneously admits improper evidence, the error cannot be deemed harmless unless the reviewing Court can find, within reasonable probability, that the outcome of the trial would have been the same had the error not occurred. See State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

In this case, the trial court erred in admitting irrelevant evidence which unfairly bolstered the character and credibility of the prosecutor's main witnesses. Further, because the case was all about that credibility, the error cannot be deemed harmless.

a. Relevant facts

When Ms. Finney was testifying, the prosecutor asked if she allowed a firearm into her house, and Finney replied, "[a]bsolutely not." RP 130. The following exchange then occurred:

Q: [prosecutor]: A rifle or shotgun or handgun, anything?

A: [Finney]: Not even a BB gun.

Q: Okay. And why not?

A: I don't - -

[DEFENSE]: Objection; relevance.

RP 156.

The prosecutor relied on this evidence in closing argument. RP 300. In arguing that the jury should believe that Langford had brought the gun to the house, the prosecutor declared:

Now, remember that both Erin and Derrick told you under oath there are no guns in that house. *They don't keep any guns in that house. She doesn't approve of them. She thinks they're a safety hazard, and she has young children. So when Derrick quickly gets dressed, it's not like Derrick has gone to be with a gun under his pillow or anything of that nature. He doesn't arm himself as he's going downstairs.*

RP 300 (emphasis added).

- b. The court abused its discretion in admitting the irrelevant, prejudicial “good character” evidence

The trial court erred in reversing its decision and admitting Finney’s testimony about her “good character” regarding owning guns. Further, the admission of that evidence, coupled with the prosecutor’s use of it in closing, compels reversal.

In general, evidence of a person’s good or bad character is not admissible to prove that they acted in conformity therewith. ER 404(a). There is an exception for the character of a witness but only “as provided in ER 607, 608, 609.” ER 404(c). ER 607 provides simply that parties may challenge the credibility of a witness, even if they call that witness. ER 609 provides the rule for admission of prior convictions. And ER 608 provides that the “credibility” of a witness may be attacked or supported by “reputation evidence,” but such evidence may only refer to the witness’ character for “truthfulness or untruthfulness.” ER 608(a); see State v.

Benn, 120 Wn.2d 631, 651-52, 845 P.2d 289, cert. denied, 510 U.S. 944 (1993). In addition, “[s]pecific instances of conduct” of a witness used to prove credibility under ER 608 cannot be proved by extrinsic evidence, must be relevant to “truthfulness or untruthfulness” and are only admissible on cross-examination. ER 608(b); Benn, 120 Wn.2d at 652.

Here, the testimony admitted was not “reputation” evidence. It was not admitted on cross-examination. Nor was it evidence regarding “truthfulness or untruthfulness.” Instead, it was evidence of Finney’s good character, i.e. that she was not the kind of person who would have a gun in her home. And it was used to prove that she acted in conformity with that character i.e., did not have a gun in her home and/or would not have let Cleary have a gun in her home. The entire point of introducing the evidence was to bolster Finney - and by extension, Cleary - in the eyes of the jurors, to make them believe Cleary was less likely to have been the one with the gun and thus Langford more likely to be guilty. Put another way, because the jury was tasked with deciding whether Cleary had the gun in the home and pulled it on Langford (and thus Langford was not guilty) or Langford had brought the gun, the “character” evidence of whether Finney would have a gun in her home was intended to sway the jury into believing Finney’s and Cleary’s version of events and convict Langford.

As this Court has noted, it is improper for prosecutors to bolster a witness’ character or credibility. State v. Jones, 144 Wn. App. 284, 293, 183 P.3d 207 (2008). Such bolstering is recognized to “artificially

increase probity” of that witness’ testimony in the eyes of jurors. See State v. Smith, 67 Wn. App. 838, 844, 841 P.2d 76 (1992). As a result, it is misconduct for a prosecutor to elicit improper “good character” evidence and to rely on such evidence in arguing guilt. See Smith, 67 Wn. App. at 844.

That is exactly what happened here. The only reason to elicit the testimony was to prove that Finney was not likely to have a gun in her house and that it was therefore more likely that Langford was guilty.

Further, there is more than a reasonable probability that the admission of the improper “good character” evidence affected the verdict. That evidence went directly to the heart of the case and the jury’s crucial determination of whether Cleary had the gun at the home as Langford said in his defense, or Langford brought it and thus was guilty.

Notably, there were already serious problems with Cleary’s credibility and Finney’s credibility by extension, because of her potential motive of trying to protect Cleary from criminal liability for his acts. In contrast, in Smith, the improper “bolstering” evidence was simply evidence that an officer had a number of commendations and awards. 67 Wn. App. at 844. The defendant, however, failed to object to the admission of the improper evidence, and the reviewing court was not convinced that the outcome of the trial would have been different, under the facts of that case. 67 Wn. App. at 845. The court found that there was other, properly admitted evidence of the officer’s extensive history and background in the particular area about which he was testifying, so that

there was “no reason to believe that the evidence of commendations and awards caused the jury to give more credibility” to the officer’s testimony. 67 Wn. App. at 844-45. Here, there was no such properly admitted evidence on this point. The evidence admitted was specifically elicited for the purpose of bolstering Finney’s credibility and the credibility of the state’s version of events. It was exploited by the prosecutor in closing argument for exactly that purpose. The court abused its discretion in admitting the evidence, and this Court should so hold and should reverse.

2. THE CUMULATIVE EFFECT OF THE ERRORS  
COMPELS REVERSAL

Even if standing alone the acts of misconduct and the admission and exploitation of the improper “good character” evidence would not support reversal, their cumulative effect will compel reversal when that effect deprived the defendant of his constitutionally protected right to a fair trial. State v. Henderson, 100 Wn. App. 794, 998 P.2d 907 (2000); State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976). While Langford maintains that each of the errors is sufficiently prejudicial to compel reversal, reversal would also be required based on the cumulative effect of the errors. Those errors ensured that the prosecutor did not have to meet the full weight of his constitutionally mandated burden of proof and the jury thus convicted based on a lesser, improper standard. Those errors misled the jury as to their proper role and how they were to make their decision. Those errors told the jurors that they should fault Langford for exercising a right. And those errors ensured that the jury making the crucial evaluation of credibility was improperly swayed by “good

character” evidence which was admitted for the sole purpose of trying to make Langford appear more guilty. Given the magnitude and impact of these errors, there was no way that the trial in this case was anything close to the constitutionally protected fair trial before an impartial jury Langford should have been given.

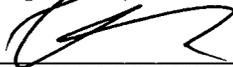
Even if the Court does not decide to reverse based upon the impact of any of the individual errors, this Court should reverse because the cumulative impact of the errors deprived Langford of a fair trial.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 15<sup>th</sup> day of October, 2008.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

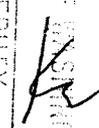
Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,  
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

to Mr. Timothy Langford, DOC 877701, WSR, P.O. Box 777,  
Monroe, WA. 98272.

DATED this 1st day of October, 2008.

  
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