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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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DEPUTY

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

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NO. 37825-6 II

STATE OF WASHINGTON,

Respondent.

vs.

ROBIN HYLTON,  
Appellant.

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On Appeal from the Superior Court of Lewis County

**STATE'S RESPONSE BRIEF**

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## STATEMENT OF THE CASE

Appellant's version of the statement of the case is adequate for understanding the controversies presented.

## ARGUMENT

### **A. THE PROSECUTOR'S STATEMENTS DID NOT DENY HYLTON A FAIR TRIAL.**

The state concedes that the prosecuting attorney in this case misstated the presumption of innocence when he told the jury,

"So basically tells you if you think something happened, if you believe it happened, it's beyond a reasonable doubt... So, if in your mind it's reasonable to think that something happened, you're convinced beyond a reasonable doubt." RP at 83-84<sup>1</sup>

However, it is clear that this misstatement was not flagrant, ill-intentioned, or incurable by instruction, and thereby does not warrant reversing the conviction.

Prosecutorial misconduct does not require reversal if this court is convinced that the misconduct did not prejudice the jury. The bar for determining the probability of prejudice is high. There must be "a substantial likelihood that the alleged prosecutorial misconduct affected the verdict." State v. Russe! (citing State v. Lord, 117 Wn.2d 829, 887, 822 P.2d 177 (1991)). A defendant

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<sup>1</sup> Unless otherwise noted, all references to "RP" refer to the May 15, 2008 Verbatim Report of Proceedings

claiming prosecutorial misconduct bears this burden. State v. Brown 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Showing that there is merely a possibility of an impact upon a verdict is insufficient, as are indefinite, conclusory and unsupported assertions of prejudice. State v. Perez-Arellano, 60 Wn.App 781, 786, 807 P.2d 898 (1991).

To determine whether remarks were prejudicial, a court examines the remarks “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” Brown, 132 Wn.2d at 561. Where, as here, the defense fails to object to an improper comment, the standard for reversal is higher. Reversal is not required “unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” Id. The “flagrant and ill-intentioned” standard for misconduct requires the same “strong showing of prejudice” as the test for manifest constitutional error under RAP 2.5(a). State v. Neidigh, 78 Wn.App. 71, 78, 895 P.2d 423 (1995). Hylton's arguments do not survive this scrutiny.

In the context of the prosecuting attorney's entire closing argument, it is clear that his incorrect descriptions of the reasonable doubt standard were mere careless misstatements. The two sentences in which he mischaracterizes the standard are not a part of a scheme or strategy to mislead the jury and take advantage of Mr. Hylton's pro se status. Indeed, the statements are not even consistent. In the first, the prosecutor tells the jury that to satisfy the reasonable doubt standard they must only think a fact exists, while in the second he instructs them that their thoughts must be reasonable before they are convinced beyond a reasonable doubt. RP at 83-84.

More significantly, the prosecutor immediately precedes his two brief statements with the verbatim reasonable doubt instruction. He does not attempt to hide the law from the jury. In fact, this is the third time the jury hears the standard description of "beyond a reasonable doubt." The prosecuting attorney then - clearly searching for his next thought and words - correctly states that "doubt doesn't necessarily equal a reasonable doubt..." RP 83. After momentarily losing his train of thought and making the first mischaracterization of the reasonable doubt standard, he repeats this sentiment: "if after you... so a doubt is not a reasonable

doubt." *Id.* He reminds the jury that he discussed this distinction during voir dire. *Id.* Apparently, at this point in his argument, the prosecuting attorney's statements are primarily intended to re-convey, however ineffectively, the unreasonable – reasonable doubt distinction. His jumbled statements do not appear intended to deceive the jury. Notably, the prosecutor does not thereafter make reference to his improper interpretation of reasonable doubt. He does not apply his simplified standard to the evidence or draw conclusions based upon it. Without more, the statements are not prejudicial. Singular, non-flagrant misstatements by prosecutors are not a basis for reversal due to prejudice. See Perez-Arellano, 60 Wn.App. 781, 786-787; State v. Pedersen, 122 Wn.App. 759, 770(2004); State v. French, 101 Wn.App. 380, 388, 4 P.3d 857 (2000) (citing State v. Fleming, 83 Wn.App. 209, 921 P.2d 1076 (1996)).

Moreover, it is apparent that whatever prejudice the prosecutor's misstatements may have caused were curable by a corrective instruction. In fact, his statements are of the type that is most susceptible to cure in this manner. The prosecutor's remarks did not create a sentiment or provide information to the jury that a jury would be unable to disregard, such as prior bad acts, emotional

or sympathetic facts, highlighting a defendant's refusal to testify, or comments on a witnesses' credibility or the defendant's guilt.

Statements of this type carry an impact that is creates an indelible mark on any individual's mind. A curative instruction may tax a jury to ignore this information. But if the statements resonate with the jury or have an emotional impact, they may be difficult to ignore.

In contrast, misstatements of a legal nature are easily disregarded by a jury once revealed as incorrect by the judge. Outside of the legal profession, legal statements do not so resonate with individuals or create such strong emotional responses that it is difficult for individuals to abandon them when instructed. Purely legal statements do not have the capacity to so inflame a jury that there is a substantial likelihood that a curative instruction will fail to insure a fair trial. The judge's well familiar position as the final purveyor of the law insures that jurors will yield to a judge's determination of the law. At trial, a judge is clearly the superior authority for stating and interpreting the law. In this setting, once a jury is informed that the prosecutor has misspoken, there is no reason the jury would not trust the instruction of the judge and disregard the prosecutor's statements. As with other fields involving specialized knowledge, misstatements of law are easily

wiped from the mind when they are revealed incorrect by a trusted authority.

In this case, the court twice instructed the jury in the correct standard of reasonable doubt. RP 12 & 77. As well, it directed jurors to disregard statements by counsel that are not supported by "the law as given by the court." RP 12-13 & 75. The jury is presumed to follow the court's instructions. Perez-Arellano, 60 Wn.App. at 787. As a result, these instructions can be presumed to have cured any prejudice arising from the prosecutor's argument. Hylton has not challenged the accuracy or completeness of the instructions or identified any circumstances that would overcome the presumption that the jury followed these instructions.

Certainly, in light of the minimal potential for prejudice, an additional instruction regarding the misstatements would have neutralized their affect. An instruction reminding the jury of the burden placed on them by the presumption of innocence would have lead them back to the language of court's definition of reasonable doubt and to disregard the prosecutor's unclear interpretation. Once exposed to the light, the prosecutor's statement would have had no force. Because Hylton has not

shown differently, he fails to meet his burden to show reversible error. See U.S. v. Manning, 56 F.3d 1188, 1199 (C.A. 9 1995).

Several Washington holdings support this conclusion. In State v. Classen, 143 Wn.App. 45, 176 P.3d 582 (2008), the defendant alleged misconduct after the prosecutor stated in closing argument,

"Manslaughter is an accident. You look at the instructions on manslaughter it talks about acting recklessly for first degree, or negligently for second degree. Those are concepts of accident. Where's the accident here? This is not an accident." Classen, 143 Wn.App. at 53.

The defendant did not request a curative instruction in response.

On appeal, this court found that the statements were not so prejudicial to require reversal of the conviction:

"Even assuming, without deciding, that the prosecutor's misstatement of law was misconduct, it was not so flagrant and ill-intentioned that a curative instruction could not have remedied its prejudicial effect." Classen, 143 Wn.App. at 64-65.

Similarly, division three of this court did not find grounds for reversal in State v. Barajas when the prosecutor misstated the burden of proof for premeditation in his closing argument. State v. Barajas, 142 Wn.App. 24, 177 P.3d 106 (2007). The prosecuting

attorney used an analogy to canine instincts to describe the burden of proof:

"A good way to think about it is this; even the mangie, mongrel mutt can intend to if you touch their food bowl while they are eating, they bit you. Their intent is get away from my food. Now, some people may well say that a good bird dog can plan. Do you have a good bird dog? They always seem to flush that bird out where there is nothing in the sky but blank sky. That dog might be able to plan, but that is not what we are required to prove to you, just that you touch my food, I bite you. You try to deport me, try to arrest me, I hurt you...."  
Barajas, 142 Wn.App. at 33.

The reviewing court noted that this analogy incorrectly stated the State's burden of proof with regard to premeditation. However, the court concluded that any possible confusion created by the statements could be resolved by the court reading the correct description of the State's burden and by admonishing the jury to ignore statements by counsel contrary to the law. *Barajas*, 142 Wn.App. at 38. On that basis, the appellate court was satisfied that the prosecutor's comments did not influence the outcome of the trial. *Id.*

In *State v. Copeland*, 130 Wn.2d 244, 922 P.2d 1304 (1996), the Supreme Court considered another type of misstatement of the law. Reviewing a prosecutor's closing

argument, the Court disapproved of the prosecutor's use of probabilities to suggest guilt:

"We do not countenance use of a mathematical approach to the determination of guilt, and especially do not do so where, as in this case, there is no basis in the record for assuming independence of the events described by the prosecutor." Copeland, 130 Wn.2d at 293.

In his closing argument, the prosecutor had listed a stream of unlikely facts that occurred during the crime to support his conclusion that the probability of all of them taking place together was remote. Id. The Court noted the argument was inappropriate and distorted the presumption of innocence. Yet, the Court concluded that a curative instruction would have counteracted the State's improper legal standard. Copeland, 130 Wn.2d at 293-294.

Finally, two Supreme Court cases indicate the level of confidence the Court has in a curative instruction to obviate prejudice. In State v. Hart, 26 Wn.2d 776, 175 P.2d 944 (1947), the Court found that a prosecuting attorney undermined the providence of the jury when he told the jury that they could discern the defendant's guilt from the trial court's rulings:

"The fact that there is evidence enough to justify you to return such a verdict [of guilty] is apparent from the fact that the Court lets this case go to you. But the Court tells you that in your own mind you must be satisfied as

to certain things in order to return a verdict of 'guilty.'  
Hart, 26 Wn.2d at 795.

The trial court responded to the statement by instructing the jury that the statement was erroneous. It renewed its instruction that the jury is the sole judge of the facts and the lone determiner of guilt. Hart, 26 Wn.2d at 796. The Supreme Court approved of this action finding that the instruction "effectively cured any error that would have otherwise existed. Id.

The Court made the same holding in the recent case, State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008). The Court found that a prosecutor made "remarkable misstatements of the law" when he told the jury it did not need to give the defendant the benefit of the doubt. Warren, 165 Wn.2d at 28. On three occasions during closing arguments, the prosecutor made similar statements over the objections of defense counsel. Warren, 165 Wn.2d at 25. The Court found that the prosecutor, who had made similar statements in a prior trial, "sought to undermine the State's burden of proof..." and mislead the jury "regarding the bedrock principle of the presumption of innocence..." Warren, 165 Wn.2d at 26-27. The trial court finally instructed the jury that it must give the defendant the benefit of any reasonable doubt. Warren, 165 Wn.2d

at 25. The Court held that the trial court's instruction cured the damage of the prosecutor's statements. Warren, 165 Wn.2d at 28.

In each of these cases, the appellate courts either concluded that a curative instruction neutralized the potential prejudice raised by misstatements of law, or could have done so if the defendant had requested one. In contrast to the present facts, the prejudice caused in each of these cases exceeded that caused by the Lewis County prosecutor's statements. Simply, in each the misconduct was more severe.

The above cases regard deliberate misstatements presented in a manner that appealed to a jury's rationality or experience. The Lewis County prosecutor's statements strayed from the legal standard for the State's burden of proof, but they were brief, unprepared, abstract, and isolated remarks. There is no evidence that the prosecutor "sought to undermine the State's burden..." Warren, 165, Wn.2d at 27. As such, the comments were curable by the trial court's use of a curative instruction.

Hylton disagrees. He presents several theories why the prejudice caused by the misstatements was not susceptible to a remedial instruction. His theories, however, do not establish a substantial likelihood that the statements affected the verdict. They

merely indicate that prejudice was a possibility in this case. Hylton fails to ever present, as is his burden, any evidence that the jury was actually, or likely, prejudiced.

Hylton presents four arguments that the prosecuting attorney's comments affected the verdict against him. First, citing State v. Fleming, 83 Wn.App. 209, 921 P.2d 1076 (1996) and State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984), he argues that a prosecutor's disregard of a well-established rule of law is flagrant and ill-intentioned misconduct. Appellant's Brief at 7. Besides being conclusory, this argument does not apply to the prosecutor's statements in Hylton's trial. The prosecutor may have misstated the standard for a well-established doctrine of our justice system, but he did not deliberately follow a practice or assert an argument that reviewing courts had "repeatedly held" is misconduct. Fleming, 83 Wn.App. at 213. There is no question that the Lewis County prosecutor's statements constituted misconduct. But they did not constitute flagrant and ill-intentioned conduct.

In that regard, the case before this court is not similar to State v. Fleming. In Fleming, the prosecutor's comments not only misstated the nature of reasonable doubt, but also altered the

presumption of innocence, infringed upon the role of the jury, and violated a defendant's privilege against self-incrimination. *Fleming* 83 Wn.App. at 213-215. In that case, the "errors pervaded the prosecutor's closing and rebuttal arguments" and created a web of reinforcing misstatements. Under those conditions, an instruction could not have been expected to cure the prejudice caused by the prosecutor's compounding infringement on Fleming's constitutional rights. As a result, the reviewing court summarily held that his failure to object did not preclude review. *Fleming*, 83 Wn.App. at 216.

Since the severity of the prosecutor's misconduct in *Fleming* significantly exceeds that committed by the prosecuting attorney in this case, it's holding provides little direction. In circumstances such as the current case, the holdings of *Classen*, *Copeland*, *Warren*, and *Hart* are more instructive.

Nor does *State v. Davenport* support Mr. Hylton's argument. That case differs from the facts of this case because there existed in *Davenport* evidence in the record that "clearly supports the conclusion that the jury had considered the improper statement during deliberation..." *Davenport*, 100 Wn.2d at 764. In closing, the prosecutor lead the jury to believe that they could convict the

defendant for being an accomplice although he had not been charged for that crime. Because accomplice to burglary had not been charged, the judge had not instructed the jury in the law of accomplice liability before closing arguments. *Davenport*, 100 Wn.2d at 759. During deliberations, the jury indicated that they were considering whether the defendant had committed the uncharged crime when they requested clarification of the meaning for "accomplice". *Id.* Based upon this evidence, the Supreme Court held that there was a likelihood that the prosecutorial misconduct had affected the jury's verdict. No similar evidence exists here.

Next, Mr. Hylton argues that the simplicity of the prosecutor's interpretation of the reasonable doubt standard made it susceptible to adoption by the jury. This argument ignores that possibility of a curative instruction given by the court to correct the prosecutor's misleading comments. It is difficult to conceive that the temptation of using the prosecutor's more simple, although somewhat confusing comments, would be so great as to overcome an instruction from the court to ignore the statements because they are inconsistent with the law. Certainly, Mr. Hylton has given the court no reason that this might be the case.

Mr. Hylton's next argument is similar in nature. He argues that any curative instruction given by the court would have been rendered impotent by the prosecutor's echoing and distorting the language of the court's "beyond a reasonable doubt" instruction. Appellant's Brief at 9. He provides no authority for this assertion, nor any reason why this might be true. It is an improbable suggestion. His argument conceives of the prosecutor's statements as part of an insidious manipulation of the jury that had the force of an emotional plea or subliminal message. Apparently, he believes that once the jurors heard the statements, they became helplessly confused. But this is not borne out by the record or by law. The prosecutor's statements were not a model of clarity themselves ("if you think... if you believe... if in your mind it's reasonable to think..." RP 83-84) and it is presumed that the jury is able to follow the court's instruction. Warren, 165 Wn.2d at 28. While the prosecutor's distortion and oversimplification of the reasonable doubt instruction may constitute misconduct, there is no reason to believe that the prosecutor's language so overwhelmed the jury that it was unable to ignore the simple remarks if so instructed by the judge. Hylton's argument does not meet his burden.

Mr. Hylton's argument also assumes the trial court would have simply repeated its original instruction in response to an objection from Mr. Hylton. However, normally curative instructions inform the jury that the State's comment was improper and not to be considered. Courts do not usually merely parrot the language already imparted to the jury. And there is no reason to suspect the trial court here would have done anything less. The purpose of a curative instruction is to reverse the impact of the misconduct, not merely to dilute it by repetition of instructions. Moreover, the very act by a judge of issuing a curative instruction in response to an objection indicates to a jury that the objected statement was in error. In this case, an additional instruction would have eliminated all prejudice.

Finally, while recognizing that pro se litigants are held to the same standard as lawyers, Hylton argues that his choice to represent himself is a basis for finding the prosecutor's statements ill-intentioned. Appellant's Brief at 10. He was right in the first instance: a pro se litigant is not given special treatment due to his self-representation. The trial court informed Mr. Hylton of the risks to act pro se. 2/28/08 RP at 8.

Regardless, it is evident from the context of the prosecuting attorney's statements that they were the result of a careless attempt to elucidate "reasonable doubt," not a devious attempt to place a different standard of proof in the minds of the jury. The statements did not exploit Mr. Hylton's lack of legal training.

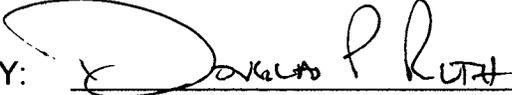
Mr. Hylton has not met his burden. He has failed to demonstrate that upon objection to the prosecutor's comments, an instruction from the court could not have cured any prejudice created by the comments. The court issued jury instructions that correctly defined the nature of "beyond a reasonable doubt". Mr. Hylton has not challenged these instructions or identified any circumstances that would overcome the presumption that the jury followed the instructions. He has not identified how the remarks were flagrant and there is no evidence that they were ill-intentioned. He has failed to show that there is any possibility, let alone a substantial likelihood, that but for the prosecutor's statements, the jury would have acquitted him. Accordingly, relief is not warranted.

#### CONCLUSION

For the foregoing reasons, this Court should affirm Hylton's conviction and remand for a new trial.

RESPECTFULLY SUBMITTED this 10 day of March, 2009.

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\_\_\_\_\_  
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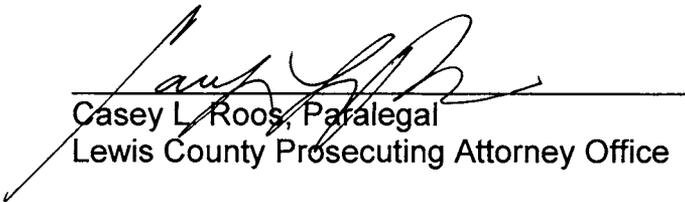
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DEPUTY

Ms. Casey Roos, paralegal for Douglas Ruth, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On March 10, 2006 the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

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DATED this 10<sup>th</sup> day of March, 2009, at Chehalis, Washington.

  
\_\_\_\_\_  
Casey L. Roos, Paralegal  
Lewis County Prosecuting Attorney Office

Declaration of  
Mailing