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DIVISION II
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STATE OF WASHINGTON
BY  _____
DEPUTY

No. 37920-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Ralph Grammont,

Appellant.

Clallam County Superior Court Cause No. 07-1-00285-4

The Honorable Judge Ken Williams

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Grammont's Fifth and Fourteenth Amendment privilege against self-incrimination by admitting his unwarned custodial statements.
2. The trial court erred by finding that Mr. Grammont was subjected to custodial questioning that was exempt from *Miranda*.
3. The trial court erred by failing to exclude Mr. Grammont's statements absent proof they were the product of a rational intellect and a free will despite Mr. Grammont's alcohol consumption.
4. The prosecutor's misconduct in closing violated Mr. Grammont's Fourteenth Amendment right to due process.
5. The prosecutor committed misconduct by expressing her personal opinion that Mr. Grammont lied in his testimony, and that state witnesses told the truth.
6. The prosecuting attorney committed misconduct by suggesting that the jury could convict simply by weighing Mr. Grammont's testimony against that of Cole and Carroll.
7. The trial court erred by overruling Mr. Grammont's objections to the prosecutor's misconduct.
8. Mr. Grammont was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
9. Defense counsel was ineffective by objecting to only two instances of prosecutorial misconduct in closing.
10. The trial court exceeded its authority by ordering a mental health evaluation as a condition of community custody without following the mandatory statutory procedure.
11. The trial court's restitution order violated Mr. Grammont's Fourteenth Amendment right to due process.
12. The trial erred by denying Mr. Grammont's request for more information about the state's restitution claim.

13. The trial court's restitution order was based on a misunderstanding of the law.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person has a constitutional privilege against self-incrimination, which requires exclusion of a suspect's answers to custodial interrogation absent *Miranda* warnings and a proper waiver. Mr. Grammont was subjected to custodial interrogation without *Miranda* warnings and without waiving his rights. Should the trial court have excluded Mr. Grammont's statements during the state's case-in-chief?

2. For *Miranda* purposes, a person is in custody whenever a reasonable person would feel he or she was not at liberty to stop police questioning and leave. In this case, undisputed testimony established that two officers directed Mr. Grammont to sit on a couch and questioned him for 5-10 minutes, that he did not believe he was free to leave, that he assumed he was under arrest, and that the officers confronted him with the fact that alleged victim was bleeding. Would a reasonable person in Mr. Grammont's circumstances have felt that they were not free to terminate the interrogation and leave?

3. Except for routine booking questions asked for record keeping purposes, all custodial questions constitute interrogation and are subject to the rule in *Miranda*. In this case, the officers asked Mr. Grammont about what had happened prior to their arrival. Did the officers questioning constitute interrogation?

4. A prosecutor may not make an argument that shifts the burden of proof. Here, the prosecutor suggested that the jury should convict by comparing Mr. Grammont's testimony with that of prosecution witnesses. Did the prosecutor commit misconduct that violated Mr. Grammont's Fourteenth Amendment right to due process?

5. A prosecutor may not express a personal opinion on the credibility of a witness. Here, the prosecutor expressed her personal opinion that Mr. Grammont lied and that state witnesses told the truth. Did the prosecutor commit misconduct that violated Mr. Grammont's Fourteenth Amendment right to due process?

6. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, defense counsel objected to only two instances of prosecutorial misconduct in closing. Was Mr. Grammont denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

7. A sentencing court may require an offender to obtain a mental health evaluation as a condition of community custody only after reviewing a presentence investigation report and finding that the offender likely has a mental illness that influenced the offense. In this case, the trial judge did not review a presentence report and did not find that Mr. Grammont likely had a mental illness that influenced the offense. Did the trial court exceed its authority by ordering a mental health evaluation as a condition of community custody without following the mandatory statutory procedure?

8. Due process requires a restitution order to be based on reliable evidence, which the defendant has an opportunity to refute. Here, the court treated the Crime Victim Fund's itemized statement to be conclusive proof of the appropriate amount of restitution, and denied Mr. Grammont's motion for additional information on the underlying amounts. Did the trial court's erroneous restitution order violate Mr. Grammont's Fourteenth Amendment right to due process?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Ralph Grammont, age 65, and Selma Cole, age 79, had been romantically involved and living together for about five or six years. RP (6/10/08 am) 46-48; RP (6/10/08 pm) 17, 31.¹ The couple invited Ms. Cole's daughter, Linda Carroll, who was 55, over for dinner. RP (6/9/08) 25. Mr. Grammont prepared a lavish meal that included alcoholic beverages. RP (6/9/08) 26-27; RP (6/10/08 am) 49. Both Mr. Grammont and Ms. Carroll consumed significant amounts of alcohol over the course of the evening, and both were affected by it. RP (3/6/08) 25, 27; RP (6/9/08) 27, 53; RP (6/10/08 am) 13, 17; RP (6/10/08 pm) 21.

At some point, Mr. Grammont and Ms. Carroll were outside smoking. RP (6/9/08) 27. She claimed he masturbated in front of her, but Mr. Grammont said that he confronted her about being too harsh and judgmental of Ms. Cole's parenting. RP (6/9/08) 31, 44-45; RP (6/10/08 am) 64, 70-72; RP (6/10/08 pm) 21, 25-26. Back inside the house, Ms. Cole urged Ms. Carroll to spend the night since she was intoxicated, but

¹ Three different volumes of Verbatim Report of Proceedings were filed relating to June 10, 2008. Court Reporter McAneny filed her portion of the 6/10/08 hearing on 10/29/08, and that will be referred to in this brief as RP (6/10/08 am). Court Reporter Hamilton filed her portion of the 6/10/08 hearing on 10/29/08, and that will be referred to in this brief as RP (6/10/08 pm). Portions of Hamilton's VRP were not complete, and so McAneny filed a supplemental VRP covering portions from the afternoon on 2/17/09, and this brief will refer to that portion as RP (6/10/08 supp.).

Ms. Carroll said she intended to leave. RP (6/9/08) 32; RP (6/10/08 am) 52. Both Ms. Carroll and Mr. Grammont said that the other attacked them and both claimed self-defense. RP (6/9/08) 33-36, 54; RP (6/10/08 pm) 27-28, 30, 31-34, 45-46.

Ms. Cole called 911, and the call was recorded. RP (6/9/08) 35; RP (6/10/08 am) 57-58. The interaction between Mr. Grammont and Ms. Carroll was recorded through the dispatch system, as was an interaction between Mr. Grammont and the police officers who responded to the 911 call. RP (3/6/08) 14-15. On the recording, Mr. Grammont told the officers he didn't want them to take his knife from him, and he claimed that he'd been in a fight with a man.² RP (3/6/08) 24-26.

The police arrested Mr. Grammont. RP (6/10/08 am) 19. He was charged with Assault in the Second Degree. CP 23.

Mr. Grammont moved to suppress the recording of his statements to the officers. Brief in Support of CrR 3.5 Motion, Opposition to Defense Motion to Suppress, Supp. CP. At a CrR 3.5 hearing, the state called no

² He explained that he didn't want the officers to take his knife because it was valuable, and was not used in the incident. ~~RP (3/6/08) 24~~. He also explained that he said that he'd been fighting with a man because he thought Linda Cole had left and he believed the police would always arrest the man if they responded to an argument between a man and a woman. ~~RP (3/6/08) 25-26~~.

witnesses, but introduced the 911 recording into evidence. RP (3/6/08) 14-18.

Mr. Grammont argued that his statements were the result of custodial interrogation without benefit of *Miranda* warnings. He testified that the police sat him down on the couch and interrogated him for five to ten minutes. RP (3/6/08) 21-23. Mr. Grammont testified that he'd consumed cocktails and wine, and was legally intoxicated when the officers arrived. RP (3/6/08) 26-27.

On the issue of whether or not Mr. Grammont was in custody for *Miranda* purposes, the court ruled as follows:

In this case there was, certainly police had arrived at Mr. Grammont's home. He was inside his home. Police came into his home. Mr. Grammont says they told him to sit down. Frankly whether or not someone would believe at that point they were not free to go, reasonable in the opinion of the Court that that likely is certainly approaching that situation. RP (3/6/08) 36.

However, the court admitted Mr. Grammont's statements, concluding that the police had not interrogated Mr. Grammont because the officers' questions were not "designed to elicit incriminating information but rather questioning designed to determine what in fact had occurred that caused them to be called." RP (3/6/08) 36. The trial court did not enter written findings of fact and conclusions of law.

Mr. Grammont renewed his motion to exclude the 911 recording at the start of trial and again when it was offered, but the court overruled the objection. RP (6/9/08) 15-18, 23; RP (6/10/08 am) 57-59, 88-89. The recording was played for the jury. RP (6/10/08 am) 109; Exhibits 15 and 17, Supp. CP.

Prior to trial, Mr. Grammont asked the court to appoint a new attorney twice. RP (4/11/08) 5-6. He told the court that his attorney wasn't working with him or adequately investigating the case. RP (4/11/08) 6-8. The court denied the request both times. RP (4/11/08) 5, 10-11.

The defense also contested the nature and extent of Ms. Carroll's claimed injuries during the jury trial. RP (6/9/08) 56-61, 78-100; RP (6/10/08 am) 36-43; RP (6/10/08 supp.) 6-23.

During closing argument, the prosecuting attorney told the jurors:

Officer Wright, when he testified, said the evidence is what the evidence is, and the evidence in this case shows that someone is lying, because you have two radically different versions of the event. ...

The evidence shows that someone is lying. ...

The evidence shows that someone is lying. ...

The evidence shows that someone is lying, but the evidence also shows that someone is telling the truth.

MR. FESTE: Your Honor, I want to object to this characterization {INAUDIBLE}

THE COURT: Ms. Lundwall, response?

MS. LUNDWALL: I can comment on what the evidence shows.

THE COURT: I'm going to overrule the objection.

...

MS. LUNDWALL: Someone was telling the truth, and the stains on her shirt corroborate that. ...

Also consider what the credibility of the witness is. You have the defendant who told you that he fabricated another person in the house because he believed that when a man and a woman fight, the man goes to jail. And he categorized that as poor judgment. So you have someone who will freely lie in order to avoid getting in trouble, and this is not something that he appeared to have any moral qualms about. In fact, he seemed to feel when he testified that he was perfectly justified in making something up to avoid the consequences of his actions.

This is someone who will lie to avoid trouble.

MR. FESTE: Objection to that, Your Honor.

THE COURT: The objection is overruled.

RP (6/11/08) 23, 25-27, 29.

The jury convicted Mr. Grammont as charged. CP 9. The court did not order or review a presentence investigation. At sentencing, the court ordered Mr. Grammont to undergo a mental health evaluation and follow its recommendations. CP 17; RP (6/24/08) 28. Mr. Grammont appealed.³ Notice of Appeal, filed DATE, CP XX.

A restitution hearing was held four months later. RP (10/23/08) 6-29. At the hearing, the state relied on an itemized report from the Crime Victim's Compensation fund, listing payments made for Ms. Carroll's claims of injury. Restitution Exhibit 3, Supp. CP; RP (10/23/08) 6-12.

³ A separate Notice of Appeal was filed to contest the restitution findings, and the Court of Appeals consolidated the matters in an order dated February 26, 2009.

Mr. Grammont filed a motion requesting additional information. RP (10/23/08) 6-9; Motion for More Definite Statement re: Restitution Claim, Supp. CP. The court denied the request, and made the following comment:

There's a complete itemization -- I am not-- frankly, under the statute where Crime Victim's pays amount unless there's some reason to believe that they were not payable under the statute, the statute simply says crime victim gets reimbursed for restitution.

There are 2 modes of proving restitution and one is that Crime Victim's paid it to the victim, they're entitled to be reimbursed and we rely on them to get it right, so unless there's some indication they got it wrong, the Court's pretty much bound by that.

RP (10/23/08) 10.

The state then presented testimony of Ms. Carroll supporting a claim of an additional \$349.92. RP (10/23/08) 11-24.

The court ordered Mr. Grammont to pay \$10,182.92 to the Crime Victim's Fund, and \$349.42 to Ms. Carroll. RP (10/23/08) 29; Order Setting Restitution, Supp. CP. This timely appeal followed. CP 8; Notice of Appeal filed January 12, 2009. Supp. CP.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. GRAMMONT'S FIFTH AND FOURTEENTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION BY ADMITTING HIS UNWARNED CUSTODIAL STATEMENTS.

The Fifth Amendment to the U.S. Constitution provides that “No person shall... be compelled in any criminal case to be a witness against himself.” U.S. Const. Amend. V. The privilege against self-incrimination is applicable to the states through the due process clause of the Fourteenth Amendment.⁴ U.S. Const. Amend. XIV; *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). The law presumes that statements made by a suspect while in custody were compelled in violation of the privilege against self-incrimination. *State v. Corn*, 95 Wn. App. 41, 57, 975 P.2d 520 (1999).

Two standards determine the admissibility of custodial statements: the due process “voluntariness” test, and the *Miranda* test. *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) (citing *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)); *State v. Nelson*, 108 Wn.App. 918, 924, 33 P.3d 419 (2001).

⁴ Similarly, Article I, Section 9 of the Washington State Constitution, provides that “No person shall be compelled in any case to give evidence against himself...” Wash. Const. Article I, Section 9. Despite the difference in wording, both provisions have been held to provide the same level of protection. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).

A. Mr. Grammont's unwarned custodial statements were obtained in violation of *Miranda* and should not have been admitted during the state's case-in-chief.

To implement the privilege against self-incrimination and to reduce the risk of coerced confessions, an accused person must be informed of her or his rights prior to custodial interrogation. *Seibert*, at 608. Failure to provide the required warnings and obtain a waiver requires exclusion of any statements obtained. *Seibert*, at 608. It is "clearly established" that statements taken in the absence of counsel are inadmissible unless the government meets its heavy burden of showing that the suspect made a voluntary, knowing, and intelligent waiver of her or his rights. *Hart v. Attorney General of Florida*, 323 F.3d 884, 891-892 (C.A.11, 2003) (citing *Miranda*, at 475).

Custodial interrogation occurs whenever a person in custody is subjected to "either express questioning or its functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Thus any express questions posed to a person in custody must be preceded by *Miranda* warnings.⁵ *Rhode Island v. Innis*.

⁵ The sole exception is for routine booking questions asked for record-keeping purposes. *Pennsylvania v. Muniz*, 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990).

Whether or not a person is ‘in custody’ for *Miranda* purposes rests upon “[t]wo discrete inquiries...: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.” *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995) (footnote omitted). The latter determination is a mixed question of law and fact subject to *de novo* review. *Keohane*, at 112; see *State v. Sutherby*, ___ Wn.2d ___, ___, 204 P.3d 916, 922 (2009).

A reviewing court examines the totality of the circumstances and decides “whether a reasonable person in such circumstances would conclude after brief questioning that he or she would not be free to leave.” *United States v. Brobst*, 558 F.3d 982, 995 (C.A.9, 2009) (citation and internal quotation marks omitted). Relevant factors include (1) the language used to summon the suspect, (2) the extent to which the suspect is confronted with evidence of guilt, (3) the physical surroundings, (4) the duration of the detention, and (5) the degree of pressure applied to detain the individual. *Brobst*, at 995. If a reasonable person would not feel at liberty to terminate the interrogation and leave, the circumstances are

deemed equivalent to formal arrest and the person is ‘in custody’ for *Miranda* purposes. *Keohane*, at 112.

Here, at the CrR 3.5 hearing, the prosecutor presented no testimony. RP (3/6/08) 14-19. Instead, the state introduced a copy of the 911 recording, which – because the phone remained off the hook after the police arrived—included the officers’ interrogation of Mr. Grammont. RP (3/6/08) 18; Exhibit 15, Supp. CP. Mr. Grammont testified that the officers told him to sit on the couch, that he was not free to leave, that he assumed he was under arrest, that he was questioned for 5-10 minutes by two officers, and that (during the questioning) they confronted him with the fact that Cole was bleeding. RP (3/6/08) 21-23, 26.

Under these circumstances, a reasonable person would not have felt at liberty to stop the questioning and leave. Accordingly, Mr. Grammont was in custody. *Brobst, supra; Keohane, supra*. Because questions were posed to him, he was subject to interrogation. *Rhode Island v. Innis, supra*. The state did not introduce any evidence suggesting that he waived his right to counsel and his right to remain silent; accordingly, his statements should not have been admitted at trial. *Keohane, supra*.

The trial court’s decision admitting Mr. Grammont’s unwarned custodial statements was erroneous. The trial court found that Mr.

Grammont was likely in custody. RP (3/6/08) 36. However, the court decided that Mr. Grammont was not interrogated because the officers' questions were not "designed to elicit incriminating information but rather questioning designed to determine what in fact had occurred that caused them to be called." RP (3/6/08) 36. This violates the standard set forth in *Miranda* and *Rhode Island v. Innis*.

The court's analysis should have ended when it determined that the officers posed express questions to Mr. Grammont.⁶ The U.S. Supreme Court has created only one exception to the *Miranda* requirement, and that is for routine booking questions asked for record-keeping purposes. *Pennsylvania v. Muniz, supra*. All other express questions constitute interrogation, regardless of their purpose. There is no *Miranda* exception for "questioning designed to determine what in fact had occurred..." RP (3/6/08) 36.

Mr. Grammont was subjected to custodial interrogation without benefit of *Miranda* warnings. The police did not obtain a waiver of his rights. Because of this, his statements should not have been admitted

⁶ Only non-questions—statements or conduct that are the functional equivalent of express questioning—are subjected to additional analysis: "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, at 301 (footnote omitted).

during the state's case-in-chief. *Miranda, supra*. Mr. Grammont's conviction must be reversed and his case remanded to the trial court for a new trial, with instructions to exclude the statements. *Keohane, supra*.

B. The state failed to prove that Mr. Grammont's statements were voluntary since his alcohol consumption may have made him artificially compliant when he was questioned.

The privilege against self-incrimination absolutely precludes use of any involuntary statement against an accused in a criminal trial, for any purpose. *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). This restriction is "equally applicable to a drug-induced statement." *Townsend v. Sain*, 372 U.S. 293, 307, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963) (overruled on other grounds by *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992)).

If by reason of extreme intoxication, a statement is not "the product of a rational intellect and a free will... it is not admissible and its reception in evidence constitutes a deprivation of due process." *Gladden v. Unsworth*, 396 F.2d 373, 380-381 (1968) (citing *Townsend v. Sain, supra*). This is so whether the statement is spontaneous or obtained through interrogation. *Gladden v. Unsworth*, at 380.

Here, Mr. Grammont's unrefuted testimony established that he'd had cocktails, wine, and more drinks shortly before making statements. RP (3/6/08) 26-27. He told the court that he was legally intoxicated when

the police came. RP (3/6/08) 27. The state provided no testimony about Mr. Grammont's condition at the time of his statement. RP (3/6/08).

Under these circumstances, the prosecutor failed to establish that Mr. Grammont's statements were voluntary. His convictions must be reversed and the case remanded for a new trial, with instructions to exclude the statements. *Gladden v. Unsworth, supra*.

II. THE PROSECUTOR'S MISCONDUCT IN CLOSING VIOLATED MR. GRAMMONT'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A prosecuting attorney is a quasi-judicial officer, charged with the duty of ensuring that an accused receives a fair trial. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P. 3d 899 (2005). Prosecutorial misconduct requires reversal whenever the prosecutor's improper actions prejudice the accused person's right to a fair trial. *Boehning*, at 518.

Misconduct may be raised for the first time on appeal under two circumstances.

First, a reviewing court will address prosecutorial misconduct when it amounts to a manifest error affecting a constitutional right. RAP 2.5(a); *State v. Jones*, 71 Wn.App. 798, 809-810, 863 P.2d 85 (1993)

(“Jones I”)⁷. A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).⁸ Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed. *State v. Flores*, 164 Wn.2d 1, 25, 186 P.3d 1038 (2008). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Flores*, at 25. The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

Second, prosecutorial misconduct may be reviewed absent a defense objection if it is “so flagrant and ill-intentioned” that no curative

⁷ *But see State v. Gregory*, 158 Wn.2d 759, 808 n. 24, 147 P.3d 1201 (2006) (“There has been some disagreement as to the impact of a failure to object at trial upon a claim on appeal that a prosecutor’s argument amounted to an improper comment on a constitutional right.”)

⁸ The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

instruction would have negated its prejudicial effect. *State v. Henderson*, 100 Wn. App. 794, 800, 998 P.2d 907 (2000).

A. The prosecutor committed reversible misconduct by expressing her personal opinion that Mr. Grammont lied in his testimony, and that prosecution witnesses told the truth.

It is misconduct for a prosecutor to express a personal opinion as to the credibility of a witness. *State v. Horton*, 116 Wn.App. 909, 921, 68 P.3d 1145 (2003) (“Horton I”); *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984); *United States v. Frederick*, 78 F.3d 1370, 1378 (9th Cir. 1996), citing *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir.1980), cert. denied, 452 U.S. 942, 101 S.Ct. 3088, 69 L.Ed.2d 957 (1981).

Misconduct occurs when it is clear that counsel is expressing a personal opinion rather than arguing an inference from the evidence. *State v. Price*, 126 Wn.App. 617, 653, 109 P.3d 27 (2005); *State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990); *State v. Robinson*, 44 Wn.App. 611, 722 P.2d 1379 (1986).

Here, the prosecutor expressed her personal opinions about Mr. Grammont’s credibility. In particular, she repeatedly called Mr. Grammont a liar. RP (6/11/08) 23, 25, 26, 27, 29.

This misconduct prejudiced Mr. Grammont, and was so flagrant and ill-intentioned that no curative instruction would have eliminated its effect. The trial boiled down to a credibility contest between Mr.

Grammont on the one hand and Carroll and her mother on the other. By putting her thumb on the scale, the prosecutor improperly influenced the jury to decide this critical issue based on improper considerations.

Accordingly, the convictions must be reversed and the case remanded for a new trial. *Henderson*.

B. The prosecuting attorney committed misconduct by suggesting that the jury could convict simply by weighing Mr. Grammont's testimony against that of Cole and Carroll.

A prosecuting attorney commits misconduct by making a closing argument that shifts the burden of proof. *United States v. Perlaza*, 439 F.3d 1149, 1171 (9th Cir., 2006). Such misconduct affects a constitutional right and requires reversal of the conviction unless the error is harmless beyond a reasonable doubt. *State v. Moreno*, 132 Wn. App. 663, 672, 132 P.3d 1137 (2006); *see also Perlaza*, at 1171.

It is misconduct for a prosecutor to argue that acquittal requires the jury to find that prosecution witnesses are either lying or mistaken. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). Prosecution arguments of this sort are *per se* flagrant and ill-intentioned. *See Fleming*, at 214 (Because the prosecutor's "improper argument was made over two years after the opinion" setting forth the rule, the court "therefore deem[s] it to be a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial.")

Here, the prosecutor repeatedly argued that Mr. Grammont lied and Carroll and Cole told the truth. RP (6/11/08) 23, 25, 26, 27, 29. Implicit in this argument was a suggestion that the jury could convict simply by weighing the conflicting testimony and deciding who told the truth. This is improper because jurors could decide they believed the prosecution witnesses, but still vote to acquit because they had a reasonable doubt about Mr. Grammont's guilt.

By asking the jury to weigh the Mr. Grammont's testimony against that presented on behalf of the prosecution, the state unconstitutionally shifted the burden of proof and violated Mr. Grammont's right to due process. This error was flagrant and ill-intentioned rather than trivial, formal, or merely academic. *Fleming, supra; Flores, supra.*

Credibility was a critical issue at trial. By suggesting that the jurors could vote to convict simply by weighing conflicting testimony and deciding who told the truth, the prosecutor violated Mr. Grammont's Fourteenth Amendment right to due process. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Fleming, supra.*

III. MR. GRAMMONT WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL ONLY OBJECTED TO TWO INSTANCES OF PROSECUTORIAL MISCONDUCT IN CLOSING .

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). It is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227

(2006) (“Horton II”). An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland*); see also *State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance; however, this presumption is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, at 130. Any trial strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

A failure to object to improper closing arguments is objectively unreasonable “unless it ‘might be considered sound trial strategy.’”

Hodge v. Hurley, 426 F.3d 368, 385 (C.A.6, 2005) (quoting *Strickland*, at 687-88). Under most circumstances,

At a minimum, an attorney who believes that opposing counsel has made improper closing arguments should request a bench conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection out [of] the hearing of the jury.... Such an approach preserves the continuity of each closing argument, avoids calling the attention of the jury to any improper statement, and allows the trial judge the opportunity to make an appropriate curative instruction or, if necessary, declare a mistrial.

Hurley, at 386 (citation omitted).

In this case, defense counsel made only two objections to the prosecutor's improper closing arguments. RP (6/11/08) 26, 29. These objections confirm that counsel had no strategic reason to allow the prosecutor to shift the burden of proof and express personal opinions. Indeed, there is no conceivable strategic reason for counsel's failure to object to each instance of misconduct. Defense counsel should have objected to each instance of misconduct and requested a mistrial. If the error is not reviewable under RAP 2.5(a) (or under the "flagrant and ill-intentioned" standard), Mr. Grammont was denied the effective assistance of counsel. *Hurley, supra*. His conviction must be reversed and the case remanded for a new trial.

IV. THE TRIAL COURT EXCEEDED ITS AUTHORITY BY ORDERING A MENTAL HEALTH EVALUATION WITHOUT FOLLOWING THE MANDATORY STATUTORY PROCEDURE.

RCW 9.94A.505(9) permits a sentencing court to order a “mental status evaluation” as a condition of community placement or community custody, but only under certain conditions. RCW 9.94A.505(9) provides as follows:

The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

RCW 9.94A.505(9). Failure to comply with the statute requires that the condition relating to the mental health evaluation be stricken. *State v. Brooks*, 142 Wn.App. 842, 176 P.3d 549 (2008); *State v. Jones*, 118 Wn.App. 199, 76 P.3d 258 (2003) (“Jones II”).

Here, the trial court failed to comply with RCW 9.94A.505(9). The court did not request or consider a presentence report, and did not make a finding that reasonable grounds exist to believe Mr. Grammont is mentally ill and that his condition likely influenced the offense. RP

(6/24/08) 4-30. Accordingly, the requirement must be stricken from the judgment and sentence. *Brooks, supra*.

V. THE TRIAL COURT VIOLATED MR. GRAMMONT'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY DENYING HIS REQUEST FOR INFORMATION UNDERLYING THE STATE'S RESTITUTION CLAIM AND BY APPLYING THE WRONG LEGAL STANDARD IN IMPOSING RESTITUTION.

A trial court's authority to order restitution is purely statutory. *State v. Smith*, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). *See also State v. Tribble*, 96 Wn.App. 662, 664, 980 P.2d 794 (1999) (where the trial court fails to follow the provisions of the governing statute, its restitution order is void). A restitution order is reviewed for an abuse of discretion. *State v. Morse*, 45 Wn.App. 197, 199, 723 P.2d 1209 (1986). The trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). This includes the application of an incorrect legal analysis or other error of law. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007).

The meaning of a statute is a question of law that reviewed *de novo*, with the objective of ascertaining and carrying out legislative intent. *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). Where the statute's meaning is plain, its terms are given effect without resort to judicial construction. *J.M.*, at 480.

Under RCW 9.94A.753(3), restitution “shall be based on easily ascertainable damages for ... actual expenses incurred for treatment for injury to persons.” Where a crime victim is entitled to benefits under the Crime Victims Compensation Act (CVCA), the trial court “shall order restitution in all cases.” RCW 9.94A.753(7); *see also Tribble*, at 664 (L & I may seek restitution if statutory benefits have been paid as a result of the defendant's crime). The CVCA's purpose is to advance “compelling state interests in compensating the victims of crime and in preventing criminals from profiting from their crimes.” RCW 7.68.300.

Although RCW 9.94A.753(7) mandates an order of restitution under the CVCA, it does not mandate that the order equal the amount requested. The trial court has discretion to determine the amount of restitution. *State v. Mark*, 36 Wn.App. 428, 433, 675 P.2d 1250 (1984). *See also State v. Mead*, 67 Wn.App. 486, 490, 836 P.2d 257 (1992) (the size of a restitution award is within the trial court's discretion).

Because the trial court determines the amount of restitution, it must have a sufficient evidentiary basis on which to do so. *State v. Pollard*, 66 Wn.App. 779, 784, 834 P.2d 51 (1992). Evidence supporting restitution is sufficient “if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.” *Mark*, at 434.

Due process requires a restitution order to be based on reliable evidence, which the defendant has an opportunity to refute. *Pollard*, at 784-85.

In this case, the trial judge misunderstood the effect of payment under the CVCA. When defense counsel requested additional information regarding the restitution claim, the court denied the request and made the following comments:

There's a complete itemization -- I am not-- frankly, under the statute where Crime Victim's pays amount unless there's some reason to believe that they were not payable under the statute, the statute simply says crime victim gets reimbursed for restitution.

There are 2 modes of proving restitution and one is that Crime Victim's paid it to the victim, they're entitled to be reimbursed and we rely on them to get it right, so unless there's some indication they got it wrong, the Court's pretty much bound by that.

RP (10/23/08) 10.

In adopting the CVCA request, the court noted that “the crime victim compensation fund is zealously guarded by the State, and they don't pay bills they are not satisfied are related to the victims of the crime.” RP (10/23/08) 29.

Although Washington courts do allow for estimated damages in restitution cases, there still must be a sufficient evidentiary basis for estimating the loss not subject to speculation or conjecture. *State v. Tobin*, 132 Wn.App. 161, 173, 130 P.3d 426 (2006) *aff'd*, 161 Wn.2d 517, 166

P.3d 1167 (2007). Here, the trial judge applied the wrong legal standard in adopting the CVCA printout as the evidentiary basis for restitution.

A similar error was made in *State v. Bunner*, 86 Wn.App. 158, 936 P.2d 419 (1997). In that case, the defendant challenged the state's proof on a claim paid by the Department of Social and Human Services (DSHS). The evidence in *Bunner* consisted of a DSHS medical recovery report itemizing amounts the State paid for the victim's medical treatment and counseling. *Bunner*, at 159. The trial court relied on the fact that DSHS had already made a determination to pay benefits as sufficient proof, stating, “[T]he Office of Provider Services made a judgment that ... these were expenses that were necessitated by this crime, whether or not the proportionate amounts that were paid were because of limitation of funds or because of some indication of-or some adjudication of proximate cause, I have no idea, but it just seems to me that there has already been a determination made.” *Bunner*, at 159. The Court of Appeals held that this inference was insufficient evidence and violated the defendant’s right to due process. *Bunner*, at 160.

Here, as in *Bunner*, the trial court applied the wrong legal standard by relying on the itemized report as sufficient proof to support its restitution order. This abuse of discretion violated Mr. Grammont’s Fourteenth Amendment right to due process. The court’s restitution order

must be vacated and the case remanded to the trial court. *Bunner, supra*.
On remand, the state must provide the additional information requested by
Mr. Grammont. Before imposing restitution, the court must hold an
evidentiary hearing, and may not rely on payment from the CVCA fund as
conclusive proof that the amounts are correct.

CONCLUSION

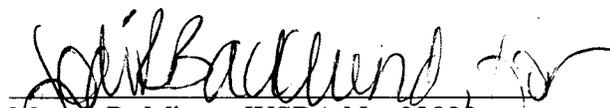
For the foregoing reasons, Mr. Grammont's conviction must be
reversed and the case remanded for a new trial. In the alternative, if the
conviction is not reversed, the requirement that Mr. Grammont obtain a
mental health evaluation must be stricken, and the case must be remanded
for a new restitution hearing.

Respectfully submitted on May 15, 2009.

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DIVISION II

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STATE OF WASHINGTON
BY:  DEPUTY

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Ralph Grammont
223 East 4th St., Suite 20
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and to:

Clallam County Prosecuting Attorney
223 E. 4th Street, Suite 11
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on May 15, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 15, 2009.



Jodi R. Backlund, WSBA No. 22917
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