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COURT OF APPEALS
DIVISION II

09 MAY 12 PM 2:08

STATE OF WASHINGTON

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No. 38523-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Daniel Lewis, Jr.,

Appellant.

Grays Harbor County Superior Court Cause No. 08-1-00346-1

The Honorable Judge David Edwards

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Lewis's conviction was entered in violation of his Fourteenth Amendment right to due process.
2. The trial judge erred by failing to instruct the jury on self-defense.
3. The trial judge violated Mr. Lewis's unqualified right to have the jury pass on the inferior degree offense of Robbery in the Second Degree.
4. The prosecutor committed misconduct that created a manifest error affecting Mr. Lewis's Fourteenth Amendment right to due process.
5. The prosecutor committed misconduct that was so flagrant and ill-intentioned that no curative instruction would have alleviated the resulting prejudice.
6. Mr. Lewis was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
7. If the absence of self-defense instructions is not preserved for review, then Mr. Lewis was denied the effective assistance of counsel.
8. Defense counsel was ineffective for failing to introduce available impeachment material, because the defense strategy relied on discrediting Crocker.
9. If the prosecutor's misconduct is not preserved for review, then Mr. Lewis was denied the effective assistance of counsel.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the court to instruct the jury on all essential elements of an offense. Where an accused person presents some evidence of self-defense, the absence of self-defense becomes an element that the state must prove beyond a reasonable doubt. Did the trial court's failure to instruct the jury on self-defense violate Mr. Lewis's Fourteenth Amendment right to due process?

2. A criminal defendant is entitled to jury instructions on an inferior degree offense if there is evidence that only the inferior offense was committed. The evidence here, when taken in a light most favorable to Mr. Lewis, established that he committed only Robbery in the Second Degree. Did the trial judge's refusal to instruct on manslaughter violate Mr. Lewis's Fourteenth Amendment right to due process and his state constitutional right to a jury trial?

3. A prosecutor may not make an argument that shifts the burden of proof. Here, the prosecutor suggested that the jury could only acquit if it found Crocker to be lying and Mr. Lewis to be telling the truth. Did the prosecutor commit misconduct amounting to a manifest error affecting Mr. Lewis's Fourteenth Amendment right to due process?

4. A prosecutor may not express a personal opinion on the credibility of a witness. Here, the prosecutor expressed his personal opinion that Crocker "told the truth about what happened, that he had been beaten up and robbed and that his money and his wallet and his checkbook had been rifled through, his money had been taken." Was the prosecutor's misconduct so flagrant and ill-intentioned that reversal is required even absent a defense objection?

5. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, Mr. Lewis's trial strategy involved a claim of self-defense, but the record does not establish whether or not defense counsel proposed instructions on self-defense. If the self-defense claim is not preserved for review, was Mr. Lewis denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

6. An accused person is denied the effective assistance of counsel when her or his attorney provides deficient performance that prejudices the defendant. Here, although the defense strategy required counsel to discredit Crocker, counsel failed to impeach Crocker with available impeachment material. Was Mr. Lewis

denied his constitutional right to the effective assistance of counsel?

7. Where a prosecutor commits misconduct in closing, a defense attorney must, at a minimum, state her or his objections outside the presence of the jury. Despite the prosecutor's egregious misconduct in this case, defense counsel failed to voice any objections. If the prosecutor's misconduct is not preserved for review, was Mr. Lewis denied the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

With \$150 in his pocket, Thomas Crocker visited the Crystal Steam Baths in Aberdeen to spend time with a woman named "Andrea," whom he'd seen a couple of times. RP (10/14/08) 9, 14. They went up to her apartment, he gave her money to buy drugs, and she left the room. RP (10/14/08) 9, 11. After some time, Daniel W. Lewis, Jr. came into the room and the two men fought. RP (10/14/08) 11-15, 80-83. Following the fight, Crocker went to the police station, and said he'd been assaulted and robbed. RP (10/14/08) 16-18, 38. Police photographed his injuries. RP (10/14/08) 17, 38.

Mr. Lewis was arrested at a bar a block or so away. RP (10/14/08) 42-44. In his pocket, the police found a WalMart receipt, ostensibly from a purchase made earlier in the day by Mr. Crocker, and \$113 in cash. RP (10/14/08) 8, 43-34. The state charged Mr. Lewis with Robbery in the First Degree. CP 1-2. Mr. Lewis maintained that he'd asked Crocker to leave Andrea's room (at her request), that Mr. Crocker attacked him, and that he defended himself. RP (10/14/08) 73-91.

In his statement to the police, Crocker said he gave Andrea the money so that she could purchase some marijuana for him. RP (10/13/08) 11. The state moved *in limine* to exclude the fact that Mr. Crocker had

prior drug convictions, and that he was hoping to purchase drugs. RP (10/13/08) 13-14; Motion in Limine, Declaration, Order in Limine, Supp. CP. Defense counsel explained that their theory of the case was that this was a drug sale gone bad. RP (10/13/08) 13-14. The court provisionally granted the state's motion *in limine* to prevent any mention of Crocker's prior convictions and desire to obtain drugs, and instructed the attorneys to raise the issue without the jury present. RP (10/13/08) 13-14; Motion in Limine, Declaration, Order in Limine, Supp. CP.

At trial, Crocker claimed that he gave Andrea money to get drugs for men in the hallway. RP (10/14/08) 11. He also said "I don't do drugs." RP (10/14/08) 21. Later in his testimony, he said, "I don't drink ... I don't use drugs." RP (10/14/08) 32. Defense counsel did not seek to impeach him with his previous statement to the police or with his prior drug convictions. RP (10/13/08) 11-14; RP (10/14/08) 18-34.

Mr. Lewis testified and explained that Crocker had attacked him when asked to leave the apartment. RP (10/14/08) 73-91. He denied stealing Crocker's money, and told the jury that he'd only swung at Crocker twice. RP (10/14/08) 82, 88. When he was shown the photos of Crocker, Mr. Lewis testified that he didn't remember Crocker looking like that when he left the apartment. RP (10/14/08) 90.

The defense proposed instructions on the inferior degree offense of Robbery in the Second Degree; the court refused the instructions.¹ RP (10/14/08) 56, 93. The defense did not propose, and the court did not give, any instructions relating to self-defense. Court's Instructions to Jury, Supp. CP.

During his rebuttal closing argument, the prosecuting attorney made the following comments:

You know, he [Crocker] could have said, I have been beat up. But no, he told the truth about what happened, that he had been beaten up and robbed and that his money and his wallet and his checkbook had been rifled through, his money had been taken.

...

Do you believe that Mr. Crocker isn't telling you the whole story or do you believe that the defendant is fudging on the story? Do you believe that Mr. Crocker took a swing or do you believe that the defendant beat him up to take the money and the wallet?
RP (10/14/08) 106-107.

The jury convicted Mr. Lewis as charged, and he was sentenced within his agreed standard range. CP 3-10; RP (10/27/08) 16. This timely appeal followed. CP 11-12.

¹ The court mentioned receiving proposed instructions from both parties, but the defense submission does not appear to be part of the trial court file. RP (10/14/08) 55.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. LEWIS'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY FAILING TO INSTRUCT THE JURY ON SELF-DEFENSE.

Due process requires the state to prove every element of the crime charged beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash. Const. Article I, Section 3; *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67, 941 P.2d 661 (1997).

The failure to instruct on all the elements of an offense is a constitutional error that may be raised for the first time on appeal. *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); RAP 2.5(a). The error is presumed to be prejudicial. *State v. Kiehl*, 128 Wn. App. 88, 91, 113 P.3d 528 (2005). Reversal is required unless the prosecution can establish that the error was harmless beyond a reasonable doubt. *State v. Jones*, 106 Wn. App. 40, 45, 21 P.3d 1172 (2001) ("Jones I"). See *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002); *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed. 2d 35 (1999); *Pope v. Illinois*, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed. 2d 439 (1987).

RCW 9A.16.020 provides that “The use, attempt, or offer to use force upon or toward the person of another is not unlawful... [w]henver used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary...” RCW 9A.16.020.² The defense is not limited to assault or homicide cases. *See, e.g., State v. Arth*, 121 Wn.App. 205, 87 P.3d 1206 (2004) (holding that self-defense applies in a prosecution for malicious mischief).

Where self-defense is raised at trial, the absence of self-defense becomes another element of the offense that the state must prove beyond a reasonable doubt. *State v. Woods*, 138 Wn. App. 191, 156 P.3d 309 (2007). An accused person is entitled to instructions on self-defense when she or he presents “some evidence” that the use of force was lawful. *Woods*, at 199.

In this case, Mr. Lewis testified that he used lawful force to defend himself after Crocker assaulted him. RP (10/14/08) 71-93. Given this

² In addition, RCW 9A.16.110(1) provides “No person in the state shall be placed in legal jeopardy of any kind whatsoever for protecting by any reasonable means necessary, himself or herself, his or her family, or his or her real or personal property, or for coming to the aid of another who is in imminent danger of or the victim of assault...”

clear testimony raising the issue of self-defense, the trial court should have instructed the jury on self-defense, regardless of whether or not defense counsel proposed such instructions.³ RCW 9A.16.020; *Woods, supra*. The failure to do so relieved the state of its burden to prove the absence of self-defense beyond a reasonable doubt. *Woods, supra*.

The conviction violates Mr. Lewis's Fourteenth Amendment right to due process and must be reversed. The case must be remanded to the trial court, with directions to instruct the jury on the issue of self-defense. *Woods, supra*.

II. THE TRIAL COURT VIOLATED MR. LEWIS'S UNQUALIFIED RIGHT TO HAVE THE JURY PASS ON THE INFERIOR DEGREE OFFENSE OF ROBBERY IN THE SECOND DEGREE.

RCW 10.61.003 provides as follows:

Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

RCW 10.61.010 provides as follows:

³ Although defense counsel apparently proposed instructions, they are not part of the trial court record. See RP (10/14/08) 55. It is unclear whether or not defense counsel proposed instructions on self-defense. However, in light of Mr. Lewis's clear testimony raising self-defense, the absence of self-defense instructions creates a manifest error affecting his Fourteenth Amendment right to due process. RAP 2.5(a). If the absence of self-defense instructions cannot be raised for the first time on review pursuant to RAP 2.5(a), it should be reviewed as an ineffective assistance of counsel claim. Accordingly, the issue is also presented as part of Mr. Lewis's ineffective assistance argument elsewhere in this brief.

Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of which the accused is guilty.

These statutes guarantee the “unqualified right” to have the jury pass on the inferior degree offense if there is “even the slightest evidence” that the accused person may have committed only that offense. *State v. Parker*, 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984), quoting *State v. Young*, 22 Wn. 273, 276-277, 60 P. 650 (1900) (“Young I”). The appellate court views the evidence in a light most favorable to the accused person. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). The instruction should be given even if there is contradictory evidence, or if the accused person presents other defenses. *State v. Fernandez-Medina, supra*. The right to an appropriate lesser degree offense instruction is “absolute,” and failure to give such an instruction requires reversal. *Parker*, at 164.

Robbery in the Second Degree is an inferior degree offense to Robbery in the First Degree.⁴ RCW 9A.56.200; RCW 9A.56.210. A

⁴ See *Fernandez-Medina*, at 454: an inferior degree instruction is proper if “(1) the statutes for both the charged offense and the proposed inferior degree offense proscribe but one offense; (2) the information charges an offense that is divided into degrees, and the

person is guilty of robbery in the second degree “if he commits robbery,” defined as “unlawfully [taking] personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone.” RCW 9A.56.190; RCW 9A.56.210.

In this case, Mr. Lewis presented evidence that he committed only the inferior degree offense of Robbery in the Second Degree. He testified that he only swung at Crocker twice, and that Crocker did not appear injured when he left the room. RP (10/14/08) 88, 90. Taking this evidence in a light most favorable to Mr. Lewis, a jury could have found that Mr. Lewis took money from Crocker using force but without causing injury.⁵ Accordingly, he had an unqualified right to the inferior degree instruction.

proposed offense is an inferior degree of the charged offense...” (internal quotation marks and citations omitted).

⁵ Although this does not explain the injuries Crocker had when he arrived at the police station, the burden is not on Mr. Lewis to show the source of the injuries or to disprove Crocker’s testimony; if the jury could have believed Mr. Lewis did not cause the injuries, the court should have given the inferior degree instruction. *Fernandez-Medina, supra*.

- A. The trial judge's refusal to instruct on Robbery in the Second Degree denied Mr. Lewis his constitutional right to due process under the Fourteenth Amendment.

Refusal to instruct on a lesser-included offense can violate the right to due process under the Fourteenth Amendment. U.S. Const. Amend. XIV; *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (1988). The constitutional right to such an instruction stems from "the risk that a defendant might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes to avoid setting him free." *Vujosevic*, at 1027. *See also Beck v. Alabama*, 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (In capital cases, "providing the jury with the 'third option' of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard...").⁶

Because the trial judge refused to instruct the jury on the lesser-included offense of second-degree robbery, Mr. Lewis was denied his constitutional right to a fair trial under the due process clause. U.S. Const. Amend. XIV; *Vujosevic*. The conviction must be reversed and the case

⁶ The Court in *Beck* explicitly reserved the question of whether or not the rule applies in noncapital cases. *Beck*, at 638, n.14. Some federal courts only review a state court's failure to give a lesser-included instruction in noncapital cases when the failure "threatens a fundamental miscarriage of justice..." *Tata v. Carver*, 917 F.2d 670, 672 (1st Cir. 1990).

remanded to the superior court. *State v. Schaffer*, 135 Wn.2d 355, 357-358, 957 P.2d 214 (1998).

- B. The trial judge's refusal to instruct on Robbery in the Second Degree violated Mr. Lewis's state constitutional right (under Wash. Const. Article I, Sections 21 and 22) to have the jury consider applicable lesser included offenses.

Under the Washington Constitution, "The right of trial by jury shall remain inviolate..." Wash. Const. Article I, Section 21. Furthermore, "[i]n criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury..." Wash. Const. Article I, Section 22. As with many other constitutional provisions, the right to a jury trial under the Washington State Constitution is broader than the federal right. *State v. Hobble*, 126 Wn.2d 283, 298-99, 892 P.2d 85 (1995); *City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982).

Washington State Constitutional provisions are analyzed with reference to the six nonexclusive factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986). In this case, analysis under *Gunwall* supports an independent application of the state constitution. These two provisions establish an accused person's state constitutional right to have the jury instructed on applicable lesser-included offenses.

1. The language of Wash. Const. Article I, Sections 21 and 22 supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

The first *Gunwall* factor requires examination of the text of the state constitutional provisions at issue. Wash. Const. Article I, Section 21 provides that “[t]he right of trial by jury *shall remain inviolate...*” *emphasis added*. “The term ‘inviolat

... For [the right to a jury trial] to remain inviolate, it must not diminish over time.” *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). Wash. Const. Article I, Section 22 (amend. 10) provides that “[i]n criminal prosecutions the accused shall have the right to. . . a speedy public trial by an impartial jury...” The direct and mandatory language (“shall have the right”) implies a high level of protection.

Thus an accused person’s right to have the jury consider a lesser-included offense remains the same as it existed in 1889, and “must not diminish over time,” *Sofie v. Fibreboard Corp.*, at 656. *Gunwall* factor one favors an independent application of these provisions.

2. Significant differences in the texts of parallel provisions of the federal and state constitutions supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

The second *Gunwall* factor requires analysis of the differences between the texts of parallel provisions of the federal and state constitutions. Wash. Const. Article I, Section 21, which declares “[t]he

right of trial by jury shall remain inviolate....” has no federal counterpart. The Washington Supreme Court in *Pasco v. Mace*, *supra*, found the difference between the two constitutions significant, and determined that the state constitution provides broader protection. This difference in language also favors an independent application of the state constitution.

3. State constitutional and common law history supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

Under the third *Gunwall* factor, this court must look to state constitutional and common law history. Article I, Section 21, Washington “preserves the right as it existed at common law in the territory at the time of its adoption.” *Pasco v. Mace*, at 96. *See also State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987); *Hobble*, *supra*; *State v. Smith*, 150 Wn.2d 135, 151, 75 P.3d 934 (2003) (“Smith I”). In 1889, when our state constitution was adopted, the lesser-included offense doctrine was well-established under the common law. *Beck v. Alabama*, at 635 n. 9 (citing 2 M. Hale, *Pleas of the Crown* 301-302 (1736); 2 W. Hawkins, *Pleas of the Crown* 623 (6th ed. 1787) 1 J. Chitty, *Criminal Law* 250 (5th Am. ed. 1847); T. Starkie, *Treatise on Criminal Pleading* 351-352 (2d ed. 1822)).

Thirty years prior to the adoption of the state constitution in 1889, the Court for Washington Territory addressed a parallel doctrine (relating to inferior degree offenses), and declared that “There is no better settled

principle of criminal jurisprudence than that under an indictment for a crime of a high degree, a crime of the same character, of an inferior degree, necessarily involved in the commission of the higher offense charged, may be found.” *Clarke v. Washington Territory*, 1 Wash. Terr. 68, 69 (1859).

It was against this backdrop that the framers decided that “[i]n criminal prosecutions the accused shall have the right” to a jury trial, and that the jury trial right “shall remain inviolate.” Wash. Const. Article I, Sections 21 and 22. Accordingly, *Gunwall* factor 3 supports an independent application of Article I, Sections 21 and 22 in this case, and establishes a state constitutional right to instructions on applicable lesser-included offenses.

4. Pre-existing state law supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

The fourth *Gunwall* factor “directs examination of preexisting state law, which ‘may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.’” *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 809, 83 P.3d 419 (2004) (quoting *Gunwall*, at 62). Just one year prior to adoption of the state constitution, the Court noted that a jury had the power to convict an accused person ““of any offense, the commission of which is necessarily

included within that with which he is charged in the indictment.”

Timmerman v. Territory, 3 Wash. Terr. 445, 449 (1888) (quoting Territorial Code of 1881, Section 1098). This language endures in the current provision. *See* RCW 10.61.006. Accordingly, *Gunwall* factor four supports a state constitutional right to applicable instructions on a lesser-included offense.

5. Differences in structure between the federal and state constitutions supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

In *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994) (“*Young II*”), the Supreme Court noted that “[t]he fifth *Gunwall* factor... will always point toward pursuing an independent state constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State’s power.” *Young* (“*Young II*”), at 180. Thus factor five favors Mr. Lewis’s position.

6. The right to a jury trial is a matter of particular state interest or local concern, and supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

The sixth *Gunwall* factor deals with whether the issue is a matter of particular state interest or local concern. The right to a jury trial is a matter of state concern; there is no need for national uniformity on the issue. *Smith I*, at 152. *Gunwall* factor number six thus also points to an

independent application of the state constitution, and supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

All six *Gunwall* factors favor an independent application of Article I, Section 21 and 22 of the Washington Constitution. Our state constitution protects an accused person's right to have the jury consider lesser-included offenses. The trial judge's failure to instruct on the lesser-included offense of Manslaughter in the Second Degree violates Wash. Const. Article I, Sections 21 and 22. Accordingly, Mr. Lewis's conviction must be reversed and the case remanded to the trial court for a new trial.

Because the trial judge refused to instruct the jury on the inferior degree offense of Robbery in the Second Degree, Mr. Lewis's conviction for first-degree robbery must be reversed. *Fernandez-Medina, supra*. The case must be remanded for a new trial, with instructions to permit the jury to pass on the inferior degree offense.

III. THE PROSECUTOR'S MISCONDUCT IN CLOSING VIOLATED MR. LEWIS'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 II")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

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

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 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 his personal opinion that Crocker 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

claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

1379 (1986); *State v. Papadopoulos*, 34 Wn.App. 397, 400, 662 P.2d 59, review denied, 100 Wn.2d 1003 (1983).

Here, the prosecutor expressed a clear personal opinion on Crocker's credibility:

You know, he [Crocker] could have said, I have been beat up. But no, he told the truth about what happened, that he had been beaten up and robbed and that his money and his wallet and his checkbook had been rifled through, his money had been taken. RP (10/14/08) 106-107.

This misconduct prejudiced Mr. Lewis, 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 Crocker and Mr. Lewis. By putting his 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 acquittal required the jury to find that Crocker lied under oath and that Mr. Lewis told the truth.

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 State v. 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 argued that the jury could simply weigh Crocker’s testimony against that of Mr. Lewis:

Do you believe that Mr. Crocker isn’t telling you the whole story or do you believe that the defendant is fudging on the story? Do you believe that Mr. Crocker took a swing or do you believe that the defendant beat him up to take the money and the wallet?
RP (10/14/08)107.

This misconduct was flagrant and ill-intentioned under *State v. Fleming, supra*. Furthermore, as noted above, Crocker’s credibility was critical. By suggesting that acquittal required the jury to find Crocker a liar, the prosecutor severely prejudiced Mr. Lewis’s case. Accordingly, the convictions must be reversed and the case remanded for a new trial. *State v. Fleming, supra*.

- C. The prosecutor's misconduct cannot be justified as a proper response to defense counsel's argument.

Prosecutors are supposed to be more than mere partisan advocates.

Boehning, supra. A defendant has no power to open the door to prosecutorial misconduct. *State v. Jones*, 144 Wn.App. 284, 295, 183 P.3d 307 (2008) ("Jones III").

In this case, if the prosecutor believed defense counsel's arguments were improper, he should have objected and requested a curative instruction. Any imagined impropriety did not grant license to give a personal opinion on the credibility of a witness, or to misstate the burden of proof. *See Price, supra; State v. Fleming, supra*. Accordingly, the prosecutor's misconduct cannot be justified by anything that occurred during defense counsel's closing.

IV. MR. LEWIS WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

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. If Mr. Lewis’s self-defense claim is not preserved for review, defense counsel provided ineffective assistance by failing to propose instructions on self-defense.⁹

The reasonable competence standard requires defense counsel to be familiar with the relevant legal standards and instructions applicable to the representation. *See, e.g., State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003); *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978).

A failure to propose proper instructions on the justifiable use of force

⁹ As noted above, defense counsel proposed jury instructions; however, those instructions are not part of the trial court record. RP (10/14/08) 55. To ensure that the Court addresses the trial court’s failure to instruct the jury on self-defense, this issue is presented both on its merits and as an ineffective assistance claim.

constitutes ineffective assistance of counsel. *Woods, supra*; see also *State v. Rodriguez*, 121 Wn. App. 180, 87 P.3d 1201 (2004).

Mr. Lewis's trial strategy rested on his testimony that he used lawful force to repel an attack initiated by Crocker. RP (10/13/08) 12-14; RP (10/14/08) 18-106. There is "no conceivable legitimate tactic" explaining counsel's failure to propose instructions on self-defense. *Reichenbach*, at 130. Nor is there any indication in the record suggesting that counsel was pursuing a strategy that required him not to propose such instructions. See *Hendrickson, supra*. Under these circumstances, trial counsel should have proposed instructions on self-defense, and the failure to do so constituted deficient performance. *Woods, supra*. The error prejudiced Mr. Lewis, because without such instructions, the jury was unable to evaluate the self-defense claim, and could not acquit Mr. Lewis even if it believed he used lawful force against Crocker.

If Mr. Lewis's self-defense claim is not preserved for review, defense counsel was ineffective for failing to propose instructions on self-defense. *Woods, supra*. The conviction must be reversed and the case remanded for a new trial. *Woods, supra*.

- B. Because Mr. Lewis's trial strategy required defense counsel to discredit Crocker's testimony, counsel was ineffective for failing to impeach Crocker with available information.

Crocker and Mr. Lewis were the only witnesses to the altercation that resulted in this prosecution. Their testimony was radically different; while Crocker claimed he was blindsided by Mr. Lewis, the latter testified that Crocker assaulted him after being called a name. RP (10/14/08) 13-14, 28, 80, 90. Because Mr. Lewis's self-defense claim and his denial of the theft rested on his version of events, the defense strategy required defense counsel to discredit Crocker's testimony.

Crocker had two prior drug convictions, and the prosecutor also acknowledged that he went to the Crystal Steam Baths (at least in part) to purchase drugs. RP (10/13/08) 11-14; Motion in Limine, Declaration, Supp. CP. Although the prosecutor obtained a pretrial ruling excluding evidence of Crocker's prior convictions (and his desire to obtain drugs), the door to this evidence was opened when Crocker testified that he was not there to buy drugs and that he did not use drugs. RP (10/14/08) 21, 32. *See, e.g., State v. Smith*, 115 Wn.2d 434, 798 P.2d 1146 (1990) ("Smith II") (defense opened the door to otherwise inadmissible evidence).

Under these circumstances, defense counsel should have sought permission to impeach Crocker with his prior convictions and evidence that he went to buy drugs at the motel. His failure to do so was deficient

performance. *Reichenbach, supra*. Because the defense strategy required Crocker to be discredited, there is no conceivable strategic purpose justifying counsel's omission. Furthermore, because Crocker's credibility was critical to the state's case, the error prejudiced Mr. Lewis. Evidence that Crocker had two prior drug convictions and had gone to the motel to seek drugs would have severely undermined his credibility, given his claims that he was not there to buy drugs and did not use drugs. The prejudice was magnified by the fact that Mr. Lewis admitted to his own drug use (and was found with a syringe in his possession). RP (10/14/08) 68, 77, 79.

Counsel's failure to impeach Crocker prejudiced Mr. Lewis and violated his Sixth and Fourteenth Amendment right to the effective assistance of counsel. His conviction must be reversed and the case remanded for a new trial. *Reichenbach, supra*.

C. Defense counsel should have objected to the prosecutor's misconduct in closing.

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 had no conceivable strategic reason to allow the prosecutor to shift the burden of proof or express his personal opinion. Defense counsel should have objected to this clear 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. Lewis was denied the effective assistance of counsel. *Hurley, supra*.

CONCLUSION

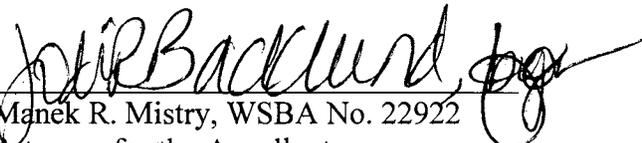
For the foregoing reasons, Mr. Lewis's conviction must be reversed and the case remanded for a new trial. On retrial, the court must instruct the jury on self-defense and on the inferior degree offense of second-degree robbery.

Respectfully submitted on May 11, 2009.

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CERTIFICATE OF MAILING

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

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Clallam Bay Corrections Center
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Clallam Bay, WA 98326

and to:

Grays Harbor Prosecuting Attorney
102 West Broadway, #102
Montesano, WA 98563

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on May 11, 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 11, 2009.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

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