

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

STATE OF WASHINGTON,

Respondent,

v.

HEZZIE BAINES,

Appellant.

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STATE OF WASHINGTON
BY  DEPUTY

FILED
COURT OF APPEALS
DIVISION II

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

The Honorable Thomas P. Larkin, Judge

APPELLANT'S OPENING BRIEF

KATHRYN RUSSELL SELK
WSBA No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

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A. ASSIGNMENTS OF ERROR

1. Hezzie Baines' Fifth Amendment and Article I, § 9, rights to pre-arrest silence were violated during the prosecutor's cross-examination and closing argument.

2. The prosecutor committed flagrant, prejudicial misconduct and violated Baines' Sixth Amendment and Article I, § 22, rights to counsel by commenting on Baines' exercise of those rights.

3. The prosecution cannot meet its burden of proving that any of the constitutionally offensive misconduct meets the high standard for constitutional harmless error.

4. The prosecutor committed flagrant, prejudicial misconduct in misstating the evidence, misstating the jury's role, giving the jurors a "false choice" and telling them they had to find the state's witness was lying in order to acquit Baines.

5. The prosecutor committed further flagrant, prejudicial misconduct by attempting to incite the juror's passions, prejudices and sympathy to bolster the credibility of its crucial witness.

6. Baines was deprived of his Sixth Amendment and Article I, § 22 rights to effective assistance of counsel.

7. The cumulative effect of the prosecutor's multiple acts of misconduct deprived Baines of his constitutionally guaranteed right to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is a violation of a defendant's rights to be free from self-incrimination for a prosecutor to comment on a defendant's pre-arrest

silence in a way that implies that the silence was evidence of guilt.

In cross-examination, the prosecutor emphasized that Baines had failed to stay at the scene of the crime in order to explain his side of the story to the police. Then, in closing argument, the prosecutor used this “failure” as evidence of guilt. Is reversal required because the prosecution cannot prove this constitutionally offensive misconduct was harmless?

2. A prosecutor’s arguments denigrating counsel are misconduct and amount to an improper comment on the defendant’s exercise of his right to counsel where the comments imply that counsel is attempting to mislead the jury or detract them from their proper role.

In closing argument, the prosecutor first said that it was a “story as old as time” for a defendant “to try to make up a story and hope” jurors would “buy it,” then said that it was also a “story as old as time” for “a defense attorney” to get up and act “indignant” to try to convince the jurors there was “some truth in what he said,” but that it was “just an attempt to fill the room with smoke” and convince the jury to “set aside that which you know you’re looking at.” He also characterized part of counsel’s closing as “defense speak.” Is reversal required because the prosecution cannot prove this improper comment on Baines’ exercise of his right to counsel was harmless under the constitutional harmless error standard?

3. It is serious misconduct for a prosecutor to mislead the jury as to the evidence. Did the prosecutor commit such misconduct in telling the jury that Baines had “flat out” declared that the state’s main witness was saying things that were not true even though Baines never made such a declaration?

4. It is further flagrant, prejudicial misconduct for the prosecutor to tell the jury it has to find the state's witness is lying in order to acquit, or that it has to decide between either the state's witnesses or the defense witnesses in order to decide a case. Did the prosecutor commit such misconduct when he told the jury that it had to make a "choice between who is telling the truth here," that it should "by all means" find Baines not guilty if they "have reason to doubt" the main witness and thought he "got up there and told" them "a pack of lies," if they thought he told them "a bunch of things that aren't true," and if they thought he would "jeopardize" his livelihood and his job by lying to them?

Further, was it flagrant, prejudicial misconduct when the prosecutor told the jury it had to find Baines was guilty if it found that the victim was a "straight up" guy who had told them the truth? And was it misconduct when the prosecutor told the jury it could only find Baines not guilty if it had a "reason to doubt" the state's witness?

5. Was it further flagrant, prejudicial misconduct when the prosecutor repeatedly told the jury that the victim did not "ask for any of this" and detailed all the impacts he had suffered as a result of the crime, then implied that the jury would have to find the victim "wanted" to be a victim in order to find Baines not guilty?

6. Was counsel ineffective in failing to object or make any efforts to minimize the corrosive impact of any of the prosecutor's repeated, pervasive and prejudicial misconduct?

7. Does the cumulative effect of the prosecutor's multiple acts of misconduct compel reversal where the misconduct deprived Baines of

his constitutionally guaranteed right to a fair trial?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Hezzie A. Baines was charged by second amended information with second-degree burglary and attempted residential burglary, each alleged with a deadly weapon enhancement. CP 34-35; RCW 9A.52.030(1); RCW 9.94A.310; RCW 9.94A.370; RCW 9.94A.510; RCW 9.94A.533. A jury trial was held before the Honorable Thomas P. Larkin on December 2, 3, 4, 10 and 11, 2008. RP 1, 18, 28, 40, 208. Prior to the case going to the jury, Judge Larkin dismissed the deadly weapon allegation. RP 160-61. The jury then acquitted Baines of the second-degree burglary charge but found him guilty of the attempt charge. CP 59-60; RP 208-21.

On January 9, 2009, Judge Larkin sentenced Baines to 54 months in custody. CP 151-63; RP 245. Baines appealed and this pleading follows. See CP 175-88.

2. Testimony at trial

Eric Sylstad lives in Midland, Washington, on a “decent-sized” parcel of land. RP 48-50. His house sits about 20 feet off the street and has a deck on both the front and the back. RP 48-51. The driveway goes next to the back deck and on that deck sits a hot tub “enclosure.” RP 50-52, 69. Off the deck, farther in the backyard, Sylstad has a 10 x 10 shed he calls his “barbecue” shed but which he admits is more often used by his kids to store their toys, bikes and other things. RP 50-51.

On August 13, 2007, Sylstad arrived home at 5:30 or 6:00 in the evening and pulled his truck into the gravel driveway. RP 52. As he was almost to the back deck, he saw two men. RP 53, 72. One, a white man, came off the deck and ran away so fast that Sylstad could not catch him. RP 53. The other man walked off the deck, cut through Sylstad's carport and then ran. RP 53, 72. Sylstad jumped out of his truck to follow. RP 53, 72.

The man Sylstad was chasing was already near the back of Sylstad's property when Sylstad yelled for him to stop. RP 52-53. Sylstad used "a few choice bad words" and demanded to know what the man was doing on Sylstad's property. RP 52-53. According to Sylstad, the man was about 15 yards in front of Sylstad when the man turned and "swung" Sylstad's daughter's little purple "t-ball" bat towards Sylstad. RP 53, 75. At the same time, the man said, "I am not breaking into your house" or "I didn't try breaking into your house." RP 53-55, 82.

At trial, Sylstad said that the man let go of the bat as he swung, so that it flew towards Sylstad. RP 53-55, 82. In the statement Sylstad made the day of the incident, however, Sylstad never said any such thing had occurred. RP 79-80, 83.

Sylstad shouted at the man, "[i]f you're not f-ing breaking into my house, what are you doing on my property" or "what the hell are you doing on my property?" RP 53, 82. The man then climbed over Sylstad's back fence. RP 54. Sylstad was unable to follow, so he instead yelled that he was calling police and would make sure the man got caught. RP 54. Sylstad also yelled "other things" at the man, expressing his feelings and

showing that he was upset. RP 54-55.

Once the man made it across Sylstad's neighbor's yard, he encountered barbed wire fence. RP 54-55. Sylstad said he saw the man get "hung up" on the top of that fence and fall, face first, into the dirt on the other side. RP 54-55. By that point, Sylstad was on the phone with the 9-1-1 police emergency operator and could hear sirens from the approaching police. RP 55. Sylstad told the operator that Sylstad had a weapon in his house, although he did not know if the man had been inside and gotten it. RP 56-57. Sylstad also told the operator the direction Sylstad thought the man was heading. RP 57. The operator told Sylstad to go back to his house, because there was now an officer waiting in the driveway. RP 57.

That officer was Pierce County Sheriff's Department (PCSD) deputy Walter Robinson. RP 88-90. While Robinson was talking with Sylstad, he heard over the radio that another deputy, Scott Wheeler, had detained someone believed to match the description of the person for whom they were searching. RP 92. Robinson drove Sylstad to see the man and, after Sylstad identified him, the man was transported to jail. RP 57, 92. The man was "bleeding profusely from his head." RP 58. That man was later identified as Hezzie Baines.

Sylstad testified that his kids were not at home at the time of the incident and no one had gotten into his house. RP 59. Sylstad believed, however, that someone had damaged the rubber seal on the "french" back door. RP 59-60. He also thought the wood and "inside by the door jamb" was "all scar[r]ed up" by the knob. RP 60. Sylstad described the marks as

“real flat and narrow” “little markings” which he thought looked like they were the result of someone “jamming an object in there and trying to get in.” RP 62.

Sylstad admitted he never saw Baines doing anything to the back door. RP 84. Sylstad maintained, however, that he knew the damage had happened that day, although he stopped short of claiming he checked his locks and door jambs daily. RP 84.

Nothing else anywhere on Sylstad’s property was disturbed in any way. RP 66.

According to Sylstad, his neighbor later brought over a screwdriver which had been found in that neighbor’s field. RP 66. Sylstad thought the screwdriver was his and that it had been found next to where Baines had gone over the fence. RP 66-67. The screwdriver had marks on the flat head side “like it was beat with an object.” RP 67.

Although Sylstad admitted he did not really know for sure what caused the markings on the doors and was not an expert in such matters, he declared his opinion that the screwdriver “matched . . . perfectly” with the markings on the french door. RP 68. In contrast, despite his training and experience, a police officer later testified that it was not possible for him to take a screwdriver and match it with an area which had been broken into because, although there are experts “capable of matching a tool to a tool mark,” the officer did not himself have “enough formal training in that to personally do it.” RP 96. The screwdriver was not offered as evidence, nor were there pictures of the marks Sylstad said he saw on the door to his home. RP 78. Sylstad admitted he still had the screwdriver at

his home. RP 78. Officer Robinson did not see a screwdriver at any point and no one brought any screwdriver to his attention in relation to the case. RP 96. He said if a screwdriver had been found, it could have possibly been an important piece of evidence. RP 97.

Sylstad admitted that he never saw Baines holding a screwdriver the day of the incident, nor did he see Baines carrying one when he was running. RP 83.

Sylstad thought the screwdriver and his daughter's plastic "t-ball" bat had been in the hot tub enclosure on his deck before that day. RP 63, 66, 75. He said the door to that enclosure was locked but the windows were not. RP 64. He also thought the door was not locked when he checked his home after the incident that day. RP 64-65.

Sylstad admitted there were stereos and other things in the house which could be seen if someone walked up and looked in his windows, none of which were missing when he checked the house. RP 68, 74.

Police came out and fingerprinted "the whole place." RP 78. Although there was no allegation that Baines had gloves that day, none of his fingerprints were found at the home, nor were any found on the t-ball bat, which was tested unsuccessfully. RP 78, 95-96.

Baines explained that he was not trying to break into Sylstad's home at all that day but was just trying to get his keys back from the other man with him, Troy Walker. RP 131-32, 140-46. Baines had been at his house doing chores at about 2 or 3 in the afternoon that day when Walker, whom Baines had known in elementary school and not seen for years, stopped by unexpectedly. RP 131-32. Walker had been drinking and

partying since the night before and he was acting obnoxious, “a little crazy and weird.” RP 133. Baines and Walker talked, smoked cigarettes and caught up with each other a little before Hezzie’s wife, Jennifer Baines¹ came home. RP 134.

Jennifer saw Walker’s condition and told Baines that Walker needed to leave. RP 134. She testified that Walker was being “loud” and “obnoxious,” smelled of alcohol and was obviously drunk. RP 109-11, 117, 118. She was not happy with him being there and said it was not normal for anyone to be at their house in that condition. RP 111, 118.

Baines suggested that they go for a ride in the car with Walker in order to get Walker away from the house, and Jennifer agreed to go along. RP 112, 134-35.

They ended up at a park, where Jennifer got out of the car and watched some kids playing football, while Baines and Walker smoked a cigarette. RP 113, 136. Jennifer heard Walker arguing with Baines because Walker wanted to go to a store to get more alcohol but Baines and Jennifer had resisted. RP 113. Baines said he “just kept stalling and stalling,” telling Walker that they were not going to the store “right now.” RP 137. Walker kept pestering him but Baines told Walker to just “chill out” with them, because it was a nice day to be at a park. RP 137.

At some point, Walker asked for a cigarette and Baines told him to “go ahead,” that Baines was watching the game. RP 137. Walker reached into the car, grabbing the whole pack of cigarettes and the keys. RP 138.

¹Because Mrs. Baines has the same last name as her husband, she is referred to by her first name herein for clarity. No disrespect is intended.

Baines told Walker to give the keys back and Walker said, “no, I’ll be right back.” RP 138. Baines said “no, don’t take my car,” pushing Walker and demanding the keys. RP 138. Baines was upset because he had all of his keys on that ring, including those for his house. RP 138.

Walker again said he would “be right back” and Baines said, “no, give me my keys,” pushing Walker. RP 138. Walker then hit Baines and Baines got mad. RP 138. A fight ensued between the cars but, after a few hits, Walker “took off,” with Baines chasing behind and saying “give me my keys, man, don’t play with the keys.” RP 138. Baines was throwing rocks and whatever he could at Walker to get him to stop him. RP 138.

Jennifer saw Walker running away from the car carrying the car keys. RP 114. She also saw Baines running after Walker and heard Baines yelling for Walker to give the keys back. RP 114-15.

Baines followed Walker as Walker ran across people’s yards. RP 138. Whenever Baines got close to him, Walker would hit Baines. RP 138-39. Baines was getting beaten up “really bad,” so he picked up a bat he found on a lawn they were on and try to swing it towards Walker. RP 139. It was at that point that Sylstad arrived and thought they were breaking into his house. RP 139.

Baines said he and Walker never went towards any of the entrances to the house and were just on the side of the house, “fighting and stuff.” RP 140.

When they saw Sylstad, Walker said, “f” you to Baines and took off running. RP 139. Baines tried to explain to Sylstad that nobody was trying to break into his house but Sylstad kept saying he was going to call

the police. RP 139-40. Baines also tried to tell Sylstad that Walker had beaten him up and taken his keys and that Baines needed help, but Sylstad was not willing to hear it even though Baines' face was bleeding where Walker had hit him. RP 140. After a moment, Baines decided he needed to leave, because he was worried about getting arrested for a warrant he had outstanding. RP 139-40.

Officer Robinson conceded that, at the time of the incident, Baines had an outstanding warrant. RP 98.

Baines explained that he still had the bat in his hands when Sylstad started screaming about calling police but dropped it when he was running and about to jump over the fence. RP 141. He had found the bat in the yard with other kids' toys. RP 141. Sylstad admitted that, although he thought his daughter had put the bat away the night before, she could have gotten it back out later. RP 84.

Baines testified that he had no intent to break in when he went onto Sylstad's property, nor was he planning to commit any other crime there. RP 142. Jennifer confirmed that she had heard absolutely no talk at the house, in the car or at the park about committing a burglary. RP 116.

Sylstad admitted that he thought it would be "[v]ery bizarre" for anyone to be trying to break in at the time this occurred because that was normally when people would be coming home. RP 77.

After Jennifer waited at the park for awhile for her husband to return, she finally locked up the car and took a bus back home. RP 115-16. When she got home, she got another set of car keys and called her mom for a ride back to the park. RP 115-16. Jennifer's mother, Sharon

Steele, remembered her daughter calling her that day and asking for a ride to her car, which was at a park. RP 122.

Jennifer found out later that Baines had been arrested. RP 116.

To this day, Walker has neither shown up nor returned Baines' keys. RP 142. Baines and his wife had to have the keys changed on the car, home and "stuff" as a result. RP 151.

D. ARGUMENT

1. REVERSAL IS REQUIRED BECAUSE THE PROSECUTOR COMMITTED CONSTITUTIONALLY OFFENSIVE MISCONDUCT WHICH THE PROSECUTOR CANNOT PROVE WAS NOT HARMLESS

It is well-settled that, as quasi-judicial officers, prosecutors have a duty to ensure that an accused receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). As part of that duty, prosecutors are required to refrain from engaging in conduct at trial which is likely "to produce a wrongful conviction." State v. Clafin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985). Because of her role, the words of a prosecutor carry great weight with the jury, so that a prosecutor's misconduct does not just violate her duties but may also deprive the defendant of his state and federal constitutional due process rights to a fair trial. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); Suarez-Bravo, 72 Wn. App. at 367; 5th Amend.; 6th Amend.; 14th Amend.; Art. I, § 22. In addition, when a

prosecutor's comments invite the jury to draw a negative inference from a defendant's exercise of a constitutional right, those comments are constitutionally offensive misconduct because they "chill" the defendant's free exercise of that right. State v. Belgarde, 110 Wn.2d 504, 512, 755 P.2d 174 (1988); United States v. Jackson, 390 U.S. 570, 581, 88 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). As a result, it is grave misconduct for the prosecutor to make such arguments. State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984); see Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).

In this case, reversal is required, because the prosecutor committed serious, prejudicial misconduct by commenting on Baines' exercise of his constitutional rights to be free from self-incrimination and to be represented by counsel. Further, the prosecution cannot meet its heavy burden of showing that this constitutionally offensive misconduct was harmless beyond a reasonable doubt.

a. Constitutionally offensive misconduct in commenting on Baines' failure to stay to talk to police and give them his story

First, the prosecutor committed constitutionally offensive misconduct by eliciting testimony designed to draw a negative inference from Mr. Baines' exercise of his constitutional right against self-incrimination and then relying on that testimony and Mr. Baines' silence in arguing his guilt.

i. Drawing a negative inference from silence

During cross-examination, the prosecutor asked Baines about his claim that he was being beaten up by Walker and thus was "really the

victim here.” RP 149. The prosecutor then noted that “instead of reporting the assault to the police and instead of waiting for medical aid,” Baines ran, even though he knew “exactly what it looks like” he was doing on the property. RP 149. When Baines said he ran because he had an outstanding warrant, the prosecutor asked why that would cause Baines to run, then said it was because Baines did not “want to take accountability for whatever it was - - the reason for the warrant; is that correct?” RP 149. Counsel’s objection was overruled. RP 150.

Later, in initial closing argument, the prosecutor argued that Baines was guilty 1) because he ran instead of staying to explain to Sylstad that Baines was actually the victim, 2) because he ran instead of staying to explain that he was not trying to burglarize the house, 3) because he ran instead of staying to ask Sylstad to call the police for help, and 4) because Baines ran instead of staying to talk to police:

Again, why does the defendant run? If he’s truly - - if you believe Mr. Sylstad that the defendant just ran, there was no oh, help me, I am the victim of an assault here, help me out. The defendant runs long before that. He runs. He could have stopped and told. . . Mr. Sylstad about this, that he was the victim. We’re not here burglarizing your house. I just want you to know my buddy is really drunk. He is being a jerk. I need some help. Can you call 911? Look, you can see injuries on my face. I am not here doing anything. Just give me some help. That is not what Mr. Sylstad told you happened. He ran because of consciousness of guilt.

...

Why does the defendant not stop when the police are called? Ask yourself this: Sure, Mr. Baines will tell you that he ran because of the warrant, but you have got a situation here that sure looks like you committed a pretty serious crime, looks like you’re trying to break into someone’s house. Why not face the law and say you know what? I do have an arrest warrant.

Let's deal with it, but I want you to know that I stuck around because I'm not guilty here. I want you to know it looks pretty bad, but I want you to know that this is really what happened.

RP 178 (emphasis added).

In rebuttal closing argument, the prosecutor again returned to this theme that Baines showed his guilt by failing to stay around and talk to police, declaring, “that makes him guilty because he didn’t stop to say help me, help me, I am the victim of an assault.” RP 201.

ii. The arguments were serious, constitutionally offensive and prejudicial misconduct

By eliciting the testimony and making the arguments, the prosecutor violated Mr. Baines’ rights to remain silent and against self-incrimination. As a threshold matter, these issues are properly before the Court. Where the prosecution elicits testimony infringing upon the exercise of a constitutional right, that involves a “claim of manifest constitutional error, which can be raised for the first time on appeal” under RAP 2.5(a)(3). State v. Curtis, 110 Wn. App. 6, 9, 11-12, 37 P.3d 1274 (2002). Further, when a prosecutor commits serious, prejudicial and flagrant misconduct, the issue may be raised on appeal despite the failure of counsel to object below. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 11292 (1995).²

On review, this Court should reverse. Both the state and federal constitutions guarantee the accused the right to be free from self-incrimination. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1991); Doyle v. Ohio, 426 U.S. 610, 619-20, 96 S. Ct. 2240, 49 L. Ed. 2d

²Those failures are an independent grounds for reversal, as discussed, *infra*.

91 (1976); Fifth Amend.; Art. I, § 9.³ As part of that right, a defendant has a constitutional right to remain silent in the face of accusation. See State v. Earls, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991).

As a result, it is completely improper, impermissible and misconduct for the prosecution to even suggest that a negative inference be drawn from the defendant's pre-arrest silence. Easter, 130 Wn.2d at 243; see State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002); State v. Fricks, 91 Wn.2d 391, 395, 588 P.2d 1328 (1979). This prohibition applies not only to closing argument but also to testimony, whether deliberately or unintentionally elicited by the state. Romero, 113 Wn. App. at 787; see also, State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). Indeed, it is not required that the state deliberately exploit an improper comment for reversal to be required. See Romero, 113 Wn. App. at 787. Put simply, "[a]n accused's right to remain silent and to decline to assist the State in the preparation of its criminal case may not be eroded by permitting the State in its case in chief to call the attention of the trier of fact the accused's pre-arrest silence to imply guilt." Easter, 130 Wn.2d at 243; see State v. Knapp, 148 Wn. App. 414, 199 P.3d 505 (2009).

Thus, in State v. Hager, __ Wn. App. __, __ P.3d __ (No. 37539-7-II) (September 3, 2009) (2009 WL 2832088), this Court recently found reversal was required where an officer testified that the defendant was

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

“evasive” when speaking to police, even though there was a pretrial order excluding that characterization. The trial court denied a motion for mistrial based upon the belief that the detective was “not aware” of the pretrial ruling. ___ Wn. App. at ___ (slip op. at 3). After first questioning that finding, this Court declared that, “inadvertent or not,” the comment violated Hager’s constitutional right to be free from self-incrimination. *Id.* That right, the Court noted, protects the accused from “having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government.” *Id.*, quoting, *Easter*, 130 Wn.2d 241 (quoting *Doe v. United States*, 487 U.S. 201, 213, 108 S. Ct. 2341, 101 L. Ed. 2d 184 (1988)). Because the officer’s comment that Hager was “evasive” was made in the context of describing Hager’s denial of the allegations, “it was injected for no other purpose than to suggest Mr. Hager’s guilt.” *Id.*

Similarly, in *Romero*, an officer gave unsolicited testimony that Romero would not waive his rights and talk to police when they arrested him. 113 Wn. App. at 793. Even though the prosecutor did not use that testimony in arguing guilt, because the comment of the officer was clearly intended to “denigrate Mr. Romero and undermine his defense,” it was improper. 113 Wn. App. at 793-94.

Thus, even unemphasized mention of and allusion to a defendant’s exercise of his right to remain silent may be constitutionally offensive. *See State v. Keene*, 86 Wn. App. 589, 938 P.2d 839 (1997). The question is whether the mention is “so subtle and so brief” that it did not draw attention to the defendant’s exercise of his rights, or whether it was an

improper comment on those rights. See State v. Burke, 163 Wn.2d 204, 216, 181 P.3d 1 (2008), quoting, State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991) (quotation omitted). The comment in Hager was more than a mere passing “reference” to silence and amounted to a “comment” because the officer’s testimony clearly made the inference that, because Hager was “evasive with the detective, he was guilty of the allegation against him.” Hager, __ Wn. App. at __ (slip op. at _4-5).

Here, the prosecutor did not simply elicit testimony designed to imply Baines’ guilt based upon his pre-arrest silence - he exploited that testimony in closing, clearly drawing the link for any jurors who might have missed it during trial. Baines’ failure to stay to give his side of the story was “consciousness of guilt.” RP 178. His failure to “stop when the police are called” was noted, and the jury was told to ask itself why Baines did not stay to “face the law” if he was innocent. RP 178. If Baines was really not guilty as he claimed, the prosecutor suggested, Baines would have spoken to police in order to admit he had an arrest warrant and tell them, “I want you to know that I stuck around *because I’m not guilty here. I want you to know it looks pretty bad, but I want you to know that this is really what happened.*” RP 178 (emphasis added). And again, in rebuttal closing argument, the prosecutor specifically declared that Baines’ failure to stay and talk to police “*makes him guilty,*” that Baines had effectively admitted his own guilt by his pre-arrest silence “because he didn’t stop to say help me, help me, I am the victim of an assault” to the police. RP 201 (emphasis added).

Thus, unlike in cases where there was a single, unsolicited comment by a witness, in this case the testimony was solicited and then deliberately and repeatedly used to draw the unconstitutional inference that Baines' silence equaled guilt.

Indeed, the prosecutor's conduct in this case was an especially flagrant violation of Baines' rights. For example, in State v. Keene, *supra*, this Court reversed where a detective testified that the defendant refused to return telephone calls after being told that such failure would result in the allegations being turned over for prosecution. 86 Wn. App. at 592. In closing argument, the prosecutor referred *once* to the testimony, then told the jury it was their "decision if those are the actions of a person who did not commit these acts." 86 Wn. App. at 592. In holding that the testimony and the prosecutor's brief argument "constituted impermissible comments on Keene's right to pre-arrest silence," this Court noted that such a comment occurs when there is even a *suggestion* that silence might mean guilt. 86 Wn. App. at 594. Because the officer's testimony established that the defendant had not been heard from, and because the prosecutor's argument asked the jury to *consider* whether the failure to contact the detective was the act of an innocent man, the comments were impermissible comments on the defendant's silence, "suggesting it was an admission of guilt." 86 Wn. App. at 594.

Here, the prosecutor went much further than suggesting that the jury should decide for itself what an innocent man would do - he *told* them what such a man would do, then made it clear that Baines had not acted in that fashion. If there was any question in juror's minds about what the

prosecutor was getting at when he cross-examined Baines about his failure to stay and report the assault to police, the closing argument made it clear. The prosecutor was saying that, if Baines was innocent, he would have stayed and spoken not only to Sylstad but also to police. He would have admitted to police that things looked bad for him but stayed so he could tell them his version of events, because he was innocent. By failing to do so, the prosecutor said, Baines had shown his guilt.

The misconduct in this case was even more egregious than that in two cases where this Court recently reversed. In State v. Thomas, 142 Wn. App. 589, 174 P.3d 1264 (2008), when police arrived, Thomas was not there but his ex-girlfriend, Bonds, was holding a bloody towel to her face. 142 Wn. App. at 591-92. Thomas called several times over the next few days, trying to speak to Bonds, but was not allowed to do so. Id. At one point, an officer answered the phone and Thomas said he wanted to talk to Bonds, not the officer. Id.

At trial, the prosecutor elicited the officer's testimony that Thomas had not wanted to talk to the officer when the officer answered the phone. 142 Wn. App. at 593. Then, in closing argument, the prosecutor reminded the jurors that Thomas had not wanted to talk to the officers to tell them his "story" even though he knew that he was being accused of a crime, and that he would not talk to police. 142 Wn. App. at 594.

On appeal, Thomas argued that it was an improper comment on his pre-arrest silence when the prosecutor argued that point and also that, although Thomas knew police were there, he "'fled' rather than returning to deny Bonds's accusations to the police." 142 Wn. App. at 595.

In reversing, this Court first noted that a mere “reference” to silence was not reversible error absent a showing of prejudice, but that the crucial question was whether the state uses such a reference “as evidence of the defendant’s guilt.” 142 Wn. App. at 595. The “crucial distinction,” this Court noted, “is whether the State uses the accused’s silence to its advantage, either as evidence of guilt or to suggest to the jury that the silence was an admission of guilt.” *Id.* While the comment of the officer that Thomas did not want to talk to her was “no more than a passing reference to Thomas’ [] silence,” this Court found, the prosecutor’s arguments in closing converted that testimony into something far more - and violated Thomas’ constitutional rights:

[I]n closing argument, the prosecutor turned Officer Peterson’s testimony into more than a passing reference to Thomas’ [] decision not to talk with the officer. The prosecutor emphasized that although he had been accused of a crime, Thomas would not return to tell his story, . . .and “didn’t go back” to explain [his version of events]. . . **These comments plainly conveyed the message that if Thomas was not guilty, he would have returned to the crime scene to tell his side of the story.**

142 Wn. App. at 596 (emphasis added).

Here, the prosecutor did not simply comment on Baines’ failure to return and explain his side of the story - he told the jurors that failure showed Baines’ guilt. The message of the comments did not require any interpretation, as in Thomas. They were absolutely clear.

Similarly, the comments in this case were even more egregious than those in Knapp, supra. Knapp was accused of committing a residential burglary. 148 Wn. App. at 420. At trial, the prosecutor asked the arresting officer what Knapp said when the officer told him that an

eyewitness had identified Knapp as being involved. 148 Wn. App. at 419. The officer responded that Knapp had “hung his head” but not said anything in response. *Id.* Similar testimony was elicited during direct examination of the officer about Knapp’s acting “complacent” when told another witness had also identified him. *Id.* In closing argument, the prosecutor argued *once* that one of the reasons to believe Knapp was involved in the burglary was his behavior when told he had been identified, i.e., his failure to say to the officer, “No, it wasn’t me.” 148 Wn. App. at 420.

On appeal, Knapp argued that the testimony and closing argument violated his constitutional rights to pre-arrest silence. 148 Wn. App. at 420. The Court - and the prosecution itself - agreed. *Id.* The officer’s testimony, they admitted, was an improper comment on Knapp’s silence and the prosecutor improperly “implied that an innocent person would have denied the accusation.” *Id.*

Here, the prosecutor did not simply *imply* that Baines would have denied the accusations if innocent. He specifically *argued* that theory. RP 178-201. The prosecutor’s conduct here was even more egregious than that found to be serious constitutional misconduct in Thomas and Knapp. This Court should so hold.

In response, the prosecution may attempt to justify the improper comments by claiming that they were nothing more than an effort at “impeachment.” Any such claim, however, should fail. Under certain circumstances, when a defendant testifies, his prearrest silence may be used to impeach him. *See, e.g., Lewis*, 130 Wn.2d at 705-706. Even so,

the silence may only be used for impeachment and must not be used by the state as substantive evidence of guilt. Id.; see Easter, 130 Wn.2d at 237; Burke, 163 Wn.2d at 218.

Here, the evidence was so used. Thomas, supra, is instructive. In Thomas, the prosecution claimed that it was simply using Thomas' failure to speak to police when he called his girlfriend's home and his failure to return to her home after the incident to tell his side of the story as "impeachment" of Thomas' exculpatory testimony about what he said occurred. 142 Wn. App. at 596. This Court disagreed. While some of the comments simply disputed Thomas' claims about how many times he had called and whether he had threatened anyone when he called, the Court noted, other comments had exceeded that permissible scope:

[T]he prosecutor went beyond impeaching Thomas'[] story about the number and nature of the phone calls. He described Thomas'[] statements as "[y]eah, I don't want to talk to you" and "I don't want to talk to you [about] my story," and his motive for them as "[h]e's just been accused of a crime. I mean he knows that that's what's going on. The cops showed up there for a reason". . .
[T]he prosecutor's argument plainly invited the jury to infer Thomas'[] guilt from his refusal to talk with Officer Peterson and to return to the scene to tell the police his story.

142 Wn. App. at 597 (emphasis added).

Similarly, in Burke, the Supreme Court rejected the prosecution's claim that the defendant's silence was used only for impeachment when it was elicited and used in a way suggesting that the silence was evidence of guilt. Burke was accused of having nonconsensual sex with a younger girl at a party. 163 Wn.2d at 207. Police went to Burke's home, where he told them the sex was consensual and that he did not know her age but knew she was in high school. At that point, Burke's father asked if his son was

going to be charged with something and, when officers said it was “very possible,” told his son not to talk to police until he had consulted with counsel. Id. As police were leaving, Burke made a comment that “this was a bunch of shit” and that girls at a certain high school “were always trying to get guys in trouble.” Id.

At trial, the prosecutor asked an officer if Burke had ever explained his last comment. Id. Unsolicited, the officer then declared that Burke had already at that point “asked pretty much to talk to an attorney” so the officer did not ask any more questions because the interview had been stopped. Id. In cross-examination, the prosecutor asked Burke to explain why he never told police that he thought the victim was 16. 163 Wn.2d at 209. And in opening and closing, the prosecutor argued that Burke’s defense that the victim told him she was 16 and he thus thought she was of legal age was not credible because if that had really happened “he would have said so either to the police at the first interview” or when talking to the victim’s sister the next day on the phone. 163 Wn.2d at 208. The prosecutor also told the jury that the police “were there to gather the defendant’s side of the story” but he only “chose to give them” a little before his father ended the interview “perhaps sensing that it wasn’t necessarily okay to have sex” with the victim. Id.

On appeal, Burke argued that the trial court erred in failing to grant a motion for a mistrial, which he had asked for based upon his argument that the prosecutor had improperly invited the jury to infer his guilt based upon his exercise of his right to remain silent. 163 Wn.2d at 210. The prosecutor responded, *inter alia*, that it was proper impeachment for the

prosecutor to draw attention to “what Burke did say and what he did not say by remaining silent during the interview” to “imply his guilt.” 163 Wn.2d at 218.

In rejecting that argument, the Supreme Court noted that it had joined “other courts in being skeptical of the probative value of impeachment based on silence.” Id. The Court noted that silence was “ambiguous” under these circumstances because “an innocent person may have many reasons for not speaking,” including the awareness of the right not to speak, a belief that any attempts to do so would be futile, explicit instructions not to speak from counsel, mistrust of law enforcement officers and the simple unwillingness of a citizen to speak to police “not because they are guilty of some crime, but rather because ‘they are simply fearful of coming into contact with those whom they regard as antagonists.’” 163 Wn.2d at 219, quoting, People v. DeGeorge, 73 N.Y.2d 614, 618-19, 541 N.E.2d 11, 543 N.Y.S.2d 11 (1989) (citations omitted in original).

As a result, our Supreme Court concluded, “[i]n most cases it is impossible to conclude that a failure to speak is more consistent with guilt than with innocence,” so that a failure to speak is not particularly probative as impeachment. Burke, 163 Wn.2d at 219. Put another way, the Court said, to be relevant to impeachment, the silence must somehow bear on the defendant’s truthfulness, rather than just being used based on the theory that the defendant showed his guilt by failing to speak. Id. The prosecutor in Burke had “intentionally invited the jury to infer guilt from Burke’s termination of his interview” by suggesting that Burke did so

because he had done something wrong, so the prosecutor had violated Burke's right to silence. 163 Wn.2d at 221-22.

Here, just as in Thomas, the prosecutor's comments told the jury that, if Baines was not guilty, he would have returned to Sylstad's property - or never run away at all - to "tell his side of the story" to police. And just as in Thomas, here, the prosecutor's argument plainly invited the jury to infer that Baines was guilty because he had not stayed to "tell the police his story" but had instead run away. Just as in Burke, the prosecutor "intentionally invited" the jury to infer Baines' guilt based upon his silence. Thus, just as in Thomas and Burke, the prosecutor's comments were not proper impeachment but rather improper, unconstitutional argument. Any efforts by the prosecution to claim otherwise should be soundly rejected by this Court.

By first cross-examining in a way that implied a negative inference for Baines' failure to tell his side of the story to police and then arguing that the failure to stay or return to speak to police was evidence of Baines' guilt, the prosecutor committed constitutionally offensive misconduct. This Court should so hold. Further, because both Thomas and Knapp came from the very same prosecutor's office, this Court should consider ordering that office to conduct remedial training of all of its prosecutors as a result of its failure to ensure that they do not engage in this type of clearly constitutional misconduct, already condemned by this Court repeatedly, again.

b. Constitutionally offensive misconduct affecting Baines' rights to counsel

The prosecutor also committed another type of constitutionally offensive misconduct which amounted to an improper comment on Baines' rights to be represented by counsel.

i. Comments denigrating counsel and his role

In closing argument, the prosecutor began with the theme that the "one thing" jurors should take away from the case was that it was a "story as old as time" for a defendant who is "caught red-handed and caught in the act of committing a crime" will come to trial, "try to make up a story and hope" jurors will "buy it." RP 170-71. He also said that the "effort as old as time" included dismissing the evidence as "just a coincidence" declaring the victim was "mistaken or lying." RP 171. He concluded that this "story" had occurred in this case. RP 171.

Then, in rebuttal closing argument, the prosecutor began:

You know, ladies and gentlemen, I told you earlier that this story is as old as time in making up the blame, making up something trying to sell. **There's also a story as old as time that a defense attorney gets up here and acts indignant, and therefore there must be some truth in what he said. In the end, that is just an attempt to fill the room with smoke and set aside that which you know you're looking at.**

RP 198-99 (emphasis added). A few moments later, the prosecutor told the jury that the evidence said Baines was guilty because "even [defense counsel]. . . will tell you that" all of the circumstances pointed to that. RP 202. The prosecutor also described part of counsel's closing as "defense speak." RP 202.

- ii. It is completely improper for the government's lawyer to impugn the integrity of counsel or counsel's role, as such comments amount to a negative comment on the exercise of the right to counsel

These arguments of the prosecutor were improper, prejudicial and constitutionally offensive misconduct. Both the state and federal constitutions guarantee the accused the right to counsel. Strickland v. Washington, 366 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 482 (2006); 6th Amend; Art. I, § 22. It is misconduct and amounts to a negative comment on the exercise of those rights where the prosecutor makes comments designed to imply that counsel's role is to twist the words of witnesses or create a "smokescreen" in order to distract the jury from the evidence or its duties. See e.g. State v. Negrete, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993), review denied, 123 Wn.2d 1030 (1994); see also, Bruno v. Rushen, 721 F.2d 1193, 1194-95 (9th Cir. 1983), cert. denied sub nom McCarthy v. Bruno, 469 U.S. 920 (1984). Such arguments invite the jury to imply a negative inference from the defendant's exercise of his right to counsel, because they suggest that such antics are somehow part of defense counsel's role. See State v. Gonzales, 111 Wn. App. 276, 45 P.3d 205 (2002), review denied, 148 Wn.2d 890 (2003).

Thus, in Gonzales, it was held to be improper and misconduct when the prosecutor argued that he had a "very different job than the defense attorney" because did not have a client or a responsibility to

convict but only had an “oath and an obligation to see that justice is served” while counsel “has an obligation to a client.” 111 Wn. App. at 282-83. The Court noted that it was improper because it effectively ““seeks to draw the cloak of righteousness around the prosecutor in his personal status as government attorney and impugns the integrity of defense counsel.”” 111 Wn. App. at 283, quoting, United States v. Frascone, 747 F.2d 953, 957 (5th Cir. 1984).

Here, the prosecutor similarly sought to denigrate not only counsel’s integrity but also the role of defense counsel in general. After setting up the theme that lying at trial - and thus committing perjury - in order to get out of responsibility when you are “caught red-handed” was a “story as old as time,” and what was happening here, the prosecutor then declared it was another “story as old as time” for a defense attorney to “get[] up here and act[] indignant” in order to try to convince the jury that there was some “truth” in what he was saying when actually there was not. RP 170-71, 198-99. And defense attorneys using that “story” amounted to “an attempt to fill the room with smoke” to try to distract the jury from the evidence and make them decide the case on an improper basis, i.e., “set aside that which you know you’re looking at.” RP 198-99. Further, counsel was portrayed as someone who was using “defense speak” rather than admit that his client was guilty - as if defense attorneys have some other language they use to try to obscure the truth.

And all of this argument about counsel’s conduct being a “story as old as time” was linked back to the prosecutor’s other “story as old as time” - that of someone being willing to commit perjury and “making up

the blame, making up something trying to sell” to try to sway the jury to ignore the evidence. RP 170-71, 198-99.

Thus, the prosecutor impugned the integrity not just of Baines’ counsel but *all* defense counsel, who were portrayed as trying to distract jurors from the truth and the evidence with their antics in order to effectively fool the jury into finding for the defense. The clear implication was that defense attorneys engage in this kind of behavior to try to cause the jury to be swayed from their role, in order to get guilty clients like Baines off. Indeed, the prosecution’s arguments intimated that even *counsel* thought his client was guilty but would not admit it because he was a defense attorney and therefore corrupt.

The prosecutor’s arguments denigrating counsel and his role were serious, prejudicial misconduct which amounted to comments not only personally denigrated Baines’ counsel but also denigrating counsel’s role and implying Baines’ guilt based upon his exercise of the right to counsel. This Court should so hold.

- c. Reversal is required because the prosecution cannot meet the heavy burden of proving these constitutional errors harmless

Reversal and remand for a new trial is required, because these constitutional errors cannot be proven harmless by the prosecution.

Where, as here, the prosecutor commits misconduct infringing on a constitutional right, the prosecution bears a very heavy burden in trying to prove that constitutional error harmless. Easter, 130 Wn.2d at 242. It can only meet that burden if it can convince this Court that any reasonable jury would have reached the same result, absent the error. State v. Guloy, 104

Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). And that standard is only met if the untainted evidence was so overwhelming that it “necessarily” leads to a finding of guilt. 104 Wn.2d at 425.

Here, the prosecution cannot meet that burden for any of the constitutionally offensive misconduct in which the trial prosecutor engaged. As a threshold matter, it is important to note that this Court uses a different standard and test for review of this issue than those employed when the issue on review is the sufficiency of the evidence to support a conviction. Where the question is sufficiency of the evidence, this Court uses a relatively deferential standard, looking to see if the evidence, taken in the light most favorable to the state, would be enough for *any* rational fact-finder to convict. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), overruled in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). The burden is on the defendant to prove that the evidence was so deficient that no reasonable fact-finder could have made the required findings below. See, e.g., State v. Eckenrode, 159 Wn.2d 488, 496, 150 P.3d 1116 (2007).

In stark contrast, to prove a constitutional error “harmless,” the prosecution bears the burden of showing that *every* reasonable fact-finder would have convicted even if the error had not occurred. Easter, 130 Wn.2d at 242. Indeed, constitutional error is presumed prejudicial. Id. Rather than being deferential, the standard for constitutional harmless error, the “overwhelming evidence” test, requires the Court to reverse unless it is convinced beyond a reasonable doubt that the constitutional

error could not have had *any* effect on the fact-finder's decision to convict. Easter, 130 Wn.2d at 242.

Thus, even when there is enough evidence to uphold a conviction against a "sufficiency of the evidence" challenge, that is not enough to meet the "overwhelming evidence" test. See, e.g., Romero, 113 Wn. App. at 783-85. Romero is instructive. In Romero, the defendant was accused of having shot a gun in a mobile home park. 113 Wn. App. at 783. In addition to the evidence that Mr. Romero ran from the officers and was seen in the area of the crime just after the shooting, officers also found a shotgun inside the mobile home where Mr. Romero was hiding, and shell casings on the ground next to the mobile home's front porch. Romero, 113 Wn. App. at 783. Descriptions of the shooter seemed to point to Mr. Romero, and an eyewitness testified to seeing him shooting the weapon. 113 Wn. App. at 784. Although the witness was "one hundred percent" positive the shooter was Romero, the witness remembered seeing that man wearing a blue-checked shirt, rather than a grey-checked shirt Romero had. 113 Wn. App. at 784. And although another man, wearing a blue-checked shirt, was also with Romero that night, when shown the shirt Romero was wearing the eyewitness identified it as the one the shooter had worn. 113 Wn. App. at 784.

In reversing, the Court rejected Romero's argument that the evidence was insufficient, taking the evidence in the light most favorable to the state. 113 Wn. App. at 794. But the same evidence the Court found adequate to support the conviction against a sufficiency challenge was *not* enough when the constitutional harmless error standard applied. 113 Wn.

App. at 793. The officer had testified that Romero had not cooperated or spoke with police, although the prosecution had not exploited the comment in closing and had not even “purposefully elicited” the officer’s “unresponsive” answer. 113 Wn. App. at 793. Nevertheless, the Court held, it could not “say that prejudice did not likely result due to the undercutting effect on Romero’s defense.” 113 Wn. App. at 794.

Although there was significant evidence that Romero was guilty, that was not sufficient to amount to “overwhelming” evidence of guilt, sufficient to find the constitutional error harmless. 113 Wn. App. at 795-96. Indeed, the Court held, because the evidence was disputed, the jury was “[p]resented with a credibility contest,” and “could have been swayed” by the sergeant’s comment, “which insinuated that Romero was hiding his guilt.” 113 Wn. App. at 795-96.

The Romero decision serves to highlight the differences between the amount of proof of guilt required to be sufficient to support a conviction on review and the amount required to be “overwhelming evidence” which renders a constitutional error harmless. 113 Wn. App. at 797-98. Further, it indicates that, even when there is strong evidence of guilt, a reviewing court will not affirm a conviction tainted by constitutional error if the jury’s decision could have been affected by the error. See also, Easter, 130 Wn.2d at 242 (reversing based on the failure to prove constitutional error harmless because, while the state’s theory regarding Easter’s guilt was supported by significant evidence, there was disputing evidence so that the evidence did not “overwhelmingly establish” guilt in light of the emphasis on his silence as evidence of guilt).

Put another way, where the evidence of silence is used to indicate that the defendant is somehow hiding his guilt, that is an impermissible opinion on guilt under the law which may “sway” the jury so that reversal is required under the constitutional harmless error standard even when there is evidence supporting the state’s theory of guilt. Easter, 130 Wn.2d at 242-43.

Thus, in Burke where the “trial boiled down to whether the jury believed or disbelieved Burke’s story that the victim told him she was 16,” the constitutional error of commenting on Burke’s silence was not harmless, because it “had the effect of undermining his credibility as a witness, as well as improperly presenting substantive evidence of guilt for the jury’s consideration.” 163 Wn.2d at 222-23.

Here, just as in Romero, Easter and Burke, there was evidence of Mr. Baines’ guilt. But there was also conflicting evidence, such as the lack of his fingerprints, the state’s failure to bring in the screwdriver or any pictures of the alleged damage, Baines’ testimony explaining what had happened, the fact that Baines was bleeding from his head which could be explained by Walker hitting him as Baines said and the corroborating testimony of Mrs. Baines and her mother.

Indeed, the jury clearly did not completely believe Sylstad’s version of events, nor did it completely accept the prosecution’s claims of Baines’ guilt, because it *acquitted* Baines of the second-degree burglary the state claimed he must have committed to get the screwdriver and the bat. The jury’s further evaluation of Baines’ credibility was certainly not unaffected by the repeated comments telling the jury that Baines would not

have remained silent if he were innocent and implying his guilt because he had a defense attorney who was doing what such attorneys do by trying to distract the jury from its real duties and the evidence with “smoke.” The untainted evidence in this case was not so overwhelming that it necessarily led to a finding of guilt. The very grave errors and misconduct here cannot be deemed “harmless” and reversal is required.

2. THE PROSECUTOR COMMITTED FURTHER
FLAGRANT, PREJUDICIAL MISCONDUCT AND
COUNSEL WAS INEFFECTIVE

Reversal is also required because of the prosecutor’s flagrant, prejudicial misconduct in misstating the evidence, telling the jury it had to decide who was telling the truth and who was lying in order to perform its duty, telling the jury it had to find Sylstad was lying in order to fail to convict and attempting to inflame the jury’s passions and prejudices in order to bolster Sylstad’s testimony. Further, counsel was ineffective in relation to all of this misconduct.

a. Relevant facts

In closing argument, after telling the jury Baines was caught “red-handed” and “in the act of committing a crime” and was just coming to them “with a story to try and explain away the evidence” and “hope someone will buy it,” the prosecutor then said the jury was presented with the choice that either Baines was guilty or that his story, which “does not pass a straight face test,” was believable. RP 171. The prosecutor told the jury Baines was asking the jury “to believe him over Mr. Sylstad, the victim,” then went on:

Mr. Sylstad told you a number of things that the defendant flat out says aren't true. He says - - Eric says the only thing that he said to me was we weren't breaking in. That is it. He said a couple of times we weren't breaking in. He says it a couple of times, because that is sure what it looks like. What does the defendant tell you? Well, according to the defendant, he tells this whole story about being assaulted by his friend, Troy, how he's got all of these cuts and injuries on his face and he needs help. That is not what Mr. Sylstad told you. According to Mr. Sylstad, the only thing the defendant said is we are not breaking in as he's trying to run away.

Again, you have a choice between who is telling the truth here.

RP 174 (emphasis added).

A moment later, the prosecutor portrayed the jury's decision as "a choice between" Sylstad's version of events and that of Baines. The prosecutor went on:

So you have two choices, Mr. Sylstad or the defendant. Who do you believe? Who has every motivation to lie? Who has every reason to tell you something that is not the truth? Is it Mr. Sylstad, who got up on the stand and told you what he saw, what he heard, and what he discovered that night?

Mr. Sylstad has no reason to lie to you. I don't need to tell you that. You know that. You know because he's the victim of burglary. He has no reason to jeopardize his future, jeopardize his family, jeopardize his living by telling you anything other than the truth. The defendant has every reason to lie and tell you something other than the truth, and you know that he does so.

RP 175-76 (emphasis added). That was followed by the prosecutor telling the jurors that they "know that the defendant is not telling the truth." RP 176.

In summing up, the prosecutor said that Baines was guilty because his story did not "pass a straight face test" and also was told by someone the jury could not trust, which was inconsistent with what Sylstad said.

RP 188. The prosecutor declared: “Mr. Sylstad. . . is a credible witness . . . who has no reason to lie.” RP 188.

For his part, in his closing argument, counsel questioned the prosecution’s failure to present pictures of the alleged damage to the door and other evidence like the screwdriver or any fingerprints. RP 194-97. He also tried to defuse the impact of the prosecutor’s arguments about lying by stating, “[a]ccording to counsel, nobody is telling the truth except Mr. Sylstad.” RP 195. Counsel said Mrs. Baines had no motive to lie and asked, “[d]id I bring Mrs. Baines’ mother in here to lie to you?” RP 197.

In rebuttal closing argument, the prosecutor said:

You know, ladies and gentlemen, **if you have reason to doubt Mr. Sylstad, if you think that Mr. Sylstad got up there and told you a pack of lies, then by all means find the defendant not guilty.** If you think that Mr. Sylstad wanted this, if you think he wanted to be harassed for the last 16 months of his life, he wanted his daughter to be sleeping in his bed for three months, if you think he wanted to have to spend money to replace the doors, if you think that he wanted police showing up at his house and you think that he wanted the worry and panic that comes with not knowing where your daughters are on the night of the burglary, **if you think that he wanted that and he decided to get up here and lie and tell you a bunch of things that aren’t true, then by all means find the defendant not guilty.**

RP 199-200 (emphasis added). The prosecutor repeated that Sylstad did not “ask for any of this “and Mr. Sylstad has no reason to lie.” RP 200.

The prosecutor then said:

In the end, if you believe Mr. Sylstad was coming in here and being forthright with you and being a straight-up guy and telling you what occurred, then the defendant is guilty because there wasn’t somebody else[.]

RP 200. The prosecutor repeated this again one more time before ending.

RP 201.

- b. The prosecutor misstated crucial evidence and the jury's role as well as his own burden with this flagrant, prejudicial misconduct and counsel was ineffective

These arguments of the prosecutor were serious, flagrant and prejudicial misconduct, in three ways.

First, the prosecutor committed serious misconduct and misstated the evidence when he claimed that Baines had “flat out” said that much of what Sylstad had said was not true. No attorney is permitted to misstate the evidence and thus mislead the jury. State v. Davenport, 100 Wn.2d 757, 763, 675 P. 2d 1213 (1984). Nor is an attorney permitted to argue facts not in evidence. See id. This is especially true of the prosecutor, whose status as a quasi-judicial officer entrusts him with not only special authority in the eyes of the jury but also with a special responsibility to ensure the defendant receives a fair trial. State v. Reeder, 46 Wn.2d 888, 892-93, 285 P.2d 884 (1955). Regardless of the fact that a prosecutor may get caught up “in the heat of a trial” and “become a little over-enthusiastic in their remembrance of the testimony,” he still has a duty to ensure he does not mislead the jury, especially about crucial evidence. See Davenport, 100 Wn.2d at 763; State v. Fullen, 7 Wn. App. 369, 387, 499 P.2d 893, review denied, 81 Wn.2d 1006 (1972), cert. denied, 411 U.S. 985 (1973).

Here, in his entire testimony, Baines never once said that Sylstad was not telling the truth. RP 130-55. He never said Sylstad was lying, nor did he ever say Sylstad was saying things which were “not true.” RP 130-55. He simply presented his version of events, including that he was

trying to tell Sylstad about having been assaulted but Sylstad was not hearing him as he was more focused on calling the police because he thought Baines and Walker had been breaking in. RP 130-55.

Thus, there was absolutely no evidence that Baines *ever* “flat out” said that anything Sylstad said was “not true.” The prosecutor’s declaration that such testimony had occurred was a serious misstatement of the evidence and was improper.

Notably, it would have been serious, prejudicial misconduct for the prosecutor to even *try* to elicit such statements as he claimed Baines made. See State v. Castaneda-Perez, 61 Wn. App. 354, 362, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991). Prosecutors are not allowed to cross-examine in an effort to get a defendant to say the witnesses against him are lying. State v. Neidigh, 78 Wn. App. 71, 76, 895 P.2d 423 (1995). Such cross-examination is improper because it is irrelevant whether the defendant believes witnesses are lying and because such questioning “puts the defendant in a bad light before the jury.” State v. Wright, 76 Wn. App. 811, 821, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995).

Clearly, the purpose of the prosecutor’s misstatement was to put Baines in a bad light before the jury and further support the prosecutor’s improper arguments about the jury’s duties and responsibilities at trial. Those arguments, telling the jurors that they had to decide who was lying and who was telling the truth in order to decide the case and that they had to find that Sylstad was lying in order to acquit, were further flagrant, prejudicial misconduct. It is well-settled that it is “misleading and unfair to make it appear that an acquittal requires the conclusion” that the

prosecution's witnesses are lying. Castaneda-Perez, 61 Wn. App. at 362-63; United States v. Richter, 826 F.2d 206, 209 (2nd Cir. 1987). The argument is improper and misstates the burden of proof and the jury's role, because the jury is *not* required to determine who is telling the truth and who is lying in order to perform its duty. State v. Boehning, 127 Wn. App. 511, 524, 111 P.3d 899 (2005). Instead, it is only required to determine if the prosecution has proven its case beyond a reasonable doubt. Wright, 76 Wn. App. at 824-26.

In addition, the argument incorrectly gives the jury the "false choice" between believing the witnesses are lying or telling the truth, whereas the "testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved." Wright, 76 Wn. App. at 824-26; see State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). It is thus improper not only to tell jurors they need to decide who is telling the truth and who is lying but also to tell them that they must convict unless they find the state's witnesses are lying. Wright, 76 Wn. App. at 824-25.

Thus, in Fleming, the prosecutor's argument was misconduct in a case where the defendants were accused of raping the victim in her home and the sole issue was whether the sexual contact was consensual. 83 Wn. App. at 213. The victim testified that it was not; the defendants said that it was. The prosecutor told the jury it would have to find that the victim lied, was confused, or just fantasized what had happened in order to find the defendants not guilty. 83 Wn. App. at 213.

In finding that the argument was absolutely clear misconduct, both a misstatement of the law and a misrepresentation of the role of the jury and the prosecutor's burden of proof, the Fleming Court declared:

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

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

Just as in Fleming, here the jury did not have to decide who was lying or telling the truth in order to decide the case. See RP 174-75. It did not have to make a "choice" between either Sylstad or Baines as the one who was "telling the truth here." See RP 174. It did not have "two choices, Mr. Sylstad or the defendant." RP 175-76. Instead, it could have been unsure whether Sylstad was able to accurately recall and recount what happened because of the adrenalin rushing through his system as a result of arriving home and finding strangers there unexpectedly, or whether he was simply mistaken.

Further, the jury did not have to find that Sylstad was lying - and had a motive to do so - in order to acquit. It did not have to find that Sylstad was lying, that he had a "reason to lie," or that he had a "reason to jeopardize his future, jeopardize his family, jeopardize his living" by lying on the stand. RP 175-76, 188. It did not have to "have reason to doubt Mr. Sylstad" and find that he "got up there and told. . .a pack of lies" in order to "find the defendant not guilty." RP 199-200. The jury certainly

did not have to find that Sylstad “decided” to get up on the stand “and lie and tell you a bunch of things that aren’t true” before it could “find the defendant not guilty,” as the prosecutor declared. RP 199-200.

Instead, all that was required was that the jury find a reasonable doubt about Sylstad’s memory or perceptions, or that the prosecution had simply not presented sufficient evidence to prove its case.

Finally, the jury was not even required to make a “choice” between finding Baines guilty and believing his version of events. See RP 171. It could have disbelieved Baines but still acquitted if it found that the prosecution failed to present sufficient evidence to prove its case beyond a reasonable doubt.

The prosecutor thus misstated not only the evidence but also the jury’s role - and his own burden - by telling the jury it had to decide who was telling the truth and who was lying, that it had to convict if it did not believe Baines, and that it had to find Sylstad was lying in order to find Baines not guilty.

Further, by declaring to the jury that it should only find Baines guilty if it had “reason to doubt” Sylstad, the prosecutor not only misstated the jury’s role but also turned the prosecution’s constitutionally mandated burden on its head. The jury was not required to convict unless it could come up with a “reason to doubt” Sylstad -there is no presumption of *guilt*. Instead, it was required to acquit unless it decided the state had proven its case beyond a reasonable doubt. See Fleming, 83 Wn. App. at 213. This further misstatement of the jury’s task was especially egregious.

The prosecutor’s third type of flagrant, prejudicial misconduct was

his attempt to bolster Sylstad's credibility as part of the improper "truth and lying" theme by inflaming the jury's passions and prejudices. It is flagrant, prejudicial misconduct to try to sway the jurors by inciting their passions and prejudices. See State v. Bautista-Caldera, 56 Wn. App. 186, 195, 783 P.2d 116 (1989), review denied, 114 Wn.2d 1011 (1990). Further, prosecutors are not permitted to try to bolster the credibility of their witnesses. Such arguments are misconduct because they invite the jury to decide the case based upon emotion, not based on the evidence. Belgarde, 110 Wn.2d at 510-512.

Here, the prosecutor made just such improper appeals when, in rebuttal closing argument, he told the jury not only that it should "by all means find the defendant not guilty" if it had "reason to doubt" Sylstad and thought he had gotten on the stand and "told a pack of lies" but also that it had to find Sylstad "wanted" the trauma he had suffered as a result of the incident:

If you think he wanted this, if you think he wanted to be harassed for the last 16 months of his life. . . .wanted his daughter to be sleeping in his bed for three months. . . wanted to have to spend money to replace the doors. . . wanted police showing up at his house. . . wanted the worry and panic that comes with not knowing where your daughters are on the night of the burglary, if you think that he wanted that and he decided to get up here and lie and tell you a bunch of things that aren't true, **then by all means find the defendant not guilty.**

RP 199-200 (emphasis added). In addition, the jury was told that Sylstad did not "ask for any of this," which the prosecutor said showed he had "no reason to lie." RP 200.

Thus, the prosecutor tried to bolster the testimony of his crucial

witness by igniting the strong sympathy of jurors on Sylstad's behalf, for all of the difficulties and impact Sylstad and his family had suffered as a result of the incident. And the prosecutor specifically linked Sylstad's credibility to those emotional appeals. Further, the obvious corollary of that prosecutorial argument was to remind the jurors that it was Baines who was alleged to have *caused* all this trauma to Sylstad, who did nothing to "ask" for his suffering.

Reversal is required based upon this misconduct. It is well-recognized that "[p]rosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels those tactics are necessary to sway the jury in a close case." Fleming, 83 Wn. App. at 215. Even where, as here, counsel failed to object to the misconduct below, a reviewing court will still reverse if the misconduct is so flagrant and prejudicial it could not have been cured by instruction. Belgarde, 110 Wn.2d at 507.⁴

Here, no instruction could have cured the enduring prejudice caused by the prosecution's repeated arguments on this point. The prosecutor did not simply tell the jury, effectively, that Mr. Baines' defense was that Sylstad was lying. Nor did the prosecutor only misrepresent the record on that point. He also indicated that the jurors had to *find* that Sylstad, an upstanding family man, had some nefarious *motive* to lie and was doing so, in order to find Baines not guilty. Jurors were falsely told they had to choose between Sylstad and Baines in order to

⁴Counsel's ineffectiveness in failing to object to the misconduct is discussed, infra.

decide the case, and that if they did not believe Baines, they had to find him guilty. They were also told they could only find Baines not guilty if they had some “reason to doubt” Sylstad. And they were reminded of all of the indignities and difficulties Sylstad had suffered, with the implication that, if the jury did not convict, it would essentially be saying Sylstad had “asked” to so suffer. The effect of these arguments went far beyond just misstating the evidence, the law, the jury’s role and the burden of proof - they also clearly invoked the jury’s strong passions for Sylstad and against Mr. Baines. The arguments were exactly the kind which create such strong emotional reactions that they amount to a “bell” which, once sounded, cannot be unring.

Indeed, ten years ago, the Fleming Court held that it is so well-established that arguments such as those made here are misconduct that the very fact the prosecutor made such arguments demonstrates that they are flagrant and ill-intentioned. Fleming, 83 Wn. App. at 214. Notably, in Fleming, the prosecutor did not go as far as here, by raising the specter of perjury on top of everything else.

There is no question Baines was on Sylstad’s property on the day of the incident. He admitted that. The only question was what he was doing there. Because the prosecution did not bring in pictures of the alleged damages, or any fingerprints from Baines, or the alleged screwdriver, the case was basically all about credibility. The prosecutor’s misconduct struck directly at the heart of that issue -the only issue at trial.

Notably, “improper suggestions” made by a prosecutor “carry much weight against the accused when they should properly carry none,”

because the average juror will believe that a prosecutor will act in the interests of justice and act as befits an officer of the court and the people. Berger, 295 U.S. at 88. The prosecutor fell far short of that standard here, and the result was that Mr. Baines was deprived of his state and federal constitutional rights to a fair trial. This Court should reverse.

In the alternative, in the unlikely event that the Court believes that the enduring prejudice caused by the misconduct could have been erased by a proper instruction, this Court should reverse based on counsel's ineffectiveness in failing to object and request such an instruction. Both the state and federal constitutions guarantee the accused the right to effective assistance. Strickland, *supra*; Hendrickson, 129 Wn.2d at 77-78; 6th Amend; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). If Mr. Baines can show that, but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different, reversal is required. Strickland, 466 U.S. at 694.

Here, Mr. Baines can meet that standard. The misconduct went to the heart of the prosecution's case against him. It misstated crucial evidence. It misstated the jury's role, relieved the prosecution of the full weight of its burden of proof, and invoked strong feelings against Baines and for the victim. Yet counsel made no objection to the prosecutor's repeated acts of misconduct despite their very clear prejudice to his client.

It is Mr. Baines' position that the enduring prejudice caused by the

prosecutor's multiple acts of non-constitutional misconduct could not have been erased by even the most strongly worded instruction. If, however, such erasure was even possible, reasonably competent counsel would have made the attempt to do so on his client's behalf. The failure was unprofessional, and it clearly prejudiced Mr. Baines in this case. This Court should so hold and should reverse.

3. THE CUMULATIVE EFFECT OF THE MISCONDUCT COMPELS REVERSAL

Even if this Court were to find that none of the acts of misconduct compel reversal standing alone, reversal would nevertheless be required. Where a single act of misconduct standing alone would not compel reversal, reversal is required where the cumulative effect of all of the misconduct was "so ill-intentioned and flagrant as to have materially affected the outcome of the trial." State v. Henderson, 100 Wn. App. 794, 804-805, 998 P.2d 907 (2000).

Mr. Baines submits that the prosecution cannot meet its burden of proving the constitutionally offensive misconduct to be "harmless." Further, the incredibly pervasive flagrant, prejudicial misconduct in misstating the jury's role and the evidence, inciting the jurors' passions and prejudices and telling the jurors that they had to find Sylstad was lying in order to acquit, standing alone, compels reversal. In the unlikely event that this Court disagrees, however, there can be no question that the cumulative effect of all of the misconduct deprived Baines of his right to a fair trial and a new trial is required.

This is not a case where the prosecutor made a single slip of the

tongue or even two. This is a case in which the prosecutor repeatedly made comments which are recognized as misconduct, in an effort to convince the jury to convict. This Court should not countenance the incredibly improper, pervasive misconduct which occurred in this case and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 14th day of September, 2009.

Respectfully submitted,



KATHRYN A. RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

CERTIFICATION OF SERVICE BY MAIL

I hereby declare under penalty of perjury under the laws of the State of Washington that I deposited a true and correct copy of the attached document to opposing counsel and appellant by placing it in the United States Mail first-class postage prepaid to the following addresses:

TO: Kathleen Proctor, 946 County City Building, 930 Tacoma Ave. S,
Tacoma, WA. 98402;

TO: Hezzie Baines, DOC 935625, MCC, P. O Box 700, Monroe, WA.
98272-0777.

DATED this 14th day of September, 2009.


KATHRYN A. RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

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