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No. 39644-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Michael Rieken,**

Appellant.

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Grays Harbor County Superior Court Cause No. 08-1-00568-5

The Honorable Judge F. Mark McCauley

**Appellant's Opening Brief**

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### **ASSIGNMENTS OF ERROR**

1. Mr. Rieken's conviction violated his Fourteenth Amendment right to due process.
2. The court's "to convict" instruction omitted an essential element.
3. The trial court erred by giving Instruction No. 10.
4. Mr. Rieken was denied his constitutional right to a jury trial because the jury did not determine the identity of the substance he allegedly possessed.
5. Mr. Rieken was denied his constitutional right to a jury determination of all facts that increased the penalty for his offenses.
6. The trial court erred by sentencing Mr. Rieken to a prison term greater than that permitted by the jury's verdict.
7. The prosecutor committed misconduct that infringed Mr. Rieken's constitutional right to due process.
8. The prosecutor committed misconduct by misstating the burden of proof during closing arguments.
9. The prosecutor committed misconduct by suggesting that acquittal for unwitting possession required the jury to "entirely disregard" the trooper's testimony.
10. The prosecutor committed misconduct by suggesting that acquittal for unwitting possession required jurors "to be 51 percent sure that the defendant is telling the truth..." RP 53.
11. Mr. Rieken was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
12. Defense counsel was ineffective by failing to object to prosecutorial misconduct in closing.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The identity of a controlled substance is an essential element of Possession of a Controlled Substance. Here, the court's "to convict" instruction omitted the identity of the controlled substance Mr. Rieken possessed. Did Mr. Rieken's conviction violate his Fourteenth Amendment right to due process?
2. A sentencing judge may not impose sentence beyond that authorized by the jury's verdict. In this case, the jury did not identify the controlled substance possessed by Mr. Rieken. Did the sentencing judge violate Mr. Rieken's Sixth and Fourteenth Amendment right to a jury trial by imposing a sentence greater than that authorized by the jury's verdict?
3. A prosecutor may not make an argument that misstates the burden of proof. Here, the prosecutor mischaracterized the burden of proof for the affirmative defense of unwitting possession. Did the prosecutor's misconduct violate Mr. Rieken's Fourteenth Amendment right to due process?
4. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, defense counsel failed to object to the prosecutor's misconduct in closing. Was Mr. Rieken denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Michael Rieken and his girlfriend visited her father in the hospital. RP 30-31. While there, Mr. Rieken helped another family member fix his car. RP 39. Mr. Rieken was given a boat, and he hooked up the boat so he could tow it back to his home. RP 40. Since these activities made him dirty, he borrowed some clothing to wear over his clothing for the ride home. RP 31-32, 39-40.

The boat was in rough shape, and debris fell from it on the highway. RP 6. Trooper Eisfeldt signaled them to pull over, because of the debris and for speeding. RP 5-6. While neither occupant of the car noticed the officer behind them, Mr. Rieken pulled over within a quarter mile to check on their tires. RP 33, 36, 41-42. The officer arrested Mr. Rieken for Driving While License Suspended in the Third Degree. RP 7. During a search of Mr. Rieken, the officer found a small container in his pants pocket, which turned out to contain methamphetamine. RP 9, 24.

The state charged Mr. Rieken with Possession of a Controlled Substance (Methamphetamine):

That the said defendant, Michael O. Rieken, in Grays Harbor County, Washington, on or about July 26, 2008, did possess a controlled substance, to wit: Methamphetamine.  
CP 1.

At the jury trial, the court gave the jury a “to convict” instruction that included the following elements:

- (1) That on or about July 26, 2008, the defendant possessed a controlled substance; and
  - (2) That the acts occurred in the State of Washington.
- Instruction No. 10, Court’s Instructions to the Jury, Supp. CP.

Instruction number 9 informed the jurors that “Methamphetamine is a controlled substance.” Instruction No. 9, Court’s Instructions to the Jury, Supp. CP. At Mr. Rieken’s request, the court instructed the jury on the affirmative defense of unwitting possession. Instruction No. 11, Court’s Instructions to the Jury, Supp. CP.

During closing, the prosecuting attorney argued that the jury should believe the officer, who had testified that Mr. Rieken acknowledged having “meth” in his pocket. RP 10, 53. He contrasted this with the testimony of Mr. Rieken and his girlfriend, both of whom said that Mr. Rieken was wearing borrowed clothing. RP 31-32, 40, 53. “You have to entirely disregard the testimony of the trooper in this case to reach that conclusion.... I would also point out that, pursuant to this instruction, if you’re 50 percent sure the defendant is telling the truth in this case then it’s your duty as jurors to find him guilty, because he has to—he has the burden of persuasion, you have to be 51 percent sure that the defendant is telling the truth in this case to find him not guilty.” RP 53.

Mr. Reiken's attorney argued that his possession was unwitting. RP 54-57. During rebuttal, the prosecutor again urged the jury to find the trooper credible: "You have to really ask yourself the defense's theory of this case is, why would the trooper make this up? Because that's essentially what they're asking you to believe is that the trooper brought up here today, he never said who the meth is..... And there's really no reason the trooper in this case to tell anything but the truth." RP 57. Defense counsel didn't object to any of the prosecutor's statements. RP 53, 57.

The jury returned a verdict of guilty that read as follows: "We, the jury, find the defendant, Michael Owen Rieken, Guilty of the crime of Possession of a Controlled Substance as charged." Verdict Form A, Supp. CP. The court sentenced Mr. Rieken using the standard range for possession of methamphetamine, and he timely appealed. CP 3-11, 12.

## **ARGUMENT**

**I. MR. RIEKEN'S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT'S "TO CONVICT" INSTRUCTION OMITTED AN ESSENTIAL ELEMENT OF POSSESSION OF METHAMPHETAMINE.**

A "to convict" instruction must contain all the elements of the crime, because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22,

31, 93 P.3d 133 (2004). The jury has the right to regard the “to convict” instruction as a complete statement of the law. Any conviction based on an incomplete “to convict” instruction must be reversed. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). The adequacy of a “to convict” instruction is reviewed *de novo*. *State v. Deryke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

The identity of a controlled substance is an element of a crime where it increases the punishment that can be imposed. *State v. Goodman*, 150 Wn.2d 774, 785-786, 83 P.3d 410 (2004); *see also State v. R.L.D.*, 132 Wn. App. 699, 708, 133 P.3d 505 (2006). The crime of possession of a controlled substance is punished differently depending on the identity (and, in the case of marijuana, quantity) of the substance possessed. RCW 69.50.4013; RCW 69.50.4014.

Furthermore, the Sixth Amendment guarantees an accused person the right to a trial by jury. U.S. Const. Amend. VI. Any fact which increases the penalty for a crime must be found by a jury by proof beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In Washington, failure to submit such facts to the jury is not subject to harmless error analysis. *State v. Recuenco*, 163

Wn.2d 428, 440, 180 P.3d 1276 (2008) (citing Wash. Const. Article I, Section 21).<sup>1</sup>

Here, the “to convict” instruction omitted the identity of the substance allegedly possessed by Mr. Rieken. Instruction No. 10, Court’s Instructions to the Jury, Supp. CP. Because of this, the conviction must be reversed and the case remanded for a new trial. *Smith*, at 263. In addition, the jury’s verdict limited the sentencing judge to the lowest penalty for possession of a controlled substance. *Blakely*, *supra*. If the conviction is not reversed, the sentence must be vacated and the case remanded for a new sentencing hearing.

**II. THE PROSECUTOR’S MISCONDUCT IN CLOSING VIOLATED MR. RIEKEN’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. *Id.*, at 518.

Misconduct may be raised for the first time on appeal when it amounts to a manifest error affecting a constitutional right.<sup>2</sup> RAP 2.5(a);

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<sup>1</sup> By contrast, harmless error analysis *does* apply under federal law. *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

*State v. Jones*, 71 Wn.App. 798, 809-810, 863 P.2d 85 (1993). 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).<sup>3</sup> Where prosecutorial misconduct infringes on 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. *Id.*, at 25. The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

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<sup>2</sup> Prosecutorial misconduct that does not affect a constitutional right 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). *But see also 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.”)

<sup>3</sup> The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

A prosecuting attorney commits misconduct by making a closing argument that misstates 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. This includes arguments 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).<sup>4</sup>

In this case, the prosecutor made arguments misstating the burden of proof regarding Mr. Rieken's affirmative defense of unwitting possession. First, the prosecutor committed misconduct by arguing that acquittal required the jury to "entirely disregard" the trooper's testimony. RP 53. Second, the prosecutor argued that jurors "[had] to be 51 percent sure that the defendant is telling the truth..." RP 53.

Neither of these assertions is true. The jury could acquit Mr. Rieken on the affirmative defense if they found the defense established by

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<sup>4</sup> In addition to infringing the accused person's constitutional right to due process, arguments of this sort are *per se* flagrant and ill-intentioned. *See Fleming*, at 214 (Because the prosecutor's "improper argument was made over two years after the opinion" setting forth the rule, the court "therefore deem[s] it to be a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial.")

a fraction of a percentage above 50%. Under these circumstances, they would not “entirely disregard” the trooper’s testimony. It would be sufficient for jurors to weigh the trooper’s account and find it fractionally less persuasive than Mr. Rieken’s testimony (and that of his girlfriend).

It is difficult to establish an affirmative defense, especially when it contradicts an officer’s testimony. By distorting the burden, the prosecutor committed misconduct that violated Mr. Rieken’s right to a fair trial. Accordingly, Mr. Rieken’s conviction must be reversed and the case remanded to the trial court for a new trial. *Flores, supra*.

**III. MR. RIEKEN WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO OBJECT TO PROSECUTORIAL MISCONDUCT IN CLOSING .**

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective

assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). It is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland*); see also *State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance; however, this presumption is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, at 130. Any trial strategy “must be based on reasoned decision-making...” *In re Hubert*,

138 Wn. App. 924, 929, 158 P.3d 1282 (2007). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

A failure to object to improper closing arguments is objectively unreasonable “unless it ‘might be considered sound trial strategy.’” *Hodge v. Hurley*, 426 F.3d 368, 385 (C.A.6, 2005) (quoting *Strickland*, at 687-88). Under most circumstances,

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

*Hurley*, at 386 (citation omitted).

In this case, defense counsel failed to object to the prosecutor’s improper closing arguments. RP 53, 57. Counsel had no strategic reason to allow the prosecutor to misstate the burden of proof; indeed, there is no conceivable strategic reason for counsel’s failure to object to such misconduct. Defense counsel should have objected to each instance of

misconduct and requested a mistrial. If the prosecutor's misconduct is not reviewable under RAP 2.5(a) (or under the "flagrant and ill-intentioned" standard), Mr. Rieken was denied the effective assistance of counsel. *Hurley, supra*. His conviction must be reversed and the case remanded for a new trial.

### **CONCLUSION**

For the foregoing reasons, Mr. Rieken's conviction must be reversed and his case remanded for a new trial. In the alternative, his sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on January 29, 2010.

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CERTIFICATE OF MAILING

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

All postage prepaid, on January 29, 2010.

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 January 29, 2010.

  
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