

No. 39860-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

JARRETT REEDY,

Appellant.

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

The Honorables James Orlando (trial and sentencing),
Thomas J. Felnagle, Susan J. Serko and Ronald E. Culpepper (motions),
Judges

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 4

 1. Procedural Facts 4

 2. Testimony at trial 5

D. ARGUMENT 11

 1. THERE WAS INSUFFICIENT EVIDENCE TO PROVE MR. REEDY GUILTY AS AN ACCOMPLICE TO THE ROBBERY 11

 2. IN THE ALTERNATIVE, THE PROSECUTOR COMMITTED SERIOUS, CONSTITUTIONALLY OFFENSIVE MISCONDUCT AND COUNSEL WAS INEFFECTIVE 16

 a. Relevant facts 17

 b. The arguments misstated the prosecutor’s constitutional burden, the jury’s role and the presumption of innocence and were misconduct 19

 c. Reversal is required 25

 d. In the alternative, counsel was ineffective 30

 3. IN THE ALTERNATIVE, THE JURY INSTRUCTIONS ON THE SPECIAL VERDICT WERE IMPROPER AND THE RESULTING VERDICT AND ENHANCEMENT MUST BE STRICKEN 31

E. CONCLUSION 40

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

In re Wilson, 91 Wn.2d 487, 588 P.2d 1161 (1979) 14

State v. Bashaw, ___ Wn.2d ___, ___ P.3d ___ (2010 WL 2615794) (July 1, 2010) 32, 34-39

State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007) 19, 20, 39

State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007). 19, 20

State v. Boast, 87 Wn.2d 447, 553 P.2d 1322 (1976). 13

State v. Bowerman, 115 Wn.2d 794, 802 P.2d 116 (1990) 30

State v. Clausing, 147 Wn.2d 620, 56 P.3d 550 (2002) 32

State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984). 19

State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996). 19, 25, 26

State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003) 3, 33-36

State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). 25, 27

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996) 30, 31

State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1988) 11

State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996) 32

State v. Rotunno, 95 Wn.2d 931, 631 P.2d 951 (1981) 12

State v. Studd, 137 Wn.2d 533, 973 P.2d 1049 (1999). 30

State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008), cert. denied, ___ U.S. ___, 129 S. Ct. 2007 (2009). 34, 39

WASHINGTON COURT OF APPEALS

State v. Amezola, 49 Wn. App. 78, 741 P.2d 1024 (1978), disagreed with on other grounds by State v. McDonald, 138 Wn.2d 680, 981 P.2d 443 (1999) 14

State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009) . . . 32, 34-39

State v. Barrow, 60 Wn. App. 869, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991) 19, 20, 39

State v. Casteneda-Perez, 61 Wn. App. 354, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991). 19, 20

State v. Cleveland, 58 Wn. App. 634, 794 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991). 3, 19

State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996). 29

State v. Luna, 71 Wn. App. 755, 862 P.2d 620 (1993). 32

State v. Madison, 53 Wn. App. 754, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989) 19

State v. Romero, 113 Wn. App. 779, 54 P.3d 1255 (2002). 19

State v. Saunders, 91 Wn. App. 575, 958 P.2d 364 (1998). 3, 33-36

State v. Venegas, 155 Wn. App. 507, 228 P.3d 821 (2010). 25, 27

State v. Wright, 76 Wn. App. 811, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995) 30, 31

FEDERAL AND OTHER CASELAW

Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), overruled in part and on other grounds by Estelle v. McGuire, 502 U.S. 62, 73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). 11

Chalmers v. Mitchell, 73 F.3d 1262 (2nd Cir.), cert. denied, 519 U.S. 834 (1996) 32

Gonzalez-Balderas, 11 F.3d 1218 (5th Cir.), cert. denied, 511 U.S. 1129 (1994) 12

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 16, 19, 26, 30

<u>State v. Banks</u> , 260 Kan. 918, 927 P.2d 456 (1996).	34, 39
<u>State v. Boswell</u> , 170 W. Va. 433, 294 S.E.2d 287 (1982)	21
<u>State v. Medina</u> , 147 N. J. 43, 685 A.2d 1242, <u>cert. denied</u> , 519 U.S. 1135 (1996)	20
<u>Strickland v. Washington</u> , 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)	30
<u>Sullivan v. Louisiana</u> , 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)	26
<u>United States v. Pine</u> , 609 F.2d 106 (3 rd Cir. 1979).	24

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

Article 1, § 22	1, 30
RCW 69.50.401(1)(2)(b).	4
RCW 9.41.010(12)	4
RCW 9.41.040(1)(a)	4
RCW 9.94A.310	4
RCW 9.94A.370	4
RCW 9.94A.510	4
RCW 9.94A.530	4
RCW 9A.08.020	12
RCW 9A.52.020(1)(a)	4
RCW 9A.56.190	4
RCW 9A.56.200(1)(a)(I)	4
Sixth Amendment	1, 30

A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to prove appellant Jarrett Reedy guilty of first-degree robbery.

2. The prosecutor committed flagrant, prejudicial and constitutionally offensive misconduct in closing argument which could not have been cured by instruction.

3. Appellant Jarrett Reedy was deprived of his Article 1, § 22 and Sixth Amendment rights to effective assistance of counsel.

4. In the alternative, the firearm special verdict and the resulting sentencing enhancement must be stricken because the jury was improperly instructed in a way which did not make it clear that the jurors did not have to be unanimous to answer the special verdict form “no,” thus violating appellant Jarrett Reedy’s right to the presumption of innocence. Appellant assigns error to Jury Instructions 5, 36 and 37, copies of which are attached as Appendix A.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. JoJo Evans, Sr., went into a motel room, announced that everyone was being “jacked,” then hit a man there on the head. Everyone started running except Evans and a man named Jarrett Reedy, who were seen running out one after the other a few minutes later by police. Evans later allegedly dropped a gun just before he was arrested and Reedy allegedly dropped a gun and a container of methamphetamine in a trash can before his arrest.

There was no evidence that Evans and Reedy even knew each other. The place the incident occurred was the home of a drug seller,

where it could be expected that people would congregate with unfamiliar people in their shared role as buyers. Was there insufficient evidence to prove that Reedy was an accomplice to Evans in robbing the apartment when the only evidence was that Reedy opened the door when Evans knocked to be let in, that Reedy was present along with others when Evans committed the assault, and that Reedy ran out of the motel just after Evans and was allegedly carrying methamphetamine and a gun different than the one Evans had been found with when he ran?

2. It is misconduct for a prosecutor to misstate the law. Such misconduct amounts to a constitutional violation when it directly impacts a constitutional right of the defendant.

a. The state and federal due process guarantees require the prosecution to prove every part of its case, beyond a reasonable doubt. Further, the presumption of innocence mandates that the jury must acquit unless and until the prosecution meets that burden of proof.

In this case, the prosecutor told the jury that it could not acquit Reedy unless the jurors could specifically state a reason that they doubted his guilt. The prosecutor also told them that the presumption of innocence ended when they started deliberating. Is reversal required based on the prosecutor's misstatement and minimization of his constitutionally mandated burden of proof?

b. The prosecutor also told the jurors, repeatedly, that it was their duty and role to decide who was telling the truth and what the truth was about what happened at the time of the alleged incident. Is

reversal required because the jury is not required to make such a determination but is instead tasked with the sole duty of deciding whether the state has proven its case, beyond a reasonable doubt?

c. Where a prosecutor commits misconduct which directly impacts a constitutional right, prejudice is presumed and reversal is required unless the prosecution can prove that the “overwhelming untainted evidence” is so strong that any reasonable jury would have convicted the defendant in the absence of the misconduct. Can the state meet that heavy burden where the prosecutor’s misconduct directly impacted the jury’s ability to evaluate all of the evidence and there was thus no evidence left “untainted” upon which the convictions can rely?

Further, could the state meet the constitutional harmless error test where the evidence linking Reedy to the robbery was extremely thin?

d. In the unlikely event the Court finds that the constitutionally offensive misconduct could possibly have been cured by objection and instruction, was counsel prejudicially ineffective in failing to seek such remedies?

3. Under State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), and consistent with the principle that the defendant is entitled to the benefit of any reasonable doubt under the presumption of innocence, a jury need not be unanimous in answering a special verdict “no.” The jury instructions in this case repeatedly told the jurors they had a duty to deliberate to reach a unanimous verdict but failed to make it clear that such unanimity was not required for answering the special verdict “no.”

a. Were the jury instructions improper and misleading

in misstating the requirements for entering a ‘no’ finding on the special verdict? Further, were appellant’s rights to the benefit of any doubt and the presumption of innocence violated by the improper instructions?

b. Must the sentencing enhancement based upon the special verdict be dismissed where the verdict was the result of instructions which so tainted the deliberative process that it is not possible to deem the error harmless?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Jarrett Lynn Reedy was charged by information with first-degree burglary, first-degree robbery, unlawful possession of methamphetamine with intent to deliver and first-degree unlawful possession of a firearm. CP 142-44; RCW 9A.010(12); RCW 9.41.040(1)(a); RCW 9A.52.020(1)(a); RCW 9A.56.190; RCW 9A.56.200(1)(a)(I); RCW 69.50.401(1)(2)(b). Firearm enhancements were also alleged for the burglary and robbery. CP 142-44; RCW 9.94A.310; RCW 9.94A.370; RCW 9.94A.510; RCW 9.94A.530.

After pretrial motions before the Honorable Ronald Culpepper on May 5 and 11, 2009, the Honorable Susan Serko on May 13 and 14, 2009, and the Honorable Thomas J. Felnagle on July 9, 2009, trial was held before the Honorable James Orlando on August 18-21, 2009.¹ Before the

¹The verbatim report of proceedings in this case consists of 7 volumes of transcript, which will be referred to as follows:
the motion hearings of May 5, 11, 2009, as “1RP;”
the motion hearings of May 13 and 14, 2009, as “2RP;”
the motion hearing of July 9, 2009, as “3RP;”
the 4 chronologically paginated volumes containing the trial and sentencing on August 18-21 and October 2, 2009, as “RP.”

case was submitted to the jury, the court dismissed the burglary charge. RP 306. The jury ultimately found Reedy guilty of first-degree robbery, not guilty of possession of methamphetamine with intent to deliver but guilty of the lesser included crime of unlawful possession and guilty of second-degree unlawful possession of a firearm. RP 399-401; CP 291-95. It also found that Reedy was armed with a firearm for the robbery. RP 401.²

On October 2, 2009, the court ordered Reedy to serve a low-end standard range sentence of 46 months for the robbery, 18 months for the drug possession and 12 months on the firearm possession, to run concurrently. RP 429; CP 298-311. The 60-month firearm enhancement was ordered to run concurrently to the 46 months on the robbery. RP 429.

Reedy appealed and this pleading follows. See CP 314.

2. Testimony at trial

Shalamar Erickson and Amber Sawyer-Jones went to a motel room in the Lakewood area to smoke and buy some drugs from Erickson's friend, "Travis," in the afternoon of November 5, 2008. RP 16-17, 35, 48. Sawyer-Jones drove them to the motel in her car and she and Erickson went to the room of Erickson's friend on the second floor, where Erickson would later testify that Erickson's friend, Travis Patterson, and another man were inside. RP 18-19, 47. Sawyer-Jones, in contrast, thought there were three people there, including Patterson, all white men. RP 48, 57.

Erickson said she and Sawyer-Jones smoked some "meth" with

²While it was submitted to the jury, the special verdict form for Reedy was apparently not filed in the court file.

everyone in the room and she gave some money to her Patterson to buy the “dope.” RP 42. Sawyer-Jones claimed, however, that she no longer smoked “meth” and was only there to buy marijuana. RP 46, 48, 49, 60. Sawyer-Jones said there was no marijuana there so she did not do any drugs. RP 49, 60. Both women agreed that they hung around for about 10 or 15 minutes before they started getting ready to leave. RP 20, 33, 49-62.

According to Erickson, at the moment they were about to leave, a man came into the room with a handgun in his hand and hit Patterson over the head with the gun. RP 21. Sawyer-Jones, in contrast, remembered that it was one of the men who had been there all along but kept going in and out of the room who came into the room with a gun. RP 58-63. Sawyer-Jones said that, when he came in, the man said they were all “getting jacked.” RP 58-63.

Erickson said it was clear that the other man who was already in the room at the time was not involved in what was going on. RP 26. That man, later identified as Jarrett Reedy, left “pretty quickly” after Patterson was hit. RP 26.

According to Sawyer-Jones, Reedy was first out the door after Patterson was hit, followed by Erickson and Sawyer-Jones. RP 63. The two women ran down the stairs and got into the car, driving off. RP 22, 52. They drove only a few blocks when they were pulled over by police officers in an undercover car. RP 22, 52.

The officers asked where Erickson and Sawyer-Jones were coming from and the women responded, “[f]rom the motel room, as if you don’t know that.” RP 23. Erickson and Sawyer-Jones were searched and were

asked for identifying information. RP 24. Sawyer-Jones remembered being handcuffed and asked questions for awhile. RP 54.

Sawyer-Jones remembered that, at some point during the questioning, one of the officers took Erickson in a police car and drove her away someplace before eventually bringing her home. RP 54-57. Erickson, however, did not recall being taken back to the motel and shown people there, nor did she remember being asked if anyone there was involved in the incident. RP 24. The officer who brought Erickson to the motel said that she had identified one of the two men detained there as being involved in the assault, while the other she said had just been there. RP 101, 111.

Erickson did not recall what the person who hit her friend looked like, nor did she recall what the other man in the apartment with her friend looked like. RP 26-27, 34. She explained that she was “pretty high” at the time of the incident and had been smoking “meth” with Sawyer-Jones just before they got to the motel. RP 27, 30. Erickson’s intake of meth over the 3-4 days prior to the incident was about a gram and a half a day, which Erickson said was about “normal” for her drug use at the time. RP 30.

Indeed, Erickson admitted that, when she uses meth and stays up for days at a time, she sometimes heard voices and saw things that were not there. RP 33. The hallucinations are both auditory and visual. RP 34. Her inability to remember what the men there looked like was in part on the “effect” smoking meth and staying up for days had on her memory. RP 34. Nevertheless, Erickson was “pretty sure” that the events she

thought had occurred had actually happened. RP 41.

Sawyer-Jones denied smoking “meth” that day, saying she did not use it anymore and was not using at the time. RP 49. An officer who interviewed her later said that Sawyer-Jones admitted being at the motel that day to use “meth.” RP 117.

Unfortunately for Evans, that was the day Officers Darcy Olsen, Jeff Martin, Anders Estes and others at the Lakewood Police Department (LPD) were planning on doing a controlled narcotics buy with an informant at that motel, in that very room, room 242. RP 86, 124, 136. Martin was working surveillance and watched a man later identified as JoJo Evans, Sr., leave the room twice and walk down the stairs to a Toyota parked there, getting into that car. RP 139. The first time, Evans was in the car for about a minute, probably going in through the driver’s side. RP 140. The second time he went into the passenger side and was in the car for a couple of minutes. RP 140. Martin did not see anything in Evans’ hands at any point when he was observing him. RP 141. When Evans headed back to the room the second time, he looked at the vehicle Martin was in and Martin thought Evans then looked a little “hesitant” and suspicious of Martin’s car and appearance. RP 142.

When Evans went back to the door of the room, Martin said he saw the man hesitate, knock lightly on the door and go inside when someone in a red shirt opened the door. RP 143. Evans kept looking over his shoulder at Martin’s vehicle, making Martin sure the officers “had been compromised.” RP 144. Martin admitted, however, that anytime he was working undercover he always felt like he had been compromised, so

he did not know if he was overreacting or not. RP 144.

With Martin watching from his vantage point more than half a football field away, the door to the room was then “flung” open. RP 145, 240. Martin saw two women run out, followed by a man. RP 145. The women got into a car parked at the motel and drove off. RP 145-46. When they drove out, Martin called over his “channels” to tell other officers what was happening. RP 146. Martin lost sight of the man and assumed he had gone around the building to the north. RP 147.

A moment later, Martin saw someone he identified as Evans and another man later identified as Jarrett Reedy run out of the room and down the corridor. RP 147. Evans ran out first, with Reedy following behind about 10 feet. RP 148. Martin drew his gun and caught Evans at the bottom of the stairs, ordering him to the ground. RP 150, 153. Evans looked at Martin, hesitated, slid and “shuffled” to his right and as he got to the front end of the parked vehicle Evans moved his right hand up towards the front pocket of his sweatshirt. RP 154. Because the officer did not know if Evans was going for a weapon the officer continued to order Evans to stop. RP 154-55. Evans dropped his hand out of his pocket and the officer then heard what sounded like a loud metal clank or “ping” on the ground. RP 154-55. A moment later, Evans got on the ground himself. RP 155.

All of this took about six seconds from the moment the door to the room had opened and people had come rushing out. RP 156.

Martin said the man in the red shirt, Reedy was now in front of him and Martin saw a “flash” and noticed Reedy somewhere near a trash

can and coke machine. RP 157. Another officer was positioned nearby where Reedy had gone and Martin then heard that officer ordering Reedy to the ground. RP 158. Martin testified that he then saw Reedy go to the trash can, drop something the area of the can and then get to the ground. RP 158-59. Martin walked back to the area where he had seen Evans pause just in front of the vehicle and there he found a handgun. RP 161. Martin then went to the trash can and saw inside a black handgun and something that looked like it contained “a large amount of methamphetamine.” RP 158-61.

The gun in the trash can was an unloaded nine millimeter handgun. RP 166, 230, 234. The gun underneath the car was a Smith & Wesson .45 caliber automatic handgun which was loaded at the time it was seized. RP 171-73, 194. A pistol magazine was in the room but it was a .380. RP 232-33.

About 20 minutes after the police thought they had the scene secured, the door to 242 suddenly opened and someone else came out. RP 197, 264. That person had what appeared to be a “laceration” of his head and possibly his face and was identified as Travis Patterson. RP 197-98, 265. Patterson had a red stain on his sweatshirt that appeared to be blood. RP 199-200. Patterson was not willing to say anything about what might have been taken from him, if anything. RP 270, 277.

The Toyota Evans had been in and out of had a two .45 caliber rounds on the floorboards, a backpack with a digital scale inside, some plastic bags and some powder in a bag believed to be methamphetamine. RP 78.

A small plastic Tupperware from the garbage can was not fingerprinted but was found to contain 38.9 grams of methamphetamine. RP 78, 213, 242. Reedy also allegedly dropped a bag with .5 grams in it on the ground at some point, although the testimony on that was somewhat unclear. RP 216, 220-23.

Officer Martin believed that the first man they had seen run out with the women had been Patterson and that he had somehow managed to get back into the apartment while it was being surrounded and cordoned off by police. RP 226, 243.

Inside room 242, on the bed and in the toilet, was some marijuana, in contrast to the testimony of Sawyer-Jones that there was none in the room. RP 49, 60, 125.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO PROVE MR. REEDY GUILTY AS AN ACCOMPLICE TO THE ROBBERY

Under the state and federal due process clauses, the prosecution bears the constitutional burden of proving every element of the crime charged beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991). Where the state fails in this duty, reversal and dismissal with prejudice is required, because the state, with all its resources, is not permitted a second chance to prove that which it failed to prove initially. See State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1988).

In this case, reversal and dismissal of the robbery conviction is required, because there was insufficient evidence to prove Reedy guilty of that crime.

Reedy was accused of “acting as an accomplice” in committing the crime of robbery. CP 142-44. The prosecution’s evidence against Reedy was 2) that he opened the door to Evans when Evans knocked on it just before the assault occurred inside, 2) that Reedy was later seen running from the apartment behind Evans, and 2) that Reedy was later found near some methamphetamine and a gun which was *not* the one Evans had been carrying. This evidence was utterly insufficient to prove Reedy guilty as an accomplice.

To prove Reedy guilty as an accomplice to first-degree robbery, the prosecution had to prove that he 1) took some “accomplice act” such as soliciting, commanding, encouraging or aiding Evans in that robbery and 2) did so knowing that his act would have the effect of promoting or facilitating the robbery. See RCW 9A.08.020.

This burden is not met by showing that the defendant was present when someone else committed a crime. See State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981). This is true even if that presence somehow makes the crime easier to commit. Id. It is true even if the alleged accomplice knows that his presence will help in the commission of the crime. Id. And it is so even if the person accused of being the accomplice does nothing to stop the crime from being committed, knows the person committing it and even takes advantage of the crime having occurred in some way. State v. Luna, 71 Wn. App. 755, 758-60, 862 P.2d

620 (1993).

Instead, a person may only be found guilty as an accomplice if there is proof that he did something in association with the principal with the specific intent to accomplish the specific crime alleged or charged. State v. Boast, 87 Wn.2d 447, 455-56, 553 P.2d 1322 (1976).

Thus, in Luna, supra, a defendant who was with another person who stole a truck and then raced with him in another car could not be held liable as an accomplice to the truck theft even though he did nothing to stop the theft and engaged in racing with the defendant in the stolen truck. 71 Wn. App. at 759. Regardless of his presence and what he had done after the truck was stolen, there was no evidence the defendant had “associated with and participated” in the car theft “as something he wished to happen and which he sought by his acts to make succeed.” 71 Wn. App. at 759. In addition, there was no evidence the defendant knew of or “even suspected” that the other person would steal a truck, nor did the racing amount to “promoting or facilitating” that theft, which was already completed at the time. 71 Wn. App. at 759-60.

Similarly, in State v. Amezola, 49 Wn. App. 78, 741 P.2d 1024 (1978), disagreed with on other grounds by State v. McDonald, 138 Wn.2d 680, 981 P.2d 443 (1999), there was insufficient evidence to support the defendant’s conviction for possession with intent to deliver heroin as an accomplice when she was a live-in companion of a man who had been seen dealing drugs and had quantities of the drug and other contraband in his closet. It was not enough, the Court said, that the defendant was physically present in the home; she must also be proven to

have associated with the enterprise in some way. 49 Wn. App. at 88-89. Even though the defendant had performed domestic tasks which made it easier for her boyfriend to commit his crimes, and even though she might have known that her boyfriend was involved in such criminal activity, that was not sufficient to hold her liable as an accomplice. 49 Wn. App. at 89-90.

And in In re Wilson, 91 Wn.2d 487, 588 P.2d 1161 (1979), a defendant who was with others who stole weatherstripping from office building windows, made it into a “rope” and then strung it across a road was not guilty as an accomplice to the reckless endangerment the others engaged in just by being there and “being involved in the whole atmosphere of what was going on.” 91 Wn.2d at 490. Just being there, being friends with the perpetrators and even knowing that they were engaging in the illegal conduct was insufficient for accomplice liability, because the state failed to provide any evidence that the defendant sought to associate with or participate in any way. 91 Wn.2d at 491-92.

Here, there was no evidence to prove that Reedy “associated with and participated” in the robbery “as something he wished to happen and which he sought by his acts to make succeed,” or that he committed any “accomplice act” knowing that he was “promoting or facilitating” a first-degree robbery. See Luna, 71 Wn. App. at 759. Prior to the assault, the only “act” he was alleged to have committed in relation to Evans was opening the door to the drug dealer’s motel room when Evans knocked to get back in. But according to the officer, this was not the **first** time Evans had knocked and gone back in after getting into the Toyota for a moment -

it was the second. It is not as if the motel room had a security alarm and Reedy turned off the alarm so that Evans could get in - he had already apparently *been* in the motel room. Opening the door for someone who knocks at a drug dealer's motel room does not by itself support the conclusion that Reedy had "associated with" or participated in the robbery as something he wished to make occur - especially where, as here, that person had already been inside the room and was not locked out or needing help to get in.

Crucial here is the evidence that was missing. There was no evidence that Reedy and Evans arrived together, or in the same car. At least one witness was sure that Reedy was there well before Evans. RP 18-19. Indeed, there was no evidence presented that Reedy and Evans were friends, had been seen together before, or even *knew* each other.

The only other evidence the state presented involved Reedy's actions after the assault, when Reedy 1) ran just as other people did but left the motel behind Evans and 2) was arrested near a trash can he was seen dropping something in, in which a gun and some drugs were later found. This evidence, however, does nothing to establish that Reedy was aiding, encouraging, commanding or taking any other "accomplice act" knowing that it was "promoting" or facilitating Evans in committing the robbery. At most, it shows that a man who was in a drug dealer's motel room a moment before 1) had a gun with him, 2) had some drugs with him, and 3) fled the room after an assault occurred, behind the person who had committed the assault. The gun was not alleged to have been involved in the assault, and the drugs could easily have belonged to Reedy

or been bought by him. Even if it could be assumed that those drugs were someone else's and not something Reedy had bought, at most his possession of them after the incident would establish that he had taken advantage of the situation caused by the situation and stolen something himself. There was no evidence of collusion or even communication between Reedy and Evans which would support even the smallest link between the two men, let alone prove that Reedy was an accomplice to Evans in the robbery.

Because there was insufficient evidence to prove Reedy guilty as an accomplice to the first-degree robbery, his conviction for that crime must be reversed and dismissed and he must be resentenced accordingly.

2. IN THE ALTERNATIVE, THE PROSECUTOR
COMMITTED SERIOUS, CONSTITUTIONALLY
OFFENSIVE MISCONDUCT AND COUNSEL WAS
INEFFECTIVE

Even if the evidence were somehow seen to be sufficient to support the robbery conviction, reversal of that conviction would be required because of the prosecutor's misconduct.

The correct standard of proof beyond a reasonable doubt is the touchstone of the criminal justice system. Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), overruled in part and on other grounds by Estelle v. McGuire, 502 U.S. 62, 73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Indeed, as the Supreme Court has recognized, correct application of the standard is the primary "instrument for reducing the risk of convictions resting on factual error." Cage, 498 U.S. at 40, quoting Winship, 397 U.S. at 363.

In this case, reversal is required, because the prosecutor committed serious, prejudicial and constitutionally offensive misconduct by repeatedly misstating and minimizing his burden of proving the case beyond a reasonable doubt, misstating the jury's proper role and misleading them about the presumption of innocence. Further, counsel was ineffective in response to these acts of misconduct. Because the prosecution cannot prove these constitutional errors harmless, this Court should reverse.

a. Relevant facts

In initial closing argument, the prosecutor told the jury that they were the “sole judges of credibility” and had to “**decide who's telling the truth, who's being less than truthful.**” RP 338 (emphasis added). He gave an example of someone who did not know the exact date when something happened but admitted not being sure, saying that with that testimony, the jury would get to decide “is it true beyond a reasonable doubt or not?” RP 338.

A few moments later, the prosecutor turned to the presumption of innocence, declaring that the presumption “kind of stops once you start deliberating, right?” RP 340. He said “[a]t that point, you start to evaluate evidence and decide if that has been overcome or not.” RP 340. He told the jury that it had to ask if it was convinced beyond a reasonable doubt that “**each element is true**” and use that as their guide to what the prosecutor had to prove and what he did not. RP 340.

When talking about Erickson and Sawyer-Jones, the prosecutor told the jurors that they could “trust them to **tell you the truth** as long as

it doesn't interfere with what they perceive to be their best interests." RP 343. The prosecutor then told the jurors what he was "getting at" with his arguments was:

When you took at this testimony, I want you to peel back different layers of the onion to get to the truth, what you would swear you would do, all right?

And then once you decided what you know and what you don't know, okay, what you reasonably know in the total context, okay, what you don't know, then apply those elements and decide: Is that what happened? Is that not what happened?

RP 344 (emphasis added).

In closing argument, counsel for Evans addressed the prosecutor's declarations on the presumption of innocence, saying "[h]ow these two gentlemen sit here right now they are innocent. Okay? Unless and until in deliberations you decide, based on the law and the facts, the State has proven each and every element beyond a reasonable doubt." RP 357.

In rebuttal closing argument, the prosecutor told the jury, "**[w]hen you start to decide what you believe is true beyond a reasonable doubt**, what's not, please don't just pick one fact out and say are there doubts about this one fact? Look at all the facts." RP 389 (emphasis added). The prosecutor told the jury to "[s]pin it all out, talk about it" and they would decide that the prosecution's theory of what happened was correct. RP 391.

A moment later, the prosecutor declared:

If you are - - if you decide to decide, what you should be able to say, "I have a doubt about, okay, element X, and it's because of this reason," fill in the blank, okay? And it should be a reason that comes from evidence or lack of evidence.

RP 392 (emphasis added).

b. The arguments misstated the prosecutor's constitutional burden, the jury's role and the presumption of innocence and were misconduct

The prosecutor committed constitutionally offensive misconduct when he argued 1) that the jurors had to be able to provide a specific reason for any doubt that the defendants were guilty and 2) that the jury's role was to decide the truth and that jurors had to make that decision in order to perform their required duties.

Improper statements of a prosecutor which mislead the jury as to the law are not only misconduct but also may result in a violation of the defendant's due process rights to a fair trial. State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). Further, prosecutorial misconduct which has a direct impact on a defendant's constitutional rights is subject to the constitutional harmless error standard. See, State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

Here, not only were Mr. Reedy's due process rights to a fair trial affected by the prosecutor's misconduct but also his due process rights to have the prosecution bear the constitutional burden of proving every element of the crime charged beyond a reasonable doubt. See Winship, 397 U.S. at 363-64; Cleveland, 58 Wn. App. at 648. Indeed, because the correct standard of reasonable doubt is the means by which the presumption of innocence is guaranteed, it absolutely essential to ensure that the jury is not misled as to the correct standard. See State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). That standard has been subject to so many years of litigation and is now so carefully defined that our Supreme Court has recently warned against the "temptation to expand

upon the definition of reasonable doubt,” because such expansion may well result in improper dilution of the prosecution’s constitutional burden and the presumption of innocence. Bennett, 161 Wn.2d at 317-18.

The prosecutor did not resist the temptation here, and the result was an improper dilution and minimizing of his constitutional burden, as well as a violation of Reedy’s due process rights to a fair trial.

First, the prosecutor committed serious, constitutionally offensive misconduct and relieved himself of the full weight of his burden of proof in telling the jury that, in deciding the case, they had to be able to come up with a reason for their doubts. The prosecutor declared:

It you are - - if you decide to decide, what you should be able to say, “I have a doubt about, okay, element X, and it’s because of this reason,” fill in the blank, okay? And it should be a reason that comes from evidence or lack of evidence.

RP 392 (emphasis added).

With this argument, the prosecutor turned the concepts of proof beyond a reasonable doubt and the jury’s proper role on their heads. The argument effectively told the jury they were required to *convict* unless they could find a specific reason not to do so. But it is not the duty of the jury to presumptively *convict*; the jury’s duty is to presumptively *acquit*, unless and until they find that the state has met its constitutionally mandated burden of proof. See State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995). Further, “[j]urors may harbor a valid reasonable doubt even if they cannot explain the reason for the doubt.” See State v. Medina, 147 N. J. 43, 52, 685 A.2d 1242, cert. denied, 519 U.S. 1135 (1996). Telling the jurors that they need

to come up with a specific reason they believed Reedy (and Evans) were not guilty was the same as saying that there is a presumption of guilt, rather than a presumption of innocence. See, e.g., State v. Boswell, 170 W. Va. 433, 442-43, 294 S.E.2d 287 (1982); State v. Banks, 260 Kan. 918, 926-28, 927 P.2d 456 (1996). Such argument “fundamentally misstates the reasonable doubt standard” and “impermissibly risks” causing the jury to apply a standard of proof less than that mandated by the constitution. See Chalmers v. Mitchell, 73 F.3d 1262, 1274 (2nd Cir.), cert. denied, 519 U.S. 834 (1996) (Newman, J., dissenting).

Indeed, this Court has recently held that “fill-in-the-blank” argument similar to the one made here was improper and misconduct. State v. Venegas, 155 Wn. App. 507, 523-24, 228 P.3d 821 (2010). In Venegas, the prosecutor told the jury, “[i]n order to find the defendant not guilty, you have to say to yourselves: ‘I doubt the defendant is guilty, and my reason is’ - blank.” 155 Wn. App. at 523. This Court first noted that a prosecutor from the same office had also been involved in a recent case which made clear how improper such argument was, then quoted from that case:

The jury need not engage in any such thought process. By implying that the jury had to find a reason in order to find [the defendant] not guilty, the prosecutor made it seem as though the jury had to find [the defendant] guilty *unless* it could come up with a reason not to. Because we begin with a presumption of innocence, this implication that the jury had an initial affirmative duty to convict was improper. Further, this argument implied that [the defendant] was responsible for supplying such a reason to the jury in order to avoid conviction.

155 Wn. App. at 524, quoting, State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). The Venegas Court then declared:

We reiterate that prosecutors who continue to employ an improper “fill-in-the-blank” argument needlessly risk reversal of their convictions.

Venegas, 155 Wn. App. at 524.

Thus, the complete impropriety of this kind of argument is now clear. Notably, in Venegas, this Court found the argument to be misconduct “so flagrant and ill-intentioned that it could not have been cured by instruction” and could be raised on appeal despite counsel’s failure to raise it below. 155 Wn. App. at 523-24, n. 16.

In addition to the improper “fill-in-the-blank” argument, in this case, the prosecutor also committed misconduct in misstating the presumption of innocence. In closing, the prosecutor declared that the presumption “kind of stops once you start deliberating, right,” and that when jurors started deliberating, they would then “start to evaluate evidence and decide if that has been overcome or not.” RP 340. This was a misstatement of the presumption, which continues throughout the entire trial and is not set aside simply because jurors start deliberating but is only “overcome, if at all, during the jury’s deliberations.” Venegas, 155 Wn. App. at 524.

Finally, the prosecutor misstated the jury’s constitutional function and role when he repeatedly declared or intimated that the jury had a duty to decide the truth of what had happened and had to decide who was telling the truth in order to perform its required role as a jury. After first telling the jurors that they had to “decide who’s telling the **truth**, who’s being less than **truthful**,” the prosecutor told the jurors they were to decide “is it **true** beyond a reasonable doubt or not” and whether “each

element is **true**.” RP 338, 340 (emphasis added). The prosecutor also told the jury when they could trust Erickson and Sawyer-Jones “to tell you the **truth**,” then used the metaphor of an onion and said the jurors were to look at the testimony and “peel back” the different layers to “get to the **truth**,” something he said the jurors had sworn to do. RP 344 (emphasis added).

All of this argument occurred *before* defense counsel for either Evans or Reedy made any arguments. Then, in rebuttal closing argument, the prosecutor told the jury that they were to “decide what you believe is **true** beyond a reasonable doubt.” RP 389.

But it is not the jury’s function, role or duty to decide “the truth.” Anderson, 153 Wn. App. at 429. Instead, the jury’s task is to determine whether the state has met its constitutional burden of proving guilt beyond a reasonable doubt. See, e.g., Wright, 76 Wn. App. at 826; State v. Barrow, 60 Wn. App. 869, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). Similar arguments have been repeatedly condemned in this state as misstating the jurors’ role and presenting them with a “false choice” i.e., requiring them to choose which witnesses are lying or telling the truth. See, Wright, 76 Wn. App. at 826. The choice is “false” because jurors need not decide that anyone is lying or telling the truth in order to perform its function, even if the various witness’ versions of events seem to be inconsistent. Barrow, 60 Wn. App. at 876. As one court has noted:

[t]he testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved. The testimony of two witnesses can be in some conflict, even though both are endeavoring in good faith to tell the truth.

State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991).

As this Court noted in Anderson:

A jury's job is not to "solve" a case. It is not, as the State claims, to "declare what happened on the day in question." Resp't's Br. at 17. **Rather, the jury's duty is to determine whether the State has proved its allegations against the defendant beyond a reasonable doubt.**

153 Wn. App. at 429 (emphasis added).

Casting the jurors' role as deciding and declaring the "truth" not only misstates that role but also improperly dilutes the prosecution's constitutionally mandated burden of proving guilt beyond a reasonable doubt. When the jury is told that their job is to decide the "truth," that invites a decision improperly based not upon the constitutional standard but rather on the jury's conclusion of which side the jurors believed. See, e.g., United States v. Pine, 609 F.2d 106, 108 (3rd Cir. 1979). Such arguments suggest "determining whose version of events is more likely true, the government's or the defendant's." See United States v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5th Cir.), cert. denied, 511 U.S. 1129 (1994). As a result, the jury is misled into thinking they simply must decide which version of events is more likely and then base their decision on that determination, based upon a preponderance of the evidence. Id.

Thus, by repeatedly invoking the idea that jurors were supposed to decide and declare the "truth," the prosecutor not only misstated the jury's role but also his own burden of proof. As noted above, misstating and minimizing that constitutional burden is not just misconduct, it is misconduct directly impacting a constitutional right, which is presumed

prejudicial. See, e.g., Easter, 130 Wn.2d at 242.

The prosecutor misstated and minimized his constitutionally mandated burden of proof, urged the jury to effectively apply a presumption of guilt, misstated the constitutional presumption of innocence, and repeatedly misstated the jury's role and duties. This Court should so hold.

c. Reversal is required

Reversal is required. Because the prosecutor's multiple acts of misconduct misstated and minimized the prosecutor's constitutionally mandated burden of proof and the jury's proper role, the misconduct directly affected Reedy's constitutional due process rights to have the prosecution shoulder the burden of proving its case against him beyond a reasonable doubt. As a result, the constitutional "harmless error" standard applies. See, e.g., Easter, 130 Wn.2d at 242. That standard requires the prosecution to shoulder a very heavy burden, which the prosecution cannot meet unless 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).

The prosecution cannot meet that burden here. To prove that any jury would have reached the same result absent the error and the constitutionally offensive misconduct was thus "harmless," the prosecution has to show that the untainted evidence against Reedy is so overwhelming that it "necessarily" leads to a finding of guilt. 104 Wn.2d at 425.

The difficulty for the prosecution here is that *none* of the evidence in this case was “untainted” by the prosecutor’s misstatements and minimizing of his constitutionally mandated burden of proof. The proper standard of proof beyond a reasonable doubt is the means of providing the “concrete substance for the presumption of innocence” guaranteed to all the accused. Winship, 397 U.S. at 363. Unless the jury properly understands the correct standard of proof beyond a reasonable doubt, the entire trial is affected, because a “misdescription of the burden of proof” will vitiate all the jury’s findings. See Sullivan v. Louisiana, 508 U.S. 275, 280-81, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

As a result, this is not a case where, as in Easter, the prosecutor’s comments drew a negative inference on the defendant’s exercise of a constitutional right but other evidence was unaffected by that improper inference. See, e.g., Easter, 130 Wn.2d at 242. Instead, here, the prosecutor’s misconduct affected the jury’s perception of *all* of the evidence, thus tainting the jury’s entire decision-making process. The misconduct here was not limited in effect to simply part of the evidence - it went to the entire case against Mr. Reedy. There was no “untainted” evidence against Reedy and the error thus cannot be deemed “harmless.”

In addition, even if there had been some “untainted” evidence here, the constitutional harmless error test could not be met. The standard of finding “overwhelming untainted evidence” is far different than the standard of establishing that there was “sufficient evidence” to support a conviction challenged for insufficiency on review. See State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002). In Romero, shots were

fired in a mobile home park, Romero was seen in the area by officers and other witnesses, he ran from officers just after the crime, officers found a shotgun inside the mobile home where Romero was hiding, shell casings were found on the ground next to the mobile home's front porch, descriptions of the shooter identified Romero, and an eyewitness was "one hundred percent" positive the shooter was Romero. Romero, 113 Wn. App. at 783-84. There were a few minor problems with the identification and Romero himself denied being the shooter. 113 Wn. App. at 784. That evidence was sufficient, the Romero Court found, to uphold the conviction against a challenge for insufficiency of the evidence. 113 Wn. App. at 797-98.

But that same evidence was not sufficient to satisfy the constitutional harmless error test, which applied because an officer made comments about Romero not speaking to police, in violation of Romero's Fifth Amendment rights. Despite the strong evidence supporting the conviction, the Court found, that was not "overwhelming evidence" of guilt. 113 Wn. App. at 793.

Here, there was also not "overwhelming evidence" of guilt. Such evidence only exists if no reasonable jury would *fail* to convict even absent the error. See Guloy, 104 Wn.2d at 425. The evidence against Reedy, at least as to the robbery, was almost nonexistent. There was no evidence he and Evans arrived together, or seemed to be acting in concert, or even *knew* each other. Taken in the light most favorable to the state, the prosecution's evidence against Reedy on the robbery was as follows:

- 1) that Reedy opened a drug dealer's motel room door - a room in which

the dealer was apparently actively selling drugs to buyers - after Evans had gone down the stairs outside the room to rummage a car for the *second* time, 2) that Reedy was in the room when Evans committed the assault, 3) that Reedy ran out after Evans when everyone was fleeing the apartment and 4) that Reedy had possession of some methamphetamine and a gun - other than the gun Evans had used in the assault.

This evidence is insufficient to meet even the much more lenient standard of review used when the sufficiency of the evidence to convict is challenged on review, as argued *infra*. It certainly cannot satisfy the far more stringent standard of being so “overwhelming” on the issue of Reedy’s guilt as an accomplice to the robbery that the constitutional harmless error standard was met.

Indeed, the fact that the jury convicted Reedy despite the lack of sufficient evidence is proof of the improper effect of the prosecutor’s arguments on the jury’s decision.

The correct standard of reasonable doubt and its corollary the presumption of innocence are the very centerpiece of our entire criminal justice system, because reasonable doubt is the “prime instrument for reducing the risk of convictions resting on factual error.” Cage, 498 U.S. at 40. The prosecutor’s arguments told the jury that the prosecutor was not required to meet his constitutionally mandated burden of proof but rather something far more like a “preponderance” standard. The arguments also told the jury they had to come up with specific reasons for their doubts, and that the presumption of innocence ended when deliberations started. Finally, the jury was again encouraged to render an

improper verdict and apply more of a “preponderance” standard in making its decision because it was repeatedly told that it had to decide and declare the “truth.” These serious constitutional errors were not harmless, and this Court should so hold and should reverse.

Indeed, reversal would be required under even the non-constitutional standard for prosecutorial misconduct. Under that standard, this Court will reverse for misconduct despite the failure to object below where that misconduct is so flagrant and ill-intentioned that the prejudice it caused could not have been cured by instruction. See Barrow, 60 Wn. App. at 876. In Venegas, this Court specifically declared that the “fill-in-the-blank” kind of argument made here and the misstatements of the presumption of innocence met that standard. 155 Wn.2d at 523-24, n.16. Further, the argument telling the jury it had to decide who was telling the truth is akin to the one found to be similarly flagrant and ill-intentioned years ago. See State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996).

All of the misconduct here went directly to the crucial issue in this case - whether the very thin evidence against Reedy on the robbery would be sufficient to convict him. The arguments that were flagrant and ill-intentioned in Venegas are equally so here, especially given that it is again the same prosecutor’s office involved as was in Venegas and Anderson before it. If the Court does not dismiss the robbery conviction for insufficiency of evidence, this Court should nevertheless reverse and remand for a new trial on that count because the prosecutor’s flagrant, prejudicial misconduct directly impacted Reedy’s constitutional rights to a

fair trial, to have the state prove its case beyond a reasonable doubt, to the presumption of innocence and to having a jury perform its proper duty rather than be swayed to apply a lesser burden for conviction.

d. In the alternative, counsel was ineffective

In the unlikely event this Court finds that the prosecutor's repeated, comprehensive and compelling misstatements of the law and reduction of his constitutionally mandated burden of proof could have been cured if counsel had objected and requested curative jury instructions, this Court should nevertheless reverse based on counsel's ineffectiveness. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (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. 2d 482 (2006); Sixth 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). Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

While in general, the decision whether to object or request instruction is considered "trial tactics," that is not the case in egregious circumstances if there is no legitimate tactical reason for counsel's failure.

State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989); see also Hendrickson, 129 Wn.2d at 77-78. In such cases, counsel is shown ineffective if there is no legitimate tactical reason for counsel's failure to object, an objection would likely have been sustained, and an objection would have affected the result of the trial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Here, there could be no "tactical" reason for failing to object to the prosecutor's multiple, serious misstatements of his constitutional burden of proof. An objection to the misstatement would likely have been sustained, because any reasonable trial court would have recognized that the prosecution's argument clearly minimized the prosecution's constitutionally mandated burden of proof.

As a result of counsel's ineffectiveness, the jurors' minds were tainted with evocative images and ideas which allowed them to convict Reedy based on something far less than proof beyond a reasonable doubt. Counsel's ineffectiveness provides yet another ground upon which the constitutionally infirm convictions in this case should be reversed.

3. **IN THE ALTERNATIVE, THE JURY INSTRUCTIONS ON THE SPECIAL VERDICT WERE IMPROPER AND THE RESULTING VERDICT AND ENHANCEMENT MUST BE STRICKEN**

In the event that this Court does not find that the prosecutor's misconduct compels reversal and remand for a new trial in this case, reversal and remand for resentencing would nevertheless be required.

At sentencing, Reedy was ordered to serve a 60-month term of flat time for the firearm enhancement on the robbery. That term must be

stricken under the controlling precedent of State v. Bashaw, ___ Wn.2d ___, ___ P.3d ___ (2010 WL 2615794) (July 1, 2010), because the jurors were improperly instructed in a way which indicated that they had to be unanimous not only to answer the special verdicts “yes” but also “no.”

Jury instructions are constitutionally sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the applicable law. See State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). This Court applies de novo review to determine whether instructions met those standards. See State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996).

In this case, the instructions did not meet those standards. First, Instruction 5, the instruction on deliberation, told the jurors their duty was “to deliberate in an effort to reach a unanimous verdict.” Supp. CP _____ (instructions, filed 8/21/09, at 8).³ Instruction 36 also told the jurors, “[b]ecause this is a criminal case, each of you must agree for you to return a verdict.” Supp. CP _____ (at 39-40). It further told the jurors that they would first consider the “crimes as charged” and had to “unanimously agree on a verdict,” referring to verdict A and also “each count.” Supp. CP ___ (at 39-40).

³Although the court’s instructions were properly designated as clerk’s papers at the time of the original designation, it appears that the clerk’s office instead indexed proposed instructions, rather than the instructions the court gave. Counsel is therefore filing a supplemental designation redesignating the court’s instructions. She will file a corrected opening brief with the new numbers as soon as they are received.

But the special verdict instruction, Instruction 37, then told the jurors:

You will also be furnished with special verdict forms. If you find the defendant not guilty do not use the special verdict forms. If you find the defendant guilty, you will then use the special verdict forms and fill in the blank with the answer “yes” or “no” according to the decision you reach. **In order to answer the special verdict form “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you have a reasonable doubt as to the question, you must answer “no.”**

CP 250 (emphasis added).

Taken together, these instructions were misleading and incorrect, because they gave the improper impression that unanimity was required not only in order to conclude that the state had met its burden of proving the special verdict but also to find that it had *not*. Under Goldberg, supra, however, while unanimity is required to *convict* on a special verdict, however, it is *not* required for the jury to conclude that the state has not satisfied its burden of proving the special verdict. See Goldberg, 149 Wn.2d at 890. Instead, the Supreme Court held, for special verdicts on such things as aggravating factors or enhancements, “the jury **must be unanimous** to find the State has proven the existence of the aggravating factor beyond a reasonable doubt” but is not required to be unanimous in order to answer the special verdict “no.” 149 Wn.2d at 892-93 (emphasis in original).

Thus, not all jurors have to agree that the prosecution has not proven an enhancement in order to answer “no” on a special verdict. See id. This has the practical effect of ensuring that the defendant receives the benefit of any reasonable doubt - a benefit to which he is clearly entitled

as part of the presumption of innocence. See State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008), cert. denied, ___ U.S. ___, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). If some jurors have such doubts whether the state has met its burden of proving a special verdict, the special verdict is answered “no” and the defendant is given the benefit of those doubts.

Thus, in Goldberg, where the jury was given the same special verdict instruction as that which was given here, the defendant was entitled to the “no” verdict originally rendered by the jurors, even though the jury poll showed that “no” was not unanimous. 149 Wn.2d at 891-93. The trial court erred in refusing to accept that “no” and in ordering the jurors to continue deliberation until they were “unanimous,” the Supreme Court held, because there was no requirement for such unanimity in order to answer “no.” Id.

If there were doubts about whether the Goldberg decision meant what it said, those doubts were laid to rest by a near-unanimous Court recently in Bashaw, supra. In that case, the Supreme Court adhered to Goldberg and declared, plainly, that “a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant’s maximum allowable sentence,” such as a special verdict. ___ Wn.2d at ___ (slip op. at 14-15). This was the “rule from Goldberg,” the Bashaw Court held, and it is an “incorrect statement of the law” to instruct the jurors that in a way indicating that they have to agree in order to answer a special verdict. Bashaw, ___ Wn.2d at ___ (slip op. at 16). Instead, the Supreme Court held, unanimity is only required to find the “*presence* of a special finding increasing the

maximum penalty. . . [but] it is not required to find the *absence* of such a special finding. ___ Wn.2d at ___ (slip op. at 16) (emphasis in original).

Put another way, the Bashaw Court held, “[a] nonunanimous jury decision on . . . a special finding is a final determination that the State has not proved that finding beyond a reasonable doubt.” ___ Wn.2d at ___ (slip op. at 13, 15). Thus, jurors need not be unanimous to answer a special verdict form “no” under the law of this state. Id.; see Goldberg, 149 Wn.2d at 890.

Here, the instructions did not make this standard clear and instead improperly suggested that unanimity was required to answer “no.” After first repeatedly informing the jurors that they had to agree to render a verdict and that their duty was to do so, the special verdict form did not then make it clear that such unanimity was not required to answer “no” on the special verdict.

Dismissal of the enhancement and remand for resentencing without that enhancement is required. Bashaw, supra, controls. In Bashaw, after concluding that it was error to instruct the jury that it had to be unanimous in order to answer the special verdict, the Supreme Court then turned to the question of whether the error could be deemed harmless and concluded it could not. ___ Wn.2d at ___ (slip op. at 15-16). The Court reached this conclusion after looking at the “several important policies” behind prohibiting retrial on an enhancement alone. A second trial “exact[s] a heavy toll on both society and defendants,” crowds court dockets, delays other cases and helps “drain state treasuries,” the Court noted, so that the “costs and burdens of a new trial, even if limited to the

determination of a special finding, are substantial.” ___ Wn.2d at ___ (slip op. at 15). Further, the Court declared:

Retrial of a defendant implicates core concerns of judicial economy and finality. Where, as here, a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality.

___ Wn.2d at ___ (slip op. at 15-16).

Considering those policies, the Court next rejected the idea that the polling of the jury to have them affirm the verdict somehow rendered the error “harmless.” ___ Wn.2d at ___ (slip op. at 16). To find the error “harmless,” the Court said, it would have to be able to conclude beyond a reasonable doubt that the jury would have reached the same verdict, absent the error. ___ Wn.2d at ___ (slip op. at 16). This it could not do because the error in the procedure so tainted the conclusion:

The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction. *Goldberg* is illustrative. There, the jury initially answered “no” to the special verdict, based on a lack of unanimity, until told it must reach a unanimous verdict, at which point it answered “yes.” Given different instructions, the jury returned different verdicts. We can only speculate why this might be so. **For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result.**

___ Wn.2d at ___ (slip op. at 16-17) (citations omitted; emphasis added).

As a result, the Supreme Court held, it was not possible to “say with any confidence what might have occurred had the jury been properly instructed” and “[w]e therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.” ___ Wn.2d ___ (slip op. at 17).

Notably, the Bashaw Court reached this conclusion even though it had already found that evidentiary error in relation to two of the three special verdicts and sentencing enhancements was harmless in light of the evidence in the case. ___ Wn.2d at ___ (slip op. at 2-17). In Bashaw, the three enhancements were for three counts of delivery of a controlled substance, alleged to have each occurred within 1,000 feet of a school bus route stop and thus subject to a “school bus route stop” sentencing enhancement. ___ Wn.2d at ___ (slip op. at 2-3). The prosecution relied on evidence from a measuring device which was not properly shown to be reliable. Id. The measuring device indicated that the three deliveries occurred 1) within 924 feet of a school bus route stop, 2) within 100 feet of a school bus route stop and 3) within 150 feet of a school bus route stop. ___ Wn.2d at ___ (slip op. at 3). Officers also testified that the first delivery was approximately 1/10 mile (528 feet) or 1/4 mile (1,320 feet) from the stop. ___ Wn.2d at ___ (slip op. at 4).

After first finding that the measuring device evidence should have been excluded, the Court concluded that admission of that evidence was harmless error as to the second and third deliveries, because the evidence was such that there was “no reasonable probability” that the jury would have concluded that those deliveries had not taken place within 1,000 feet of the stop if the measuring device evidence had been excluded. ___ Wn.2d at ___ (slip op. at 4-12).

Despite that evidence, however, the Court reversed the enhancements for the second and third deliveries based upon the error in the instructions for the special verdicts. ___ Wn.2d at ___ (slip op. at 13-

process and misled the jury into thinking that it had to be unanimous in order to answer “no” to the special verdict, reversal and dismissal of the firearm special verdict and remand for resentencing without that verdict is required.

Finally, although the Court in Bashaw did not address this issue, the improper instructions also deprived Reedy of his constitutional right to the “benefit of the doubt” under the presumption of innocence. That presumption is the “bedrock upon which the criminal justice system stands.” Bennett, 161 Wn.2d at 315-16. A defendant is constitutionally entitled to the benefit of the doubt when it comes to determining whether the state has proven its case. Warren, 165 Wn.2d at 26-27. In the context of a special verdict, indicating to jurors that they have to be unanimous not only to answer “yes” but also to answer “no” deprives the defendant of the benefit of the doubts some jurors may have had. As the Bashaw Court noted, where, as here, the jury is under the mistaken belief that unanimity is required, “jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result.” ___ Wn.2d at ___ (slip op. at 17).

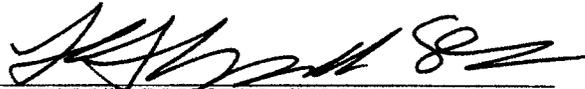
Because the jury was improperly instructed and misled about whether it had to be unanimous in order to answer the special verdict form “no,” the special verdict on the firearm enhancement must be stricken under Bashaw. Reversal and remand for resentencing without that enhancement is required.

E. CONCLUSION

Because there was insufficient evidence to support it, the conviction for first-degree robbery must be reversed and dismissed. In the alternative, reversal and remand for a new trial on that count is required because of the prosecutor's flagrant, prejudicial and constitutionally offensive misconduct. Also in the alternative, reversal and remand for resentencing without the firearm enhancement is required under Bashaw.

DATED this 15th day of July, 2010.

Respectfully submitted,



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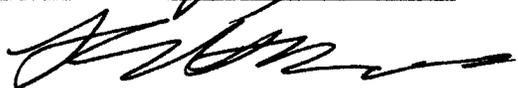
CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

to Mr. Jarrett Reedy, DOC 334958, Stafford Creek Corr. Center,
191 Constantine Way, Aberdeen, WA., 98520.

DATED this 19th day of July, 2010.



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INSTRUCTION NO. 5

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 36

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the judicial assistant. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and verdict forms for each defendant. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing the verdict forms, you will first consider the crimes as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form

A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on verdict form A, do not use other verdict forms associated with that count.

On each count, if you find the defendant not guilty of the crime as charged, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime. If you unanimously agree on a verdict, you must fill in the blank provided in the verdict form for that count the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict forms and notify the judicial assistant. The judicial assistant will bring you into court to declare your verdict.

INSTRUCTION NO. 37

You will also be furnished with special verdict forms. If you find the defendant not guilty do not use the special verdict forms. If you find the defendant guilty, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no."