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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOJO HAMILTON EVANS, SR., and  
JARRETT REEDY, APPELLANTS

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Appeal from the Superior Court of Pierce County  
The Honorable James R. Orlando

No. 08-1-05298-4

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the defendants' convictions of first -degree robbery should be affirmed where, viewing the evidence in the light most favorable to the State, there was sufficient evidence from which a rational trier of fact could have found the essential elements of that crime beyond a reasonable doubt.
2. Whether the defendants have failed to meet their burden of showing either prosecutorial misconduct or that the unchallenged argument at issue was flagrant and ill-intentioned.
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5. With respect to Defendant Reedy, whether the trial court properly instructed the jury with respect to the special verdict.

B. STATEMENT OF THE CASE.

1. Procedure

On November 6, 2008, Jojo Hamilton Evans, Sr., hereinafter "Defendant Evans," was charged by information with first-degree burglary with a firearm sentence enhancement in count I, first-degree robbery with a firearm sentence enhancement in count II, second-degree assault with a firearm sentence enhancement in count III, unlawful possession of a

controlled substance with intent to deliver in count IV, and second-degree unlawful possession of a firearm in count VI. CP 1-3. His co-defendant, Appellant Jarrett Lynn Reedy, hereinafter referred to as “Defendant Reedy,” was charged by information with first-degree burglary with a firearm sentence enhancement in count I, first-degree robbery with a firearm sentence enhancement in count II, unlawful possession of a controlled substance in count IV, and first-degree unlawful possession of a firearm in count VII. CP 142-44.

The matters were consolidated for a trial, which began on August 18, 2009. RP 1. The court heard pre-trial motions that day, RP 2-9, and the parties selected a jury. RP 9-15. The deputy prosecutor gave an opening statement and then called Shalamar Erickson, RP 15-45, Amber Sawyer-Jones, RP 45-65, Maureena Dudschus, RP 67-82, Lakewood Police Officer Darcy Olsen, RP 82-111, Sergeant Anders Estes, RP 112-128, Officer Jeff Martin, RP 128-78, 193-252, Detective Bryan Johnson, RP 181-93, and Officer David Crommes, RP 259-78.

Both parties stipulated to the convictions underlying the unlawful possession of a firearm charges. RP 7 (Evans), 9 (Reedy); RP 178-80; RP 278-80; CP 7-9 (Evans); CP 210-12 (Reedy)

The State rested on August 20, 2009. RP 281.

Defendant Evans then moved to dismiss the first-degree burglary charged in count I, the first-degree robbery charged in count II, the second-degree assault charged in count III, the unlawful possession of a controlled substance with intent to deliver charged in count IV, and the possession of a stolen firearm charged in count V. RP 290-94. Defendant Reedy moved to the first-degree burglary charged in count I, the first-degree robbery charged in count II, and the unlawful possession of a controlled substance charged in count IV. RP 294-97. The State made no objection to Defendant Evans's motion to dismiss count V, possession of a stolen firearm, and the court granted that motion. RP 290, 305. The State argued against dismissal of the remaining counts, RP 297-303. The court granted the defendants' motion to dismiss the first-degree burglary charged in count I with respect to both defendants, but denied the defendants' motions with respect to the remaining counts. RP 303-06.

Defendants Evans and Reedy then rested. RP 308.

The parties discussed jury instructions, RP 309-320. The defendants did not take any exception to the instructions given, though they did object to the court's refusal to instruct the jury on second-degree robbery. RP 321. Neither defendant took any exception to any of the instructions regarding the special verdict forms. RP 321-22. The court then read the instructions to the jury on August 20, 2009. RP 322.

The deputy prosecutor then gave his closing argument, RP 323-352, followed by Defendant Evans, RP 354-74, and then Defendant Reedy, RP 374-82. The deputy prosecutor then gave his rebuttal. RP 383-92.

On August 21, 2009, the jury returned verdicts. RP 397-402. The jury found Defendant Evans guilty of first-degree robbery as charged in count II, guilty of second-degree assault as charged in count III, not guilty of unlawful possession of a controlled substance with intent to deliver as charged in count IV, but guilty of the lesser-included crime of unlawful possession of a controlled substance, and guilty of second-degree unlawful possession of a firearm as charged in count VI. RP 399-400; CP 118-22. The jury also found Defendant Reedy guilty of first-degree robbery as charged in count II, not guilty of unlawful possession of a controlled substance with intent to deliver as charged in count IV, but guilty of the lesser-included crime of unlawful possession of a controlled substance, and guilty of second-degree unlawful possession of a firearm as charged in count VII. RP 400; CP 291-95. The jury also returned special verdicts indicating that Defendant Evans was armed with a firearm at the time he committed the crimes charged in counts II and III and that Defendant Reedy was armed with a firearm at the time he committed the crime charged in count II. RP 400-01; CP 123-24.

On October 2, 2009, the court sentenced both defendants. RP 406-30. The court found Defendant Evans to have an offender score of seven and sentenced him to 87 months on count II, plus the 60-month firearm sentence enhancement, 12 months and one day on count IV, and 43 months on count VI, for 147 months of actual total confinement. RP 416; CP 125-38. Defendant Evans moved to dismiss the second-degree assault conviction to avoid violating double jeopardy provisions and the court granted that motion. RP 417.

The court found that Defendant Reedy had an offender score of three and sentenced him to 46 months on count II, plus the 60-month firearm sentence enhancement, 12 months on count IV, and 18 months on count VII, for 106 months of actual total confinement. RP 420-29; CP 298-311.

Defendants Evans and Reedy both filed a timely notices of appeal RP 417; CP 139; RP 429-30; CP 314-28.

## 2. Facts

On November 5, 2008, Shalamar Erickson and her friend, Amber Sawyer-Jones, went to a motel room to smoke and buy some “meth” from a man named Travis. RP 17, 35, 39-40. When they arrived, there was one other man in the room with Travis. RP 19, 35. She and Sawyer-Jones were in the room for about ten to fifteen minutes, RP 20, and everyone in

the room was smoking “meth.” RP 33. While there, a third man entered the room with a handgun in his hand, and hit Travis over the head with that gun. RP 20-21, 35. Erickson testified that, once in the room, she had given Peterson the money for the methamphetamine, “but hadn’t got anything before the incident” because her drug transaction was interrupted by this robbery. RP 37, 42. Erickson and Sawyer-Jones then ran out of the room, down the stairs, got into their vehicle, and drove away, but were stopped by police a short time later. RP 21-23. Erickson testified that she did not remember the officers taking her anywhere thereafter and did not recall being shown the suspects or asked if she could identify them. RP 24. Erickson did not describe either of the other men in the room. RP 26-27, 34.

In November, 2008, Officer Darcy Olsen was working in the special operations unit of the Lakewood Police Department and had “develop[ed] information that led [her] to Econo Lodge Hotel in Tacoma.” RP 83-85. Olsen testified that Shalamar Erickson was taken back to the hotel for a show-up identification. RP 86-88. Erickson identified two people as being participants in the robbery “in different ways,” apparently stating that the defendants “were both there, but one did not commit the robbery or the assault; the other one did.” RP 101, 111.

Amber Sawyer-Jones testified that she and Erickson went “[t]o the Econo Lodge on Hosmer” in Tacoma, Washington to buy some marijuana. RP 46-47. She testified that once they got inside the room, there was no marijuana and that she did not use any drugs while there. RP 49. However, everyone else in the room was smoking “meth.” RP 60. While they were doing so, a man came into the room with a gun “and said everybody was getting jacked and said he wasn’t playing.” RP 51, 62. Officer David Crommes, who held a bachelor’s degree in law and justice and had approximately fifteen years of law enforcement experience, testified that, in this context, the term “jacked” meant robbed. RP 259-60, 270-71. The man then hit one of the other men with the gun, RP 51, 62, before Sawyer-Jones got up and ran from the room with Erickson. RP 51. Sawyer-Jones and Erickson got into Sawyer-Jones’s vehicle and drove away, only to be stopped by police a couple blocks away. RP 51-52.

Lakewood Police Officer Jeff Martin was working, with other members of the Lakewood Police Department’s special operations unit, which conducts undercover narcotics investigations. RP 129-30. The unit was conducting an investigation of narcotics activity in room 242 of the Econo Lodge Hotel on November 5, 2008. RP 130-36. Police believed that there was a “substantial quantity of methamphetamine being moved through that room.” RP 227. Martin was performing surveillance of the

room and parked his vehicle about sixty yards from that room, such that he had an unobstructed view of the room. RP 134-36. While there, Martin observed Defendant Evans exit room 242, walk along the upper corridor of rooms, down the stairs, and get into a Toyota Corolla parked in the lot. RP 138-39. Evans then walked back to room 242. RP 140. During his second trip back to the hotel room, Evans paused and “made direct eye contact” with Officer Martin. RP 142. Evans then hesitated at the door before knocking lightly on the door. RP 143. A second person in a red shirt, later identified as Defendant Reedy, opened the door for Evans. RP 143, 157, 225. Evans continued to look over his shoulder at Officer Martin’s vehicle before entering the room and closing the door behind him. RP 144.

Less than two minutes later, the hotel door was “flung open” and two women and a man came out and sprinted down the corridor. RP 145. The man went down the stairs and around the building to the north, while the two women got into a gold-colored Toyota SUV and drove east out of the parking lot. RP 146-47. Martin advised Sergeant Anders Estes about the women who were fleeing in the SUV. RP 146.

Then, Defendants Reedy and Evans exited the room and ran down the corridor. RP 147-48. Evans came out first, followed by Reedy. RP 148. As Evans came down the stairs, Officer Martin stepped out of his

vehicle, identified himself as a police officer, drew his weapon, and ordered Evans to the ground. RP 149-50. Evans looked at Martin, hesitated, and then “slid” and “shuffled” to his right to the front end of a parked vehicle. RP 154. Evans then placed his right hand into the front pocket of his sweatshirt. RP 155. Officer Martin did not know if Evans was reaching for a weapon. RP 154-55. Evans then took his hand out of his pocket and Martin heard “a loud metal clank or ping on the ground.” RP 155. Only then did Evans comply with Martin’s command and go to the ground, where he was handcuffed. RP 155-56.

Officer Sean Conlon arrived in the parking lot to assist and ordered Defendant Reedy to the ground. RP 158. Reedy then moved to a trash can and dropped something into the trash can or in the area of the trash can. RP 158. Officer Sanders then placed Reedy in handcuffs. RP 159.

After Evans and Reedy were in custody, Martin walked to the area where Evans had dropped something in front of the parked vehicle and observed a Smith & Wesson .45-caliber handgun underneath that vehicle. RP 161, 235. Martin “recovered the handgun” and then looked inside the trash can into which Reedy had dropped something. RP 161. Inside that trashcan was a black handgun and a “Tupperware container” which “contained a large amount of methamphetamine.” RP 161, 213.

The handguns were subsequently tested and both firearms were found to fire and function normally. RP 183-6.

About twenty minutes after the defendants were taken into custody, officers noticed the door to room to 242 open again and saw the third man, who had run out of the room with Erickson and Sawyer-Jones, again exit the room and walk towards the opposite side of the building. RP 197, 264, 271. Officers Crommes and Martin stopped that man, later identified as Travis Patterson, and noticed that he had lacerations on his head and face. RP 197-98, 243, 265-66. According to Officer Crommes, Patterson was not willing to tell officers what was taken from him. RP 269, 277.

Police then searched room 242 and the Toyota Corolla. RP 176. Inside the room, police found digital scales, associated with illicit “narcotics distribution,” RP 210-12, 233, but did not find any drugs. *See* RP 233, 300. Inside the Corolla, Officer Martin found and collected a digital scale, a backpack, and two rounds of .45-caliber ammunition. RP 201-05. Inside the backpack were plastic bags consistent with those used for “[p]ackaging illicit narcotics.” RP 207-09.

Washington State Patrol Forensic Scientist Maureena Dudchus tested the contents of four bags containing a “crystalline material with powder” and found that each contained methamphetamine. RP 67-78.

C. ARGUMENT.

1. THE DEFENDANTS' CONVICTIONS OF FIRST-DEGREE ROBBERY SHOULD BE AFFIRMED BECAUSE, VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THAT CRIME BEYOND A REASONABLE DOUBT.

In a criminal case, a defendant may challenge the sufficiency of the evidence before trial, at the end of the State's case in chief, at the end of all of the evidence, after the verdict, and on appeal. *State v. Lopez*, 107 Wn. App. 270, 276, 27 P.3d 237 (2001). "In a claim of insufficient evidence, a reviewing court examines whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,' 'viewing the evidence in the light most favorable to the State.'" *State v. Brockob*, 159 Wn.2d 311, 336, P.3d 59 (2006)(quoting *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Thus, "[s]ufficient evidence supports a conviction when, viewing it in the light most favorable to the State, a rational fact finder could find the essential elements of the crime beyond a reasonable doubt." *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be

drawn therefrom.” *Id.* (quoting *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P.2d 1068 (1992). “Determinations of credibility are for the fact finder and are not reviewable on appeal.” *Brockob*, 159 Wn.2d at 336.

In the present case, the trial court instructed the jury as follows as to the elements of first-degree robbery:

To convict the defendant of the crime of the crime of robbery in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 5<sup>th</sup> day of November, 2008, the defendant or an accomplice unlawfully took personal property, not belonging to the defendant, from the person or in the presence of another;

(2) That the defendant or accomplice intended to commit theft of the property;

(3) That the taking was against the person’s will by the defendant or accomplice’s use or threatened use of immediate force, violence or fear of injury to that person;

(4) That the force or fear was used by the defendant or accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) That in the commission of these acts or in immediate flight therefrom the defendant or accomplice was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon or inflicted bodily injury; and

(6) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 89.

The court also defined accomplice in the context of its instruction no. 25:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity must be shown to establish that a person present is an accomplice.

CP 104.

Under the law of the case doctrine, where, as here, no party objected to instructions, they became the law of the case. *State v. Hickman*, 135 Wn.2d 97, 101, 954 P.2d 900 (1997).

Viewing the evidence in the light most favorable to the State, a rational fact finder could have found the essential elements of first-degree robbery beyond a reasonable doubt with respect to both defendants.

The first element requires evidence “[t]hat on or about the 5<sup>th</sup> day of November, 2008, the defendant or an accomplice unlawfully took personal property, not belonging to the defendant, from the person or in the presence of another.” CP 89.

In the present case, there was testimony from multiple witnesses that there was methamphetamine in room 242 at the time of the robbery. *See, e.g.*, RP 17, 33, 35, 37, 39-40, 60. Specifically, the evidence showed that the Lakewood Police Department was conducting an investigation of “narcotics” activity in room 242 of the Econo Lodge Hotel, and that it believed that there was a “substantial quantity of methamphetamine being moved through that room.” RP 130-36, 227. *See* RP 124. In fact, both Shalamar Erickson and Amber Sawyer-Jones, who were in the room at the time of the robbery, testified that occupants of that room were smoking methamphetamine. RP 33, 60.

Moreover, it is reasonable to infer from Erickson’s testimony that Patterson, himself, was in possession of methamphetamine at that time of the robbery. RP 37, 42. Shalamar Erickson testified that she went to that room to buy some “meth” from a man named “Travis,” RP 17, 35, 37, 39-

40, who was later identified as Travis Patterson. RP 266. Erickson agreed that she had earlier been introduced to Travis “for drug purposes.” RP 40. Erickson testified that, once in the room, she had given Patterson the money for the methamphetamine, “but hadn’t got anything before the incident” because her drug transaction was interrupted by the robbery. RP 37, 42. Therefore, it is reasonable to infer that because Erickson had given money to purchase methamphetamine to Patterson, but had not received the methamphetamine from Patterson before the robbery occurred, and that there was methamphetamine in the possession of Patterson at the time of the robbery.

It can likewise be inferred, from the testimony of Sawyer-Jones and Martin, that the man who entered the room in the middle of that transaction, displayed a handgun, and told everyone that they were “getting jacked,” or robbed, was Defendant Evans. Specifically, Officer Martin testified that he was performing surveillance of room 242, RP 134-36, when he saw Defendant Evans walk to the hotel room, pause, make eye contact with him, and then knock on the door. RP 142-43. A second person in a red shirt, later identified as Defendant Reedy, opened the door for Evans. RP 143, 157, 225. Sawyer-Jones testified that a man came into the room with a gun, and “said everyone was getting jacked.” RP 51, 62. Officer David Crommes, who had approximately fifteen years of law

enforcement experience and a bachelor's degree in law and justice, testified that, in this context, "jacked" meant robbed." RP 259-60, 270-71.

Finally, although Patterson was not willing to tell officers what was taken from him after this, RP 269, 277, there was methamphetamine in Patterson's room before Evans entered, and no methamphetamine found in that room afterwards, RP 210-12, 233. Because "a large amount of methamphetamine" was found in the possession of Defendant Reedy immediately after the robbery, RP 159, 161, 213, it is reasonable to infer that the methamphetamine in Reedy's possession as he ran from the room, was taken from Patterson or, at least, from the room in Patterson's presence.

Because all reasonable inferences from the evidence must be drawn in favor of the State, *State v. Salinas*, 119 Wn.2d at 201, these inferences must be made for purposes of this analysis. Thus, there was sufficient evidence that Evans displayed a firearm, told Patterson, in vernacular, that he was being robbed, and struck him in the head with the firearm and that Reedy aided Evans in completing that robbery by first allowing him into the room and then taking possession of Patterson's property after Evans displayed and used force. In other words, there is sufficient evidence to show that defendants Evans and Reedy took Patterson's methamphetamine from Patterson or in his presence, and

hence that they “took personal property, not belonging to [them] from the person or in the presence of another.” CP 89. Therefore, there was sufficient evidence of element (1).

There is also sufficient evidence of element (2), which requires “[t]hat the defendant or accomplice intended to commit theft of the property.” “Theft means to wrongfully obtain or exert unauthorized control over the property of another, or the value thereof, with intent to deprive that person of such property.” CP 106. In this case, Sawyer-Jones testified that the man later identified as Evans told Patterson and the others that they were “getting jacked,” or robbed. This clearly evidences an intent to deprive the people in the room of their property, here, methamphetamine. Given the fact that this methamphetamine was found to be in Reedy’s possession as he and Evans thereafter ran from the room, there is certainly sufficient evidence that Evans and Reedy “intended to commit theft of the property.” CP 89. Therefore, there is sufficient evidence of element (2).

There is also sufficient evidence of element (3), which requires “[t]hat the taking was against the person’s will by the defendant or accomplice’s use or threatened use of immediate force, violence or fear of injury to that person.” CP 89. In this case, there was evidence that Evans both threatened and used immediate force. Specifically, both Erickson

and Sawyer-Jones testified that Evans displayed a firearm and then struck Patterson in the head with that firearm, immediately after telling him, colloquially, that he was being robbed. Martin testified that Reedy opened the door and let Evans in to do this and that he wound up in possession of the methamphetamine immediately after he did it. Therefore there was sufficient evidence that the taking of the methamphetamine was “against [Patterson’s] will by the defendant or accomplice’s use or threatened use of immediate force, violence or fear of injury to that person,” CP 89, and hence, sufficient evidence of element (3).

There was also sufficient evidence of element (4), which requires “that the force or fear was used by the defendant or accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking.” CP 89. Again, Evans displayed the firearm, told Patterson he was being robbed, and then hit him. This indicates that the force was used to obtain possession of the property, especially given that Reedy was able to obtain possession of the methamphetamine immediately after Evans did this. Therefore, there is sufficient evidence of element (4).

The same is true with respect to element (5), which requires “[t]hat in the commission of these acts or in immediate flight therefrom the defendant or accomplice was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon or inflicted bodily

injury.” CP 89. In this case, there was evidence of every clause of this disjunctive sentence. First, there was testimony from Sawyer-Jones and Erickson that Evans displayed what appeared to be a handgun during the robbery. RP 20-32, 35, 51, 62. There was testimony from Officer Martin that Evans appeared to have dropped a .45-caliber handgun while running from the room, RP 154-55, 161, 213, and there was testimony from Detective Bryan Johnson that he and Detective Sail analyzed that handgun and found it to fire and function normally. RP 183-86. Second, there was testimony from Officer Martin that Defendant Reedy was armed with a handgun while running from the room, RP 158, 161, which was also found to fire and function normally. RP 183-86. Third, there was testimony from Sawyer-Jones and Erickson that Evans hit Patterson in the head with the handgun after telling him that he was robbing him, RP 20-21, 35, 51, 62, and testimony that Patterson suffered lacerations to his head and face, RP 197-98, 243, 265-66, as an apparent result. Therefore, there was more than sufficient evidence of element (5).

There was also sufficient evidence of element (6), which required “[t]hat any of these acts occurred in the State of Washington.” CP 89. Amber Sawyer-Jones, Officer Jeff Martin, and Officer David Crommes all testified that the Econo Lodge Hotel, where the relevant acts occurred, was located in the State of Washington. RP 47, 131, 261. Shalamar

Erickson, Officer Darcy Olsen, and Sergeant Anders Estes all testified that that this hotel was in the City of Tacoma, RP 17, 85, 112, which is located in State of Washington. Therefore, there was sufficient evidence of element (6), that “any of these acts occurred in the State of Washington.” CP 89.

Because, viewing the evidence in the light most favorable to the State, there was sufficient evidence from which a rational trier of fact could have found elements (1) through (6) beyond a reasonable doubt, there was sufficient evidence of first-degree robbery as to both defendants, and their convictions of first-degree robbery should be affirmed.

2. THE DEFENDANTS HAVE FAILED TO MEET THEIR BURDEN OF SHOWING EITHER PROSECUTORIAL MISCONDUCT OR THAT THE UNCHALLENGED ARGUMENT AT ISSUE WAS FLAGRANT AND ILL-INTENTIONED.

Absent a proper objection, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221, 226 (2006)(quoting *State v. Brown*, 157 Wn.2d 44, 561, 134 P.3d 221 (1997)); *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. Ziegler*, 114

Wn.2d 533, 540, 789 P.2d 79 (1990); *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). This is because the absence of an objection “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610(1990)(*emphasis in original*).

Even where there was a proper objection, an appellant claiming prosecutorial misconduct “bears the burden of establishing the impropriety of the prosecuting attorney’s comments and their prejudicial effect.” *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009); *State v. Fisher*, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009); *State v. McKenzie*, 157 Wn.2d 44, 134 P.3d 221 (2006)(quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)); *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962)(before an appellate court should review a claim based on prosecutorial misconduct, it should require “that [the] burden of showing essential unfairness be sustained by him who claims such injustice.”). Hence, a reviewing court must first evaluate whether the prosecutor’s comments were improper. *Anderson*, 153 Wn. App. at 427.

“A prosecutor’s improper comments are prejudicial ‘only where ‘there is a substantial likelihood the misconduct affected the jury’s

verdict.’” *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007)(quoting *Brown*, 132 Wn.2d at 561, 940 P.2d 546); *Fisher*, 165 Wn.2d at 747. “A reviewing court does not assess ‘[t]he prejudicial effect of a prosecutor’s improper comments... by looking at the comments in isolation but by placing the remarks ‘in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.’” *Id.* (quoting *Brown*, 132 Wn.2d at 561). “[R]emarks must be read in context.” *State v. Pastrana*, 94 Wn. App. 463, 479, 972 P.2d 557 (1999).

“The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Anderson*, 153 Wn. App. 417, 427-28, 220 P.3d 1273 (2009). “It is not misconduct... for a prosecutor to argue that the evidence does not support the defense theory. Moreover, the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

In the present case, both defendants argue that the deputy prosecutor committed misconduct in making the following argument:

Run that loop of inferences that I talked about before about the elements, hold the State to its burden. Hold it exactly to its burden. Don’t say, “I wish I had the

universe,” okay? Don’t say, “I wish I had fingerprints,” and then “I wish we had fingerprints, I wish we had the video from the satellite,” I talked about before.

Been sitting here watching it for three days. No fingerprints on this file. Do you have any doubt that’s my file? Convinced beyond a reasonable doubt?

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 the evidence or lack of evidence.

RP 391; Brief of Appellant Evans, p. 16-19; Brief of Appellant Reed, p. 16-30.

However, neither defendant objected to this comment at trial. *See* RP 391-2. Therefore, the issue is waived on appeal “unless the comment was so flagrant or ill intentioned that an instruction could not have cured the prejudice.” *Anderson*, 153 Wn. App. At 428. The defendants’ have failed to show that it was, and as a result, their convictions should be affirmed.

Although it is true that, the *Venegas* Court recently reversed convictions of a defendant based on statements made by the deputy prosecutor in closing argument, *State v. Venegas*, 155 Wn. App. 507, 523, 228 P.3d 813 (2010), *Venegas* is distinguishable from the present case for at least four reasons.

First, the prosecutor’s comments in *Venegas* were materially different from that at issue here. In *Venegas*, the prosecutor stated

“*[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.” *Venegas*, 155

Wn. App. at 523(emphasis added). In finding this comment to be

improper, this Court noted that

[b]y 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.

*Id.* at 524 (citing *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009).

The comment made in the present case contains no such implication, however. Here, the prosecutor simply told the jury that “if you decide to decide” that the defendants are not guilty, “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?” RP 391. There is nothing in this statement that implies “that the jury had to find a reason in order to find [the defendant] not guilty.” In fact, very shortly before making this statement, the prosecutor told the jury to “hold the State to its burden” and to “[h]old it exactly to its burden.” *Id.* Indeed, the statement at issue here is no more than a restatement of the court’s instruction that “[a] reasonable doubt is one for which a reason exists,” CP 77-117, and is therefore,

materially different from the comment at issue in *Venegas*. Because the comment here does not state or imply “that the jury had to find a reason in order to find [the defendant] not guilty,” it is materially different from the comment at issue in *Venegas*, and not improper. Therefore, the defendants’ convictions should be affirmed.

Second, the comments in *Venegas* occurred more than once and were much more invidious to the presumption of innocence than the comment at issue here. The prosecutor in *Venegas* did not stop with the argument quoted above, but went on to state that

the presumption of innocence... erodes each and every time you hear evidence that the defendant is guilty.... Every single time that evidence is presented that the defendant is guilty as charged, then that presumption erodes little by little, bit by bit, and at the conclusion of all of the evidence, including the defendant’s witnesses and the defendant, herself, and that presumption no longer exists, then that’s when the State has proven the case beyond a reasonable doubt.

*Venegas*, 155 Wn. App. at 524. As the Court in *Venegas* noted, this is a clear misstatement of the law because “[t]he presumption of innocence continues ‘throughout the entire trial’ and may only be overcome, if at all, during the jury’s deliberations.” *Id.* The Court in *Venegas* indicated the critical importance of these later comments to its decision by holding that, “[t]he prosecutor committed flagrant misconduct **by repeatedly attacking**

Venegas's presumption of innocence with improper arguments that had no basis in law." *Id.* At 525 (emphasis added).

The same cannot be said of the deputy prosecutor here. The prosecutor here made no comments of the sort found in *Venegas* and no clear misstatements of the law. *See* RP 323-52, 383-92.

Indeed, the deputy prosecutor began the rebuttal argument, in which the challenged comment appears, by stating that the defendants don't "have to present a theory of the case," but that the State does. RP 383. Earlier, in his closing argument, the deputy prosecutor drew the jury's attention to the trial court's Instruction Number 2, which stated:

Each defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. ***The defendant has no burden of proving that a reasonable doubt exists as to these elements.***

***A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.***

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

RP 339-40; CP 77-117 (emphasis added). The deputy prosecutor went on to draw the jury's attention specifically to the first paragraph of this

instruction, by pointing out to the jury that “it says the defendant doesn’t have a burden, and that’s true, too, doesn’t have a burden.” RP 340.

The deputy prosecutor further told the jury during his closing argument:

[w]hat I am telling you, if you short circuit these jury instructions, all right, because you think you kind of get it without reading them, I suggest you are making a mistake, you are not following the oath that you swore to follow. Okay? Look at the instructions, make sure.

RP 334. The prosecutor also told the jury to

keep going back to the jury instructions –and that’s my theme, if you haven’t noticed that yet, that’s my theme, go back to the jury instructions.

RP 337. At the very end of his closing argument, the deputy prosecutor told the jury:

As the *State being the party with the burden of proof*, I get to talk at the end.... But if I forget to do it on the second time around, just going to ask you one more time: ***Let those instructions be your guide. Follow the law.***

RP 339-40 (emphasis added). Because “those instructions” specifically instructed the jury that “[a] defendant is presumed innocent” and that “[t]his presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt,” CP 77-117, the deputy prosecutor’s comments cannot, as in *Venegas*, be construed as “repeatedly attacking” the presumption of innocence or as attacking it at all. They, therefore, cannot be construed as

improper, and certainly not as flagrant or ill-intentioned. Because the defendants did not object to the comment at trial, any issue regarding it must be considered waived on appeal, and the defendant's convictions should be affirmed.

Third, although the Court in *Venegas* did find the statement “to find the defendant not guilty, you have to say to yourselves: ‘I doubt the defendant is guilty, and my reason is’ –blank” to be flagrant and ill-intentioned, *Venegas*, 155 Wn. App. at 523, fn 16, it did so in apparent *obiter dictum*. *See Id.* at 526. This phrase was *obiter dictum* because the Court's reversal in *Venegas* was not based on prosecutorial misconduct, but on cumulative error. *See Id.* Indeed, the Court only characterized the prosecutor's comment as flagrant and ill-intentioned in a footnote and did not base its decision to reverse on this footnote. *See Venegas*, 155 Wn. App. at 524. Rather, the Court held “that the accumulation of errors discussed above,” including the improper exclusion of expert testimony and improper admission of ER 404(b) evidence, was “of sufficient magnitude that reversal is necessary.” *Venegas*, 155 Wn. App. at 526. As a result, *Venegas* is distinguishable from the instant case and the defendant's convictions should be affirmed.

Fourth, although the Court in *Venegas* may have found the comment at issue there to be flagrant and ill-intentioned, such a comment

cannot, as a matter of law, always be so. Indeed, as the case law has consistently recognized, a reviewing court cannot assess a prosecutor's comments "in isolation," but must examine them 'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *Yates*, 161 Wn.2d 714, 774 (quoting *Brown*, 132 Wn.2d at 561); *Anderson*, 153 Wn. App. at 428-29. Because the context varies, so must the characterization of the comments found therein. The Court in *Venegas* seemed to indicate that the prosecutor who uttered the comments there at issue ignored the Court's earlier admonition in *Anderson*, and that, as a result, her comment was "flagrant" and "ill-intentioned." *Venegas*, 155 Wn. App. at 523-24. Specifically, the Court noted that it had recently pronounced similar remarks by a deputy Pierce County prosecutor to be improper, and then stated, "[w]e 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.

The same can not be said of the deputy prosecutor in the present case. Indeed the deputy prosecutor here made his comments before the court's initial iteration in *Anderson* was even published. Although *Anderson* was published December 8, 2009, *Anderson*, 153 Wn. App. at 417, the prosecutor's argument was made on August 20, 2009, 06/01/2009

RP 54, almost four months before. It would have been impossible for him to ignore *Anderson* by continuing “to employ an improper ‘fill-in-the-blank’ argument,” because, at the time he made his argument, neither *Anderson* nor any other decision had even considered such an argument, much less ruled it improper. As a result, the prosecutor’s comment here could not have been flagrant or ill-intentioned and, certainly not so flagrant and ill-intentioned as to warrant reversal.

Thus, *Venegas* is distinguishable from the present case. The comment at issue here, even if it could be considered improper, cannot be considered flagrant or ill-intentioned. Therefore, the issue should be considered waived and the defendant’s convictions affirmed.

Defendant Reedy also argues that the deputy prosecutor committed misconduct by “repeatedly declar[ing] or intimat[ing] that the jury had a duty to decide the truth of what had happened.” Brief of Appellant Reedy, p. 22-25. Nevertheless, the deputy prosecutor never actually said this.

Rather, he stated, the following:

Want to point out something in Jury Instruction Number 1. And I have got this highlighted or laid out so I won’t forget to talk about it. But that second page. Top of the second page of Jury Instruction Number 1. Talks about how to evaluate evidence. It’s really going to be useful in trying to evaluate evidence. You are the sole judges of credibility.

***You decide who's telling the truth, who's being less than truthful.***

RP 337-38. (emphasis added)

Somewhat later, the deputy prosecutor referred the jury to instruction number 2, CP 81, which defined reasonable doubt, and stated

***Hold me to the burden of proof exactly. Says: Are you convinced beyond a reasonable doubt that – beyond a reasonable doubt that each element is true?***

So the elements are your guide as far as what I have to prove and what I don't, okay?

RP 339-40 (emphasis added).

The deputy prosecutor continued

When you look 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.

Finally, he stated

When 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. And that jury instruction tells you to, not me telling you to. It says right there, at the top of page 2, Jury Instruction Number 1, about a third of the way down in that paragraph, that a really good way to decide on whether something is credible, should have

weight or not, is it reasonable, right, in the context of all the other evidence. All right?

RP 389-90.

Although, Defendant Reedy now argues that each of these comments constitutes misconduct, *see* Brief of Appellant, p. 22-25, neither he nor Defendant Evans ever objected to any of these comments at trial. *See* RP 1-431. Therefore, any issue involved in these comments is waived on appeal “unless the comment was so flagrant or ill intentioned that an instruction could not have cured the prejudice.” *Anderson*, 153 Wn. App. at 428. In determining whether these comments meet this standard, they must be assessed, not in isolation, but “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” *State v. Yates*, 161 Wn.2d at 774.

In the present case, although the deputy prosecutor did tell the jury, “[y]ou decide who’s telling the truth, who’s being less than truthful,” RP 337-38, in so doing, he did no more than reiterate the court’s instruction number 1 that the jurors “are the sole judges of the credibility of each witness” and “the sole judges of the value or weight to be given to the testimony of each witness.” CP 77-117. Both the instruction and the deputy prosecutor’s comment about it were accurate and proper. There

was nothing in this comment to suggest that the jury's duty was to discern the truth.

Second, although the deputy prosecutor did state that the jury should ask if it is "convinced beyond a reasonable doubt that – beyond a reasonable doubt that each element is true," RP 340, in so doing, he did not argue that the jury's role is to seek the truth, but simply to decide whether the elements of the crimes alleged have been proven beyond a reasonable doubt. This is made clear in the prosecutor's very next sentence, in which he tells the jury "the elements are your guide as far as what I have to prove and what I don't, okay?" RP 340.

The same is true with respect to the third comment. Although the deputy prosecutor told the jury "to peel back different layers of the onion to get to the truth," in the very next sentence, he argued that "once you [have] decided what you know and what you don't know... then apply those elements." RP 334. Thus, again, the deputy prosecutor is not arguing that the jury's role is to seek the truth, but simply to decide whether the elements of the crimes alleged have been proven beyond a reasonable doubt. This is not improper.

Finally, when the deputy prosecutor argued that when the jury "decide[d] what [it] believe[d] is true beyond a reasonable doubt," he was simply arguing that it should consider the evidence "in the context of all

the other evidence.” RP 389-90. In other words, he was simply asking the jury to follow the court’s proper instruction number 1 in assessing the credibility of witnesses. Compare RP 389-90 with CP 77-117. This was not improper.

Indeed, none of these comments were improper, and they were definitely not “so flagrant or ill intentioned that an instruction could not have cured the prejudice.” *Anderson*, 153 Wn. App. at 428. In fact, the deputy prosecutor referenced one of the court’s proper instructions in each of the comments at issue here and did no more than discuss those instructions. Those instructions themselves, properly discuss the jury’s legitimate role in judging the credibility of witnesses and the State’s burden of proof beyond a reasonable doubt.

Because, neither defendant objected to any of these comments at trial and neither has shown any of the comments to be “so flagrant or ill intentioned that an instruction could not have cured the prejudice,” *Anderson*, 153 Wn. App. at 428, any issue involved in these comments should be considered waived on appeal. Therefore, the defendants’ convictions should be affirmed.

Although Defendant Evans argues that *Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009), should control, he is mistaken.

In *Anderson*, this Court held that a deputy prosecutor's repeated requests that the jury "declare the truth" were improper because the jury's duty is not to declare the truth of what happened, but to determine "whether the State has proved its allegations against a defendant beyond a reasonable doubt." *Anderson*, 153 Wn. App. at 429. Unlike in *Anderson*, however, the deputy prosecutor in the present case never asked the jury to "declare the truth," but simply encouraged it to consider the facts "in the context of all the other evidence," RP 389-90, to determine if the State had proved the elements of the charged offenses beyond a reasonable doubt. RP 339-40. Such argument is, under *Anderson*, entirely proper.

Moreover, in *Anderson* the defense had objected to the comments at trial. 153 Wn. App. at 423-24. Neither defendant objected to the comments at issue here. *See* RP 1-431. Nevertheless, the Court in *Anderson* found that when these comments were examined "in the context of jury instructions that clearly lay out the jury's actual duties" and counsel's other argument, the defendant there failed to demonstrate that there was a substantial likelihood that this misconduct affected the verdict. *Id.* at 429. This Court therefore held that a new trial was not warranted and affirmed the defendant's conviction. *Id.*

In the present case, as in *Anderson*, there were jury instructions which properly laid out the jury's actual duties. For example, there were

instructions which made it quite clear that the State “has the burden of proving each element of each crime beyond a reasonable doubt” and that “if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.” CP 77-117. At no point do any of the court’s instructions mention that the jury is to declare the truth of what happened. *See Id.*

Because, neither defendant objected to any of the deputy prosecutor’s comments at trial and neither has shown any of the comments to be “so flagrant or ill intentioned that an instruction could not have cured the prejudice,” *Anderson*, 153 Wn. App. at 428, any issue related to these comments should be considered waived and the defendants’ convictions should be affirmed.

3. DEFENDANT REEDY HAS FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF HIS TRIAL COUNSEL’S FAUILURE TO OBJECT TO REMARKS OF THE DEPUTY PROSECUTOR BECAUSE HE HAS NOT SHOWN THAT SUCH OBJECTIONS WOULD HAVE BEEN SUSTAINED.

“Effective assistance of counsel is guaranteed by both the United States Constitution amendment VI and Washington Constitution article I, section 22 (amendment X).” *State v. Yarbrough*, 151 Wn. App. 66, 89, 210 P.3d 1029, 1040-41 (2009); *State v. Johnston*, 143 Wn. App. 1, 177

P.3d 1127 (2007). A claim of ineffective assistance of counsel is reviewed *de novo*. *Yarbrough*, 151 Wn. App. at 89.

“Washington has adopted the *Strickland* test to determine whether a defendant had constitutionally sufficient representation.” *State v. Cienfuegos*, 144 Wn.2d 222, 25 P.3d 1011 (2001)(citing *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990)); *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). That test requires that the defendant meet both prongs of a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See also *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). “First, the defendant must show that counsel’s performance was deficient” and “[s]econd, the defendant must show that the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687; *Cienfuegos*, 144 Wn.2d at 226-27. A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563, 571 (1996); *In Re Rice*, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

The first prong “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687.

Specifically, “[t]o establish deficient performance, the defendant must show that trial counsel’s performance fell below an objective standard of reasonableness.” *Johnston*, 143 Wn. App. at 16. “The reasonableness of trial counsel’s performance is reviewed in light of all the circumstances of the case at the time of counsel’s conduct.” *Id.*; *State v. Garrett*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994). “Competency of counsel is determined based upon the entire record below.” *State v. Townsend*, 142 Wn.2d 838, 15 P.3d 145 (2001)(citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969). “To prevail on a claim of ineffective assistance of counsel, the defendant must overcome a strong presumption that defense counsel was effective.” *Yarbrough*, 151 Wn. App. at 90. This presumption includes a strong presumption “that counsel’s conduct constituted sound trial strategy.” *Rice*, 118 Wn.2d at 888-89. “If trial counsel’s conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.” *Yarbrough*, 151 Wn. App. at 90 (citing *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002), *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

“In order to show that counsel was ineffective for failing to object to the remarks of the prosecutor, the defendant must show that the

objection would have been sustained.” *State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007). Moreover, “[c]ounsel’s decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions,” and “[o]nly in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal.” *Id.*

With respect to the second prong, “[p]rejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed.” *Id.* “A reasonable probability is a probability sufficient to undermine confidence in the outcome.”

*Cienfuegos*, 144 Wn.2d at 229.

Defendant Reedy argues that his trial counsel was ineffective for failing to object to the instances of alleged prosecutorial misconduct already discussed. Brief of Appellant, p. 30-31. Defendant Reedy has failed to meet his burden.

As discussed above, the deputy prosecutor committed no misconduct whatsoever. As a result, no objection at trial would have been sustained and no curative instruction could have been necessary. Because Defendant Reedy has not shown that an objection would have been sustained, he cannot show that counsel was ineffective for failing to object to these remarks of the prosecutor. *State v. Johnston*, 143 Wn. App. 1,

19, 177 P.3d 1127 (2007). Therefore, Defendant Reedy cannot show that his trial counsel's performance was deficient and his claim of ineffective assistance of counsel must fail.

4. WITH RESPECT TO DEFENDANT EVANS, REMAND FOR CORRECTION OF THE JUDGMENT IS APPROPRIATE BECAUSE THE TRIAL COURT FAILED TO COMPLY WITH DOUBLE JEOPARDY PROVISIONS BY REDUCING EVANS'S SECOND-DEGREE ASSAULT VERDICT TO JUDGMENT.

The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. It applies to the states through the due process clause of the Fourteenth Amendment. *State v. Wright*, 165 Wn.2d 783, 801, 203 P.3d 1027 (2009)(citing *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)). The Washington State Constitution similarly mandates that no person shall "be twice put in jeopardy for the same offense." Wn. Const. Art. I, sec. 9. Washington's double jeopardy clause "offers the same scope of protection as its federal counterpart." *State v. Adel*, 136 Wn.2d 629, 632, 632, 965 P.2d 1072 (1998)(citing *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)). The double jeopardy clause encompasses three separate constitutional protections:

It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for

the same offense after conviction. And it protects against multiple punishments for the same crime.

*Id.*, 127 Wn.2d at 100.

With respect to the third protection, “a defendant convicted of alternative charges may be judged and sentenced on one only.” *State v. Trujillo*, 112 Wn. App. 390, 411, 49 P.3d 935 (2002)(citing *State v. Gohl*, 109 Wn. App. 817, 824, 37 P.3d 293 (2001)). “[A] court may violate double jeopardy either by reducing to judgment both the greater and the lesser of two convictions for the same offense or by conditionally vacating the lesser conviction while directing, in some form or another, that the conviction nonetheless remains valid.” *State v. Turner*, 169 Wn.2d 448, 464, 238 P.3d 461 (2010). While “double jeopardy does not require permanent, unconditional vacation of the lesser of the two convictions for the same criminal conduct,” *Id.* at 456-61, “a judgment and sentence must not include any reference to the vacated conviction –nor may an order appended thereto include such a reference.” *Id.* at 464-65.

“It remains the law that a lesser conviction previously vacated on double jeopardy grounds may be reinstated if the defendant’s conviction for a more serious offense based on the same act is subsequently overturned on appeal.” *Id.* at 466.

In the present case, the jury did find Defendant Evans guilty of both first-degree robbery in count II and second-degree assault in count III. CP 118-19; RP 398-402. Although the trial court did not sentence

Defendant Evans on count III and did not seem to include this conviction in its calculation of his offender score for the remaining three counts, it did reduce the jury's guilty verdict pertaining to that count and to count II, first-degree burglary, to judgment. CP 125-38. *See* RP 413-17. In so doing, the trial court failed to comply with double jeopardy protections by "reducing to judgment both the greater and the lesser of two convictions for the same offense." *Turner*, 169 Wn.2d at 464.

This, however, will remain the case only as long as the first-degree burglary conviction in count II is affirmed. Should the first-degree burglary conviction be reversed by this Court for insufficient evidence, then the second-degree assault conviction in count III would no longer offend double-jeopardy protections. *See Turner*, 169 Wn. 2d at 466. Indeed, if the first-degree burglary conviction were so reversed, count III should be affirmed, but the matter should be remanded to the trial court to impose sentence on this second-degree assault count. *See Id.*

Assuming, however, that this Court affirms Defendant Evans's conviction of first-degree burglary, the matter should be remanded to the trial court for the sole purpose of entering a corrected judgment removing any reference to a second-degree assault conviction or the jury's verdict with respect to count III.

5. WITH RESPECT TO DEFENDANT REEDY, THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH RESPECT TO THE SPECIAL VERDICTS.

Jury instructions are appropriate where they “permit each party to argue his theory of the case and properly inform the jury of the applicable law.” *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). The standard for review applied to a challenge to a trial court’s instructions depends on whether the trial court’s decision is based upon a matter of law or of fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court’s decision is reviewable only for abuse of discretion if based on a factual dispute. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). The trial court’s decision based upon a ruling of law is reviewed de novo. *State v. Bashaw*, 169 Wn.2d 133, 140, 234 P.3d 195 (2010).

“Washington requires unanimous jury verdicts in criminal cases.” *State v. Goldberg*, 149 Wn.2d 888, 892, 72 P.3d 1083 (2003)(citing Wn. Cont. art. I, sec. 21). However, while “unanimity is required to find the presence of a special finding increasing the maximum penalty, *Goldberg*, 149 Wn.2d at 893, 72 P.3d 1083, it is not required to find the absence of such a special finding.” *Bashaw*, 169 Wn.2d at 147. *See State v. Coleman*, 152 Wn. App. 522, 216 P.3d 479 (2009).

Defendant Reedy now argues that the trial court's jury instructions, including number 37 which is the only instruction to specifically address the special verdict forms, "improperly instructed" the jury that it had to be unanimous in order to answer the special verdicts "no."

Reedy, however, did not object to this instruction at trial. RP 321-22. Because appellate courts will generally "not consider issues raised for the first time on appeal." *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007)(citing *State v. Tolias*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); RAP 2.5(a), and Reedy has articulated no exception to this rule, see RAP 2.5(a), Brief of Appellant Reedy, p. 1-40, this issue should be considered waived. See *Bashaw*, 169 Wn. 2d at 146 (noting that the rule that a non-unanimous jury decision that the State has not proven a special finding beyond a reasonable doubt is a final determination "is not compelled by constitutional protections against double jeopardy, but rather by the common law precedent of this court, as articulated in *Goldberg*." (internal citations omitted)).

Assuming *arguendo* that this issue is properly before the Court, the trial court here properly instructed the jury with respect to the special verdict. Specifically, the court's instruction 37, the only instruction to deal with the special verdict forms, stated:

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 had a reasonable doubt as to the question, you must answer “no.”***

CP 117 (emphasis added).

This relevant language of this instruction is virtually identical to that given by the trial court in ***Goldberg***. There, the court instructed the jury, in its instruction 16, that

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 had a reasonable doubt as to the question, you must answer “no.”

***Goldberg***, 149 Wn.2d at 893. The Supreme Court noted that “under instruction 16, unanimity is not required in order for the verdict to be final,” and held that “it was error for the trial court to order continued deliberations” after the jury returned a non-unanimous special verdict of “no.” *Id.* at 894. In other words, the trial court erred, not in giving this instruction, which properly stated the law, but in requiring the jury to deliberate further. As this Court recently noted, “the trial court [in ***Goldberg***] did not have authority to act as it did ***because its instruction required the jury to be unanimous only to answer the special verdict***

*question 'Yes'*; but no instruction required the jury to be unanimous to answer the special verdict question 'No.'" *Coleman*, 216 P.3 at 485 (emphasis added).

In the present case, as in *Goldberg*, and *Coleman* for that matter, instruction 37 "required the jury to be unanimous only to answer the special verdict question 'Yes'; but no instruction required the jury to be unanimous to answer the special verdict question 'No.'" *Id.* In the present case, the jury returned a unanimous special verdict of "yes," RP 401-02, and the Court, at no point, ordered further deliberation. RP 1-431.

As a result, the jury was properly instructed that "unanimity is required to find the presence of a special finding increasing the maximum penalty," but "not required to find the absence of such a special finding." *Bashaw*, 169 Wn.2d at 147. Therefore, the trial court here properly instructed the jury with respect to the special verdict and should be affirmed.

Nevertheless, Defendant Reedy argues that Instructions 5 and 36, when taken together with instruction 37, "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*." Brief of Appellant Reedy, p. 32-35. The defendant is mistaken.

Instruction 5 did properly instruct the jury that it had a duty “to deliberate in an effort to reach a unanimous *verdict*.” Appendix A. *Compare* Wn. Const. art. I, sec. 21. Likewise, Instruction 36 properly told the jury that “[b]ecause this is a criminal case, each of you must agree for you to return a verdict.” See Appendix B. *Compare* Wn. Const. art. I, sec. 21.

Both of these instructions, however, were clearly concerned with the *verdict* forms which pertained to the substantive crimes charged, and not with the *special verdict form* at issue in instruction 37. This fact was made clear to the jury in instruction 37, which indicated in its first three sentences, that the jury’s deliberation on the special verdict was to begin only after it had completed its verdicts on the underlying offense:

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.

CP 117 (emphasis added). Instruction 37, as has been shown, then went on to properly instruct the jury that “unanimity is required to find the presence of a special finding increasing the maximum penalty,” but “not required to find the absence of such a special finding.” *Bashaw*, 169 Wn.2d at 147. Therefore, Instructions 5 and 36 were consistent with

instruction 37 and, because all were proper statements of the law, Defendant Reedy's convictions and sentences should be affirmed.

Although the defendant also argues that *Bashaw*, 169 Wn.2d 133, controls, *Bashaw* is plainly distinguishable.

In *Bashaw*, the jury instruction explaining the special verdict forms stated, "[s]ince this is a criminal case, all twelve of you must agree on the answer to the special verdict." *Bashaw*, 169 Wn.2d at 139. The Court held that this instruction, because it stated that all 12 jurors must agree the find the absence of a special finding, was error.

However, in the present case, instruction 37 stated:

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 had a reasonable doubt as to the question, you must answer "no."

CP 117 (emphasis added). Unlike the instruction at issue in *Bashaw*, instruction 37 explicitly stated that the jury need only be unanimous to answer the special verdict form "yes." It, therefore, did not suffer the same infirmity as that at issue in *Bashaw*, and, as a result, this case is distinguishable from *Bashaw*.

Indeed, as this Court noted in *Coleman*, this instruction "required the jury to be unanimous only to answer the special verdict question "Yes"; but no instruction required the jury to be unanimous to answer the

special verdict question “No.” *Coleman*, 216 P.3 at 485. Because this was a proper statement of the law under *Goldberg*, the special verdict should be affirmed.

D. CONCLUSION.

The defendants’ convictions of first -degree robbery should be affirmed because, viewing the evidence in the light most favorable to the State, there was sufficient evidence from which a rational trier of fact could have found the essential elements of that crime beyond a reasonable doubt.

Moreover, all of the defendants’ convictions should be affirmed because the defendants have failed to meet their burden of showing either prosecutorial misconduct or that the unchallenged argument at issue was flagrant and ill-intentioned and therefore, there convictions should be affirmed.

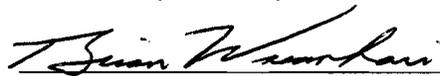
Defendant Reedy has failed to show ineffective assistance of counsel because of his trial counsel’s failure to object to remarks of the deputy prosecutor because he has not shown that such objections would have been sustained.

With respect to Defendant Evans only, remand for correction of the judgment is appropriate because the trial court failed to comply with double jeopardy provisions by reducing both his first-degree burglary and second-degree assault verdicts to judgment.

Finally, the trial court properly instructed the jury with respect to the special verdict and should be affirmed.

DATED: November 15, 2010

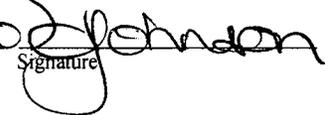
MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
BRIAN WASANKARI  
Deputy Prosecuting Attorney  
WSB # 28945

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

*Auto O.C. Marshigek  
Self*

11/15/10   
Date Signature

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**APPENDIX A**

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.

**APPENDIX B**

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

Use 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 with 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.