

40940-2-II

No. ~~40940-6-II~~

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

STATE OF WASHINGTON,

Respondent,

v.

MARCUS WHITE,

Appellant.

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STATE OF WASHINGTON
BY  DEPUTY

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

The Honorable Vicki L. Hogan (motion) and the Honorable Bryan E.
Chushcoff (trial and sentencing), Judges

APPELLANT'S OPENING BRIEF

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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 2

 1. Procedural Facts 2

 2. Testimony at trial 3

D. ARGUMENT 16

 1. THE CONVICTIONS WERE IMPROPERLY BASED UPON “DOG TRACK” EVIDENCE WHICH WAS NOT SUFFICIENTLY CORROBORATED AS REQUIRED 16

 2. THE IDENTIFICATION EVIDENCE WAS IMPROPERLY ADMITTED AND THE MISTRIAL IMPROPERLY DENIED. FURTHER, COUNSEL WAS PREJUDICIALLY INEFFECTIVE. 16

 a. Relevant facts 17

 b. Counsel was prejudicially ineffective 18

 3. THE PROSECUTOR COMMITTED MULTIPLE ACTS OF FLAGRANT, PREJUDICIAL MISCONDUCT WHICH COMPEL REVERSAL AND COUNSEL WAS AGAIN INEFFECTIVE 24

 a. Relevant facts 25

 b. These arguments were all flagrant, prejudicial misconduct 28

 4. THE SENTENCING COURT ERRED, ABDICATED ITS DUTIES AND VIOLATED DUE PROCESS IN IMPOSING A CONDITION OF COMMUNITY CUSTODY WHICH FAILED TO DEFINE THE CONDITIONS WITH WHICH WHITE MUST COMPLY 35

E. CONCLUSION 41

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT CASES

In re Brett, 142 Wn.2d 868, 16 P.3d 601 (2001) 20

In re Davis, 152 Wn.2d 647, 101 P.3d 1 (2004) 20

Miller v. Staton, 58 Wn.2d 879, 365 P.2d 33 (1961) 31

Spokane v. Douglass, 115 Wn.2d 171, 795 P.2d 693 (1990) 36

State v. A.N.J., 168 Wn.2d 91, 225 P.3d 956 (2010) 19, 20

State v. Armstrong, 37 Wash. 51, 79 P.3d 490 (1905) 33

State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008) 36, 37

State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988) 33

State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007). 29

State v. Bowerman, 115 Wn.2d 794, 802 P.2d 116 (1990) 18

State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984). 29

State v. Hendrickson, 129 Wn.2d 61, 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) 18, 35

State v. Loucks, 98 Wn.2d 563, 656 P.2d 480 (1983) 1, 16

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995) 19

State v. McKenzie, 157 Wn.2d 44, 134 P.3d 221 (2006) 33

State v. Sweet, 90 Wn.2d 282, 581 P.2d 579 (1978). 38

WASHINGTON COURT OF APPEALS CASES

State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010) 32

COURT OF APPEALS, CONTINUED

State v. Autrey, 136 Wn. App. 460, 150 P.3d 580 (2006) 38

State v. Guzman-Cuellar, 47 Wn. App. 326, 734 P.2d 966 (1987) 23

State v. Horton, 136 Wn. App. 29, 146 P.3d 1227 (2007), review denied,
162 Wn.2d 1014 (2008) 19

State v. Jones, 118 Wn. App. 199, 76 P.3d 258 (2003). 39, 40

State v. Jury, 19 Wn. App. 256, 576 P.2d 1302, review denied, 90 Wn.2d
1006 (1978) 19

State v. Larios-Lopez, 156 Wn. App. 257, 233 P.3d 899 (2010) 33

State v. Madison, 53 Wn. App. 754, 770 P.2d 662, review denied, 113
Wn.2d 1002 (1989) 35

State v. Red, 105 Wn. App. 62, 18 P.3d 615 (2001), review denied, 145
Wn.2d 1036 (2002) 18

State v. Sansone, 127 Wn. App. 630, 111 P.3d 1251 (2005) 36-38

State v. Saunders, 91 Wn. App. 575, 958 P.2d 364 (1998). 35

State v. Suarez-Bravo, 72 Wn. App. 359, 864 P.2d 426 (1994) 24

State v. Venegas, 155 Wn. App. 507, 228 P.3d 821, review denied, 170
Wn.2d 1003 (2010). 31

State v. Zimmer, 146 Wn. App. 405, 190 P.3d 121 (2008), review denied,
165 Wn.2d 1035 (2009) 35, 39

FEDERAL AND OTHER STATES' CASES

Berger v. United States, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 2d 1314
(1935), overruled in part and on other grounds by Stirone v. United States,
361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960) 24

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,
112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). 34

County Court of Ulster County, N.Y. v. Allen, 442 U.S. 140, 99 S.Ct.
2213, 60 L. Ed. 2d 777 (1979) 31

FEDERAL AND OTHER, CONTINUED

Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974) 24

United States v. Gonzalez-Balderas, 11 F.3d 1218 (5th Cir.), cert. denied, 511 U.S. 1129 (1994) 32

Lord v. Wood, 184 F.3d 1083 (9th Cir. 1999), cert. denied sub nom Lambert v. Lord, 528 U.S. 1198 (2000) 21

Manson v. Braithwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977) 23

Rios v. Rocha, 299 F.3d 796 (9th Cir. 2002) 21

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 18, 19, 21

U.S. v. Tucker, 716 F.2d 576 (9th Cir. 1983) 21

United States v. Pine, 609 F.2d 106 (3rd Cir. 1979). 32

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

Article I, § 22 1,18, 24, 38

CrR 3.6 17

Fifth Amendment 24

Former RCW 9.94A.505(9) 40

Former RCW 9.94A.700(5) 37

Former RCW 9.94A.712 37

Former RCW 9.94A.715(2)(b) 40

Former RCW 9.94A.715(2)(b) 40

Fourteenth Amendment 24

Laws of 2008, ch. 231, § 25. 40

Laws of 2008, ch. 231, § 56. 37

RULES, ETC. CONTINUED

| | |
|-----------------------------------|-----------|
| Laws of 2008, ch. 231, § 57 | 40 |
| Laws of 2009, ch. 28, § 42. | 40 |
| RAP 10.1(g) | 16 |
| RCW 9.94A.125 | 2 |
| RCW 9.94A.310 | 2 |
| RCW 9.94A.370 | 2 |
| RCW 9.94A.507 | 37 |
| RCW 9.94A.533 | 3 |
| RCW 9.94A.602 | 3 |
| RCW 9.94A.510 | 3 |
| RCW 9A.28.080 | 3 |
| RCW 9A.52.020(1)(a) | 3 |
| RCW 9A.56.190 | 3 |
| RCW 9A.56.200(1)(a) | 3 |
| Sixth Amendment | 1, 18, 24 |

A. ASSIGNMENTS OF ERROR

1. The convictions were improperly based upon “dog track” evidence which was not sufficiently corroborated with proof of identity as required under State v. Loucks, 98 Wn.2d 563, 656 P.2d 480 (1983).
2. The evidence of the “show up” identification procedure should have been suppressed and the mistrial granted.
3. The prosecutor committed flagrant, prejudicial misconduct, the cumulative effect of which deprived appellant Marcus White of his due process rights to a fair trial.
4. Appellant Marcus White was deprived of his Article I, § 22 and Sixth Amendment rights to effective assistance of counsel.
5. The sentencing court violated White’s due process rights and acted outside its statutory authority in imposing a condition of community custody which failed to define with sufficient specificity the “crime-related prohibitions” with which White will have to comply. This further violated White’s rights to a meaningful appeal. White assigns error to the following condition set forth in Appendix F of the judgment and sentence:

(VI) The offender shall comply with any crime-related prohibitions.

CP 190.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under Loucks, supra, a conviction cannot be based solely upon evidence gathered through a “dog track” but must instead also be supported by admissible, independent corroborating evidence. Is reversal required where there was not such evidence to support the convictions?
2. Is reversal required where evidence which resulted from an improperly suggestive identification procedure was admitted and the trial court failed to grant a mistrial?
3. Was counsel ineffective in failing to interview the only two eyewitnesses against his client and thus failing to discover serious defects in the “show-up” identifications and failing to move to suppress those identifications which were crucial to the state’s case?

4. Did the prosecutor commit flagrant, prejudicial misconduct by repeatedly misstating and minimizing his burden of proof and the jury's role and duties, inciting the jurors' passions and prejudices and expressing a personal opinion about guilt?

Does the cumulative effect of the misconduct compel reversal?

Further, was counsel ineffective in failing to object and attempt to mitigate the serious prejudice caused by these arguments?

5. In imposing conditions of community custody, the sentencing court failed to provide any specifics of what "crime-related prohibitions" with which White will have to comply, instead only ordering, "[t]he offender shall comply with any crime-related prohibitions." Is this condition unconstitutionally vague and in violation of White's due process rights because it fails to provide any notice from which a reasonable person could determine what conduct was mandated or prohibited and fails to provide any standards for enforcement, let alone standards sufficient to protect against arbitrary and capricious enforcement?

Because the Legislature specifically sentencing courts limited authority to impose conditions of community custody within statutory limitations, did the trial court effectively abdicate its role in failing to set forth specific conditions?

Are White's rights to a meaningful, full and fair review of his criminal conviction and judgment and sentence implicated because the failure to set forth specific "crime-related prohibitions" has effectively deprived him of this Court's review of the conditions on direct appeal?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Marcus White was charged by information with one count of attempted first-degree robbery with a firearm enhancement and one count of first-degree burglary with a deadly weapon enhancement. CP 54-55; RCW 9.94A.125, RCW 9.94A.310, RCW 9.94A.370, RCW

9.94A510, RCW 9.94A.533, RCW 9.94A.602, RCW 9A.28.080, RCW 9A.52.020(1)(a), RCW 9A.56.190, RCW 9A.56.200(1)(a).

Continuances were granted by the Honorable Judge Vicki L. Hogan on March 1 and June 9, 2010, and jury trial was held before the Honorable Judge Bryan Chushcoff on June 10, 14-16, 21-24, 2010, after which the jury found White guilty of the substantive crimes but not guilty of being armed with a deadly weapon for either crime.¹ CP 164-67. On July 9, 2010, Judge Chushcoff imposed a sentence at the bottom of the standard range. SRP 21-25; CP 179-91.

White appealed and this pleading follows. See CP 170.

2. Testimony at trial

On March 27, 2009, at about 10:30 in the evening, Benjamin Wheeler was at the apartment of Shauna Ward and Timothy Smith “just sitting, watching TV” when someone came to the door asking to see a person who lived in the apartment off and on, Jill Foster. 3RP 6, 5RP 4-7, 26. Ward testified that the man was medium height, black and “kind of dressed like a gang member,” because he was always wearing red and

¹The verbatim report of proceedings consists of 9 bound volumes which will be referred to as follows:

- the volume containing the chronologically paginated proceedings of March 1 and June 9, 2010, as “1RP;”
- June 10, 2010, as “2RP;”
- June 14, 2010, as “3RP;”
- June 15, 2010, as “4RP;”
- June 16, 2010, as “5RP;”
- the volume containing the chronologically paginated proceedings of June 21 and 22, 2010, as “6RP;”
- the separate volume with the remainder of June 22, 2010, as “7RP;”
- the proceedings of June 23, 2010, contained in a volume with June 24, 2010, but separately paginated, as “8RP;”
- the proceedings of June 24, 2010, contained in a volume with June 23, 2010, but separately paginated, as “9RP;”
- the sentencing proceedings of July 9, 2010, as “SRP.”

black and was using “common dress” styles of the day. 5RP 8, 33. She said she knew the man as “Eric,” knew he lived in the apartment complex with his uncle and had seen him visiting Foster before. 5RP 8, 28-29, 33.

In her statement to police, however, Ward said nothing about knowing the man’s name, did not say his name was “Eric,” and said nothing about knowing where he lived or that he had been at the apartment several times before. 5RP 29. She initially claimed she did not have room to write everything on the statement form, but ultimately admitted to having ended her written statement before the end of the form and leaving room in which she could have written more. 5RP 29-30. Ward then maintained that she had told an officer these details which were absent from her statement. 5RP 30. She could not, however, recall the officer’s name and admitted that information was not contained in the police report, either. 5RP 30.

According to Wheeler, after being told Foster was not there, the man chatted for a moment and then went to leave. 3RP 7, 24. It sounded like the door was open for a couple of seconds and then, unexpectedly, some men ran into the apartment. 3RP 7, 24. Wheeler said it was three or four men but Ward said it was six or eight. 5RP 7, 42. In the 9-1-1 call Ward made just after the incident, she apparently said it was 8-10 men, all black teen males. 3RP 52, 62, 6RP 51.

According to Ward, the men just “rushed in and said, “[w]e are taking this shit.”” 5RP 7. Ward said she thought they were trying to “grab stuff” but did not see them take anything. 5RP 13. Instead, she saw at least three of them rush towards where Smith and Wheeler were sitting

and suddenly they were all fighting. 5RP 13-14.

At trial, Ward described the men as “really tall,” but admitted that she did not really know how tall they were and was just estimating height based on where she sat. 5RP 15-16. Ward also said all of the men had “face-coverings on,” which she described as “bandannas and stuff like that.” 5RP 18-19. She gave details such as that some of them were wearing “hoodies” (hooded sweatshirts) and some had “beanies” on their heads. 5RP 19-20. But Ward could not remember what color the sweatshirts were, if they were light or dark or even if they had any markings on them. 5RP 19-20. Ward said one of the men had black gloves on but she did not notice if the others were wearing gloves. 5RP 20.

Despite the coverings she said were on all of the faces, Ward was pretty sure that the men were all black, because “you could see around their eye area.” 5RP 19.

In contrast to Ward, Wheeler said only one man had a bandana over his face and the others had nothing covering their faces. 3RP 7, 9, 17, 25. He remembered that a couple of them had just regular shirts and pants, and one had a “real light teal shirt.” 3RP 7, 17, 25. Wheeler did not know if that shirt was short- or long- sleeved and, on cross-examination, said it was not really just teal but also had some black writing “or something else on it somewhere,” possibly a picture. 3RP 7, 17, 25.

According to Wheeler, the guy wearing the teal shirt, who was about 5 feet 8 or 9 inches tall, punched him in the face during the altercation. 3RP 21, 32. Ward said one man who had come in but not

gone over to Wheeler and Smith stood over Ward where she was sitting with her laptop, held a hammer over her head and said, “[g]ive it to me, bitch.” 5RP 7. Ward was “pretty sure” the man was wearing a white and black checker flannel “hoodie” and black gloves. 5RP 15, 18, 23, 33. She estimated that he was taller than about five feet 10 and a half inches in height. 5RP 15, 18, 23, 33. This was the man Wheeler said had a black bandana over his face, and Ward said he had not only bandana but also “like a beanie hat” on. 5RP 18. Ward did not, however, remember anything about the pants or shoes the man was wearing. 3RP 17, 5RP 18.

Ward testified that, when she saw the hammer, she said, “Ben, help me,” after which Wheeler ran over and grabbed the man standing over her. 5RP 15. She said they then fell onto the coffee table. 5RP 15-16.

In contrast, Wheeler said, his “brother” - apparently Smith - grabbed the guy with the hammer, got him in a headlock and “put him to the table.” 3RP 7. It was a different man who then tried to grab Ward’s laptop, saying “[g]ive me it, Bitch.” 3RP 8. Wheeler said that, at that point, Ward screamed Wheeler’s name and he ran over and punched that man. 3RP 8.

At that point, Ward dropped her computer on the floor, grabbed the phone and ran into the kitchen, saying, “I’m calling the police.” 5RP 15-16. Ward said the intruders then all tried to leave, with Smith “fighting with them and tussling with them in the entranceway hallway.” 5RP 17.

Wheeler said that, when Ward called police, Wheeler himself grabbed a dirt bike helmet and ran out the door across the back parking lot to see if he could catch the men involved. 3RP 9. He saw some people

walking near another apartment building and thought they were the guys.

3RP 10. One of the men he saw appeared to have a teal shirt and Wheeler thought that guy was “like trying to crouch down in front of the bushes.”

3RP 10. Wheeler also said the people he saw were “kind of like” running.

3RP 10.

In his statement to police made that day, however, Wheeler never said anything about taking a helmet and trying to follow the men. 3RP 16. His statement was also inconsistent with much of his testimony on several basics, like who had answered the door (at trial, it was his “brother;” in the statement, it was Wheeler himself) and whether there was a “scuffle” between Smith and a suspect (at trial, he related that claim; in his statement, he said nothing about that occurring). At trial, he was specific about how many people came into the apartment, that they were black and all men, but his statement did not have those details. 3RP 15-16.

Wheeler admitted that, in fact, he did not have a very good memory and it was better at the time he made his statement. 3RP 15.

Somehow, one of the fleeing men lost a shoe, leaving it inside the apartment. 3RP 11, 5RP 25, 36. The hammer ended up being left there, too. 3RP 11, 5RP 25, 36. The shoe and hammer were later taken into evidence by police, but no testing was done on that shoe, whether for fingerprints or DNA. 4RP 106. No fingerprints were found on the hammer or anywhere else in the apartment, although not all tests which could have produced fingerprints were done. 4RP 72, 105-106.

Wendy Haddow, a TPD “K-9” dog handler officer, put her dog, Garrow, “on the scent” just outside the apartment. 4RP 5, 45. Haddow

did not have the dog start the track by using the shoe one of the suspects was known to have worn. 3RP 19, 4RP 46. Instead, the officer started the dog on the track outside the “apartment complex, outside the door, just to the north.” 4RP 23, 45.

The apartment was actually down a series of steps and it was unclear whether the “track” started down the steps or on the landing. 4RP 23-45, 5RP 31.

Haddow admitted that, because she did not start the track in the apartment, it was possible the dog followed a scent which came from someone who never entered the apartment. 4RP 46. She did not think that was likely, however, because she said that the dogs are trained to follow “an enhanced scent picture,” which occurs when someone is excited and gets “an adrenaline dump that goes out into your sweat.” 4RP 10, 5RP 10-11. The officer conceded, however, that a dog can get confused if there is more than one person with the “dump” going on, and that victims also give off adrenaline dumps. 4RP 47, 49, 59, 5RP 10-11. In fact, the officer said, the reason she did not start the dog in the apartment was that there would be such a “dump” in that apartment from the victims that it would confuse the dog and actually not be “safe” for the victims to be around the dog at that point. 4RP 64-65.

Haddow did not know that one of the alleged victims had left the apartment and ran after people he had seen and thought were the suspects that night. 4RP 47, 59. The K-9 handler officer conceded that the scent of that alleged victim would have been a scent the dog could have picked up. 4RP 59.

The officer also admitted that a “scent pattern” could be moved if there was a “lot of wind,” even up to 20 or 25 feet from where the person who left the scent actually went. 4RP 23.

The dog ran through the tennis courts, cut through a couple of buildings and crossed a street. 4RP 23, 45. He went back into the apartment complex to the east, and, at the bottom of some stairs, he started “hitting” on a pile of clothing. 4RP 26. The stairwell was on the outside of the building outside the common area of the fence. 4RP 27.

Haddow testified that the clothes were in fairly good condition and did not look dirty or wet. 4RP 28. The cement they were on was dry and there was no way to tell how long they had been there. 4RP 108.

Haddow assumed the clothing was involved with the crime, so she informed dispatch of what she had found. 4RP 25, 29, 35. She nevertheless left the clothing behind, taking the dog and trying to get him to start on “track” again. 4RP 26-30, 56. Once she determined she was not going to locate any “outstanding subjects,” Haddow went back and stood by the clothes. 4RP 31. The officer admitted that she might have handled the clothing before they were collected as evidence. 4RP 32.

Tacoma Police Department (TPD) Sergeant Robert Stark heard the dispatch after the 9-1-1 call and started driving around the area. 3RP 36-39. After about five minutes, he was driving down a street next to the apartments and saw a group of males, possibly three, heading between the buildings towards the street Stark was on. 3RP 39. Stark saw heads and shoulders only and thought the people “ducked down,” speculating that they “must have” seen his patrol car. 3RP 39.

Stark turned a corner onto a street he thought they were going to go towards but they were not there, so he turned around and went back to where he had originally seen the people. 3RP 40. He then saw three men stepping into the street. 3RP 40. The officer “drove up” on the men and asked them to wait with him for other officers. 3RP 40. The men freely complied. 3RP 40.

While they stood there, Stark said, other officers went and got Ward and Wheeler. 3RP 40. Ward said that, when the police asked her to go look at people, they told her they were going to be “identifying suspects” or said they were going to “make an I.D.” 5RP 22, 35. Wheeler said they were taken by police “down the road to identify them.” 3RP 11.

When Ward and Wheeler arrived, Officer Stark admitted, two of the detained men were in separate police cars, while the third man was detained outside. 3RP 50. It was very possible that Ward and Wheeler saw the men removed from the back of the patrol cars when the witnesses arrived together in the same police car. 3RP 19, 50-51.

The three men Ward and Wheeler were ultimately shown were “lit up” and surrounded by marked police cars and police officers, as well as police dogs. 3RP 10, 48-50, 5RP 35-36. The detained men were also all black males, like the people Wheeler thought were involved. 3RP 10. Ward knew the men were the suspects even though they were not wearing the same clothes that the men in the apartment had worn. 5RP 22. She said she knew because they were wearing barely any clothing and one was wearing black gloves like the man who had stood over her. 5RP 22, 37.

Ward admitted she did not rely on anything about facial features or

anything like that. 5RP 23. Instead, the sole reason she identified him was because he was wearing black gloves. 5RP 37-38. Ward also thought he was the right height because he was tall and noted he was the right race, i.e. black. 5RP 38. She admitted, however, that she had identified the one man more because of the black gloves than anything else. 5RP 39. She also said she did not think any person who was not guilty would have “looked so sweaty and scared.” 5RP 39.

A moment later, Ward said that the other reason she had made an identification was that “[t]he canine had followed his scent from my apartment to find them.” 5RP 38. She said she had watched the canine track them “halfway toward the direction that they took us to go I.D. them.” 5RP 41. She had watched them from her apartment and parking lot. 5RP 41, 57. She also said that she had seen the dog at the identification procedure and thought that meant the dog had tracked the people that she was being shown. 5RP 42, 49.

Haddow admitted that she and her dog, Garrow, would have been “very visible to both the subjects and the victims” at the show-up identification procedure. 4RP 42-43. Another officer thought the identification procedure occurred before the dog tracking. 6RP 52-53.

Ward also said that, when she saw the people the police were holding and noted that they did not have clothes like the men involved, the officers told Ward and Wheeler that some discarded clothes had been found. 5RP 43.

Wheeler said that, when he looked at the three men they were all “out of breath” and he “didn’t know their faces, or nothing.” 3RP 12. He

thought he saw one of the men who had been in the apartment that night, based solely upon him having a shirt that was similar to the teal or green shirt he said one of them had been wearing. 3RP 12. Wheeler admitted that, other than the teal shirt, he did not really recall any clothing. 3RP 21. Wheeler admitted that the reason he thought these three men were involved when he saw them at the show-up was “because they were with the guy with the teal shirt.” 3RP 26.

At trial, Wheeler identified someone he thought “might have been the guy” with the teal shirt but also “might not have been the guy.” 3RP 12. That man, Marcus White, was one of the men who had been detained and had been arrested along with another man, Terrell Nathan, and a juvenile, Henry Law. 3RP 40-46.

Wheeler, who was not working at the time, admitted he never had any type of job where he had to identify and remember people, such as being a waiter. 3RP 27. Wheeler claimed his habit of smoking marijuana every day did not in any way affect his ability to understand, see and remember what happened. 3RP 28.

Both White and Nathan lived at the apartment complex where they were stopped. 6RP 31, 38-39. That complex is huge, almost a block, and has basketball courts, as does the nearby YMCA and possibly a nearby school. 3RP 58, 6RP 40-41. There is a tennis court in the middle of the Spanish Hills complex and Officer Stark admitted that a person could come out of one of the apartments and cross the tennis courts as a way of getting to the YMCA. 6RP 40-41. As far as the officer knew, no one tried to walk from White’s apartment to the YMCA to see if the route through

the tennis courts was the way one could go. 6RP 43. Logan thought that there was some gating or fencing that someone might have to go over to get from the parking lot to the YMCA but when asked, could not identify the relevant structures other than the apartment building itself. 6RP 59-60. He admitted there was not fencing around the apartment complex. 6RP 59-60.

At the time of their arrest, Law was wearing a blue outer shirt, red shorts, black shoes, black gloves and a black head scarf, Nathan had on a black and white jacket with white stripes down the sleeves, black running pants and black shoes, and White was wearing a black t-shirt, red shorts and black and blue running shoes. 3RP 44-47, 60, 6RP 55-56. All three of the men were wearing shoes on both feet. 4RP 57.

The clothing which had been found at the base of the stairwell was described by Haddow as a black and green jacket, a black "LA Baseball" cap, a black and blue plaid jacket, a pair of blue Reebok running pants with a white stripe, Arizona blue jeans with a belt, a black hooded "South Pole" zip-up jacket, a pair of black gloves, a black and white "Brooklyn" jacket with sparkles on it, a white t-shirt material bandana shaped piece of fabric and some tubes of material with stuff to cover you from the neck to above your nose, similar to what you would wear if skiing or being outside in cold weather. 4RP 33. There was no "teal" shirt. 4RP 33.

Stark and Haddow opined that the young men they detained did not seem to be "wearing appropriate attire for the temperature that evening," which was cold. 3RP 47. Stark said he was wearing clothes which were heavier but admitted he was so dressed because he had to sit in a cold

patrol car outside during his shift. 3RP 37. Ultimately, he said, it was “pure speculation” on his part as to whether they were appropriately dressed. 3RP 48. Haddow admitted she did not recall if any of the men had a basketball with them. 4RP 18.

Short tandem repeat (STR) DNA testing was done on the hammer and the clothing found at the bottom of the stairs and compared with reference samples from White and Nathan. 5RP 23, 61-67. A swab of the handle of the hammer did not have enough DNA to obtain a profile. 5RP 71. A test of the cuffs of the black and white hooded sweatshirt was “of mixed origin consistent with having originated from four or more individuals,” with neither White nor Nathan excluded. 5RP 89-90. The expert admitted, however, that there was “no statistical significance” to these facts and that, indeed, there were probably “several people in this courtroom that could also be included in that mixture.” 5RP 90-91.

Another hooded sweatshirt had a “mixed” DNA profile which did not exclude White or Nathan. 5RP 91. Nor did it exclude 1/3 of the entire population of the United States. 5RP 91-92.

The red staining found on the Reebok pants tested negative when tested for blood. 5RP 93. There was some semen in stains in the interior front crotch of the pants and that was further tested for DNA and came back “as a match to the profile of Marcus E. White,” with the expert stating a change of “one in 7.5 quintillion” that it could be an “unrelated individual.” 5RP 93. The black hat was tested and it had a mixed sample with three or more people. 5RP 94. Nathan was included as the potential contributor to the profile but White was excluded. 5RP 94.

Another sweatshirt which was tested and had a three-or-more person mixed DNA profile had the majority of its profile matching Nathan, with a statistic of one in 530 quadrillion. 5RP 96. White was included as a “potential minor contributor” but the expert admitted “quite possibly anybody could have contributed to the minor portion.” 5RP 96.

The black gloves were tested and had an “apparent hair” which was not tested by itself. 5RP 97-98. DNA typing on the gloves was again from three or more people but Nathan - and one third of the U.S. population- could not be ruled out as a potential contributor. 5RP 97-98. White was specifically excluded. 5RP 97-98.

The jeans Haddow found were also tested and four or more people contributed to the DNA typing profile obtained from the pockets of the pants. 5RP 99. The “major profile” was from an unknown male and CODIS, the FBI database, was searched for a potential match and came up as “Henry E. Law.” 5RP 99-101. Nathan and White - and one in three people in the United States, again - could not be excluded as minor contributors. 5RP 99.

The state’s forensic expert admitted that she did not know when the DNA was left on any of the items. 5RP 102. She also admitted that DNA could be transferred between people if they gave each other a “man hug” even if the clothing they were wearing had been laundered, although she was not sure it was likely. 5RP 112, 127. A moment later, however, she admitted that multiple hugs over several days in the same spot could cause accumulation of DNA. 5RP 137.

When shown one of the jackets found at the base of the stairs,

Ward did not identify it as the one that the man was wearing, saying instead it looked like the same style but was different colors. 5RP 23.

Ward could not really recall what the men were wearing but thought it was “like flannels and hoodies and stuff like that.” 5RP 23.

Ward was unable to recognize anyone in the courtroom as being involved in the crime. 5RP 24.

D. ARGUMENT

1. THE CONVICTIONS WERE IMPROPERLY BASED UPON “DOG TRACK” EVIDENCE WHICH WAS NOT SUFFICIENTLY CORROBORATED AS REQUIRED

Reversal is also required because the “dog track” evidence was the only evidence linking White and Nathan to the apartment where the crime occurred and that evidence was not sufficiently corroborated as required under Loucks, supra. Pursuant to RAP 10.1(g) and this Court’s Order of Consolidation, White adopts and incorporates by reference the arguments presented in Nathan’s opening brief on appeal at 9-13.

2. THE IDENTIFICATION EVIDENCE WAS IMPROPERLY ADMITTED AND THE MISTRIAL IMPROPERLY DENIED. FURTHER, COUNSEL WAS PREJUDICIALLY INEFFECTIVE.

The convictions should also be reversed based on the improper admission of the identifications by Ward and Wheeler, the denial of the mistrial and counsel’s prejudicial ineffectiveness. Pursuant to RAP 10.1(g) and this Court’s Order of Consolidation, White adopts and incorporates by reference the arguments presented in Nathan’s opening brief on appeal. In addition, White asks the Court to consider the following:

White further asks the Court to consider that the identifications were impermissibly suggestive on the additional ground that the witnesses may well have seen two of the detained men being removed from the back of separate patrol cars for the “show-up.” Together with all the other suggestive parts of the procedure as argued in Nathan’s opening brief, these facts further supports the appellants’ position that the identification evidence should have been suppressed and the mistrial granted.

Reversal is also required because counsel was ineffective in failing to bring a motion to suppress the identifications prior to trial.

a. Relevant facts

Counsel did not move to suppress the identification evidence prior to trial. It was only after Wheeler and Ward had testified that counsel finally raised the issue, arguing after Ward’s testimony that the identification procedure was improperly suggestive and that only a mistrial could cure the constitutional error of the admission of the evidence, because the jury had heard the improper identifications and no instruction could “cure” the error. 5RP 52. When the prosecutor pointed out that no motion to suppress the identification had been made under CrR 3.6, counsel said he could still raise the issue because it was “constitutional in nature.” 5RP 53. The court then inquired about this claim and counsel said the court had a duty to ensure that defendants receive “a fair trial in the interest of justice.” 5RP 53.

The prosecutor noted that counsel could have discovered the defects in the identification procedure some time during the 14 months or so since the case was begun. 5RP 52. He also said there had “never been

a request to interview any of these witnesses by either” counsel for White or counsel for Nathan. 5RP 52.

The court recognized that there were issues with the identification, which was “not a strong one” and appeared to be based on not much more than White wearing gloves, being black and being about the same size as the man involved in the crime. 5RP 56. The court nevertheless denied the motion for a mistrial and did not strike the identification testimony. 5RP 55-56.

b. Counsel was prejudicially ineffective

Both the state and federal constitutions guarantee the accused the right to effective assistance. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); 6th Amend; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel’s representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). If Mr. White can show that, but for counsel’s deficient performance, there is a reasonable probability that the outcome would have been different, reversal is required. Strickland, 466 U.S. at 694.

Here, those standards can be met. Counsel is ineffective even despite a presumption of effectiveness if, under the circumstances, his performance fell below an objective standard of reasonableness and his actions cannot be seen as legitimate strategy or tactics. See e.g., State v.

Red, 105 Wn. App. 62, 66, 18 P.3d 615 (2001), review denied, 145 Wn.2d 1036 (2002). This Court reviews claims of ineffective assistance de novo. State v. A.N.J., 168 Wn.2d 91, 110, 225 P.3d 956 (2010).

Here, counsel's performance fell below that objective standard. In general, counsel is ineffective in failing to move to suppress evidence if such a motion would likely have succeeded. See State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). To make this determination, the Court looks at the record to see if the evidence should have been suppressed and, if so, counsel is clearly ineffective in failing to move for such suppression. See, e.g., State v. Horton, 136 Wn. App. 29, 146 P.3d 1227 (2007), review denied, 162 Wn.2d 1014 (2008) (improper search; counsel ineffective for failing to move to suppress evidence seized as a result).

But here, there is an additional layer to counsel's unprofessional failures. Counsel did not fail to move to suppress the identifications before trial as some failed but at least understandable strategy. He failed to move to suppress the identifications before trial because he failed to investigate sufficiently to know there were grounds for such a motion.

Counsel has a duty to make "reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 690-91. While not required to investigate every possible issue to exhaustion and while he is permitted to make strategic choices to limit investigation based on reasonable professional judgments, he must still sufficiently investigate potential matters of defense prior to trial in order make such judgments. See State v. Jury, 19 Wn. App. 256,

263, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978). For this reason, “[t]o provide constitutionally adequate assistance, ‘counsel must, at a minimum, **conduct a reasonable investigation** enabling [counsel] to make informed decisions about how best to represent [the] client.’” In re Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (emphasis in original; quotations omitted). Indeed, the duty to investigate exists, albeit to a lesser extent, even when a case is being resolved by way of a plea. See A.N.J., 168 Wn.2d at 111-12 (rejecting the idea that no investigation is required in such circumstances; noting that counsel has to make sufficient inquiry and investigation in order to be able to give meaningful advice on whether a plea should be entered).

A “reasonable investigation” in this context “includes investigating all reasonable lines of defense, especially ‘the defendant’s most important defense.’” In re Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004). The attorney’s “action or inaction” is examined by looking at what was known and “reasonable” at the time the attorney made his choices, and the duty to investigate is also considered in light of the strength of the government’s case. 152 Wn.2d at 722 (quotations omitted).

Here, at trial, counsel did not dispute that he had never tried to interview either Ward or Wheeler, prior to trial. See 5RP 52. Nor did he argue to the court that he should be forgiven for failing to file a pretrial motion to suppress because he had interviewed the witnesses and they had only just divulged the circumstances of the show-up for the first time at trial. 5RP 51-53.

Yet Ward and Wheeler were the sole “eyewitnesses” against his client, and the identification procedure was the very heart of the state’s case.

A defense attorney’s failure to interview or trial to interview key prosecution witnesses is ineffective assistance. See U.S. v. Tucker, 716 F.2d 576, 584 (9th Cir. 1983). Indeed, such a failure is given no deference under the Strickland standard. See, e.g., Lord v. Wood, 184 F.3d 1083, 1095 (9th Cir. 1999), cert. denied sub nom Lambert v. Lord, 528 U.S. 1198 (2000). This makes sense because counsel cannot make a reasoned decision with no information upon which to base it. See Rios v. Rocha, 299 F.3d 796, 806 (9th Cir. 2002).

Thus, in Rocha, a defense attorney who had only interviewed one witness of many could not be said to have made a reasonable tactical decision about which defense to present, because he had

insufficient facts on which to make any reasonable assumptions or on which to base any reasonable decision as to the appropriate defense or defenses to be offered.

299 F.3d at 806. And in Lord, when counsel never talked to witnesses, instead making his decisions based on what police reports said about those witnesses, the Court refused to grant deference to counsel’s decision not to call those witnesses on his client’s behalf, because it was not a reasoned, tactical decision made after interviewing the witnesses in person but rather a decision made without sufficient investigation into the facts. 184 F.3d at 1095.

Here, it was obvious from counsel’s argument below that he had not previously interviewed the witness. The defects he found in the show-

up procedure were defects he had just found at trial. 5RP 51. Indeed, he argued that the mistrial should be granted so that another defense counsel would “know that this occurred” and “be able to make a motion to exclude her identification ahead of time.” 5RP 52. And he said that he would have acted differently if he had “known. . . ahead of time” about the defects. 5RP 54.

But counsel made no claim those defects were sudden shifts from what the witnesses said in a previous defense interview and the testimony thus caught the defense off guard. 5RP 52. And when the prosecutor declared that counsel had never asked to interview either Ward or Wheeler, counsel did not dispute that claim. 5RP 52.

Thus, counsel’s failure to move to suppress the identifications was not based upon a reasoned decision made after reasonable investigation but on counsel’s failure to conduct that investigation in the first place. It was because he did not know of the serious problems with the identification procedures that he did not move to suppress. And he did not know of those problems, obviously, because he had not talked to the witnesses prior to cross-examining them at trial. This wholly unprofessional failure to interview the state’s most crucial witnesses on one of the single most important parts of the state’s case was ineffective assistance, and this Court should so hold.

Notably, had counsel made the motion to suppress pretrial with the information that he would have gathered from Ward and Wheeler, it likely would have been granted. While “show-up” identification procedures like the one used here are not considered so inherently suggestive that their

results are per se inadmissible, courts have recognized that such procedures are by their nature “suggestive.” See, e.g. State v. Guzman-Cuellar, 47 Wn. App. 326, 335, 734 P.2d 966 (1987). The question is whether the procedure, as it occurred, was unnecessarily suggestive and, if so, whether the totality of the circumstances indicate that there was a substantial likelihood of irreparable misidentification. Id.; see Manson v. Braithwaite, 432 U.S. 98, 116, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

Here, as amply noted in Nathan’s opening brief, the procedure was extremely, unnecessarily suggestive. Aside from the usual suggestiveness of the men being surrounded by officers and police cars with their lights on and having spotlights shining in their faces, there was also the issue of the tracking dog being there and how that led at least Ward to decide the men had been tracked by the dog. And there was the problem of the witnesses having possibly seen two of the men being removed from the back of the patrol cars just before the identification procedure. Further, when Ward noted the very significant difference of the men wearing clothing unlike what the men who were in the apartment wore, police told her that they had found discarded clothing - thus “explaining” that difference and implying again that “these were the guys.”

Indeed, the trial court itself declared that the identifications seemed based on nothing more than that one of the men was wearing black gloves, was a black man, and was roughly the same size that Ward guesstimated the assailants to be. 5RP 55-56.

The identification was the most significant part of the state’s far from overwhelming case against White. And Ward and Wheeler were the

most significant witnesses against his client. Counsel's unprofessional failure to interview the prosecutor's main witnesses - the only eyewitnesses against his client - is unfathomable, as is his utter failure to conduct any investigation into whether a motion to suppress the unreliable identifications should have been brought. In addition to the grounds argued in Nathan's brief, this Court should also reverse the convictions based upon counsel's ineffectiveness below.

3. THE PROSECUTOR COMMITTED MULTIPLE ACTS OF FLAGRANT, PREJUDICIAL MISCONDUCT WHICH COMPEL REVERSAL AND COUNSEL WAS AGAIN INEFFECTIVE

Prosecutors are "quasi-judicial officers" and, as a result, are required to shoulder duties other attorneys do not have, such as ensuring that a defendant receives a fair trial and that the result comes after the prosecutor has acted in the interests of justice instead of seeking to "win" at all costs. See Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). Because a prosecutor enjoys special status and an elevated role in our society, when she speaks, her words carry great weight with jurors. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); Suarez-Bravo, 72 Wn. App. at 367. Misconduct of a prosecutor thus may deprive a defendant of the fundamentally fair trial that due process demands. See Suarez-Bravo, 72 Wn. App. at 367; 5th Amend.; 6th Amend.; 14th Amend.; Art. I, § 22.

In this case, the prosecutor not only committed misconduct but deprived White of his rights to a fair trial by repeatedly misstating and minimizing his constitutionally mandated burden of proof and by invoking the passions and prejudices of the jury against the defendants in this case.

a. Relevant facts

In initial closing argument, the prosecutor told the jury it was “really important to focus on the big picture” and it “wouldn’t be enough” if the only evidence the state had to prove guilt was the testimony of Ward and Wheeler. 6RP 106. The prosecutor then argued that, with all of the evidence in context, put together, “then it’s **reasonable to believe** that all of the men that went in there committed that crime, split up afterwards. . . [w]hen you look at all of these things happening in less than twenty minutes, the dog track, the DNA, the witness ID, and what happened, you should find these defendants guilty.” 6RP 106 (emphasis added).

Next, the prosecutor told the jury that the instruction on reasonable doubt was important, that reasonable doubt “is a term that everybody who watches TV has heard,” and that the standard is not “beyond all doubt or beyond a shadow of a doubt.” 6RP 108. He told jurors they could not be “one hundred percent certain” because they were not right there when the crime occurred. 6RP 108. The prosecutor then focused on what kind of “doubt” was needed in relation to having an abiding belief:

The instruction says a doubt arising from the evidence or lack of evidence, and that’s for you to decide. Don’t ask - - **ask yourselves, do you have enough, not do you wish you had more?** We all wish we had more. It would be nice if we could hear from everybody or if we could have been there, or we had a video. There’s always something ore you’re going to want. The

question to focus on: Is there enough to satisfy you beyond a reasonable doubt as to the elements of the crime? **If you have an abiding belief, then you're convinced beyond a reasonable doubt. If you believe you're right the next morning, you believe it two years or twenty years, after all that time you still say, I did the right thing, then you have an abiding belief in the truth of your verdict.**

6RP 108-109 (emphasis added).

The prosecutor then told the jurors they were supposed to be “seeking justice” in reaching their verdict and that they needed to “do what is just,” which he said was a “correct verdict.” 6RP 109. He followed that by declaring, “[t]he defendants are guilty, and I’m asking you to find them guilty as charged.” 6RP 109.

While closing argument was going on, the prosecutor played for jurors a “Powerpoint” computer presentation which had various slides with argument and information on them. See CP 171-76. Several of the slides focused on the definition of reasonable doubt, including a slide which said:

A doubt arising from the lack of evidence:

Do you have enough?

NOT: Do you wish you had more?

There will always be something else you could have heard.

CP 174 (emphasis (size) in original). Another slide projected said:

ABIDING BELIEF

The morning after the verdict

Two years after the verdict

Twenty years after the verdict you can say

“I did the right thing”

CP 174 (emphasis (size) in original). The next slide proclaimed “verdict = justice” and told jurors that they were “seeking justice” in reaching a verdict, that they should use their “experiences. . . judgment. . . [and] common sense, and do what is just.” CP 175. That slide was followed by one which declared:

Bring justice to this case

Guilty as charged

CP 175 (emphasis (size and bold font) in original).

For his part, in closing argument, White’s counsel raised “a criticism” that the prosecutor “tried to co-opt the word ‘justice’” by putting that word “up there” with the Powerpoint presentation and then

say you need to do justice and then you say you need to convict, it infers that it would only be justice if you convicted; and that, of course, isn’t true. That would imply, then, that if a jury did not convict someone, it wouldn’t be justice, and that’s not true at all. In fact, maybe when a jury doesn’t convict someone, that is, maybe, more justice than not; but I don’t want to argue that because then I would be doing the same thing that I’m here to criticize the State for. Maybe the State didn’t mean to do that, but the inference is that justice is a conviction.

Justice isn’t a conviction. Justice is if you do your job, if you apply these rules, and you’ve stayed here as you did, and you’ve paid attention, and you think about the facts, and you work together, that becomes justice; so the State can’t co-opt the word “justice.”

7RP 39.

Later, in rebuttal closing argument, the prosecutor asked the jury whether it was “reasonable” to assume that people other than Nathan and White were with Law wearing items that Nathan and White had stained

with DNA and then Nathan and White had somehow also shown up to be arrested:

so when you start taking away things that are not reasonable, you're left with a reasonable inference of what happened; and your instructions tell you that you're allowed to do that. You're allowed to look at all of the evidence in the context that it happened and make a reasonable inference; and if you believe in that reasonable inference, then you're satisfied beyond a reasonable doubt.

7RP 52. The prosecutor asked the jury "what else could have happened" besides the version of events set out by the prosecution. 7RP 52. He argued that it was "not reasonable" for White and Nathan to have gone the way they were believed to have gone if they were just going to the YMCA rather than being involved in the crimes. 7RP 52. The prosecutor then commented on his use of the word "justice,"

And in closing, [defense counsel for White] said I co-opted the word "justice"; and if you'll remember, what I told you to do was that a correct verdict would be justice in this case. **If you have a reasonable doubt as to the identity of Mr. Nathan and Mr. White being two of the men that were inside that apartment, then you should find them not guilty; and that would be a correct and just verdict; but I believe, and I believe that we - - the State has shown that the evidence against Mr. White and Mr. Nathan is more than enough to convict them of this crime and hold them responsible for their actions that night, and that's what I'm asking you to do. Thank you.**

7RP 53-54 (emphasis added).

- b. These arguments were all flagrant, prejudicial misconduct

All of these arguments were flagrant, prejudicial misconduct. First, the prosecutor repeatedly misstated and minimized his burden of proof and misled the jury to believe that it should convict based on something far less than proof beyond a reasonable doubt. 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). Because the correct standard of reasonable doubt is the means by which the presumption of innocence is guaranteed, it is 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.

Here, the prosecutor repeatedly misstated and minimized his burden of proof and misstated the jury's duty in deciding whether the state had proven its case. In both initial and rebuttal closing argument, the prosecutor argued that the jury should accept the prosecutor's version of events because it was "reasonable to believe" that the crimes occurred the way the prosecution claimed but not "reasonable" that White and Nathan were not guilty. 6RP 106, 7RP 52. Jurors were told that, because there was no reasonable explanation other than guilt, jurors were "left with a reasonable inference" of guilt that they were allowed to rely on and if they "believe[d]" in it, could find guilt because believing in guilt was sufficient to make jurors "satisfied beyond a reasonable doubt." 7RP 52. Indeed, the prosecutor asked, "what else could have happened" that explained the

evidence besides the version of events the prosecutor presented. 7RP 52.

Further, the prosecutor argued that the jurors should not ask whether they wish they had more evidence in deciding whether to convict but that they should convict if they simply had “enough” evidence. 6RP 108. The prosecutor then compounded this argument by telling jurors that they had to have an “abiding belief” in their verdict, which meant “you’re convinced beyond a reasonable doubt.” 6RP 108-109. And the prosecutor told the jury that they had to have such a belief in their verdict, not just for finding guilt but also to acquit. 6RP 108-109. Jurors were exhorted to be “seeking justice” and “do what is just,” which was so clearly based upon convicting that counsel felt the need to address the improper argument in his closing. See 6RP 109, 7RP 39.

Finally, the prosecutor told jurors they should find Nathan and White not guilty if jurors “have a reasonable doubt” that they were involved, rather than having them presumptively innocent and acquitted unless and until the prosecution proved guilt beyond a reasonable doubt. 7RP 53-54.

And throughout at least the initial closing argument, the “Powerpoint” slides were being projected, emphasizing the prosecutor’s improper arguments, cementing with visual aids the concepts that jurors should decide the case if they had “enough” evidence even if they “wish” they had more, that they had to have an “abiding belief” in “the verdict,” not just in guilt, that their verdict was supposed to equal “justice,” that jurors had to seek justice with their verdict and use their experiences and “common sense” to do what is “just” and “[b]ring justice to this case,”

which was to find the defendants “guilty as charged.” CP 174-75.

All of these arguments were flagrant, prejudicial misconduct. First, by repeatedly focusing on whether it was “reasonable to believe” the men were guilty and whether there was “enough” evidence to convince the jurors of that reasonable “belief” or “inference,” the prosecutor effectively asked the jury to apply a “more likely than not” burden of proof, rather than requiring the prosecutor to provide proof beyond a reasonable doubt. But the burden of proof beyond a reasonable doubt is not satisfied by evidence that a defendant may have, could have or even probably committed the crime. See, e.g., Miller v. Staton, 58 Wn.2d 879, 886, 365 P.2d 33 (1961) (may, could, possibly, or might have are less than probably and probably is only equivalent to “more likely than not”); see also, County Court of Ulster County, N.Y. v. Allen, 442 U.S. 140, 166, 99 S.Ct. 2213, 60 L. Ed. 2d 777 (1979) (reasonable doubt a more stringent test than “more likely than not”).

Equally offensive was the prosecutor’s argument, in rebuttal closing argument, that jurors should “find [White and Nathan] not guilty” if jurors had “a reasonable doubt” that they were involved. 7RP 53-54. This argument again misstated the jury’s role. In fact, it eviscerated the presumption of innocence. Jurors were not required to have a “reasonable doubt” that White and Nathan were involved in order to decide to acquit. Instead, jurors were required to apply the presumption of innocence and presumptively acquit, unless and until they found the prosecutor had proven the case beyond a reasonable doubt. See, e.g., State v. Venegas, 155 Wn. App. 507, 523-24, 228 P.3d 821, review denied, 170 Wn.2d 1003

(2010).

In addition, the prosecutor's arguments about how there had been no other "reasonable" explanation for the evidence rather than guilt and telling the jury they should rely on the "reasonable inference of what happened" was akin to telling the jurors they were tasked with deciding between the versions of events at trial and that they should pick the state's version because it was more "reasonable." But such arguments invite a decision improperly based not upon the constitutional standard but rather on something far more like a "preponderance of the evidence" standard. See, e.g., United States v. Pine, 609 F.2d 106, 108 (3rd Cir. 1979); 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. Gonzalez-Balderas, 11 F.3d at 1223.

Further, the prosecutor's repeated arguments to the jury that they need to have an "abiding belief" in their verdict was yet another misstatement of the law and the presumption of innocence. Jurors need not have an abiding belief in their verdict of either guilt or innocence in order to perform their duties. It is not the jury's duty to decide innocence; they are tasked solely with deciding whether the prosecution has proved its case beyond a reasonable doubt. See, e.g., State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010). There is no need for jurors to have an "abiding belief" in innocence in order to acquit - instead, they must acquit, presumptively,

unless and until they have an abiding belief in **guilt**. See, e.g., State v. Larios-Lopez, 156 Wn. App. 257, 261, 233 P.3d 899 (2010).

These repeated misstatements of the law, the prosecutor's burden of proof and the jury's role and duty were only exacerbated by the prosecutor's flagrant misconduct in inciting the jury's passions and prejudices and giving a personal opinion on guilt in rebuttal closing argument. It is misconduct for a prosecutor to give his personal opinion of guilt or his opinion about the accused. See, e.g., State v. Armstrong, 37 Wash. 51, 54-55, 79 P.3d 490 (1905). While not precluded from arguing an opinion based on evidence, it is misconduct to make argument which is "clear and unmistakable" as a personal opinion, rather than an inference from the evidence. See State v. McKenzie, 157 Wn.2d 44, 53-54, 134 P.3d 221 (2006) (citations omitted). Further, it is serious misconduct for a prosecutor to attempt to sway the jury to decide a case based upon emotion rather than the evidence at trial. See State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

Here, the prosecutor made just such improper arguments when he repeatedly declared his belief that he had presented evidence which was "more than enough to convict" White and Nathan, and by declaring that jurors should do "justice" by convicting and "hold them responsible" by doing so. 7RP 53-54. His declaration, "I believe, I believe" that he had presented more than enough evidence of guilt clearly conveyed to the jurors the prosecutor's personal opinion in the strength of his case. And his declarations regarding "justice" again emphasized the emotional idea

that only a conviction would be “justice” and that jurors had a duty to seek “justice” and “do what is just” - rather than deciding the case based upon the evidence.

Reversal is required. Unlike other misstatements of law, misstatement of the correct standard of proof beyond a reasonable doubt is especially egregious because of its impact on the constitutional rights of the defendant and the very core of our criminal justice system. The correct standard of proof beyond a reasonable doubt is the “touchstone” of that 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.” Id. Here, the prosecutor’s misconduct repeatedly minimized that standard, invited the jurors to decide on improper bases and ensured that White and Nathan did not receive a fair trial. Even if the individual acts of misconduct did not compel reversal, the cumulative effect of the misconduct does.

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. 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, the jury's proper role and the presumption of innocence. An objection to the misstatements would likely have been sustained, because any reasonable trial court would have recognized that the prosecution's arguments were clearly improper. Even if the misconduct was not so flagrant and ill-intentioned that it could not have been cured by instruction, Counsel's ineffectiveness provides yet another ground upon which the constitutionally infirm convictions in this case should be reversed.

4. THE SENTENCING COURT ERRED, ABDICATED ITS DUTIES AND VIOLATED DUE PROCESS IN IMPOSING A CONDITION OF COMMUNITY CUSTODY WHICH FAILED TO DEFINE THE CONDITIONS WITH WHICH WHITE MUST COMPLY

A sentencing court is limited to imposing only those conditions which are authorized by statute. See State v. Zimmer, 146 Wn. App. 405, 414, 190 P.3d 121 (2008), review denied, 165 Wn.2d 1035 (2009).

Further, the due process rights guaranteed under the state and federal constitutions prohibit imposition of conditions which are

face [that] it does not provide ascertainable standards for enforcement.” Bahl, 164 Wn.2d at 758. Further, such conditions fail to define the prohibited conduct with “sufficient definiteness such that ordinary people can understand what it encompasses.” Sansone, 127 Wn. App. at 639.

Notably, delegating to the CCO - the very person tasked with enforcement - the decision of what, exactly, is prohibited or mandated creates “a real danger” of arbitrary enforcement based upon the CCO’s personal beliefs about what a defendant should and should not be doing, even if those beliefs do not reflect the law. See, e.g., Sansone, 127 Wn. App. at 639.

Here, because there is no definition of what “crime-related prohibitions” apply, there is no notice to White nor ascertainable standard for enforcement, and the conditions clearly violate due process mandates. By failing to define what prohibitions will apply, the court effectively ordered unfettered discretion in the CCO to decide what White should and should not be permitted to do, without notice to White or enforceable standards or limits.

Not only does this condition violate due process, it thus also amounts to an effective abdication of judicial responsibility for setting the terms of community custody. Under former RCW 9.94A.712² and former RCW 9.94A.700(5)³, it is the court which has the authority to order that

²This statute was renumbered effective August 1, 2009, as RCW 9.94A.507. See Laws of 2008, ch. 231, § 56.

³This statute was renumbered effective August 1, 2009, as RCW 9.94B.050. See Laws of 2008, ch. 231, § 56.

“[t]he offender shall comply with any crime-related prohibitions” or to engage in affirmative conduct requiring him to participate in crime-related treatment or counseling services.” While a sentencing court may delegate certain administrative tasks to DOC, it is not permitted to delegate its authority to DOC in a way which “abdicates its judicial responsibility” for setting the terms of community custody. Sansone, 127 Wn. App. at 642; see, State v. Autrey, 136 Wn. App. 460, 466, 150 P.3d 580 (2006). Instead, it is the court’s responsibility to set forth those conditions in the judgment and sentence, leaving to DOC the tasks appropriate to that agency i.e., monitoring and enforcement of the court’s order. By failing to set forth specific “crime-related prohibitions” which will apply, the sentencing court in this case thus abdicated its judicial responsibility and role.

But it is, in fact, important for the court to take that responsibility, not only because it is required to do so as part of sentencing and not only because of due process concerns but also because of the role and function of this Court and White’s constitutional right to a meaningful appeal. Under Article I, § 22, White is entitled to a full and fair appeal from his conviction and the resulting sentence. See, e.g., State v. Sweet, 90 Wn.2d 282, 287, 581 P.2d 579 (1978). By failing to set forth with specificity the “crime-related prohibitions” with which White will have to comply, the sentencing court effectively precluded meaningful review of them. And White thus is deprived of this Court’s scrutiny on direct appeal of the propriety of the conditions.

Notably, our appellate courts have repeatedly had to address the

propriety of certain conditions and whether they are “crime-related,” as even trial courts themselves have been known to overreach and impose improper conditions. See, e.g., Zimmer, 146 Wn. App. at 413. And there is a specific legal standard to define when something is “crime related” - one which sentencing courts themselves have had difficulty applying, not because of any defect in those courts but because, as this Court has noted the SRA is now “so astoundingly and needlessly complex that it cannot possibly be used both quickly and accurately.” State v. Jones, 118 Wn. App. 199, 211, 76 P.3d 258 (2003). Indeed, this Court declared, it is not only “extremely difficult to identify what statute applies to a given crime, much less to coordinate that statute with others that may be related.” Id. Since that declaration in 2003, there has been no “thoughtful simplification” of the SRA, which this Court implicitly requested in Jones.

If trial judges with all their experience and knowledge in the law have serious difficulty determining what is proper and what is not in sentencing, it cannot be expected that DOC personnel untrained in law would fare better. The result of failing to define for DOC what specific conditions will apply is thus fraught with risks of unconstitutional or unauthorized conditions being imposed based upon the personal beliefs of the specific CCO, leaving defendants without counsel to help them address those issues and providing personal restraint petitions to this Court as their only possible means of relief.

The Legislature specifically delegated to the court the authority - and the duty - to define the conditions of community custody with which White will have to comply. And the delegation was not a wholesale grant

of unfettered discretion; it was a carefully - often confusingly - crafted authority, subject to many limits under the various statutory requirements the Legislature provides. See, e.g. former RCW 9.94A.505(9)⁴ (mental health evaluation and treatment may be ordered only if reasonable grounds to believe mentally ill and “that this condition is likely to have influenced the offense”); former RCW 9.94A.715(2)(b)⁵ (ordering participation in rehabilitative programs or engaging in affirmative conduct is authorized only if the evidence shows that the defect or problem for which the programs or conduct are being ordered somehow contributed to the offense of conviction); see Jones, 118 Wn. App. at 208 (interpreting former RCW 9.94A.715(2)(b)).

The sentencing court’s improper failure to decide what “crime-related” prohibitions White would be required to follow as conditions of his community custody failed to give him proper notice of those conditions, failed to provide sufficient standards to prevent arbitrary enforcement, precluded him from fully exercising his constitutional right to appeal and was a wholly improper abdication of the court’s responsibilities. This Court should so hold and should either 1) strike this condition if the convictions are affirmed or 2) order that this unconstitutional condition may not be reimposed if a conviction is gained upon further proceedings after retrial.

⁴This provision was removed from the statute in 2008. See Laws of 2008, ch. 231, § 25.

⁵This statute was repealed in 2008 and 2009. See Laws of 2008, ch. 231, § 57; Laws of 2009, ch. 28, § 42.

E. CONCLUSION

For the reasons stated herein, reversal is required.

DATED this 28th day of March, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

STATE OF WASHINGTON

BY [Signature]
DEPUTY

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. Marcus White, DOC 341975, CRCC, P.O. Box 769, Connell, WA. 99326;

to codefendant Mr. Terrell Nathan, through counsel Rebecca Bouchey, P.O. Box 1401, Mercer Island, WA., 98040-1401.

DATED this 28th day of March, 2011.

[Signature]
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May 4, 2011

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CASE #: 40940-2-II

State of Washington, Respondent v. Terrell D. Nathan & Marcus White, Appellants

Counsel:

On the above date, this court entered the following notation ruling:

A RULING SIGNED BY COMMISSIONER SKERLEC:

Appellant Nathan's motion to adopt arguments in co-defendant White's opening brief is granted.

Very truly yours,

David C. Ponzoha
Court Clerk