

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

STATE OF WASHINGTON,

Respondent,

v.

KIMBERLY K. CLARK,

Appellant.

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STATE OF WASHINGTON
BY *[Signature]*
COURT CLERK

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

The Honorable Lisa Worswick (motion), and the Honorable Rosanne
Buckner (trial), Judges

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Appellant Kimberly Clark's rights to the presumption of innocence, to have the state prove its case against her beyond a reasonable doubt and to a fair trial were violated when the prosecutor repeatedly misstated and minimized his burden of proof and shifted a burden to Clark to disprove the state's case in closing argument.
2. The constitutionally offensive misconduct of the prosecutor was not harmless beyond a reasonable doubt.
3. Clark's Article 1, § 22 and Sixth Amendment rights to effective assistance of counsel were violated when counsel failed to object to the prosecutor's repeated misstatements of his constitutionally mandated burden of proof.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

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

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

In this case, the prosecutor repeatedly argued that the jury should decide whether to convict by simply asking which version of events - prosecution or defense - was more "reasonable," then rendering a verdict based on that choosing of sides.

Is reversal required because the prosecutor's arguments were serious, prejudicial misstatements and minimization of the state's constitutionally mandated burden of proof and those misstatements invited the jury to apply far less than the required standard of proof beyond a reasonable doubt to convict?

b. Were these misstatements also violations of Clark's rights to the presumption of innocence because the reasonable doubt standard is the means by which that presumption is secured?

c. Was it further misconduct and a violation of Clark's due process rights and rights to the presumption of innocence when the prosecutor told the jury that, if the defendant's version of events - and her defense itself - was not "reasonable," it was the jury's "duty to convict?"

2. Application of the standard of proof beyond a reasonable doubt is the means by which the constitutional presumption of innocence and the due process rights of the accused are guaranteed. Where a prosecutor commits misconduct which directly impacts a constitutional right, prejudice is presumed and reversal is required unless the prosecution can prove that the "overwhelming untainted evidence" is so strong that any reasonable jury would have convicted the defendant in the absence of the misconduct.

Can the state meet that heavy burden where there is conflicting testimony and the jury was required to make a credibility determination which was definitely affected by the misconduct?

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

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Kimberly Clark was charged by information with second-degree assault, alleged to be "a domestic violence incident." CP 1; RCW 9A.36.021(1)(a); RCW 10.99.020.¹ After jury trial before the Honorable Judge Rosanne Buckner on September 1-2, 7-10, 2010, Clark was found guilty as charged. RP 1, 82, 170, 222, 266, 336, 398; CP 104-107. Judge Buckner imposed a standard-range sentence on October 8,

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

the volume containing the proceedings of December 7, 2009, as "1RP;"
the three chronologically paginated volumes containing the trial and sentencing of September 1-2, 7-10, and October 8, 2010, as "RP."

2010. RP 398-429; CP 120-32. Clark appealed and this pleading follows.
See CP 137-50.

2. Testimony at trial

On August 22, 2009, in the early morning hours, Kimberly Clark spilled hot water on her husband, Undra Edwards. RP 83, 92, 128, 289-90. Clark and Edwards had known each other for about 21 years and had been married for 13 years, having five kids together. RP 84, 289, 299.

MEdwards testified that Clark had seen him in the car earlier that day with another woman he had just picked up. RP 99-101, 180. Edwards and Clark had a fight when he got home that afternoon and tried to deny it. RP 101-106, 181. Ultimately, Clark had called the police, telling them she wanted him out of her house. RP 101-106, 181. She also made Edwards mad because she told the kids and the neighbors about what he had done, which embarrassed him. RP 179-80.

When police arrived, Edwards was outside, standing on the corner. RP 82-84, 98-108, 181. The officers went to him and told him he needed to leave the house. RP 82-84, 98-107, 181. Edwards was angry that the police were telling him to leave his home so he went to a nearby bar and had some drinks. RP 181. At some point, he decided to go home and apologize to Clark. RP 181.

Clark did not know that Edwards was back in the house when he walked around the corner into the kitchen, surprising her. RP 92, 107, 182. Clark was by the stove boiling potatoes to make potato salad and was moving towards the sink with the hot pan. RP 92-107. Edwards kind of grabbed Clark's arm and she accidentally spilled some hot water on him.

RP 98, 183.

Edwards started screaming and cursing at Clark and Clark was hysterical, apologizing while he called her a “b” and things like that. RP 183. Edwards pushed Clark, not letting her near him to help, and kept yelling for her to “get away” until she finally just left the house. RP 108, 183.

Edwards admitted that, while he was hurt, he did not feel it so much because he was intoxicated. RP 110-11.

At some point after that, probably about 15 minutes or so later, Edwards called the police. RP 112-13. When they arrived, Edwards was sitting in the kitchen. RP 114. There was still water and potatoes on the floor. RP 114.

Edwards told the officers that he was burned by his wife and that he had been caught cheating. RP 114-17. They asked where Clark might have gone and he told them where he thought she might be, although he did not really know. RP 119.

It appeared to Edwards that the officers did not seem very concerned about what had happened. RP 119. Indeed, Edwards said, one of the officers was kind of smirking. RP 119. He did not expect the officers to go arrest Clark for the accident but also did not expect them to be “laughing and smirking,” either. RP 119-20.

Edwards testified that he told officers it was an accident, and that he said the same thing to the EMT when the fire department arrived to treat him. RP 115-20.

In the 9-1-1 phone call Edwards made to police, he did not say it

was an accident. RP 115, 124-25, 151, 185. At trial, Edwards explained that, at the time, he was in pain, intoxicated and still mad at his wife. RP 115, 124-25, 151, 185. He also admitted that he lied when asked if anyone had been drinking, not wanting police to think he was “a belligerent drunk.” RP 157.

Edwards thought that, when he called police, the dispatcher would just send over the fire department to treat him. RP 152. When the 9-1-1 operator, however, asked what car Clark was driving and what she looked like, Edwards answered. RP 153-55. He said both that he was mad and upset and “being a little spiteful toward her” and that he was only thinking the fire department would come. RP 156.

While police were there with Edwards, Clark called and again apologized. RP 118. Edwards said the police “snatched” the phone and told Edwards not to talk to Clark, with an officer taking the phone into the hallway, talking on it. RP 118-19.

Edwards was taken to a hospital and testified that he told the doctor there that his wife accidentally burned him by spilling some hot water on him. RP 121. He got bandages and treatment and Clark came and picked him up from the hospital, letting him stay with her until he was “healed up.” RP 120-22. He suffered second-degree burns on his right leg, right arm and right stomach and chest area. RP 162-63, 203-205.

Edwards said that he might have just said that his wife “threw boiling hot water” on him, not specifically that she had accidentally spilled it, when he was talking to the medical people. RP 186. He said he was upset that he had been caught cheating, was “not so happy” and might not

have spoken right. RP 186. The doctor who treated him at the emergency room said that her chart notes showed that Edwards said “his wife threw hot liquid on him” and that was how he got burned. RP 192, 195-96. The emergency medical technician (EMT) from the fire department who treated Edwards at the home similarly testified that Edwards told him that his wife had thrown boiling water on him but did not mention “spilling” or “accident.” RP 211-16.

Pierce County Sheriff’s Department (PCSD) deputies Robert Shaw and Michael Cooke responded to Edwards’ call. RP 127-32, 226. Shaw said that Edwards was in obvious pain when the officers arrived and appeared to have a burn, discoloration or blisters on his skin in a couple of spots. RP 127-35.

Shaw said Edwards was “in agony” from the pain, breathing heavily and begging them to “do something.” RP 132. Fire paramedics were called and treated Edwards while the officers were there. RP 132-33. Shaw testified that Edwards told the officers that Clark had been cheating on Edwards and they had argued after Clark had seen Edwards giving a woman a ride to the bus stop. RP 137-38. According to Shaw, Edwards said that Clark had thrown “a pot of boiling water on him.” RP 136. Cooke repeated that Edwards said that “his significant other had thrown water on him” and Cooke did not recall anything being said about it being an accident. RP 232-33.

Shaw also said that Edwards claimed not to know why there was boiling water and did not think Clark was cooking anything at the time. RP 137. In his police report, however, Shaw admitted that Edwards said

that Clark was boiling water on the stove at the time but that Edwards did not know what for. RP 144.

Shaw said that, when the phone rang while the officers were there, Edwards “handed” the officer the phone, identifying the caller as Clark. RP 138. Shaw asked the caller if she would come back to the home to speak with the officers about what had happened, but she said no. RP 139. Shaw also asked where the woman caller “was at” so that Shaw could go talk to her, but the woman said “no” again and hung up. RP 139.

Shaw asked Edwards to write a statement and said Edwards wanted to do so but could not because he was in so much pain. RP 139. Shaw admitted that, in fact, “[i]t was very hard to get details out of” Edwards at all. RP 144.

When Edwards was transported to the hospital, Shaw testified, Shaw and the other officer with him “drove around some” to see if they could find the vehicle they thought Clark would be driving, based on Edwards’ description of that car. RP 139-40. Shaw did not put anything in his police report, however, about taking such actions. RP 144. He also did not include anything about having talked to the children who were at the house at the time they arrived, admitting that it was something that should be included in a report “so that other officers who are maybe doing follow-up don’t expend their energy doing that.” RP 150.

Shaw did not see anything other than Edwards’ “great pain and agony” that seemed unusual, such as signs of obvious intoxication. RP 140. Shaw did not recall smelling intoxicants but admitted that, if Edwards had “just smelled of some alcohol or something like that,” it

might not have been noted in Shaw's report. RP 140.

Shaw admitted that Edwards never said anything to the officers about Clark having to call police earlier in the day to get him to leave the home. RP 144.

Although Shaw took detailed photos of Edwards' injuries, he took no photos of the kitchen. RP 142. Cooke, who did not recall seeing any food that appeared to be in the process of being cooked or potatoes on the kitchen floor, also took no photos of the alleged crime scene i.e., the kitchen. RP 236-44.

At trial, Cooke claimed that he recalled seeing what seemed like an unusual amount of water on the bed in the bedroom, much more than a person would leave after a shower so that it was actually "sopping wet." RP 237. Like Shaw, Cooke did not include anything in the police report about him seeing any such potential evidence. RP 238-39, 245-47. Cooke maintained, however, that he had an "independent recollection" of it. RP 238-29, 245-47. Cooke did not write any supplemental reports or tell Shaw anything about making such a discovery. RP 239.

Indeed, Cooke did not know if Shaw had seen this unusual sight of a sopping wet bed, which Cooke did not think to include in any report even though he had responded to a call where an alleged victim was claiming to have been hurt by someone throwing water on him. RP 239.

Cooke admitted that he and Shaw were "together the entire time. . . within five feet of each other" for the time they were at the home, with the sole exception being when Edwards was being questioned and Cooke went out to the car. RP 239. But Cooke thought maybe he had seen it - and

Shaw had not - when they “cleared” the house after they first arrived, because they probably “cleared” separate rooms. RP 250.

Just like the kitchen, neither officer took any photos of the bedroom and Cooke admitted he did not in any way record the alleged evidence in the bedroom, by photography or taking the sheets into custody or anything similar. RP 245, 247.

Despite the large number of cases Cooke had been involved with since this call, he thought he had a good recollection of this one because it was the first case he had seen “that involved boiling water.” RP 251.

PCSD Deputy Curtis Seevers got involved in the case on August 24, 2009, calling the hospital and finding out that Edwards had been released. RP 270-74. Seevers went to the apartment and spoke with Edwards the following day, noting that Edwards had some bandages on his arm and stomach on the right side. RP 274. Seevers asked Edwards if he had given a written statement and Edwards said he had not filled out the statement form he had been given the day before. RP 275. Seevers said that, when he asked Edwards what happened, Edwards said that he had been caught cheating on Clark and he was in the bedroom when she left the room, came back and threw some water on him. RP 276-77.

Edwards denied telling Seevers that the incident happened in the bedroom, instead stating that he told the officer it had happened in the kitchen and that it was an accident. RP 186. Indeed, Edwards reiterated, he told the officers, the EMT and the doctor at the hospital that it was an accident. RP 187.

Seevers admitted that there was nothing in his police report about

Edwards saying anything about it happening in the bedroom. RP 281.

Seevers took photos of Edwards and Edwards said he would fill out a statement form. RP 278-79. According to Seevers, when he spoke to Edwards later that same day, Edwards asked if the charges could be dropped against Clark. RP 279. Seevers told Edwards it was not up to him to decide and, according to Seevers, the next few times he tried to contact Edwards he was unsuccessful. RP 276-79. Seevers also said he tried to contact Clark but had not greater luck with that effort. RP 280.

Edwards explained that Seevers “came in with attitude.” RP 166, 174. Edwards also wanted to know why Seevers wanted him to fill out a statement form when the whole thing was an accident. RP 166, 174. Seevers said it was “not up to him and he has to pursue it” even though Edwards said he did not want to because “she didn’t try to burn me maliciously” and it was an accident. RP 167. Edwards said Seevers told him to write out a statement and went out to the police car to get the form but then never came back. RP 166, 174.

Kimberly Clark testified that she had gone to get Edwards from work to have lunch or something and saw him with a woman in his car. RP 290-303. She was very hurt and upset because he had a history of cheating on her. RP 290-91. She had thought he would change when she got him to start going to church again but apparently that was wrong. RP 291.

Clark confronted Edwards that afternoon and they had a verbal argument. RP 291. Clark ultimately ended up calling the police because she wanted Edwards to move back out. RP 291. Clark explained that,

while she loved Edwards, she always called the police when they were arguing and things were not calm, to get some distance and get things back to normal. RP 291.

After Edwards left, Clark called her friend, Wendy, who invited Clark to come spend the weekend at her house, so Clark started to get ready and clean up, also planning to make some potato salad for the kids. RP 291-92. Clark planned on going away “until things calmed down.” RP 292.

Clark had not expected Edwards to come back after she had the police remove him and had him take his things. RP 292. She was suspicious that he might come back, however, because he did not take all his clothes. RP 293. Clark did not want to bump into Edwards before she could leave to go to Wendy’s house. RP 293. Clark often cooked late at night if she woke up and had something to precook for the next day’s meals, preferring to spend the evening time with her kids on homework rather than cooking. RP 294.

Clark did not know what time it was when she was making the potato salad and did not know that Edwards had returned until the moment she spilled the water on him. RP 294. After the potatoes were soft enough, she was going to drain them and was turning to do that when he surprised her, coming up behind her on the side. RP 295, 306-307. That caused her to spill some hot water on him. RP 295-96. Clark got burned herself when the water sloshed back. RP 295-96.

After it happened, she was trying to help him and he was very angry and kept saying horrible things to her. RP 295. Clark kept on

apologizing but Edwards did not want to hear it. RP 296. Finally, she just left and went to Wendy's house. RP 285. Clark explained that when she gets upset she usually has to "just walk" it off. RP 296. On cross-examination, Clark was asked why she did not call for help when Edwards was hurt and she said explained that she unplugged her phone every night and it was not plugged in at the time. RP 308. She also explained that she could not really see whether he was actually hurt because he would not let her look. RP 309.

Clark said, when she called the house and did not want to come back to the home as police asked, she was not thinking and needed to get away and clear her head. RP 298, 313-14. She conceded that she hung up on the police officer when he got on the phone after she called Edwards. RP 313, 320. She called the home again a little later from her friend's house and, when her son answered, asked him why the police had been there when she called last. RP 298. Her son told her that Edwards had gone to the hospital because his burns were bad. RP 298-303. Clark then went right away to the hospital brought Edwards to her home, taking care of him for awhile. RP 298, 301.

Clark was later arrested and said she had not known she had a warrant out. RP 299. The officer who arrested her, however, opined that Clark appeared to note that he was there and then walk away into her apartment. RP 327-30. He said that when he followed her, called out her name and told her she had a warrant out for her arrest, she said something like, "let me at least put pants on." RP 330-21. The officer stated that he did not think she appear to be surprised. RP 331.

Just like the other two officers involved in the case, the arresting officer failed to include anything about claims he made at trial anywhere in his police report. RP 333. He conceded that all of his testimony about the incident was not included and justified that failure by saying he had just filed a “two-liner warrant arrest” report instead of a report tailored to and detailing the facts of the actual arrest. RP 333.

Clark made it clear that she did not intentionally throw boiling water on Edwards. RP 299. While she admitted that she and Edwards have their problems, she would not have hurt Edwards on purpose because she loved him and the spilling was an accident. RP 296.

D. ARGUMENT

THE PROSECUTOR COMMITTED SERIOUS,
CONSTITUTIONALLY OFFENSIVE MISCONDUCT AND
COUNSEL WAS INEFFECTIVE

Prosecutors are “quasi-judicial” officers, which means that, unlike other attorneys, their duty is not to “win” the case but instead to ensure that justice is done and that the defendant is given a fair trial. See State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). It is misconduct for a public prosecutor, with all of the weight of his office behind him, to misstate the applicable law when arguing the case to the jury. See, e.g., State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). Indeed, a prosecutor’s improper statements so misleading the jury may deprive the defendant of his due process rights to a fair trial. Id.

In addition, both the state and federal due process clauses require that the prosecution must bear the constitutional burden of proving every element of the crime charged, beyond a reasonable doubt. See In re

Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991).

In this case, reversal is required, because the prosecutor repeatedly misstated and minimized his constitutional burden and then urged the jury to decide Clark's guilt or innocence based on the improperly low standards of those misstatements. In addition, the prosecutor misstated the law of his burden by effectively arguing a presumption not of innocence but of guilt. Because the prosecution cannot prove these constitutional errors harmless beyond a reasonable doubt, reversal is required. In the alternative, counsel's ineffectiveness in response to the prosecutor's misconduct also compels reversal.

a. Relevant facts

In closing argument, the prosecutor told the jury that the only question in the case was whether the incident was "pure accident," as Clark and Edwards claimed, or whether the incident had happened as the prosecution claimed. RP 346. He asked the jury whether it was "mere coincidence that" Clark and Edwards had been "having this whole evening worth of arguments" and, when Edwards returned home to apologize, he "grabbed her arm at the very moment that coincidentally she was moving this boiling water from the stove to the sink." RP 346. The prosecutor repeatedly used this theme of "what a coincidence," saying he would "talk about reasonableness" of that alleged coincidence as well. RP 346.

Next, the prosecutor told the jury the case was really all about credibility, and the jury had to determine "[w]hat is the credible version of

events.” RP 354. The prosecutor said jurors had to look at “the reasonableness of the testimony in the context of the evidence,” arguing that a “reasonable person” in Edwards’ situation who was living with the perpetrator and did not have his own job would “want to testify in favor of the person that they need.” RP 355.

A little later, the prosecutor asked the jury if Clark’s story seemed “reasonable,” if her “explanation” of what occurred was “reasonable” or whether it was “more reasonable” that things had happened the way the prosecution thought. RP 357. The prosecutor went through Clark’s testimony about her actions that night, declaring that Clark “has had a year, a year to come up with the story she told you, so of course she is going to have to come up with an explanation for everything she did,” but that explanation was “just not reasonable, though.” RP 358.

In concluding his initial closing, the prosecutor told the jury the “bottom line” was “[w]hat does the evidence tell you? Does the evidence tell you that the reasonable story is that this is just some big accident” or did it tell jurors that it had happened as the prosecution alleged. RP 360. The prosecutor concluded that the prosecution’s version of events was not only “what the evidence shows” but also a “reasonable explanation,” in contrast to “[t]his whole thing about this colossal coincidence in the kitchen, this accident,” which was “not reasonable.” RP 360.

In response, counsel for Ms. Clark questioned the police investigation and the failure to secure evidence that the bed was wet or that the kitchen did not have water on the floor by taking no pictures. RP 367-68. She also argued that the state had not proved beyond a reasonable

doubt that things happened as they occurred because the defense had given “reasonable, plausible” explanation for the evidence as well, which indicated that there was not proof beyond a reasonable doubt that the prosecution’s version of events was what had occurred. RP 371.

In rebuttal closing argument, the prosecutor first stated that the jury could “easily” believe what Edwards said in the 9-1-1 tape but not believe what he said on the stand after “he had over a year to think about it.” RP 374. The prosecutor then asked if it was

reasonable to believe that somebody would say one thing to the police when they just got hurt and then go, oh, a year down the line and go, Man, you know what? I have forgiven her. I don’t want her to get in trouble. I definitely don’t want to get kicked out of my house. He is looking at getting kicked out of the house - -

RP 374. Counsel objected that “[t]here was no testimony about that” and the prosecutor argued “this is argument” and that Edwards had said “he didn’t have a job,” after which the court overruled the objection. RP 375. The prosecutor then told the jury that, even though Edwards had taken an oath when he testified “[y]ou can’t eat an oath. You can’t live in an oath,” and Edwards needed “to keep this woman happy” so he could stay where he was, so “you just say what you got to say.” RP 375.

The prosecutor then told the jury that they needed to “look at the credibility of these people” and that the prosecution was asking jurors “if **it’s more reasonable to believe that what he told the deputies was the truth, what he said to 911 was the truth.** . . . [t]hat’s what’s reasonable based on this evidence.” RP 377 (emphasis added).

Regarding counsel’s point that Edwards had cheated on Clark in the past and “somehow that makes her - - maybe she would respond to it

less,” the prosecutor declared, “[w]ell, **it’s just as reasonable to believe that this is the last straw, that she was fed up with his cheating on her.**” RP 379 (emphasis added).

A moment later, the prosecutor denigrated Clark, declaring that her behavior on the stand showed that she would cry when it was “to her advantage” but she “snapped right to” the prosecutor when she thought “she is scoring a point.” RP 379-80. The prosecutor then moved on to the definition of reasonable doubt, emphasizing the last sentence of the jury instruction giving that definition:

There is a last sentence on your jury instructions. And it says if you have an abiding belief in the truth of the charge, then you are convinced beyond a reasonable doubt. If you have an abiding believe in the truth of the charge, you are convinced beyond a reasonable doubt. **What that means is when you go back into that jury room and you talk about the evidence, you consider the evidence, you look at the evidence and you say to yourselves, you know what, she threw that water on him, that’s an abiding belief. You believe it, and you say to yourself that’s what happened.**

RP 381 (emphasis added). The prosecutor then said that there was “not reasonable doubt” just because there was “another possible story out there,” because that other story had to be looked at to see if it was “reasonable in light of all the evidence.” RP 381. The prosecutor went on:

Just the fact that you can come up with another story that kind of fits the evidence or kind of fits in, that doesn’t mean that it’s reasonable. **What’s more reasonable, right? Is it reasonable that she got mad, she threw this water on him, that he told the police that she threw water on him, that he told 911 that she threw water on him? Three days later he is talking to a deputy saying, Yeah, she threw water on me. Is that the reasonable thing that happened? Or is it more reasonable to believe that there was an accident in the kitchen[?]**

RP 382 (emphasis added). The prosecutor went on to talk about the facts he said showed that the version of events given by Clark was not “reasonable,” then asked:

Look. **What would a reasonable person do if you accidentally burned your spouse and you didn’t know if he was okay or not and a police officer answers the phone at your house? What would a reasonable person do?** Would a reasonable person say, “No, I’m not going to do anything to fix it and hang up? No. The person who does that is the person who knows, Shoot, if I go back there, I’m getting arrested. That’s the person that says I’m not coming back and I’m not telling you where I am, click.

RP 383 (emphasis added). A moment later, the prosecutor said:

Look, if you have a lot of time, you can try to come up with a story, okay, if you have got a lot of time. Mr. Edwards had a lot of time, **but it’s just not reasonable.** That’s what you are looking at. So when [defense counsel]. . .says, you know, if there are two stories out there, you have to say there is reasonable doubt, no. **That’s why we call it reasonable doubt. If Ms. Clark’s testimony is not reasonable, if Mr. Edwards’ testimony here on the stand is not reasonable, if it’s not reasonable to believe that this was an accident in light of this evidence, then your duty is to return a verdict of guilty.**

This is a reasonable story, that she was angry at her cheating husband, that she was angry he came back. She was angry he tried to hide the affair. . .She boiled up some water, and she threw the boiling water on him, and then she ran away so that she wouldn’t be arrested. **That’s the reasonable sequence of events.**

RP 384 (emphasis added).

- b. The arguments were misconduct which misstated and minimized the prosecutor’s constitutional burden, caused the jury to decide the case on an improper basis and improperly applied a presumption to convict, shifting a burden to the defendant

In making these arguments, the prosecutor committed serious, prejudicial and constitutionally offensive misconduct, in violation of Clark’s due process rights to have the state carry its constitutionally

mandated burden of proof, her right to the presumption of innocence, and her due process rights to a fair trial.

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 about the law. See State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). Indeed, the “reasonable doubt” 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,” noting that such expansion risks improper dilution of the prosecution’s constitutional burden and the presumption of innocence. Bennett, 161 Wn.2d at 317-18.

The prosecutor did not resist the temptation here, and the result was just as the Bennett Court feared.

First, the prosecutor misstated and minimized his constitutionally mandated burden of proof - and misstated the jury’s function and role - by repeatedly telling the jury their job was to simply pick which side gave a more “reasonable” version of events. It is improper to invite a decision based not upon the constitutional standard but rather on the jury’s conclusion of which “side” of the case the jurors believe. This is because the duty of jurors is not to choose between sides but rather to determine “whether the State has met its burden of proving the case beyond a reasonable doubt.” See, e.g., State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995).

Indeed, in the context of jury instructions, many courts have

condemned language “casting the jury’s ultimate decision of whether to convict or acquit in terms of a mere credibility choice” between the state’s witnesses and the defendant because such language “tend[s] to dilute and thereby impair the constitutional requirement of proof beyond a reasonable doubt.” United States v. Pine, 609 F.2d 106, 108 (3rd Cir. 1979), quoting, United States v. Oguendo, 490 F.2d 161 (5th Cir. 1974). Suggesting that the jury’s role requires “determining whose version of events is more likely true, the government’s or the defendant’s,” is improper because it clearly implies that the jury should apply “a preponderance of [the] evidence standard” rather than the constitutionally mandated standard of proof beyond a reasonable doubt. See United States v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5th Cir.), cert. denied, 511 U.S. 1129 (1994).

In fact, the “pick a side” kind of argument risks conviction based upon even less evidence than would be required if the constitutional burden for the state was the minimal standard of proof “by a preponderance.” That standard requires evidence sufficient to show that something is “more likely than not” or “more probably than not” true. See State v. Otis, 151 Wn. App. 572, 578, 213 P.3d 613 (2009); Freeman v. Freeman, 169 Wn.2d 664, 672-73, 239 P.3d 557 (2010).

The “choose a side” argument does not even require that degree of proof. The jury is not told that it is only allowed to pick a side if that side’s evidence meets the “more likely than not” standard. Instead, with the impermissible argument, the jury is told it is to choose between sides based solely upon their relative strength and weaknesses even if the state

fails to prove its case by a preponderance.

Put another way, a jury could quite easily “believe” the state’s version over that of the defense - and thus choose the state’s “side” - even if the prosecution failed to prove its case beyond a reasonable doubt. The “choose a side” type of argument has jurors simply choosing between two options, regardless whether either option would suffice under the constitutional standards.

Thus, arguing that jurors should decide guilt or innocence in a criminal case based upon which “side” they thought was more believable or likely is a serious misstatement of the prosecution’s constitutionally mandated burden of proof - one which risks conviction upon far less than the quantum of evidence truly required. In addition, telling the jurors they are tasked with making a choice between the government and defense witnesses is a misstatement of the very structure of our criminal justice system and the prosecution’s constitutionally mandated role. The “pick a side” argument invites the jury “to treat the matter of proof as a fair fight” between the government and the defendant, with the one who is even slightly more persuasive winning out. See United States v. Guest, 514 F.2d 777, 780 (1st Cir. 1975). But in fact, the matter of proof is “weighted in [the defendant’s] favor by the reasonable doubt rule” - and, by extension, the presumption of innocence. Id. As the Supreme Court has noted, the proper standard of reasonable doubt is the means by which the presumption of innocence is ensured. See Bennett, 161 Wn.2d at 315-16. And that presumption cannot be overcome unless and until the prosecution has shouldered the entire burden of proving its case beyond a reasonable

doubt, not simply because the prosecutor's version is more persuasive in comparison with that of the defense. See, e.g., State v. Venegas, 155 Wn. App. 507, 524, 228 P.3d 813, review denied, 170 Wn.2d 1003 (2010).

Here, the prosecutor repeatedly made this type of constitutionally offensive argument when he told the jury to decide the case based upon which version of events it believed or found more "reasonable." Over and over, the prosecutor framed the jury's duty as picking between the two versions of events, rather than deciding whether the state had proven its case beyond a reasonable doubt. The jury was required to determine "[w]hat is the credible version of events," the prosecutor said, and which version was more "reasonable." RP 354, 355, 357. Jurors were supposed to ask whether the "evidence" told them that Clark's claim of accident was "the reasonable story" or whether the prosecution had presented the "reasonable explanation." RP 360. The jury was asked if it was "more reasonable to believe" that what Edwards told the officers was true (RP 377) and whether it was "just as reasonable to believe" that this incident occurred because the latest act of cheating was "the last straw," rather than believing that the fact there was previous cheating meant this was somehow less upsetting (RP 379).

In addition, the jury was told that there was "not reasonable doubt" just because there was "another possible story out there." RP 382. Jurors were tasked with comparing the claims of the defense and prosecution to decide "[w]hat's more reasonable." RP 382. The prosecution's version was a "reasonable story" and the prosecutor's claims "the reasonable sequence of events," the prosecutor argued, in contrast with that of the

defense. RP 382-84.

Thus, the prosecutor repeatedly told the jury that it had to decide the case based upon choosing which version of events it found more “reasonable.” And this argument effectively erased the prosecutor’s burden of proof beyond a reasonable doubt, substituting a standard even less than the requirements for proof by a preponderance. The result was that the jury, instead of performing its proper function of deciding if the state had met its burden beyond a reasonable doubt, just picked a side it thought was more “reasonable,” regardless when the state’s burden had been met.

These arguments were constitutionally offensive misconduct. Indeed, the arguments are just another iteration of the same type of argument which Washington courts have long condemned. This argument, called the “false choice” argument, misstates the prosecution’s burden of proof and the jurors’ role by telling them they have to decide who is telling the truth and who is lying - the state’s witnesses or those of the defense - in order to render a verdict. See, Wright, 76 Wn. App. at 826. The choice is “false” because jurors need not decide that anyone is lying or telling the truth in order to perform its function. Id.

And the choice is “false” even if the versions of events seem to be inconsistent or contradict each other. State v. Barrow, 60 Wn. App. 869, 876, 809 P.2d 209 (1991). As one Court has noted, a witness may give testimony which is wholly or partially incorrect even without “deliberate misrepresentation” being involved, and the testimony of witnesses may be in conflict even if both are attempting in good faith to tell the truth. State

v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991). The jury’s constitutional role is not to “pick a side” or convict based upon which side it finds more “reasonable” - or which witnesses it thinks are lying - it is to presumptively acquit unless and until it finds that the state has met its constitutionally mandated burden of proving its case, beyond a reasonable doubt. See Wright, 76 Wn. App. at 826; see also, State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997).

Notably, there is a very real difference between the “choose a side” arguments made in this case and permissible arguments simply highlighting the defects in the defense version of events. It is not misconduct for a prosecutor to argue that the evidence does not support the defense theory, for example. See State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). When the defendant puts on a case, that case is certainly subject to scrutiny and even prosecutorial comment, within permissible bounds. Those bounds permit the prosecutor to say that, in order to believe a defendant, it would have to find state’s witnesses mistaken. Wright, 76 Wn. App. at 826. And if the state and defense version of events are in direct conflict, the prosecutor is also permitted to point out that, by accepting one version of events jurors will have to reject the other in some fashion. Id. Such arguments do not invite the jury to decide on an improper basis or upon less than the proper burden of proof, because they do not tell the jury to “choose sides” but rather weigh the relative strengths and believability of those sides. See id.

That type of permissible argument, however, is fundamentally

different than the type of argument which occurred here. Instead of just limiting himself to saying that the two versions were in conflict, or pointing out the weaknesses in the defense case, the prosecutor repeatedly told jurors they were supposed to compare the two versions and decide guilt or innocence based on that comparison.

Most egregious, the prosecutor specifically told the jury that they had a **duty to convict** unless the defense was “reasonable:”

So when [defense counsel]. . .says, you know, if there are two stories out there, you have to say there is reasonable doubt, no. **That’s why we call it reasonable doubt. If Ms. Clark’s testimony is not reasonable, if Mr. Edwards’ testimony here on the stand is not reasonable, if it’s not reasonable to believe that this was an accident in light of this evidence, then your duty is to return a verdict of guilty.**

RP 384 (emphasis added).

This argument turned the presumption of innocence on its head. The jury did not have a “duty to convict” if Clark’s defense was not reasonable. They had a duty to presumptively acquit - regardless whether Clark’s defense was completely unreasonable - unless and until the state met its burden of proving Clark’s guilt beyond a reasonable doubt. See, e.g., State v. Anderson, 153 Wn. App. 417, 429, 220 P.3d 1273, review denied, 170 Wn.2d 1002 (2010).

Nor could this “presumption to convict” argument be seen as a fair response to counsel’s argument. In responding to the prosecutor’s repeated arguments in initial closing argument that the defense version of events was unreasonable, counsel argued that, instead, it was. RP 370-71. Counsel also suggested that, if both the defense and state explanations for the evidence were reasonable, that indicated that the state had not proved

Clark's guilt beyond a reasonable doubt. RP 370-71.

Those comments, unlike those of the prosecution, did not misstate the crucial standard of the prosecution's constitutionally mandated burden of proof. And, unlike the prosecution's arguments, counsel's comments did not mislead the jury into rendering a verdict based upon far less than that standard. Instead, counsel made permissible argument in response to the prosecution's theme that the defense was not "reasonable" and made a reasonable argument based on the law.

In stark contrast, the prosecutor's argument told the jurors that they had a "duty to convict" unless the defense version of events was reasonable. Thus, the prosecutor exhorted jurors to apply a presumption of guilt rather than innocence. And further, he shifted the burden to Clark to disprove the state's case by providing a "reasonable" version of the events. Such serious, prejudicial and improper arguments, shifting the burden to Clark in violation of the mandates of due process, cannot be a proper "response" to a permissible argument by the defense.

Reversal is required. Because the prosecutor's multiple acts of misconduct misstated and minimized the prosecutor's constitutionally mandated burden of proof and the jury's proper role, applied a presumption of guilt instead of innocence and created the very real risk of conviction based upon far less than proof beyond a reasonable doubt of Clark's guilt, the misconduct directly affected Johnson's constitutional rights. See, e.g., Chapman v. California, 386 U.S. 18, 25-26, 87 S. Ct. 824 (1967) (prosecutorial conduct of making "constitutionally forbidden comments" has such effects). Unlike other misstatements of the 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.” Cage, 489 U.S. at 39-40.

Further, the correct standard of reasonable doubt is the means by which the presumption of innocence is guaranteed. Bennett, 161 Wn.2d at 315-16.

The prosecution cannot prove this serious, repeated misstatement and minimization of its constitutionally mandated burden, misstating the jury’s role and inviting conviction based upon an impermissibly low standard, and the deprivation of Clark’s rights to be free from disproving the state’s case constitutionally harmless. See, e.g., State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). To meet that burden, the prosecution must convince this Court, beyond a reasonable doubt, that *any* reasonable jury would have reached the same result absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

The prosecution cannot meet that burden here. To prove that any jury would have reached the same result absent the error and the

constitutionally offensive misconduct was thus “harmless,” the prosecution has to show that the untainted evidence against Clark was so overwhelming that it “necessarily” leads to a finding of guilt. 104 Wn.2d at 425.

The difficulty for the prosecution here is that *none* of the evidence in this case was “untainted” by the prosecutor’s misstatements and minimizing of his constitutionally mandated burden of proof. The proper standard of proof beyond a reasonable doubt is the means of providing the “concrete substance for the presumption of innocence” guaranteed to all the accused. Winship, 397 U.S. at 363. Unless the jury properly understands the correct standard of proof beyond a reasonable doubt, the entire trial is affected, because a “misdescription of the burden of proof vitiates all the jury’s findings.” Sullivan v. Louisiana, 508 U.S. 275, 280-81, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Indeed, in Sullivan, where the misdescription came from the court rather than the prosecutor, the Court found that the error was so significant and corrosive that it could not be subjected to “harmless error” analysis, even the constitutional standard. 508 U. S. at 280-81. Otherwise, the Court held, it would allow the appellate court to engage in pure speculation about what it thinks the jury might have done if it had not been so misled. Id.

As a result, this is not a case where, as in Easter, the prosecutor’s comments drew a negative inference on the defendant’s exercise of a constitutional right but other evidence was unaffected by that improper inference. See, e.g., Easter, 130 Wn.2d at 242. Instead, here, the prosecutor’s misconduct affected the jury’s perception of *all* of the

evidence, thus tainting the jury's entire decision-making process. The misconduct here was not limited in effect to simply part of the evidence - it went to the entire case against Clark.

In addition, even if there had been some "untainted" evidence here, the constitutional harmless error test could not be met. The standard of finding "overwhelming untainted evidence" is far different than the standard of establishing that there was "sufficient evidence" to support a conviction challenged for insufficiency on review. See State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002). In Romero, shots were fired in a mobile home park, Romero was seen in the area by officers and other witnesses, he ran from officers just after the crime, officers found a shotgun inside the mobile home where Romero was hiding, shell casings were found on the ground next to the mobile home's front porch, descriptions of the shooter identified Romero, and an eyewitness was "one hundred percent" positive the shooter was Romero. Romero, 113 Wn. App. at 783-84. There were a few minor problems with the identification and Romero himself denied being the shooter. 113 Wn. App. at 784. That evidence was sufficient, the Romero Court found, to uphold the conviction against a challenge for insufficiency of the evidence. 113 Wn. App. at 797-98.

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

guilt, because there was conflicting evidence on certain points. 113 Wn. App. at 793. The Court could not “say that prejudice did not likely result due to the undercutting effect on Mr. Romero’s defense.” 113 Wn. App. at 794. Because the evidence was disputed, the jury was “[p]resented with a credibility contest,” and “could have been swayed” by the sergeant’s comment, “which insinuated that Mr. Romero was hiding his guilt.” 113 Wn. App. at 795-96.

Here, the jury was also presented with a credibility contest. And there were significant differences in the versions of events given by state’s witnesses and Edwards - initially a state’s witness who effectively testified for the defense. As Romero clearly illustrates, regardless whether the case against a defendant is strong enough that it would withstand scrutiny on a challenge for sufficiency of the evidence, even a strong case in the state’s favor does not satisfy the “overwhelming evidence” test and overcome constitutional error such as that committed by the prosecutor here.

Put simply, a jury which was not improperly misled as to the true burden of proof the prosecution had to shoulder and which was not told they had a “duty to convict” Clark unless she provided a “reasonable” explanation for the evidence and thus disproved the state’s case could well have found that the state failed to prove Clark’s guilt beyond a reasonable doubt. Much of the state’s case was based upon declarations of “evidence” - the wet bed, Clark’s apparently not being surprised when an officer approached her to arrest her, etc. - or lack of evidence - the lack of food or water seen on the kitchen floor, etc. - which were not noted in any police report. And the testimony of Edwards and Clark supported the

defense. As in Romero, regardless whether there was sufficient evidence to support a conviction under the forgiving “sufficiency” standard, the evidence here was simply insufficient to establish beyond a reasonable doubt that every reasonable jury would have rendered the same verdict.

Notably, although this Court does not look at whether constitutional misconduct could have been cured by instruction when the constitutional harmless error standard is applied, it is worth noting that the error could not have been so cured in this case. The concept of reasonable doubt is so complex that even learned judges have difficulty defining it. See State v. Castle, 86 Wn. App. 48, 51-56, 935 P.2d 656, review denied, 133 Wn.2d 1014 (1997), disapproved on other grounds by Bennett, supra. Further, the correct standard of reasonable doubt is the very centerpiece of our entire criminal justice system, because it is the “prime instrument for reducing the risk of convictions resting on factual error.” Cage, 498 U.S. at 40. The prosecutor’s arguments here repeatedly told the jury that the prosecutor was not required to meet his constitutionally mandated burden of proof but rather something even less than a “preponderance” standard. The arguments told the jury to simply pick the more reasonable side. And the arguments told the jury it had a “duty to convict” unless it found that the defense version of events was sufficiently “reasonable.” These serious constitutional errors were not harmless, and this Court should so hold and should reverse.

c. In the alternative, counsel was ineffective

In the unlikely event this Court finds that the prosecutor’s repeated, comprehensive and compelling misstatements of the law and

reduction of his constitutionally mandated burden of proof and invocation of a presumption of guilt could have been cured if counsel had objected and requested curative jury instructions, this Court should nevertheless reverse based on counsel's ineffectiveness. Both the state and federal constitutions guarantee the right to effective assistance of counsel.

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674; State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

While in general, the decision whether to object or request instruction is considered "trial tactics," that is not the case in egregious circumstances if there is no legitimate tactical reason for counsel's failure. State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989); see also Hendrickson, 129 Wn.2d at 77-78. In such cases, counsel is shown ineffective if there is no legitimate tactical reason for counsel's failure to object, an objection would likely have been sustained, and an objection would have affected the result of the trial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Here, there could be no “tactical” reason for failing to object to the prosecutor’s multiple, serious misstatements of his constitutional burden of proof. An objection to the misstatement would likely have been sustained, because any reasonable trial court would have recognized that the prosecution’s argument was clearly improper and minimized the constitutional protections to which Ms. Clark was entitled.

As a result of counsel’s ineffectiveness, the jurors’ minds were tainted with the idea that they should find Clark guilty simply if they thought the prosecution’s version of events was more “reasonable.” They were left with the compelling thought that all they had to do was decide which side was more reasonable and render a verdict based on that decision. And they were told to apply a presumption of guilt, something the average juror might find compelling in concept, because they might well believe that anyone who was not guilty should be able to prove their innocence.

Counsel’s ineffectiveness provides yet another ground upon which the constitutionally infirm convictions in this case should be reversed.

Further, based upon that ineffectiveness, Ms. Clark should be appointed new counsel on remand for any further proceedings, in order to ensure that she receives effective assistance below.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and should order new counsel appointed for any further proceedings below.

DATED this 7th day of July, 2011.

Respectfully submitted,



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CERTIFICATION OF SERVICE BY MAIL

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

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

TO: Kimberly Clark, at her current address on file.

DATED this 7th day of June, 2011.


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