

No. 43208-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

ZANE R. CAVENDER,

Appellant.

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

The Honorable Beverly G. Grant, Judge

OPENING BRIEF OF APPELLANT

KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed constitutionally offensive misconduct and violated appellant Zane R. Cavender's Article I, § 9, and Fifth Amendment and Fourteenth Amendment rights.
2. The prosecutor committed flagrant, ill-intentioned and prejudicial misconduct.
3. Cavender's Sixth Amendment and Article I, § 22, rights to effective assistance of counsel were violated.
4. The sentencing judge violated the doctrine of the appearance of fairness in imposing the exceptional sentence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the prosecutor commit constitutionally offensive misconduct in violation of Cavender's rights to be free from testifying by commenting on the fact that evidence had not been presented in support of the defense when it was evidence which only Cavender could have provided?
2. Did the prosecutor commit flagrant, prejudicial misconduct in urging the jury to convict based upon the beliefs of officers and the prosecutor that Cavender had committed the charged crimes?
3. Was counsel prejudicially ineffective in failing to object to the repeated misconduct of the prosecutor?
4. Did the sentencing judge violate the appearance of fairness doctrine in ordering an exceptional sentence after relating her own sympathy and empathy for the victim and her own experience as the victim of a crime?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Zane R. Cavender was charged in the alternative by amended information with residential burglary and second-degree burglary. CP 10-11; RCW 9A.52.025, RCW 9A.52.030(1). The residential burglary was charged with the aggravating factors that the

victim of the burglary was present when the crime was committed and that the current offense was committed shortly after the defendant was released from incarceration (“rapid recidivism”), while the second-degree burglary was charged only with the “rapid recidivism” factor. CP 10-11; RCW 9.94A.525(3)(u); RCW 9.94A.535(3)(t).

A jury trial was held before the Honorable Judge Beverly G. Grant on January 10-13, 17, 23 and 24, 2012, after which the jury found Cavender guilty of residential burglary, also entering a finding that the building was occupied at the time. CP 102-104; RP 1, 245, 391. Cavender waived his right to a separate jury trial on the “rapid recidivism” factor and Judge Grant then held a bench trial which resulted in a finding of the factor. RP 663-64. At sentencing on February 24, 2012, the judge imposed an exceptional sentence of 116 months in custody. RP 685-86; CP 124-36.

Cavender appealed, and this pleading timely follows. See CP 139-52.

2. Testimony at trial

On May 23, 2011, at about 4:40 in the morning, Tacoma Police Department (TPD) officers were dispatched to a residence in Tacoma based on a call which was described as a “possible burglary in progress that was interrupted by the homeowner.” RP 115-16.

When officers arrived at the residence they found Tony Davila sitting in the backyard, holding a gun. RP 118. Another man, Zane Cavender, was on the ground with a gunshot wound to his lower right back. RP 120-21. A third man, later identified as Anthony MacDougald,

was lying face down in the alley behind the house, next to a neighbor's garage, also with a gunshot wound to his back. RP 127, 280, 452.

MacDougald was dead. RP 127, 280, 452.

About a week and a half earlier, Davila and his wife, Jennifer Vittetoe, had been the victims of a crime. RP 152. The house had a separate garage, a fenced yard and an alley running behind. RP 146-50. A section of the grass which was not fenced was "like a little carport area," where Davila sometimes parked his car. RP 152. Someone had smashed out the window of his car and stolen a "Ground Positioning System" (GPS) from inside. RP 152.

That was not the only crime which had occurred at the residence in the weeks just before the shooting. About two and a half weeks earlier, Davila reported, someone had also broken into his garage and stolen a lawn mower, a "weed whacker," a backpack and other things. RP 155. In addition, once during that time Davila and Vittetoe had gotten home and were walking towards the house when Davila heard his garage door still moving. RP 155. The garage door was opening up, so Davila went to see what was happening. RP 155.

When he got back to the garage, Davila looked and saw nothing blocking the door from closing, so he assumed someone had "swept the laser" to bring the door back up. RP 155. Davila then walked back out to the alleyway, seeing what looked like some "homeless" people hanging out nearby. RP 155. Davila said something to those people but they "just took off" and Davila decided not to try to chase them. RP 155. Davila reported the incidents to police. RP 155.

Davila admitted that, when they had moved to Tacoma, he and his wife had done a “fair amount of research” to try to find a safe area for them to buy a home. RP 178. Davila, who was in the Special Forces, was often deployed and wanted to make sure his wife was safe while he was away. RP 178.

Davila claimed, however, that he was not “upset” about the prior incidents, even though they happened in a short period of time. RP 177. He maintained he was just “kind of disappointed that we lost a few things.” RP 177. Nevertheless, he put in a garage door opener and a security alarm system, including door sensors for the back and front doors of the house, motion sensors for inside the garage and house and a “glass break” detector inside the house, too. RP 180.

In contrast to her husband, Vittetoe said she was “scared” and felt “[p]retty violated” by the prior burglaries and incidents. RP 233. She was also angry at police that they had not been able to stop the crimes from happening. RP 233. Vittetoe expressed how upset she was to her husband, who would then try to calm her down. RP 233-34.

On the night of the shooting, Davila was awakened by his two dogs barking, not “real loud.” RP 154. Because of the “problems” they had been having, Davila went to look out his back window. RP 154. It was about 4 in the morning and still dark, but Davila said he could see that the “person door” to the garage was open about six or seven inches. RP 156.

Davila grabbed a loaded pistol from his nightstand, telling his wife he thought someone might be in the garage and to call police. RP 156-57. He did not, however, think his wife really woke up. RP 181. Nor did he

wait to make sure of it before he threw on some pants and went downstairs, checking the “mud room” as he went and then heading out the back door of the house. RP 157, 183.

Davila could not explain why he did not call the police himself at that point. RP 182. He also could not explain why he did not go to the kitchen window to look out into the backyard and further “assess the situation,” except to say he did not think about it. RP 185.

There were no lights on the house or garage which shone into the yard and although the lights in the alley were on the light they cast was blocked by the garage, which had no windows on the sides, back or garage door. RP 158. Davila moved to the garage door and thought he heard a little movement inside. RP 159. He testified that he then reached inside the garage, flicked on the light and shut the garage door. RP 159, 186. After that, he moved to the left side of the door underneath a window, looking in the window to see what was inside. RP 159.

According to Davila, there were two people inside. RP 159-60, 186. Davila admitted he did not get a good “look” at them and was focusing mostly on their hands. RP 160. He nevertheless thought they were wearing “hooded” sweatshirts with pockets. RP 160. He also described them to police as one “skinny white male” who was to the right in the garage and another man, in the back of the garage, about 25 years old, about 175-80 pounds, about 5 feet 7 or 8 inches tall and African-American. RP 188-89, 204.

Neither MacDougald nor Cavender is African-American. RP 189. Davila admitted he did not see either man with any weapons. RP 162.

Davila “gave them the command,” yelling to the men that he saw them, had a gun and needed to have them come out with their hands up. RP 159-60, 186. The people inside the garage started “kind of scurrying around” inside and Davila said he saw one of them reach into his pockets, so Davila ducked his head. RP 160. Davila said he could hear some mumbling or talking among the men but could not say what was being said. RP 168.

Davila moved away from the door and back towards the sidewalk. RP 161. He was 10-15 feet away from the garage door when the door opened and one of the men inside ran out, heading in the direction of the sidewalk. RP 161-62. At trial, Davila testified that Davila had his gun out and then “decided to engage.” RP 162. Davila also said that he was “charged at” by the men, repeating that description later to police. RP 195, 407.

Davila admitted, however, that he already had his gun out and pointed at the door at the time that the first person came out of the garage. RP 196.

Davila fired a shot “low center mass,” which meant he aimed towards the bottom of the person’s rib cage. RP 162-63. Davila said that the reason he shot that direction was to try to stop the person, rather than kill them. RP 163. That first person went through the side gate and ran towards the alley. RP 163.

According to Davila, while the first man was running away, the next one came out from the garage. RP 164. Again, Davila decided to “engage,” so he shot the second man. RP 164. Again, Davila shot

towards the same part of the body and this time the man went through the fence that was “pulled open,” falling in a small grassy area next to the garage. RP 164-65. The man fell “pretty quick,” dropping to the ground just after the shot. RP 193.

Although Davila testified that the man was shot through the left side, an officer who saw the injury said it was on the right “flank” of and “to the back side” and that the injury on the front did not look like an “entry” injury. RP 167, 259.

Davila said that, at some point, his wife called out through the back window, asking what was going on, and he hollered back to call the police. RP 169. He also thought he told her a description of the individuals. RP 169. His wife seemed to be on the phone relaying the information or getting questions to ask from the conversation. RP 170.

Davila went to “clear” the person who had fallen, which meant he went to make sure the person did not present a “potential threat.” RP 165. The person, later identified as Cavender, was lying on his stomach with his hands underneath him. RP 165-71. Davila ordered Cavender to get his hands out and, after first saying he could not, Cavender managed to comply. RP 165. Davila then decided Cavender was not a threat, so Davila went and “cleared the alley” and then “cleared” the garage. RP 166.

Davila then brought out his medical aid bag and started giving medical aid to Cavender. RP 154, 167. Cavender did not have “severe bleeding” and Davila told him he was “going to be fine, it’s not a bad shot.” RP 167. Davila applied pressure to the wound and, a few minutes

later, police arrived. RP 168-69.

Vittetoe testified that she was awakened that night by one of the dogs nudging and crawling on top of her. RP 216. She looked at the clock and it was sometime near or after 4 in the morning. RP 216. Vittetoe noticed her husband was not there, so she got up and “started to panic,” looking around upstairs for him. RP 216.

At trial, Vittetoe was sure that she stayed upstairs, never going downstairs to look for her husband. RP 219, 224, 239. An officer who spoke to her just after the incident, however, admitted that Vittetoe told him that she had, in fact, gone downstairs. RP 412.

At some point, from the upstairs, Vittetoe looked out into the backyard and saw Davila on the grass next to the garage outside of the fence. RP 217, 220. At first, Vittetoe could not tell what Davila was doing, but then she saw that he “had someone” on the ground, so she yelled to ask what was going on. RP 220. Davila yelled back something about some guys “trying to get in the garage,” telling her to call police. Vittetoe, who was “pretty frantic and crying,” complied. RP 220-21. In the phone call to police, Vittetoe gave police the description her husband was transmitting, because she herself could not see much in the poor lighting. RP 223.

Vittetoe denied ever hearing any shots that night, although she admitted that it was her .45 her husband was using and that the gun was usually very “loud.” RP 238.

When she was interviewed, Vittetoe went to get her purse to give officers identification but could not find it where it was “typically”

hanging, on the hook in a “mud room” next to the stairs up to the bedroom. RP 147, 225, 407. Vittetoe then started “running around the house,” looking upstairs and downstairs for her purse. RP 225.

Vittetoe testified that, inside her purse, she kept her glucometer, driver’s license, credit cards and other identification, as well as miscellaneous items. RP 226. She also thought she had some gift cards, including one from the store “Barnes and Noble.” RP 228. A checkbook she thought was inside her purse was not recovered but she said that two checks she had not written cleared her bank account about a month after the shooting. RP 240. Vittetoe admitted, however, that she did not use the checkbook often and could have lost the checkbook at some time in the past, well before the incident. RP 348.

A credit card Vittetoe thought was in her purse was used in a local gas station. RP 362-63. She admitted that only she and her husband knew the pin number and he was going on a fishing trip the next day. RP 370. A bank employee said he had records the card was used on May 23, once at about 3:34 in the morning and another time at 3:46. RP 429. The banker admitted, however, that there was a serious possibility of unpredictable time lag because of a defect in the recording process and that the times the card was used could have been as early as 12:30 a.m. or as late as 6:30 a.m. RP 432.

MacDougald was wearing a blue rubber glove, a heavy brown denim jacket, two white t-shirts, black jeans, white socks and white tennis shoes. RP 127. A black sweatshirt was underneath his right foot. RP 128. A homicide detective, Jack Nasworthy, said the sweatshirt had a “special

forces” logo. RP 513-17. Davila identified the sweatshirt as his and said it was usually in his car, which had been in the garage that night. RP 172, 561.

A medical examiner said that three credit cards and a set of keys were on MacDougald’s body, as was a pocket-type knife. RP 272-73, 286. The examiner denied having been given those items in a paper bag by police. RP 277-79.

TPD officer Zachary Koehnke, however, testified that he had frisked the dead man and taken out his wallet but had not found anything else in his search of MacDougald’s clothing. RP 115, 130. Koehnke explained that he did not roll MacDougald over completely or go through all of his pockets. RP 133.

While she was looking for her purse, Vittetoe said, she found a DVD player on the floor in a room that was used mostly as a “dog room.” RP 226. Nasworthy also went into the room and saw the player with a cord which appeared partially wrapped around it. RP 524.

Nasworthy admitted, however, that the room where that player was located was not “easy or quick” to get to from the back door of the residence, where the purse had been hanging. RP 536. Instead, someone would have to go through the mud room and laundry room, kitchen and dining room, then turn down a hallway and head past a bathroom to get to the room where the DVD player was found. RP 536.

A laptop computer in the living room was untouched, even though anyone going from the mud room where the purse had hung to the room with the DVD player would have walked through the living room. RP

539. Also in the room with the DVD player was a television, which similarly appeared untouched. RP 538-39.

Davila thought his wife's keys were in her purse in the mud room earlier that night, and that he had brought his own keys upstairs. RP 174, 194, 199. An officer showed Davila keys he said were found inside the car in the garage. RP 196, 198. Davila told the officer "[t]hose are my keys" but, at trial, he said he meant "they are our keys," i.e. his wife's. RP 196. Vittetoe did not recall telling an officer that she was surprised that night to see that her husband's keys, which were usually on the nightstand, were not in their normal location just before the shooting. RP 238.

An officer said Cavender had a screwdriver in his jacket pocket, as well as what looked like a hypodermic needle and a knife. RP 472-73, 487. Davila admitted that the garage had tools such as screwdrivers and hammers inside and could not say whether the screwdriver was his. RP 194, 200.

The alarm Davila had set up on the house and garage did not go off that night. RP 180. Davila told the officers that the system was on. RP 196. Vittetoe said it had been installed about six days earlier and the monitoring company did a "seven-day familiarization" period where they did not monitor a new alarm. RP 211. Vittetoe also said she and her husband were not "vigilant" about arming the alarm at night. RP 212, 357.

Vittetoe did not recall that, when she talked to officers after the incident, she told them that the back door to the house, which had a dead bolt, was "always" locked. RP 235-36. Davila specifically remembered locking the back door of the home and turning the dead bolt earlier that

night. RP 191. Vittetoe thought she got up or might have gotten up about ten the night before to let the dogs out. RP 366. She could not, however, remember for sure if that happened. RP 382-83.

A neighbor testified that she was awakened by two shots going “pop, pop” at about 40 minutes after four or five that morning. RP 333-34. The neighbor looked out her bedroom window and saw Davila coming out of his garage door and moving towards the alley, holding a gun. RP 336. There was something or someone lying on the ground and Davila went out of sight for a moment. RP 337. She thought he had not had a shirt on but then went back into the house and put one on, coming back outside. RP 339.

The neighbor did not hear any shouting and thought she would have if any had occurred. RP 341. She also did not see anyone running after the shots. RP 342.

When Nasworthy went into the garage, he said he noticed that a hatchet was on top of a bunch of records and a hammer near the door. RP 526. The car inside the garage had an open glove compartment and Nasworthy saw keys on the passenger’s side front seat. RP 526-29.

Nasworthy was also clear that he personally went into the garage and checked the light switch “in all positions and the light never went on.” RP 496.

The next night, Nasworthy returned to check the ambient lighting at the same time the incident had occurred. RP 532. He testified that the backyard of the residence was “completely dark,” with the detached garage throwing “the entire backyard in a shadow.” RP 532. In his opinion, the

detective said, it would be very hard for anyone to see anyone's movement in that backyard clearly. RP 542.

A private investigator who measured from the back door of the home to the detached garage testified that the distance was 48 feet 9 inches and the distance to the spot where a detective told him the body had been found was 112 feet 8 inches. RP 574-75. The medical examiner who conducted the autopsy said that the shot to MacDougald was very "rapidly fatal" and would have caused death within seconds or at most a minute or so. RP 454. He said it was possible that MacDougald might have been able to travel 100 feet after being shot but only if it took MacDougald less than about a minute to do it. RP 454.

There was no sign of forced entry or tampering on the back door. RP 191, 534-35. Nor were there any such signs on any part of the garage. RP 196-97, 536.

D. ARGUMENT

1. THE PROSECUTOR COMMITTED BOTH CONSTITUTIONALLY OFFENSIVE MISCONDUCT AND FLAGRANT, PREJUDICIAL MISCONDUCT AND COUNSEL WAS INEFFECTIVE

As "quasi-judicial" officers, prosecutors enjoy special status but also have special duties, including the duty to ensure that the defendant receives a fair trial. 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). Further, a prosecutor must refrain from engaging in tactics the

purpose of which is to “win” a conviction at all costs. See State v. Rivers, 96 Wn. App. 672, 675, 981 P.2d 16 (1999). Instead, it is the prosecutor’s duty to seek justice, which requires seeking convictions based solely on the evidence, rather than emotion or other improper grounds such as his own belief in the guilt of the man on trial. See State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011).

In this case, the prosecutor failed in those duties and committed serious, constitutionally offensive misconduct in urging the jury to find Cavender guilty based upon the exercise of his constitutional rights. At the same time, the prosecutor committed flagrant, ill-intentioned and prejudicial misconduct by bolstering Davila’s credibility and urging the jury to rely on the fact that Davila was not charged or accused of any crime as a result of the incident. Finally, counsel was prejudicially ineffective in failing to object or even try to minimize the harm this repeated misconduct caused to his client’s ability to receive a fair trial.

a. Relevant facts

At trial, when an officer described going to the hospital just after the incident, the prosecutor established that the officer had seen Cavender there and read Cavender his rights. RP 260-61. The prosecutor then asked the officer if, after being read his rights, Cavender had agreed to speak to police. RP 260-61. The officer responded, “[h]e didn’t say he didn’t want to initially, no.” RP 261. The officer then said he asked Cavender what had happened and Cavender said, “[s]ome dude shot me in the back.” RP 261. When the prosecutor asked, “[d]id he offer any further explanation about how some ‘dude’ had shot him in the back,” the officer said, “[a]t

that point he elected to no longer answer my questions.” RP 261.

A little later at trial, the prosecutor asked one of the homicide detectives if all homicide investigations “result in criminal charges of murder or some form of homicide” and whether there were reasons, besides a case being “unsolved,” where police “might investigate a homicidal death. . .that ends up not being a criminal charge.” RP 300. The detective then declared, “[y]es, when it’s a legal, justifiable homicide.” RP 300. The detective went on to say that this case was not “unsolved,” that officers wanted to “confirm” what the homeowner said, and that the homeowner was not “ever charged with a crime” as a result of the incident. RP 301-302.

Another homicide detective, Jack Nasworthy, was asked by the prosecutor whether he knew if the “person who was identified as the shooter in the event was ever charged with a crime,” and Nasworthy answered, without objection, “[n]o, he was not.” RP 489-90.

In initial closing argument, the prosecutor reminded the jurors that Tony Davila was “the only witness who witnessed all of the events leading up to the arrest and criminal charges of Zane Cavender **that testified in this courtroom.**” RP 596 (emphasis added).

Also in initial closing argument, the prosecutor declared that Davila’s version of events was corroborated by Detective Nasworthy and that Nasworthy “did good police work” in his investigation. RP 596.

After further discussion of the facts, the prosecutor declared:

This is a case about burglary, members of the jury. Zane Cavender is charged with residential burglary and burglary in the second

degree. This is not a homicide trial. The detectives went on to investigate this as a homicide because there was a killing of a human being. Tony McDougald was shot and died there at the scene, so they investigated this as if there is a potential that somebody could be criminally charged. It is clear who fired the shots that killed Tony McDougald. That was not in dispute and was not in dispute ever. **They investigated his story. They investigated the crime scene. They treated this like a homicide investigation, and Tony Davila wasn't charged. The person that was charged with the crime you are here to decide is Zane Cavender. He is charged with the burglary. It's not State v. Tony Davila. The evidence in this case, there is no evidence to contradict what Tony Davila told you had occurred that day. Nothing.** Every bit of evidence that was introduced by Tony Davila was corroborated by other witnesses who were involved in this investigation, and the other witnesses concluding this is a burglary.

RP 605-606 (emphasis added). The prosecutor concluded that the jury was being asked to “hold Zane Cavender accountable for what he did” by finding him guilty. RP 606.

Later, in rebuttal closing argument, the prosecutor argued about what the evidence showed and said that she would rely on the jurors' memories “of what was presented on the witness stand and the exhibits admitted into evidence for you to make a determination [as] to what happened this night.” RP 632. The prosecutor then focused on “[t]he evidence that was presented,” including the “circumstantial evidence,” saying there was such evidence at trial. RP 633-34. A few moments later, the prosecutor described what happened that night and reminded jurors that Davila had “testified, and the **evidence that we have is the testimony of Tony** and you get to determine his credibility.” RP 636 (emphasis added). The prosecutor also questioned defense counsel's suggestion that the gift cards were planted by Davila, who had panicked and shot the men

even though they were not in his home. RP 637. The prosecutor declared to jurors that there was “no evidence before you that Mr. Cavender ever owned a Barnes and Noble gift card.” RP 637.

b. The arguments were misconduct which compels reversal

These arguments of the prosecutor were serious, constitutionally offensive misconduct and flagrant, ill-intentioned and prejudicial misconduct for which reversal is required.

First, the prosecutor committed serious, constitutionally offensive misconduct in repeatedly commenting on Cavender’s exercise of his rights to be free from self-incrimination, both after arrest and during trial. When a prosecutor comments in a way which invites the jury to draw a negative inference from a defendant’s exercise of a constitutional right, it “chills” the defendant’s free exercise of that right. See State v. Belgarde, 110 Wn.2d 504, 512, 755 P.2d 174 (1988); United States v. Jackson, 390 U.S. 570, 581, 88 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). It is therefore not just serious but “grave” misconduct for a prosecutor to make such arguments. See State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984); see Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).

In this case, the prosecutor committed just such misconduct in first eliciting testimony about Cavender’s post-arrest exercise of his rights to remain silent and then repeatedly drawing attention to the lack of evidence or testimony to contradict what Davila said had happened that night.

The right to remain silent and be free from self-incrimination is enshrined not only in the federal but also the state constitution. See State

v. Easter, 130 Wn.2d 228, 242, 922 P.3d 1285 (1996); Doyle v. Ohio, 426 U.S. 610, 619-20, 96 S. Ct. 2240, 49 l. Ed. 2d 91 (1976); Fifth Amend.; Art. I, § 9. As part of these rights, a defendant need not speak to police and his “failure” to do so may not be used as evidence against him. See State v. Burke, 163 Wn.2d 204, 213-14, 181 P.3d 1 (2008).

As a result, it is serious misconduct for the prosecutor to elicit testimony, make argument or even imply that the jury should apply any negative inference from the defendant’s pre- or post-arrest silence. See, e.g., State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). The rights of the defendant in this regard are defined in large part by whether the silence in question occurs before or after he is arrested and read his rights. See State v. Carnahan, 130 Wn. App. 159, 167, 122 P.3d 187 (2005). If it occurs before arrest and the defendant testifies at trial, “use of prearrest silence” may, in certain limited circumstances, be proper for impeachment purposes but not proof of anything substantive. Burke, 163 Wn.2d at 217; State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985).

When, however, the silence in question or the invocation of the right to silence occurs after reading of the rights, there can be no comment on the exercise of the rights for any purpose. Carnahan, 130 Wn. App. at 167. This is because, when a defendant is told he has the right to remain silent by the state, it is well-settled that, under fundamental principles of due process, the state may not then “comment on or otherwise exploit that decision,” even for impeachment. 130 Wn. App. at 168.

Further, when a prosecutor comments on the exercise of a

constitutional right, that issue may be raised as manifest constitutional error for the first time on appeal. See State v. Curtis, 110 Wn. App. 6, 37 P.3d 1274 (2002); see also, State v. Romero, 113 Wn. App. 779, 54 P.3d 1255 (2002).

Here, Cavender was told he had the right to remain silent by the state. But then the prosecutor repeatedly drew attention to the fact that Cavender ultimately exercised that right - both in talking to the officer and at trial. First, the prosecutor elicited testimony that Cavender initially did not exercise his rights after being read the Miranda warnings. RP 261. Then, the prosecutor elicited testimony that the officer asked Cavender what happened and that Cavender said “[s]ome dude shot me in the back.” RP 261. After that, the prosecutor elicited testimony that Cavender did not “offer any further explanation about how” the shooting had occurred and instead Cavender had “elected to no longer answer” any of the officer’s questions. RP 261.

In eliciting this testimony, the prosecutor committed serious, constitutionally offensive misconduct, because that testimony amounted to improper comments on Cavender’s exercise of his Fifth Amendment and Article I, § 9, rights against self-incrimination. Such improper comment occurs when a prosecutor invites an investigating officer to tell the jury that a defendant who has been read his Miranda rights chooses to remain silent. Doyle, supra, is instructive. In Doyle, the defendant and codefendant declined to say anything after they were arrested and then, at trial, claimed they had been framed. 426 U.S. at 611-13. The prosecutor “impeached” the defendants by talking about the fact that they had not told

police that they had been framed when they were arrested. Id. The U.S. Supreme Court reversed, holding that the comments were made in violation of the defendants' Fifth Amendment and due process rights, because it would be "fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." Doyle, 426 U.S. at 618.

Curtis, supra, is also instructive. In that case, the prosecutor elicited testimony that the defendant had been read his rights, after which the prosecutor asked, "[w]as anything said at that time?" 110 Wn. App. at 8. The officer responded that the defendant "refused" to speak to the officer and wanted an attorney present. Id. The prosecutor also elicited testimony that the officer also tried again to interview the defendant and that the officer was only able to take some pictures of Curtis at that time. Id.

On appeal, the defendant argued that this testimony and argument violated his rights to be free from self-incrimination. Id. The appellate court first recognized the claim to be one of "manifest constitutional error," subject to de novo review. 110 Wn. App. at 11. The Court then pointed out that the "right to be free from compelled self-incrimination is liberally construed." 110 Wn. App. at 11, citing, Easter, 130 Wn.2d at 242.

Addressing the issue, the Court noted that the seriousness of the error "of introducing testimony that a defendant exercised his Miranda rights depends on whether the rights were asserted before or after" arrest and the reading of his rights. Curtis, 110 Wn. App. at 12. Further, the

Curtis Court pointed out, mere “mentioning a suspect’s pre-arrest silence generally is not a violation.” Id; quoting, Lewis, 130 Wn.2d at 706.

But where the silence is post-arrest and post-Miranda, the Court noted, a defendant’s Fifth Amendment and due process rights are violated by the introduction of evidence that the defendant exercised his rights, because the government, in reading those rights, “implicitly assures the accused that he may assert his rights without penalty.” Curtis, 110 Wn. App. at 11-12.

The Curtis Court concluded that the prosecutor’s act in eliciting the testimony violated the defendant’s rights. While recognizing that the prosecutor did not “harp on” - or apparently mention - the defendant’s exercise of his Miranda rights in closing argument, the Curtis Court noted, “neither was this a case where the witness just blurted out a reference to Mr. Curtis’s silence in response to a question intended to elicit something else.” 110 Wn. App. at 13.

Instead, the Court pointed out, the prosecutor had specifically, directly asked the officer whether the defendant had said anything in response to being read his rights, and the officer had told the jury he had exercised his rights. The appellate court concluded that “[e]ither eliciting testimony or commenting in closing argument about the arrestee’s exercise of his Miranda rights circumvents the Fifth Amendment right to silence as effectively as questioning the defendant himself.” Curtis, 110 Wn. App. at 13.

Other cases similarly show the impropriety of the comments made here. In State v. Romero, 113 Wn. App. 779, 54 P.3d 1255 (2002), for

example, the prosecutor made similar comments and reversal was required, even though the prosecutor did not exploit the improper testimony on silence in closing argument. In Romero, the defendant was charged with unlawful possession of a firearm after there was a report of shots fired in the middle of the night at a mobile home park. An officer who arrived saw the defendant holding his hand behind his body outside a mobile home, after which the defendant refused to show his hands and instead ran away. 113 Wn. App. at 783. Shotgun shell casings were found on the ground near where Romero had been seen and witnesses gave an identification of the shooter as wearing a checked shirt similar to the one Romero had on, albeit a different color. 113 Wn. App. at 783-74. An eye-witness said he saw Romero do it and was “positive” it was the same man, and, although he described the shirt as “blue checkered” instead of grey, the eye-witness identified the actual shirt worn by Romero that night as the one the shooter was wearing. Id. While the eye-witness said he “did not concentrate very much” on the men’s faces, he also said he was “one hundred percent” positive it was Romero he had seen shooting. 113 Wn. App. at 784.

At trial, the prosecutor elicited testimony that, when the officers searched the home where Romero was found, the people inside “did not respond to our questions.” 113 Wn. App. at 784. He also elicited testimony that Romero was “somewhat uncooperative” when he was put in the holding cell. Id. Then, the officer declared, “we put him into the holding cell, I read him his Miranda warnings, which he chose not to waive, would not talk to me.” Romero, 113 Wn. App. at 785. Romero

himself also testified and said he had seen another man wear the checkered shirt in question and that it was that man who had shot the firearm. 113 Wn. App. at 785.

On appeal, after first recognizing that the issue was a manifest error affecting a constitutional right which could be raised for the first time on appeal, the Court examined both pre- and post-arrest silence, noting it was “well-settled that it is a violation of due process” for the prosecution to comment upon a defendant’s exercise of his right to remain silent in post-arrest situations. 113 Wn. App. at 787. After detailed examination of relevant caselaw, the Court found several core principles, including that “it is constitutional error for a police witness to testify that a defendant refused to speak to him or her” and further, for the prosecutor to “purposefully elicit testimony as to the defendant’s silence.” 113 Wn. App. at 790. While recognizing that an “indirect reference” to a defendant’s silence was not constitutional error, the Court then held that the comments in Romero were not “indirect” because the comment was “a direct comment on Mr. Romero’s choice of silence in response to questioning.” 113 Wn. App. at 792.

With the testimony, the Court noted, the Sergeant “mentioned the Miranda warnings and Mr. Romero’s decision not to waive his rights.” Romero, 113 Wn. App. at 793. Even though defense counsel had made no objection, the Romero Court held, the officer “made a direct comment about Mr. Romero’s election to remain silent,” so that “constitutional review is clearly warranted.” 113 Wn. App. at 793. The Court also stated that, although the comment was “unresponsive and volunteered,” the

comments were clearly “purposeful” by the sergeant and had the effect of being an attempt to prejudice the defense. Id.

The Court recognized that the prosecution, “[i]n fairness,” had not exploited the comment and did not specifically ask for the answer so that the improper answer was “not purposefully elicited.” Id. But the Court noted that the testimony surrounding silence “served no probative purpose other than to infer that his silence and lack of cooperation ‘was more consistent with guilt than with innocence.’” Romero, 113 Wn. App. at 794, quoting, Curtis, 110 Wn. App. at 13.

The comments were thus deemed improper and the constitutional harmless error standard applied. Romero, 113 Wn. App. at 794.

Here, the comments were even more improper than in Romero. As in Curtis, the prosecutor here deliberately elicited this testimony with the questions she specifically asked. Indeed, the questions here were more egregious than in Curtis. Here, the prosecutor specifically asked if Cavender had agreed to speak with the officer after being read his rights, i.e., “**did he agree to speak with you?**” RP 260-61 (emphasis added). Then after that the prosecutor asked if Cavender had offered “any further explanation about how some ‘dude’ had shot him in the back?” RP 261. And that question clearly, deliberately elicited the response, i.e., “**[a]t that point he elected to no longer answer my questions.**” RP 261 (emphasis added).

Thus, unlike in Romero, the improper testimony about Cavender’s invocation of his rights was specifically, deliberately elicited, not the result

of a slip of an officer's tongue. As in Curtis, the testimony was purposefully injected into the case by the prosecutor. And like in both cases, the improper testimony was "a direct comment on" the defendant's "choice of silence," the error is constitutional.

Even standing alone, this error would compel reversal. But the error in deliberately introducing evidence that Cavender exercised his rights was alas not the sole act of constitutionally offensive misconduct which occurred. After first eliciting the improper testimony that Cavender had exercised his rights to be free from self-incrimination with the officer, the prosecutor then made comments which further violated Cavender's rights to remain silent by repeatedly implying that Cavender should have taken the stand in his own defense.

Under both constitutions, a defendant in a criminal case has the right to be free from having to testify at a trial in which he is the accused. See State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987); Griffin, 380 U.S. at 614-15. As a result, it is misconduct for a prosecutor to make comments which imply that a defendant should have taken the stand in his own defense. See Ramirez, 49 Wn. App. at 336. Further, it is not required that a prosecutor's comments be explicit declarations for them to amount to such misconduct. Id. Instead, it is sufficient if the prosecutor makes arguments which are "of such character that the jury would naturally and necessarily accept it as a comment on the defendant's failure to testify." State v. Crawford, 21 Wn. App. 146, 152, 584 P.2d 442, review denied, 91 Wn.2d 1013 (1978); State v. Sargeant, 40 Wn. App. 340, 346, 698 P.2d 595 (1985).

Thus, if the prosecutor comments on the failure of the defense to present evidence, those comments are improper comments on the defendant's exercise of his right to decide not to testify if the only person who could have provided the missing testimony was the defendant. See State v. Ashby, 77 Wn.2d 33, 38, 459 P.2d 409 (1969); see also, State v. Fiallo-Lopez, 78 Wn. App. 717, 728, 899 P.2d 1294 (1995).

Here, the prosecutor's arguments amounted to just such improper comments. In initial closing argument, the prosecutor specifically reminded the jurors that Tony Davila was "the only witness who witnessed all of the events leading up to the arrest and criminal charges of Zane Cavender **that testified in this courtroom.**" RP 596 (emphasis added). But the only other two people involved who did not testify were either the dead man, MacDougal, and Cavender. The prosecutor's comment was obviously meant to draw attention to the fact that Cavender had not taken the stand to testify in his defense, i.e., be a "witness who witnessed the events" whose credibility could be examined by the jury.

Then, the prosecutor declared that there was "no evidence to contradict what Tony Davila told you had occurred that day. Nothing." RP 605-606. Again, as Cavender, a dead man and Davila were the only people close enough to the events to give such testimony, this was a clear comment on Cavender's decision not to testify.

As if that were not enough, in rebuttal closing argument, the prosecutor then implied that the jury should rely only on "what was presented on the witness stand and the exhibits admitted into evidence for

you to make a determination [as] to what happened this night.” RP 632. And again, she reminded jurors that Davila had “testified, and the **evidence that we have is the testimony of Tony** and you get to determine his credibility.” RP 636 (emphasis added). The obvious implication is that Cavender should have testified to present his side of events because the only evidence was Tony’s version as only he took the stand.

And after that, the prosecutor questioned defense counsel’s suggestion that the gift cards were planted after Davila panicked and shot then men who were not in his home, with the prosecutor specifically telling the jurors that there was “no evidence before you that Mr. Cavender ever owned a Barnes and Noble gift card.” RP 637. The clear point of this argument was to tell the jurors that, if Cavender *had* owned such a card, he should have testified about it.

All of this argument was completely improper and in violation of Cavender’s Article I, § 9, Fifth Amendment and Fourteenth Amendment rights. Fiallo-Lopez, supra, is instructive. In that case, the defendant was accused of having been involved in an “undercover buy operation for drugs,” as a target of that operation. 78 Wn. App. 719-20. The operation involved Fiallo-Lopez, two undercover detectives, a police informant and another man who was going to sell cocaine in a deal ultimately completed at a Safeway parking lot. 78 Wn. App. at 720. The informant, the seller, and the police officers all testified at trial, but Fiallo-Lopez did not. In closing argument, the prosecutor declared, *inter alia*, that there was “absolutely” no evidence to explain why Fiallo-Lopez was present, first at

a restaurant where the transaction began and then at the Safeway, or why he had contact with the seller at both places. 78 Wn. App. at 729.

Despite the fact that the prosecutor made “passing reference” to the fact that the defense had “no burden” to explain Fiallo-Lopez’ actions, the reviewing court nevertheless found constitutional error because, “the State’s argument highlighted the defendant’s silence.” Id. Under the facts, “no one other than Fiallo-Lopez himself could have offered the explanation the State demanded.” Id. As a result, the Court concluded, the prosecutor had “improperly commented on the defendant’s constitutional right not to testify” and had shifted a burden to the defendant to disprove the state’s case. Id. Although the Court found the evidence sufficient to overcome the constitutional harmless error test, the Court nevertheless condemned the argument - similar to that which occurred here - as constitutionally improper. Id.

Finally, after 1) eliciting testimony about Cavender’s exercise of his rights to be free from self-incrimination and then 2) making comments drawing attention to Cavender’s exercise of those rights at trial, the prosecutor then committed flagrant, ill-intentioned and prejudicial misconduct in repeatedly invoking the fact that Cavender, not Davila, had been charged with a crime after the police investigation, in order for the prosecutor to bolster the state’s case.

It is misconduct for a prosecutor to give her personal opinion about the defendant’s guilt or to argue in a way which implies that the defendant has only been charged because the state believes he is guilty. See, e.g. State v. Susan, 152 Wash. 365, 278 P. 149 (1929); United States v. Bess,

593 F.2d 749, 754 (6th Cir. 1979). Such argument effectively implies that, “if there were any question of the defendant’s guilt, the defendant would not even be in court.” See State v. Stith, 71 Wn. App. 14, 22, 856 P.2d 415 (1993). Further, such comments effectively amount to improper personal assurances by the prosecutor to the jury that the defendant was guilty and that trial was essentially a formality. Stith, 71 Wn. App. at 22.

Along the same lines, a prosecutor is prohibited from “bolstering” the credibility of her witnesses. See State v. Smith, 67 Wn. App. 838, 844-45, 841 P.2d 96 (1992).

Here, the prosecutor engaged in just such bolstering and improper vouching. First, she established with a homicide detective that a homicide investigation would not result in criminal charges if it was a “legal, justifiable homicide.” RP 300. Then, she established that officers “confirm[ed]” Davila’s version of events and that, as a result, Davila was not “ever charged with a crime” - obviously, conveying the message that police believed the death of MacDougald was a “legal, justifiable homicide” because Davila’s version of events was true. RP 301-302.

And if it had escaped jurors’ notice, the prosecutor asked a *second* homicide detective if Davila was ever charged with a crime as a result of the events, again eliciting that he was not. RP 489-90.

Then, in closing argument, the prosecutor specifically declared:

This is a case about burglary, members of the jury. Zane Cavender is charged with residential burglary and burglary in the second degree. This is not a homicide trial. The detectives went on to investigate this as a homicide because there was a killing of a human being. Tony McDougald was shot and died there at the scene, so they investigated this as if there is a potential that somebody could be criminally charged. It is clear who fired the

shots that killed Tony McDougald. That was not in dispute and was not in dispute ever. **They investigated his story. They investigated the crime scene. They treated this like a homicide investigation, and Tony Davila wasn't charged. The person that was charged with the crime you are here to decide is Zane Cavender. He is charged with the burglary. It's not State v. Tony Davila.** The evidence in this case, there is no evidence to contradict what Tony Davila told you had occurred that day. Nothing. Every bit of evidence that was introduced by Tony Davila was corroborated by other witnesses who were involved in this investigation, and the other witnesses concluding this is a burglary.

RP 605-606 (emphasis added).

Thus, over and over, the prosecutor reminded the jury that police believed Davila's version of events, even though Davila said he had seen a black man and neither Cavender nor MacDougald was black, and even though the light in the garage did not work at all when the officer tried it, and even though the two men were not shot "charging" towards Davila but were *shot in the backs*. And the jury was told, over and over, that the prosecution had charged a burglary case, not a homicide case - thus clearly telling the jury that the *prosecutor* believed Davila's version of events. The prosecutor engaged in improper bolstering and this Court should so hold.

Reversal is required. Constitutionally offensive misconduct is presumptively prejudicial. Easter, 130 Wn.2d at 242. As a result, reversal is required unless the **prosecution** - not Mr. Cavender - can meet the extremely high standard of proving the error constitutionally harmless. Id. The only way to meet that burden is for the prosecutor to show that *any and every* reasonable jury would necessarily still have convicted even absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182

(1985), cert. denied sub nom Washington v. Guloy, 475 U.S. 1020 (1986).

This standard is far different than the deferential standard used in cases where the issue is sufficiency of the evidence. See Romero, 113 Wn. App. at 783-85. In those cases, this Court will affirm unless *no* reasonable jury could have convicted, taking the evidence in the light most favorable to the state. See State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), overruled in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). In stark contrast, with the constitutional harmless error test, the “overwhelming evidence” test, the Court is *required* to “reverse unless it is convinced - beyond a reasonable doubt - that the constitutional error could not have had *any* effect on the fact-finder’s decision to convict. Easter, 130 Wn.2d at 242.

Indeed, Romero is a good example of the difference between the two standards, because in that case the Court first found that the evidence was sufficient to withstand scrutiny under the standard for “sufficiency of the evidence,” but then found that same evidence insufficient under the “overwhelming evidence” test, after an officer commented about the defendant’s not speaking with police. 113 Wn. App. at 783-85.

Here, the evidence against Cavender was not so overwhelming that every single reasonable jury would have necessarily convicted him of burglary without the improper comments. There were serious contradictions between the versions of events, and serious questions about what occurred. Further, the comments here were not the single comment not elicited by the prosecutor as in Romero - there were multiple

comments, not only that Cavender had exercised his rights and decided to stop speaking to the officer but also that he had further refused to testify at trial and give his version of events. And coupled with all of that was the improper bolstering by reminding the jury that officers who had investigated and the prosecutor who had made the charging decision had concluded a “legal, justifiable homicide” had been committed by Davila when he shot MacDougall - a conclusion which could not have been reached unless Cavender and MacDougall were, in fact, committing burglary. Because the prosecutor committed constitutionally offensive misconduct in eliciting testimony from the officer about Cavender’s exercise of his constitutional rights against self-incrimination after being read his rights, and again by repeatedly drawing attention to the absence of testimony only Cavender could have provided, and because that misconduct was exacerbated by the prosecutor’s repeated bolstering by reminding jurors that police and the prosecutor believed Davila, there was no chance that Cavender could have received a fair trial. Even if reversal were not required based solely upon the constitutionally offensive misconduct, reversal would still be required based upon the cumulative effect of the misconduct. This Court should so hold.

c. Counsel was prejudicially ineffective

As noted, *infra*, the constitutionally offensive misconduct of first eliciting testimony about Cavender’s post-arrest, post-Miranda exercise of his constitutional rights to be free from self-incrimination and then drawing negative inferences from the “lack” of evidence and testimony at trial which only Cavender could have given are manifest constitutional

error which may be raised for the first time on appeal. In the unlikely event, however, that this Court were to somehow find that counsel should have objected and that the errors could somehow have been cured, reversal would still be required based on counsel's ineffectiveness in failing to take those minimal steps to try to minimize the damage to his client's rights which had been wrought. Both the state and federal constitutions guarantee the accused the right to effective assistance of counsel. Strickland v. Washington, 366 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by, Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed.2d 482 (2006). To show ineffective assistance, a defendant must show that, despite a presumption of effectiveness, counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Counsel's performance is deficient if it falls below an "objective standard of reasonableness" and was not sound strategy. See In re PRP of Rice, 118 Wn.2d 876, 888, 828 P.2d 1086, cert. denied, 506 U.S. 958 (1992). That performance prejudices the defense when there is a reasonable probability that, but for counsel's deficient performance, the result would have been different. Hendrickson, 129 Wn.2d at 78. A "reasonable probability" is one which is "sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Here, counsel sat mute while the prosecutor repeatedly drew attention to his client's exercise of constitutionally protected rights, then further faulted his client for failing to waive his rights and testify. Further,

counsel did not object to the repeated, flagrant bolstering committed by the prosecutor. Should this Court find that the serious misconduct committed by the prosecutor might have been able to be at least somewhat cured by instruction, there was no legitimate strategic or tactical reason for counsel to have failed to object and request such instruction. This is especially so because there was conflicting evidence in this case, challenging the prosecution's version of events. Reversal and remand for a new, fair trial at which new counsel is appointed is required.

2. THE SENTENCING COURT VIOLATED THE APPEARANCE OF FAIRNESS DOCTRINE

Even if reversal and remand for a new trial was not required based on the misconduct in this case, Cavender is still entitled to relief, because the lower court violated the appearance of fairness doctrine in imposing the exceptional sentence.

a. Relevant facts

After the verdict was entered, there was a discussion of the date of the sentencing hearing, after which the prosecutor told the court that Davila was "likely to be unavailable for the sentencing hearing." RP 666. The prosecutor said that he thought Davila was going to submit a letter but that the prosecution "wanted to make sure he was afforded the opportunity if he wished to address the Court today." RP 666. Davila then told the court how the crime had affected his house "in a very negative way," making him wake up at night to check the house and make his wife comfortable, and that she herself can't sleep. RP 666. Davila also said he could not "stress enough just how much this has put us through the ringer"

and how hard it had been for them. RP 667.

At that point, the judge thanked Davila and his wife for being there and him for sharing his feelings about the impact of the crime on them.

RP 667. The judge then went on:

I have been a victim of having a sawed off shotgun pointed to my left temple while I was on my stomach in a beauty shop. . . that happened in 1989. I still remember it quite vividly, and I'm sure the ramification on you and your wife is not going to end even with sentencing. It is something that you are going to have to deal with and may have to seek some professional counseling in order to deal with that situation. There are little things that can trigger that memory, as easily as someone opening up a door or your putting your purse on that hook behind the door.

RP 667. The judge told Davila and his wife not to "hesitate" to seek counseling if they needed it, then went on:

None of us have any control, necessarily, over the conduct of others.

I have limited control pursuant to statute as to what kind of sentence I can impose. I want to thank you for your willingness and courage to come here today to confront the defendant. Thank you.

RP 668 (emphasis added).

Cavender's standard range was 22-29 months. RP 672. At sentencing, the prosecutor argued that the court should impose 116 months in part because he thought that Cavender's remorse was "a remorse of conviction, not a remorse that he committed this crime or that he impacted these victims in the manner that he did." RP 675.

Counsel pointed out that Cavender had no dangerous weapons with him, that the homeowners were not touched and no items were actually taken from the house, arguing that, under the facts, an exceptional

sentence was not warranted. RP 675-85.

In imposing an exceptional sentence, the court said that “[n]o one gets a comfort zone when their household has been invaded,” and that “[t]he ramifications and rippling effect experiencing something like that is something that just doesn’t go on and off with a switch or like a switch. It permeates everything you do and the things that you see and how you react to people, and just having a comfort zone in your own surroundings.” RP 685. The court also focused on the belief that Cavendar had “skated by for some time now” and should “know the consequences of your actions.” RP 684-85.

b. The judge’s actions violated the appearance of fairness doctrine and compel reversal

The comments of the judge both at the initial hearing and again at sentencing in imposing an exceptional sentence violated the appearance of fairness doctrine. That doctrine demands that actual or apparent bias on the part of the judge be absent from a proceeding. State v. Dagenais, 47 Wn. App. 260, 261, 734 P.2d 539 (1987).

Put another way, the law requires not only that a judge be actually impartial but also “that the judge **appear** to be impartial.” State v. Post, 118 Wn.2d 596, 618, 826 P.2d 172 (1992) (quotations omitted) (emphasis added). As the U.S. Supreme Court has noted, “justice must satisfy the appearance of justice.” Offutt v. United States, 248 U.S. 11, 14, 75 S. Ct. 11, 99 L. Ed. 11 (1954). Further, Canon 3(D)(1) of the Code of Judicial Conduct requires a judge to disqualify herself if, *inter alia*, her “impartiality may reasonably be questioned.” State v. Dominguez, 81 Wn.

App. 325, 328, 914 P.2d 141 (1996). The purpose of the doctrine is to prevent “the evil of a biased or potentially interested judge.” State v. Carter, 77 Wn. App. 8, 888 P.2d 1230, review denied, 126 Wn.2d 1026 (1995) (quotations omitted). Reversal is required where there is evidence of actual or potential bias. Id.

In this case, the court’s comments revealed an apparent bias on her part and caused her to appear to be far less than impartial. Both before sentencing and at the sentencing, it was made clear that she not only sympathized with the victims, had been a victim herself, suffered flashbacks from her experience and indeed had everything in her life “permeate[d]” by being a victim, but also that she was unhappy that she was “limited” by the law in the sentence she could impose and thought Cavender had somehow “skated” by when receiving sentences in the past and should be punished more than average based not simply on the specific facts of the case but also upon her own feelings about vindicating the rights of the victims and the harm they - and she - had suffered. RP 684-85.

It is difficult to conceive of how anyone hearing the judge at these hearings could feel that she was being fair and impartial in deciding whether the specific facts of this case warranted an exceptional sentence of nearly **8 years** more than the high end of the standard range of 22-29 months in a crime where no one but the alleged perpetrators were hurt, no weapons - save those of the victim - were involved or even carried by the suspects, and no major economic harm occurred. Another judge faced

with the same facts might well have concluded that a far lesser sentence was proper.

Further, dissatisfaction with the sentence a defendant has previously received is not a proper basis for imposing an exceptional sentence. See, e.g., State v. S.S., 67 Wn. App. 800, 807, 840 P.2d 891 (1992).

Most important, the “appearance of fairness” doctrine is violated unless “a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.” State v. Perala, 132 Wn. App. 98, 130 P.3d 852, review denied, 158 Wn.2d 1018 (2006), quoting, State v. Bilal, 77 Wn. App. 720, 722, 892 P.2d 674, review denied, 127 Wn.2d 1013 (1995) (quotations omitted). Given the judge’s comments, there is no way that Cavender could possibly have felt that he was being sentenced by an impartial judge. Nor would any prudent, disinterested observer. Even if the Court were to affirm the convictions despite the prosecutorial misconduct, reversal and remand for resentencing in front of a different judge would be required, because of the violation of the “appearance of fairness” doctrine.

E. CONCLUSION

For the reasons stated herein, this Court should grant Mr. Cavender the relief to which he is entitled.

DATED this 18th day of September, 2012.

Respectfully submitted,

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel via this Court's efilng upload portal and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: Mr. Zane Cavender, DOC 326409, Stafford Creek CC, 191 Constantine Way, Aberdeen, WA. 98520.

DATED this 18th day of September, 2012.

/s/Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

RUSSELL SELK LAW OFFICES

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