

No. 44086-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Arvell Kindell,

Appellant.

Clark County Superior Court Cause No. 12-1-01129-0

The Honorable Judge Rich Melnick

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by telling jurors that they were to decide whether or not unlawful possession of a firearm is a crime against persons or property.
2. The court's answer to the jury questions failed to make the relevant legal standard manifestly clear to the average juror.
3. The court's answers to the jury's questions relieved the state of its burden to prove that Mr. Kindell intended to commit a crime against persons or property within the residence.
4. The court's answer to the jury's questions erroneously permitted conviction if the jury believed that Mr. Kindell unlawfully remained in the residence with intent to commit unlawful possession of a firearm.
5. The trial court should have granted Mr. Kindell's motion for arrest of judgment and his motion for a new trial.
6. If his attorney invited the court's error (denying the defense motion to arrest judgment), then Mr. Kindell was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
7. Defense counsel should have requested a bill of particulars and sought instruction on the specific crime(s) against persons or property the state alleged Mr. Kindell intended to commit inside the residence.
8. Defense counsel should have persisted in his argument that the jury's inquiry, regarding whether unlawful possession of a firearm is a crime against a person or property, raised an issue of law rather than a factual question.
9. The prosecutor committed misconduct that infringed Mr. Kindell's Fourteenth Amendment right to due process.
10. The prosecutor committed misconduct that infringed Mr. Kindell's Sixth and Fourteenth Amendment right to a jury trial.
11. The prosecutor improperly argued that she did not have to prove what crime Mr. Kindell intended.

12. The prosecutor improperly expressed a personal opinion in closing arguments.
13. The prosecutor improperly maligned the role of defense counsel in closing arguments.
14. Mr. Kindell was denied his right to a speedy trial under CrR 3.3.
15. The trial judge erred by continuing the trial beyond Mr. Kindell's speedy trial expiration date.
16. The sentencing judge erred by sentencing Mr. Kindell with an offender score of five.
17. The trial court erred by including three misdemeanors (or gross misdemeanors) in Mr. Kindell's offender score.
18. The prosecution failed to prove the comparability of Mr. Kindell's out-of-state convictions.
19. The sentencing judge erred by including Mr. Kindell's Colorado convictions in the offender score.
20. The sentencing judge erred by (implicitly) concluding that Mr. Kindell's Colorado convictions were comparable to Washington offenses.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A conviction for burglary requires proof that the accused person unlawfully entered or remained inside a building with intent to commit a crime "against persons or property therein." Here, when jurors asked if unlawful possession of a firearm was a crime against property, the court responded "that is a factual determination" for the jury to make. Did the court's erroneous response to the jury's question relieve the prosecution of its burden to prove the elements of burglary beyond a reasonable doubt, in violation of Mr. Kindell's Fourteenth Amendment right to due process?

2. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. In this case, defense counsel failed to request a bill of particulars, and failed to seek instructions on which crime(s) against persons or property the prosecutor alleged Mr. Kindell intended to commit within the residence, and may have contributed to the court's erroneous answer to the jury's question on that subject. Was Mr. Kindell denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
3. A prosecutor may not express a personal opinion regarding the evidence admitted in a criminal trial. Here, the prosecutor repeatedly expressed her personal opinion during closing arguments. Did the prosecutor commit reversible misconduct in violation of Mr. Kindell's rights to due process and to a jury trial under the Sixth and Fourteenth Amendments?
4. A prosecutor may not malign an accused person's attorney or disparage the role of defense counsel. Here, the prosecutor repeatedly disparaged defense counsel and the defense function in her closing argument. Did the prosecutor's misconduct infringe Mr. Kindell's Sixth and Fourteenth Amendment rights to counsel and to due process?
5. CrR 3.3 requires the court to bring an in-custody defendant to trial within 60 days, unless the time for trial is reset pursuant to the rule. Here, the court erroneously continued the case beyond Mr. Kindell's speedy trial expiration date. Did the unwarranted delay violate Mr. Kindell's right to a speedy trial under CrR 3.3?
6. An out-of-state conviction may not be included in the offender score unless the prosecution proves comparability to a Washington offense. Here, Mr. Kindell acknowledged that he had eight prior Colorado convictions, but did not agree that they were comparable to Washington felonies, and did not stipulate to a particular offender score. Did the trial court err by including these Colorado convictions in the offender score?

without proof that each was comparable to the corresponding Washington offense?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Arvell Kindell was sitting on the porch of his former girlfriend's house. RP 161-162. There was an order in place that prevented him from having any contact with her or her home. RP 176, 225.

When Mr. Kindell saw police drive by, he knew he would be arrested. RP 163, 210, 225-226. He rode his bicycle and ran to a friend's house not far away. He had been doing yard work and storing some belongings at Patricia Crowley's house for some time. RP 73, 87-88, 90, 135, 211, 228. Crowley had also loaned him money more than once. RP 91.

He knocked on the door and Crowley's ten-year old granddaughter Z.M. answered the door. RP 74-75. Mr. Kindell quickly entered the home. He said that the police were after him, using colorful language, and he appeared panicked and afraid. RP 75, 102, 108. They agreed that all three of them should go out into the back yard. RP 76-78, 231. They walked to the door, but Mr. Kindell did not go out. RP 77-78, 233.

Crowley and Z.M. spoke to officers in the back yard, and left the yard. RP 77-78, 164. Police came in force, between twenty and thirty officers in total. They cleared the area, surrounded the house, and had police dogs at the ready. RP 96-97, 164, 174, 215-216.

Crowley owned two guns that she kept in her bedroom. One was a pistol that she kept in a basket, and the other was a shotgun she kept in a gun sock. RP 79-82. Neither was loaded. RP 80. She stored her ammunition in a Ziploc bag in her headboard. RP 80-81.

Mr. Kindell came out onto the porch several times, telling officers to arrest him, but law enforcement would not go up onto the porch. RP 137, 143, 147, 173, 214-215, 235-236. After several hours, Mr. Kindell was arrested. RP 175. He admitted that he was in violation of a no contact order but denied touching any guns. RP 176-177.

The state charged Mr. Kindell with Burglary in the First Degree with a firearm enhancement, and Unlawful Possession of a Firearm. CP 1. With respect to the burglary charge, the Information read as follows:

with intent to commit a crime against a person or property therein, did enter or remain unlawfully in the building of Patricia Crowley...and, in entering or while in the building or in immediate flight therefrom, the defendant or another participant in the crime did intentionally assault any person therein and/or was armed with a deadly weapon...
CP 1.

The charge was filed on June 25, 2012, and arraignment was held on July 3, 2012. Information filed 6/25/12, Clerk's Minutes filed 7/3/12, Supp. CP. Mr. Kindell was held in custody, and trial was set for August 20, 2012. Clerk's Minutes filed 7/3/12, Supp. CP.

On August 16, 2012, the state moved to continue the trial. Apparently they had sent the rifle to the lab for print analysis just that week, and the results were not yet available. Motion and Declaration for Continuance filed 8/16/12, Supp. CP. The court granted the motion and reset the trial to start on August 27, 2012. Order of Continuance filed 8/16/12, Supp. CP. The court ruled that the new date would be the 59th day of speedy trial. Scheduling Order filed 8/16/12, Supp. CP. The court further indicated that while the assigned prosecutor would not be available on the trial date, a different attorney could prosecute the case for the state. RP 2.

On August 22, 2012, the parties again appeared in court on Mr. Kindell's case. The prosecutor represented that she had met with the alleged victim of the burglary charge and wanted to do the trial herself. RP 1-6, 10. She further alleged that one of her officers was not available for the trial as set. Motion and Declaration for Order of Continuance filed 8/22/12, Supp. CP; RP 1-12.

Over the defense objection, the court set the new trial date for September 4, 2012. RP 3-5, 8, 12, 16. The court further ruled that the time period between August 27 and September 4, 2012 was an excluded period for purposes of speedy trial. Scheduling Order filed 8/22/12, Supp. CP.

Trial started on September 4, 2012. RP 21-53.

Crowley claimed that Mr. Kindell shoved Z.M. aside to get inside the house. RP 75. Z.M. testified that Mr. Kindell guided her away from the doorway so he could get through, but that the guiding motion also included a push. RP 102, 104. She said as he came through the door, he had to push the door open further to fit through, and that the door contacted her but not hard. RP 103. Officer Skeeter, who took Mr. Kindell's statement, said that Mr. Kindell denied pushing Z.M. RP 176. Mr. Kindell testified, and told the jury that he did not push the door to get inside the house. RP 213.

On the issue of guns in the home, Crowley said that Mr. Kindell did not know she had any guns, but that she had told police about the guns immediately upon leaving the house. RP 92-93. She also acknowledged that Mr. Kindell had not threatened or made any demands on Z.M. or her. RP 97-98. Mr. Kindell confirmed he did not have knowledge of guns inside the house. RP 217.

Once she was allowed back into the house 8 hours later, Crowley told the jury that she saw that her headboard had been ransacked, and her late husband's knife collection was in disarray. RP 83-84. She said that the ammunition baggy had been opened and one shell was on her couch. RP 85. This was after the SWAT team had searched the house, and after

other officers had gone through and taken evidence as well. RP 138-139. No one from the SWAT team testified about what was done in their search of the home for people and weapons. RP 72-185. Crowley said items were moved from where she had left them, and the state argued that only Mr. Kindell could have done the moving. RP 82-87, 267. There was no testimony offered by the state to show that the multiple officers who were in the home had not moved weapons in their search. RP 139, 72-185. In fact, one of the officers said that the SWAT team may have moved items in their effort to clear the house. RP 151. Mr. Kindell again denied touching any of the guns while inside the house. RP 218-219.

There was a palm print on the rifle, but it was not Mr. Kindell's. RP 130-131. The forensic scientist did not compare the palm print to any of the SWAT team officers who searched the house. RP 129. The officer who retrieved the gun and put it into evidence testified that she did not wear gloves when she picked up the gun, and that at least two other officers had handled it before she did. RP 151-152.

During its cross examination of Mr. Kindell, the prosecutor asked him about Crowley and Z.M.'s testimony:

Q Do you think Patricia did a good job testifying as to what happened?

A Patricia did a great job to testify.

Q She told --

A And [Z.M.] --

Q -- what happened?

A – [Z.M.] did a great job 'cause [Z.M.] told the truth.

Q [Z.M.] did a great -- uh-huh.

A She opened the door halfway.

Q So they both told the truth, then, didn't they?

THE COURT: Excuse me. We're going to move away from this line of questioning. This is totally inappropriate.

MS. RULLI: Okay.

THE COURT: Next question?

RP 232.

The court instructed the jury regarding the elements of the burglary charge, including the following: “2) That the entering or remaining was with intent to commit a crime against a person or property therein...” Instruction No. 15, Court’s Instructions to Jury, Supp. CP. Both the state and the defense proposed this language in their submitted instructions. Defendant’s Proposed Instructions, State’s Proposed Instructions, Supp. CP.

In her closing argument, the state’s attorney told the jury that the state did not have to “prove to you what crime [Mr. Kindell] intended to commit” inside the house. RP 262. Instead, the prosecutor claimed that the element of burglary was met because Mr. Kindell would have done any crime necessary. RP 262.

The defense responded that Mr. Kindell’s intent when entering the house was to hide, and that his conduct could at worst have comprised a criminal trespass. RP 273-274. The prosecutor countered by arguing that

the defense theory of bad police work was “ludicrous”; she claimed the defense attorney watched too much television, and further told the jury that “that’s not how this police force plays ball.” RP 287.

The foreperson of the jury sent out several questions at once:

Jury Instruction #15—1) Please clarify what “therein” means? 2) Does this include house and property? 3) Does people and property include the property owner and police officers? 4) Does illegally possessing a firearm constitute a crime against property?
Jury Note, Supp. CP.

During the discussion of possible answers, the defense attorney said that the issue of whether unlawful possession of a firearm is a crime against a person or property is not an issue for the jury but a legal question. RP 303. The court responded that if the court answered that particular part of the jury question, it would constitute a comment on the evidence. RP 304. Counsel for Mr. Kindell responded that given that, the court should just tell them they need to decide that for themselves, and agreed that it was the best answer that all could agree upon. RP 304-305.

The court answered the jury questions as follows:

1) Use your collective experiences to determine what “therein” means 2) all 4 elements must be proved by a reasonable doubt to return a verdict of guilty 3) rely on the instructions as a whole. The court not [sic] comment on the evidence 4) That is a factual determination you need to collectively decide
Jury Note, Supp. CP.

The jury returned guilty verdicts and answered “yes” to the special verdict. RP 311-312.

Mr. Kindell brought a motion to arrest the verdict and for a new trial. He argued that the issue of whether unlawful possession of a firearm was a crime against a person or property was a matter of law and not an issue for fact for the jury to determine. RP 321-323; Motion for Arrest of Judgment and Brief in Support of Motion filed 9/13/12, Response to Defense Motion filed 10/5/12, Supp. CP. The court denied the motion. RP 326.

Mr. Kindell signed a document captioned “Declaration of Criminal History,” which was appended to the Judgment and Sentence and incorporated into the court’s findings on criminal history.¹ CP 14-15. The document begins as follows:

COME NOW the parties, and do hereby declare, pursuant to RCW 9.94A.525 that to the best of the knowledge of the defendant and his/her attorney, and the Prosecuting Attorney’s Office, the defendant has the following undisputed prior criminal convictions...
CP 14.

Below this declaration is a table listing eight offenses from Colorado and six Washington offenses. CP 14. The last column of the table is captioned “PTS,” and includes some handwritten entries. CP 14.

¹ See Finding No. 2.2, CP 4.

Nothing in the document indicates that Mr. Kindell agreed to a particular offender score. Nor did he acknowledge that his Colorado offenses were comparable to Washington felonies. CP 14-15.

The court found that Mr. Kindell had an offender score of five on each offense, and sentenced him to 101 months in prison. Mr. Kindell timely appealed. CP 6, 17.

ARGUMENT

I. MR. KINDELL’S BURGLARY CONVICTION VIOLATED DUE PROCESS BECAUSE THE COURT’S ERRONEOUS RESPONSE TO A JURY QUESTION RELIEVED THE STATE OF ITS BURDEN TO PROVE AN ESSENTIAL ELEMENT.

A. Standard of Review

Constitutional questions are issues of law, reviewed *de novo*. *McDevitt v. Harborview Med. Ctr.*, ___ Wn.2d ___, ___, 291 P.3d 876 (2012). Ordinarily, a trial court’s decision to answer a deliberating jury’s question with further instruction is reviewed for abuse of discretion. *State v. Becklin*, 163 Wn.2d 519, 529, 182 P.3d 944 (2008). However, where such a decision impacts constitutional rights, review is *de novo*. *See, e.g., State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009).

Jury instructions are also reviewed *de novo*. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012).

Jury instructions are sufficient when they allow each party to argue its theory of the case, are not misleading, and when read as a whole properly inform the jury of the applicable law. *State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 793 (2012). Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

B. Due process requires the prosecution to prove every element of an offense beyond a reasonable doubt.

Due process requires the state to prove every element of a criminal offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Reversal is required whenever jury instructions “have the effect of relieving the state of the burden of proof enunciated in *Winship* on the critical question of intent in a criminal prosecution.” *Francis v. Franklin*, 471 U.S. 307, 326, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

C. The court’s instructions relieved the state of its burden to prove that Mr. Kindell intended to commit a crime against persons or property within the residence.

To obtain a conviction for burglary, the prosecution was required to prove that Mr. Kindell entered or remained unlawfully in a building “with intent to commit a crime against persons or property therein.” RCW 9A.52.020; Instruction No. 15, Supp. CP. Conviction “requires more than

just a simple showing of an intent to commit a crime.” *State v. Devitt*, 152 Wn. App. 907, 912, 218 P.3d 647 (2009). Instead, the crime intended by the accused person must be a crime against persons or property: a burglary conviction may not be based on the accused person’s intent to commit a crime against the public at large.² *Id.* The determination of whether or not a particular crime qualifies as a crime against persons or property is a legal question. *Id.*, at 911-912.

In *Devitt*, the defendant entered an apartment through an unlocked door while fleeing from the police. He was convicted of burglary on the theory that he unlawfully entered with intent to obstruct the police. The Court of Appeals reversed for insufficient evidence, holding that obstructing is not a crime against persons or property.³ *Id.*, at 911-913. Part of the basis for this conclusion was the absence of obstructing from the list of crimes against persons or property in RCW 9.94A.411. *Id.*

Unlawful possession of a firearm is not a crime against persons or property. *See* RCW 9.94A.411. The law is directed at keeping guns from felons. RCW 9.41.040. Like obstructing, UPF is a victimless crime

² Nor may conviction be based on intent to commit a crime against someone outside the building. *Id.*

³ Even if obstructing were considered a crime against persons, the “victims” in the case were the police who were not within the apartment. *Devitt*, at 913.

against the public at large. *See Devitt, at 911-913.* Accordingly, Mr. Kindell's intent to unlawfully possess a firearm could not provide the basis for the burglary charge. *Id.*

In this case, the jury was properly instructed that conviction required proof that Mr. Kindell intended to commit a crime "against persons or property" within the residence. Instruction No. 15, Supp. CP. However, when jurors asked if unlawful possession of a firearm qualified as a crime against property, the court erroneously answered "that is a factual determination you need to collectively decide." Jury Note, Supp. CP.

This response relieved the prosecution of its burden of proving Mr. Kindell's intent to commit a crime "against persons or property" within the residence. The instruction permitted jurors to convict, even if they believed the only crime Mr. Kindell intended within the residence was unlawful possession of a firearm.

The problem was compounded by the prosecutor's closing argument. Instead of directing jurors to a particular crime, the prosecutor insisted that she didn't have to prove "what crime [Mr. Kindell] intended to commit," and that he was "willing to commit any crime necessary... [H]e intended and meant to do absolutely anything that it would have taken for him to hide from the police." RP 262. Although she gave some

examples of crimes Mr. Kindell may have intended, the import of her argument was that *any* crime would suffice. RP 262.

Under these circumstances, the prosecution was relieved of its burden to prove the essential elements of burglary. The burglary conviction must be reversed and the case remanded for a new trial. *Francis*, at 326.

II. MR. KINDELL WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, art. I, §22. of the Washington

Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. art. I, §22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice - “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The presumption that defense counsel performed adequately is overcome when there is no conceivable legitimate tactic explaining counsel’s performance. *Reichenbach*, at 130. Further, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.”).

C. If the court’s error is not preserved for review, then Mr. Kindell was denied the effective assistance of counsel.

To be minimally competent, an attorney must research the relevant law. *Kyllo*, at 862. In this case, defense counsel should have known that unlawful possession of a firearm is not a crime against persons or property, and that any offense against police officers outside the residence would not be considered a crime “therein.” *Devitt*, at 911-913.

Armed with this knowledge, defense counsel could have anticipated problems by (1) requesting a bill of particulars prior to trial and (2) proposing appropriate instructions to limit the prosecution to crimes alleged in the bill of particulars. *See State v. Bergeron*, 105 Wn.2d 1, 18-19, 711 P.2d 1000 (1985).⁴ Defense counsel would also have known to stick with his initial argument—that the issue was a question of law for the judge rather than a factual question for the jury. RP 303-304.

If the error in this case is waived, or if defense counsel invited the error, Mr. Kindell was denied the effective assistance of counsel. *Kyllo*, at 862. Mr. Kindell was prejudiced by counsel’s failure to research the applicable law, to request a bill of particulars and appropriate instructions,

⁴ *Bergeron* is the source of the problem here. Had the prosecution been required to allege and prove that Mr. Kindell intended to commit a particular crime against persons or property within the residence, the issue would have been addressed through the court’s instructions. In light of this, *Bergeron* should be reconsidered if this case reaches the Supreme Court.

and to maintain his objection to the court's erroneous answer to the jury's question. As a result of the deficient performance, the jury received an instruction that permitted conviction even if jurors believed Mr. Kindell's sole criminal intent was to commit the crime of unlawful possession of a firearm within the residence. In light of the jury's question, there is a reasonable probability that counsel's failures affected the verdict.

Reichenbach, at 130.

Because Mr. Kindell was denied the effective assistance of counsel, his burglary conviction must be reversed. *Id.* The case must be remanded to the trial court for a new trial. *Id.*

III. THE PROSECUTOR COMMITTED MISCONDUCT THAT VIOLATED MR. KINDELL'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A JURY TRIAL, TO DUE PROCESS, AND TO A DECISION BASED SOLELY ON THE EVIDENCE.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *McDevitt*, at ____.

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009).⁵

⁵ A reviewing court "previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001). An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008).

Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed. *State v. Toth*, 152 Wn. App. 610, 615, 217 P.3d 377 (2009). To overcome the presumption of prejudice, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

Prosecutorial misconduct that does not infringe a constitutional right may be raised for the first time on review if it is “so flagrant and ill intentioned that it evinces an enduring and resulting prejudice incurable by a curative instruction.” *State v. Walker*, 164 Wn. App. 724, 730, 265 P.3d 191 (2011).⁶ Such error requires reversal whenever there is a substantial likelihood that the misconduct affected the verdict. *State v. Henderson*, 100 Wn. App. 794, 800, 998 P.2d 907 (2000).

⁶ The Court of Appeals also has discretion to accept review of any issue argued for the first time on appeal, including issues that do not implicate a constitutional right. RAP 2.5 (a); see *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011).

- B. The prosecutor committed misconduct by misstating the law and urging jurors to convict on an improper basis.

A prosecutor's statements to the jury upon the law must be confined to the law set forth in the instructions. *State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984). *State v. Huckins*, 66 Wn. App. 213, 218-219, 836 P.2d 230 (1992). Any statement of law not contained in the instructions is improper, even if it is correct. *Davenport*, at 760. Such misconduct is a "serious irregularity having the grave potential to mislead the jury." *Id.*, at 764. Reversal is required whenever there is a substantial likelihood that the misconduct affected the jury's verdict. *Id.*, at 762.

In this case, the prosecutor committed misconduct by urging jurors to convict if Mr. Kindell intended to commit *any* crime (not just a crime against persons or property within the residence). It was also misconduct to imply that jurors could convict without finding that Mr. Kindell intended to commit any particular crime(s):

Now, I don't have to prove to you what crime he intended to commit. It is difficult to get inside somebody's head and prove beyond a reasonable doubt what their intent was to do, what he wanted, what was in his mind at that moment when he walked up those stairs and into Patricia's house. That's what you have to decide. I would submit to you that all of the evidence proves that he was willing to commit any crime necessary to complete his action. He wanted a place to hide, and if he needed to assault somebody like he did [Z.M.], he would do that. If he needed to steal a gun in order to shoot himself or shoot the cops, he would

have. If he could have -- he intended and meant to do absolutely anything that it would have taken for him to hide from the police, because that was the only thing on his mind at that point.
RP 262.

Although jurors need not unanimously agree on the specific crime intended by the accused person, the law does require proof that the person intended actual crimes against persons or property within the residence—not simply “any crime” or “absolutely anything.” RP 262. The prosecutor’s argument suggested that conviction could be predicated upon some vague notion that Mr. Kindell intended criminal activity generally, and that jurors did not have to find he intended any specific crime.⁷

The error is of constitutional dimension, because it infringed Mr. Kindell’s Fourteenth Amendment right to due process. *Davenport*, at 760, 762. It is manifest, because it had real and practical impact on the trial. *Nguyen*, at 433. As the jury’s note establishes, jurors struggled with the very issue that was the subject of the prosecutor’s improper comments. Jury Note, Supp. CP; RP 262.

As a manifest error affecting Mr. Kindell’s right to due process, the error can be raised for the first time on review. RAP 2.5(a)(3). The error is presumed prejudicial, and the prosecution bears the burden of

⁷ Including, for example, obstructing a law enforcement officer, contrary to *Devitt*.

proving harmlessness beyond a reasonable doubt. *Toth*, at 615; *Lorang*, at 32; *Burke*, at 222.

Furthermore, the misconduct was flagrant and ill-intentioned. *Walker*, at 730. The prohibition against making arguments unsupported by the court's instructions is long-standing, and should have inhibited the prosecutor from making the arguments she made in closing. *Davenport*, at 760. There is a substantial likelihood that the misconduct affected the jury's verdict: the jury's note showed that jurors were struggling with the issue of Mr. Kindell's intent. They asked about the meaning of "therein," whether they could consider offenses occurring outside the house but on the property, whether they could consider crimes against the police, and whether UPF qualified as a crime against property. Jury Note, Supp. CP. The problem was compounded by the trial judge's response to the note, as outlined above.

Under these circumstances, the prosecutor's misconduct infringed Mr. Kindell's right to due process. *Davenport*, at 760, 762. His burglary conviction must be reversed and the charge remanded for a new trial. *Toth*, at 615.

- C. The prosecutor improperly expressed her personal opinion regarding the integrity of the police force and disparaged defense counsel for hinting at police misconduct.

The constitutional right to a jury trial includes the right to a verdict based solely on the evidence developed at trial. U.S. Const. Amend. VI; *Turner v. Louisiana*, 379 U.S. 466, 472, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965). The due process clause affords a similar protection. U.S. Const. XIV; *Sheppard v. Maxwell*, 384 U.S. 333, 335, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

It is improper for a prosecuting attorney to comment disparagingly on defense counsel's role or to impugn the defense lawyer's integrity. *State v. Thorgerson*, 172 Wn.2d 438, 451-452, 258 P.3d 43 (2011) (citing *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008) and *State v. Negrete*, 72 Wn App. 62, 67, 863 P.2d 137 (1993)). Thus, for example, a prosecutor who characterizes defense counsel's presentation "as 'bogus' and involving 'sleight of hand'" improperly impugns counsel's integrity. *Thorgerson*, at 451-452.

It is also misconduct for a prosecutor to vouch for evidence. *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984). A prosecutor may not "throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused." *State v. Monday*, 171

Wn.2d 667, 677, 257 P.3d 551 (2011) (quoting *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956)).

In this case, the prosecutor improperly disparaged defense counsel and “testified” to facts not in evidence:

[T]his speculation that the officers involved in this case would have moved evidence, changed a report, planted statements of the Defendant is ludicrous. Perhaps Defendant and his counsel have been watching too much television and not paying enough attention to what happens day in and day out in Vancouver, Washington. That's not how this police force plays ball. Why would any of the officers involved in this or that you saw testify put their own career and livelihood and freedom on the line so what—so this guy goes to jail a little longer? Really?
RP 287.

Nothing in the evidence suggested how the Vancouver police force “plays ball;” nor did anyone testify as to the consequences (or lack of) suffered by officers whose misconduct or sloppy work are revealed. *See* RP, CP *generally*. The prosecutor’s arguments about the integrity of the police force constituted vouching. *Monday*, at 677. They were improper, and should not have been made. *Id.*

Equally egregious were the prosecutor’s comments that defense counsel’s theory was “ludicrous” and that counsel may “have been watching too much television.” RP 287. Comments such as these are not proper argument—they convey the prosecutor’s personal opinion (without

reference to the evidence) and improperly disparage the accused person's attorney. *Thorgerson*, 451-452.

Although defense counsel did not object at trial, the error may be raised for the first time on review because the prosecutor's misconduct was so pervasive as to create a manifest error affecting Mr. Kindell's right to due process and his right to a jury trial. RAP 2.5(a)(3); *Turner*, at 472; *Sheppard*, at 335. Additionally, the argument was so flagrant and ill-intentioned that an objection was unnecessary; any curative instruction would only have highlighted the offending argument. As many courts have noted, "[a] bell once rung cannot be unrung." *State v. Easter*, 130 Wn.2d 228, 230-239, 922 P.2d 1285 (1996) (internal citations omitted).

The prosecutor's misconduct robbed Mr. Kindell of his right to a jury verdict free from improper influence. *Russell at 122*; see also *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). It violated his rights to a jury trial and due process. *Id.* For these reasons, his convictions must be reversed and a new trial granted. *Id.*

IV. MR. KINDELL WAS DENIED HIS RIGHT TO A SPEEDY TRIAL UNDER CRR 3.3.

A. Standard of Review

Alleged violations of the speedy trial rule are reviewed *de novo*. *State v. Rafay*, 168 Wn. App. 734, 769, 285 P.3d 83 (2012).

The absence of a factual finding on a particular issue must be interpreted as a finding against the party with the burden of proof on that issue. *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 524, 22 P.3d 795 (2001).

B. The trial court should not have continued Mr. Kindell's trial beyond his speedy trial expiration date.

CrR 3.3 is captioned "Time for trial," and sets out the speedy trial rule for criminal cases in Washington. Under CrR 3.3(h), "[a] charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice." It is the responsibility of the court to ensure compliance with the rule. CrR 3.3(a)(1). A person who is in custody must be brought to trial within 60 days of the case's commencement date.⁸ If the time for trial expires "without a stated lawful basis for further continuances, the rule requires dismissal and the trial court loses authority to try the case." *State v. Saunders*, 153 Wn. App. 209, 220, 220 P.3d 1238 (2009).

The rule requires strict compliance, which not only ensures an accused person's right to a speedy trial, but also preserves the integrity of the judicial process. *State v. Kenyon*, 167 Wn.2d 130, 136, 216 P.3d 1024

⁸ The initial commencement date is the date of arraignment. CrR 3.3 (c)(1).

(2009). A case may be continued on motion of a party, but only if “such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense.” CrR 3.3(f)(2). When a continuance is granted, the court “must state on the record or in writing the reasons for the continuance.” CrR 3.3(f)(2).

In *Saunders*, the Court of Appeals dismissed a prosecution in part because the trial court failed to adequately inquire into the circumstances and to provide adequate reasons for continuances granted over the defendant’s personal objection. *Saunders*, at 220-221. Similarly, in *Kenyon*, the Supreme Court dismissed a case because the trial court continued a case without documenting the unavailability of judges *pro tempore* and unoccupied courtrooms. *Kenyon*, at 139.

Government mismanagement cannot justify delaying a trial beyond the expiration of speedy trial. *See, e.g., State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997); *see also State v. Brooks*, 149 Wn. App. 373, 384, 203 P.3d 397 (2009). Where mismanagement forces a continuance beyond speedy trial expiration, dismissal is appropriate. *Id.*

In this case, Mr. Kindell’s arraignment took place on July 3, 2012; therefore, his speedy trial period expired no later than September 1, 2012.⁹

⁹ The court’s scheduling orders noted “elapsed days;” these appear to be erroneous. *See* Scheduling Order filed 8/16/12 and Scheduling Order filed 8/22/12, Supp. CP.

Scheduling Order filed 7/3/12, Supp. CP. The trial date, initially scheduled for August 20, 2012, was twice reset at the prosecutor's request. Motion for Continuance filed 8/16/12, Order of Continuance filed 8/16/12, Scheduling Order filed 8/16/12, Motion for Continuance filed 8/22/12, Scheduling Order filed 8/22/12, Supp. CP. The second continuance reset the case beyond speedy trial over Mr. Kindell's objection. RP 12.

The record does not support the trial court's decision.

First, the court did not find that a continuance was "required in the administration of justice." CrR 3.3(f)(2). Nor did the court find that Mr. Kindell would not be prejudiced in the presentation of his defense. RP 1-20. The absence of these findings must be held against the prosecution. *Ellerman*, at 524. By continuing the case without making the required findings, the court failed to strictly comply with the dictates of CrR 3.3, and thus violated Mr. Kindell's right to a speedy trial. *Kenyon*, at 139.

Second, the court's written decision referred only to "good cause." Scheduling Order filed 8/22/12, Supp. CP. Good cause is not a basis for a continuance beyond speedy trial. CrR 3.3.

Third, the court failed to determine whether or not the state acted with diligence, and the record suggests that it did not. The prosecutor did not seek an order requiring Mr. Kindell to provide fingerprints until the day before the second continuance hearing—more than a month and a half

after his arraignment. RP 1-2; Motion for Authorization to Fingerprint Defendant filed 8/17/12, Supp. CP. This suggests a lack of diligence. The court made no findings on the issue, which must be held against the government. *Ellerman, at 524.*

Fourth, the court did not determine the likelihood that the fingerprint analysis would provide useable information that would be material to the prosecution or the defense. Nothing in the record shows that the test results were essential to the prosecution, and, as the record shows, the testing ultimately provided no information of value. RP 118-133.

Fifth, the court did not investigate or determine whether the assigned prosecutor's rapport with certain witnesses provided an adequate basis to violate Mr. Kindell's rights under the rule. The absence of findings on this point must also be held against the state. *Id.*

Neither the written order nor the court's oral ruling acknowledged the court's duty to ensure Mr. Kindell a speedy trial. Furthermore, the court failed to balance Mr. Kindell's right to a speedy trial against the prosecution's reasons for requesting the second continuance. RP 1-20. Given the inadequate inquiry and insufficient findings, the record does not support the court's decision to postpone the trial beyond Mr. Kindell's speedy trial expiration date. Accordingly, the convictions must be reversed

and the charges dismissed with prejudice. CrR 3.3(h); *Saunders*, at 216-217.

V. MR. KINDELL’S SENTENCE MUST BE VACATED BECAUSE THE SENTENCING JUDGE FAILED TO PROPERLY DETERMINE THE OFFENDER SCORE AND STANDARD RANGE.

A. Standard of Review

An offender score calculation is reviewed *de novo*. *State v.*

Moearn, 170 Wn.2d 169, 172, 240 P.3d 1158 (2010).

B. The state bears the burden of establishing the offender’s criminal history and offender score.

At sentencing, “[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist.” RCW 9.94A.500(1). Criminal history is defined to include all prior convictions and juvenile adjudications, and “shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration.” RCW 9.94A.030(11).

Under RCW 9.94A.525, the sentencing court is required to determine an offender score based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW

9.94A.525(1). An offender “cannot agree to a sentence in excess of that which is statutorily authorized.” *In re Cadwallader*, 155 Wn.2d 867, 874, 123 P.3d 456 (2005). In particular, an offender “cannot waive a challenge to a miscalculated offender score.” *In re Goodwin*, 146 Wn.2d 861, 873-874, 50 P.3d 618 (2002).

C. The trial court erred by including three misdemeanors (or gross misdemeanors) in Mr. Kindell’s offender score.

Except in limited circumstances not applicable here, misdemeanors and gross misdemeanors are not included in the offender score. *See* RCW 9.94A.525. In this case, the trial court apparently counted three misdemeanors (or gross misdemeanors) in Mr. Kindell’s offender score: convictions for attempted escape, possession of marijuana, and malicious mischief in the third degree. CP 14.

These convictions should not have been included in the offender score. RCW 9.94A.525. Accordingly, the sentence must be vacated and the case remanded for resentencing without the two misdemeanors.

Cadwallader, at 874.

D. The prosecution failed to prove the comparability of Mr. Kindell’s out-of-state convictions.

Out-of-state convictions are provided for in RCW 9.94A.525(3), which reads (in relevant part) as follows:

Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law... If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

RCW 9.94A.525(3). Where the state alleges a defendant's criminal history contains out-of-state convictions, the prosecution bears the burden of proving the comparability of those convictions. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). An out-of-state conviction may not be used to increase an offender score unless the state proves comparability. *Id.*

To determine whether an out-of-state conviction is comparable to a Washington offense, the court must compare the elements of the out-of-state conviction to the elements of potentially comparable Washington statutes in effect when the foreign crime was committed. *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). "If the elements are not identical or if the Washington statute defines the offense more narrowly than does the foreign statute, it may be necessary to look into the record of the out-of-state conviction to determine whether the defendant's conduct would have violated the comparable Washington offense." *Ford*, at 479 (citing *Morley*, at 606).

In this case, Mr. Kindell agreed that he had eight Colorado convictions, but the prosecution made no effort to establish comparability. *See* RP 329-340. At least two of the Colorado convictions were for offenses that would not have been felonies in Washington, judging from their titles.¹⁰

The prosecutor's failure to prove comparability requires reversal of Mr. Kindell's sentence. The case must be remanded for a new sentencing hearing. *Cadwallader, at 878.*

¹⁰ These are "Escape—attempt from felony pending," and "Possession of a controlled substance—Marijuana 1-8 oz – Misd." CP 14.

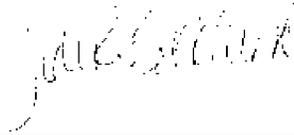
CONCLUSION

For the foregoing reasons, Mr. Kindell's convictions must be reversed and the charges dismissed with prejudice. In the alternative, the case must be remanded for a new trial.

If the convictions are not reversed, the sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on April 16, 2013,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Arvell Kindell, DOC #362028
Airway Heights Corrections Center
PO Box 1899
Airway Heights, WA 99001

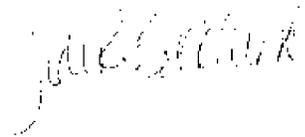
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
prosecutor@clark.wa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 16, 2013.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

April 16, 2013 - 10:02 AM

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