

NO. 45698-2-II

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

STATE OF WASHINGTON,

Appellant,

v.

BRENDA VASSAR
Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Nelson Hunt, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR.....	1
Issues Presented on Appeal.....	1
B. STATEMENT OF THE CASE	2
a. Trial Facts.....	2
b. Prosecutor Cross Examination.....	3
c. Prosecutor "Mistaken" Closing Argument.....	4
d. Prosecutor Argues Facts Not in Evidence Closing Argument and Opinion.....	4
e. Burden Shifting Argument.....	5
C. ARGUMENT	6
THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT BY: SHIFTING THE BURDEN OF PROOF TO THE DEFENSE: BY ARGUING FACTS NOT IN EVIDENCE: BY ARGUING THAT THE JURY COULD ACQUIT IF THE JURY BELIEVED THAT THE STATE'S WITNESSES WERE "MISTAKEN"; BY USING THE PRESTIGE OF THE PROSECUTOR'S OFFICE TO LEND CREDIBILITY TO THE STATE'S WITNESSES AND BY ASKING THE DEFENDANT DURING CROSS EXAMINATION IF THE POLICE WERE LIARS.	
a. Cross Examination.....	7

b. Prosecutor misstated the law and shifted the burden of proof.....12

 i. Shifting Burden of Proof.....13

c. Prosecutor Argued facts not in Evidence And Used Prestige of Office to Sway Jury.....16

d. Reversible Not Harmless Error.....20

e. Cumulative Error.....21

D. CONCLUSION24

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<i>State v. Belgarde</i> , 110 Wn.2d 504, 755 P.2d 174 (1988).....	7
<i>State v. Brett</i> , 126 Wn.2d 136, 179, 892 P.2d 29 (1995)	7
<i>State v. Casteneda–Perez</i> . 61 Wn.App. 354, 366, 810 P.2d 74 (1991), <i>review denied</i> 118 Wn.2d 1007 (1991).....	6, 11
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 578, 79 P.3d 432 (2003).....	7
<i>State v. Davenport</i> , 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).....	6
<i>State v. Finch</i> , 137 Wn.2d 792, 843, 975 P.2d 967 (1999).....	6
<i>State v. Fleming</i> , 83 Wn.App. 209, 213-14, 921 P.2d 1076 (1996), <i>review denied</i> , 131 Wn.2d 1018 (1997), <i>In re Winship</i> , 397 U.S. 358, 361-362, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970).....	11-16

TABLE OF AUTHORITIES –Cont’d

	Page
<i>State v. Glassman</i> 175 Wn.2d 969, 286, P.3d 673 (2012)	16-21
<i>State v. Huson,</i> 73 Wn.2d 660, 663, 440 P.2d 192 (1968).....	7
<i>State v. Ish,</i> 170 Wn.2d 189, 195, 241 P.3d 389 (2010).....	7
<i>State v. Padilla,</i> 69 Wn.App. 295, 299, 846 P.2d 564 (1993).....	8, 10, 12
<i>State v. Pete,</i> 152 Wn.2d. 546, 553-55, 98P.3d 803 (2004).....	17, 18, 20
<i>State v. Rinkes,</i> 70 Wn.2d at 855, 425 P.2d 658.....	17-20
<i>State v. Russell,</i> 125 Wn.2d 24, 86, 882 P.2d 747 (1994).....	7
<i>State v. Suarez-Bravo,</i> 72 Wn.App. 359, 366, 864 P.2d. 426 (1994).....	8-10, 12
<i>State v. Thorgerson,</i> 172 Wn.2d 438, 448, 258 P.3d 43 (2011).....	6, 7

TABLE OF AUTHORITIES –Cont’d

	Page
<i>State v. Venegas</i> , 155 Wn.App. 507, 523, 228 P.3d 813 <i>review denied</i> , 170 Wn.2d 1003, 245 P.3d 226 (2010) ,.....	21-24
<i>State v. Walker</i> , 164 Wn.App. 724, 265, P,3d 191 (2011)	22-24
<i>State v. Wright</i> , 76 Wn.App. 811, 821, 888 P.2d 1214 (1995) <i>review denied</i> , 127, Wn.2d 1010 (1995).....	11, 12

FEDERAL CASES

<i>Estelle v. Williams</i> , 425 U.S. 501, 96 S.Ct. 1691_48 L.Ed.2d 126 (1976).....	8
<i>Winship</i> , 397 U.S. 358, 361-362, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	14-16

A. ASSIGNMENTS OF ERROR

1. The prosecutor committed prejudicial misconduct by shifting the burden of proof to the defense.

2. The prosecutor committed prejudicial misconduct by arguing that to acquit, the jury had to believe that all of the state's witnesses were "mistaken."

3. The prosecutor committed prejudicial misconduct by asking the defendant during cross-examination if the police were lying.

4. The prosecutor committed prejudicial misconduct by arguing facts not in evidence.

5. The prosecutor committed prejudicial misconduct using the prestige of his office to bolster the credibility of the state's witnesses.

Issues Presented on Appeal

1. Did the prosecutor commit prejudicial misconduct by shifting the burden of proof to the defense?

2. Did the prosecutor commit prejudicial misconduct by arguing that to acquit, the jury had to believe that all of the state's witnesses were "mistaken?"

3. Did the prosecutor committed prejudicial misconduct by

asking the defendant during cross-examination if the police were lying?

4. Did the prosecutor commit prejudicial misconduct by arguing facts not in evidence?

5. Did the prosecutor commit prejudicial misconduct by using the prestige of his office to bolster the credibility of the state's witnesses?

B. STATEMENT OF THE CASE

a. Trial Facts

Brenda Vassar was charged with theft of a motor vehicle by repossessing a truck she sold to an acquaintance for whom she never provided the title. RP 23-27. The acquaintance, Charlene Hammons, purchased the truck for \$500 dollars. RP 23. While Ms. Hammons had possession of the truck but not the title, she and her husband decided to sell the truck to Terry Bell. RP 45. When Ms. Vassar saw Mr. Bell driving her truck she became concerned that she would be responsible for the truck if Mr. Bell had an accident so she took the truck back without informing Mr. Bell or Ms. Hammons. RP 63, 84-86. 113. Ms. Vassar stated that she was not paid for the truck and that the bill of sale was a forgery. RP64, 84, 96, 104, 105.

When officer Lowrey called Ms. Vassar to talk to her about the truck, Ms. Vassar indicated that the bill of sale was a forgery and that she had not been paid for it. RP 64, 67. When Ms. Vassar did not return the truck, Officer Lowrey informed Ms. Vassar that she would be arrested if she did not return the truck. RP 69. Ms. Vassar told Officer Lowrey that the truck was parked in front of Goodwill and voluntarily turned herself into jail. RP 68, 73, 74.

b. Prosecutor Cross Examination

During cross examination the prosecutor asked Vassar if she testified that officer Lowrey told everyone that there was a warrant out for her arrest. Vassar answered “yes.” RP 101. After the prosecutor informed Vassar that Lowrey did not actually have a warrant, he asked if Lowrey had probable cause. Vassar answered, “It was a lie, is what it was.” RP 101-102.

Q. You’re calling this officer here a liar; is that what you are saying?

A. Yes, I am.

Q. So the officer is not telling the truth, correct?

A. That’s correct.

Q. Charlene Hammons, she’s not telling the truth, right?

A. That's correct.

Q. The only person in this courtroom we should trust is you, right?

A. I believe so.

RP 102.

c. Prosecutor "Mistaken" Closing Argument

The prosecutor argued that Hammons had no reason make up her story. RP 141.

Brenda claims everybody is mistaken but her. Officer Lowrey got it wrong. Dispatch, you know, people trained to take messages on a computer when they come in, never got her phone call.

RP 141.

So dispatch is mistaken. Charlene is mistaken, because I guess there was no bill of sale, there was no money transferred, so Charlene is mistaken. Lowrey is mistaken. Mercer is mistaken. Everybody is mistaken but her. Does that make sense to you? The state submits it does not. What's going on here is the only person that has something at stake in this whole thing is making all this up because she's caught now. She has to work her way out of it.

RP 142.

d. Prosecutor Argues Facts Not in Evidence Closing Argument and

Opinion.

The prosecutor argued to the jury that Hammons was a bonded repossession agent, a fact that was never introduced into evidence. The prosecutor argued that Hammons “has to be bonded if you’re going to be a repo person. Is she going to risk her bond on this old truck?” RP 146.

e. Burden Shifting Argument

The prosecutor argued to the jury:

[t]here’s no proof that she [Hammons] forged the bill of sale.” Now, Brenda is telling you this stuff, but she didn’t back it up with anything. Her story is that, well, gee, you know, this bill of sale was created by photocopying the registration on top of that. How easy would it have been for her to take the registration down to the police department and show the, them [sic] that, line it up? What would you have done if you had been in Brenda’s shoes? The state submits that each one of us would have—if a police officer is accusing me of stealing a car and they think I forged it, I’d have gone down there with the documentation and said, “You match those signatures up and go arrest her. Brenda didn’t do that

RP 146-147.

C. ARGUMENT

THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT BY: SHIFTING THE BURDEN OF PROOF TO THE DEFENSE: BY ARGUING FACTS NOT IN EVIDENCE: BY ARGUING THAT THE JURY COULD ACQUIT IF THE JURY BELIEVED THAT THE STATE'S WITNESSES WERE "MISTAKEN"; BY USING THE PRESTIGE OF THE PROSECUTOR'S OFFICE TO LEND CREDIBILITY TO THE STATE'S WITNESSES AND BY ASKING THE DEFENDANT DURING CROSS EXAMINATION IF THE POLICE WERE LIARS.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011), a prosecutor must "seek convictions based only on probative evidence and sound reason," *State v. Casteneda*–

Perez, 61 Wn.App. 354, 363, 810 P.2d 74, *review denied*, 118 Wn.2d 1007 (1991); *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). “The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.” American Bar Association, Standards for Criminal Justice std. 3–5.8(c) (2d ed. 1980); *State v. Brett*, 126 Wn.2d 136, 179, 892 P.2d 29 (1995); *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988).

To prevail on a claim of prosecutorial misconduct the standard of review requires a defendant must show the prosecutor's conduct was both improper and prejudicial. *Thorgerson*, 172 Wn.2d at 442. To show prejudice requires that the defendant show a substantial likelihood that the misconduct affected the jury verdict. *Id.*; *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010); *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Because the defense failed to object to improper argument during trial, Vassar must also establish that the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *Thorgerson*, 172 Wn.2d at 443; *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

a. Cross Examination

A prosecuting attorney commits misconduct when his cross-examination seeks to compel a witness to opine whether another witness is telling the truth. *State v. Suarez-Bravo*, 72 Wn.App. 359, 366, 864 P.2d 426 (1994); *State v. Padilla*, 69 Wn.App. 295, 299, 846 P.2d 564 (1999)

In *Suarez-Bravo*, the prosecutor attempted to get the defendant to call the police witness liars and misrepresented the testimony of those witnesses to create non-existent conflict. *Suarez-Bravo*, 72 Wn.App. at 366. The Court citing to *Padilla*, stated the factors for determining whether the misconduct was prejudicial:

Some of the factors considered in determining whether the misconduct likely affected the verdict are whether the prosecutor was able to provoke the defense witness to say that the State's witness must be lying, whether the State's witness's testimony was believable and/or corroborated, and whether the defense witness's testimony was believable and/or corroborated.

Suarez-Bravo at 366-367 (quoting, *Padilla*, 69 Wn.App. at 301). The court reversed finding that the prosecutor's questions about the defendant's neighborhood, his status as a Hispanic non-citizen along with the prosecutor's attempts to get Suarez-Bravo to call the police liars, was prejudicial. The Court held that even without an objection, the misconduct was so flagrant and ill-intentioned that a curative

instruction could not have obviated the resulting prejudice. *Suarez-Bravo*, 72 Wn.App. at 367-368.

Here, the prosecutor committed many types of misconduct in an attempt to undermine Ms. Vassar's due process right to a fair trial. The prosecutor successfully provoked Ms. Vassar into calling all of the state's witnesses liars, mistaken and not truthful. RP 101-102. There was a single piece of corroborating evidence to support Ms. Hammons that Ms.; Vassar challenged as a forgery: this was a credibility contest case. During cross-examination just as in *Suarez-Bravo*, the prosecutor pursued a line of irrelevant questioning about probable cause for a warrant to challenge Vassar's credibility. Once the prosecutor got Vassar to call the police liars, he persisted:

Q. You're calling this officer here a liar; is that what you are saying?

A. Yes, I am.

Q. So the officer is not telling the truth, correct?

A. That's correct.

Q. Charlene Hammons, she's not telling the truth, right?

A. That's correct.

Q. The only person in this courtroom we should trust is

you, right?

A. I believe so.

RP 102. The entire line of questioning based on probable cause for an irrelevant warrant, followed by getting Vassar to call the police liars, is analogous to the irrelevant and prejudicial questions in *Suarez-Bravo*; and rises to the level of flagrant misconduct because it served no other purpose than to get the jury to discredit Ms. Vassar.

Similarly in *Padilla*, the prosecutor repeatedly asked Padilla if the police were lying. *Padilla*, 69 Wn.App. at 299. The prosecutor on appeal agreed that this was misconduct. *Id.* In *Padilla* the defense preserved the error for appeal, thus the Court considered whether there was a substantial likelihood the misconduct affected the verdict. *Padilla*, 69 Wn.App. at 301. In reversing the Court focused on the fact that the prosecutor was able to provoke Padilla to testify that the police was liars. *Id.*

The instant case is indistinguishable on this point because the here the prosecutor provoked Ms. Vassar into calling the police liars. In addition and above and beyond the misconduct the prosecutor also provoked Ms. Vassar into stating that Ms. Hammons was not telling the truth and only Ms. Vassar should be believed. RP 101-102.

Because the misconduct was not isolated, but rather repeated and contrary to the 1991 publication of *Casteneda-Perez*, which condemned this practice. In *Fleming*, the Court held that the misconduct must be considered flagrant and ill-intentioned since published case law condemned the practice. *Fleming*, 83 Wn.App. at 214. Ms. Vassar's defense in her case was based on a contest of credibility where the prosecutor's comments damaged Ms. Vassar's credibility beyond repair.

Later, Division One in *State v. Wright*, 76 Wn.App. 811, 821, 888 P.2d 1214 (1995), *review denied*, 127 Wn.2d 1010 (1995) agreed that a prosecutor asking a defendant to comment on the credibility of another witness was improper because "it places irrelevant information before the jury"

and potentially prejudices the defendant. To the extent they do in fact prejudice the defendant, we agree that such questions are misleading and unfair. What one witness thinks of the credibility of another witness' testimony is simply irrelevant. In addition, requiring a defendant to say that other witnesses are lying is prejudicial because it puts the defendant in a bad light before the jury.

Wright, 76 Wn.App. at 821-822. The Court in *Wright* did not believe that questions during cross examination about the officers "got it wrong", were as damaging as questions about lying. *Id.* The Court in

Wright did not reverse for prosecutorial misconduct because counsel failed to object. *Wright*, 76 Wn.App. at 823.

Here the prosecutor did not get Ms. Vassar to simply state the officer “got it wrong,” but he also hammered Ms. Vassar by asking repeatedly if she was calling Lowrey and Hammons liars and mistaken. RP 102. This type of questioning was prejudicial because it: cast Ms. Vassar in a bad light; was irrelevant; invaded the jury’s province; and was unfairly misleading. Reversal is required under both *Suarez-Bravo* and *Padilla*.

b. Prosecutor Misstated the Law and Shifted the Burden of Proof.

The prosecutor here argued to the jury that “Hammons had no reason to make up her story” that the police and dispatch are trained and do not get anything wrong, that to believe Ms. Vassar, the jury would need to believe that everybody else was “mistaken.” RP 141-142. This in essence informed the jury that to acquit they must find that the State’s witnesses are lying or mistaken. This was a misstatement of law and reversible error. *Fleming*, 83 Wn.App. at 213-214.

In *Fleming*, the prosecutor argued that to acquit the defendant

it had to find that the victim was lying. *Fleming*, 83 Wn.App at 213. The Court held this argument misstated the law and impermissibly shifted the burden of proof to the defense rather than the correct burden, which required acquittal if the jury did not have an abiding belief that the state proved all of the elements of the crime charged. *Fleming*. 83 Wn.App. at 214.

The argument here like the argument in *Fleming* essentially informed the jury that Ms. Vassar was not truthful and to acquit, the jury had to find that all of the state's witnesses were liars or mistaken. This misconduct misstated the law and implicitly misrepresented both the role of the jury and the burden of proof. The jury would not have had to find that Ms. Hammons, the police and dispatch were mistaken or lying in order to acquit; instead, the jury was *required* to acquit *unless* it had an abiding conviction in the truth of these witnesses' testimony. *Fleming*, 83 Wnn.App. at 214.

i. Shifting Burden of Proof

The misconduct did not end with cross-examination or arguing that to acquit the jury had to find the state's witnesses to be lying or mistaken. A prosecutor commits misconduct by misstating the law regarding the burden of proof. *State v. Fleming*, 83 Wn.App. 209, 213-

14, 921 P.2d 1076 (1996), *review denied*, 131 Wn.2d 1018 (1997); *In re Winship*, 397 U.S. 358, 361-362, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A prosecutor commits misconduct by implying the defense bears the burden to present evidence of innocence. *Fleming*, 83 Wn.App. at 213-214.

In *Fleming*, the prosecutor argued that to acquit the defendant it had to find that the victim was lying. *Fleming*, 83 Wn.App at 213. The Court held this argument misstated the law and impermissibly shifted the burden of proof to the defense rather than the correct burden, which required acquittal if the jury did not have an abiding belief that the state proved all of the elements of the crime charged. *Id.*

The prosecutor also argued that if there was any evidence that the victim lied, the defense would have presented it and because the defense did not argue the victim lied, there was no proof that she lied, implying that the defendant had failed to prove his innocence. *Fleming*, 83 Wn.App at 214. "Misstating the basis on which a jury can acquit may insidiously lead, as it did here, to burden shifting". *Fleming*, 83 Wn.App. at 214.

Here as in *Fleming*, the prosecutor shifted the burden of proof by arguing that the defense bore the burden of proving reasonable doubt when it argued:

[t]here's no proof that she [Hammons] forged the bill of sale." Now, Brenda is telling you this stuff, but she didn't back it up with anything. Her story is that, well, gee, you know, this bill of sale was created by photocopying the registration on top of that. How easy would it have been for her to take the registration down to the police department and show the, them [sic] that, line it up? What would you have done if you had been in Brenda's shoes? The state submits that each one of us would have—if a police officer is accusing me of stealing a car and they think I forged it, I'd have gone down there with the documentation and said, "You match those signatures up and go arrest her. Brenda didn't do that

RP 146-147.

This argument that Vassar did nothing to prove her innocence: "she didn't back it up" "how easy would it have been" "Brenda didn't do that" impermissibly shifted the burden to the defense in the same manner held impermissible in *Fleming*.

This argument misstated the basis for acquittal and "insidiously" shifted the burden of proof to Ms. Vassar by arguing that Ms. Vassar failed to establish her innocence. *Id*; *Fleming*, 83 Wn.App. at 214. This argument is the same as the improper argument in

Fleming where the prosecutor told the jury that if there was reasonable doubt, the defense would have established it, implying that the defense failure to prove reasonable doubt was a basis for conviction. *Fleming*, 83 Wn.App. at 214. This burden shifting is contrary to the due process requirement that the state, not the defense prove each essential element of the crime charged. *Winship*, 397 U.S. at 361-362.

Here as in *Fleming*, although defense did not object to the misconduct, it rose to the level of constitutional error and was sufficient to find reversible error because it relieved the state of its burden of proof. *Fleming*, 83 Wn.App. at 214.

c. Prosecutor Argued Facts Not In Evidence
And Used Prestige of Office To Sway Jury

The misconduct here was not limited to shifting the burden of proof; and arguing that to acquit, the jury had to find that the state's witnesses lied. The misconduct also included arguing prejudicial facts not in evidence.

Recently, the state Supreme Court in *State v. Glassman*, 175 Wn.2d 969, 286 P.3d 673 (2012), "unequivocally denounced" a prosecutor submitting evidence to the jury that has not been admitted

at trial. *Glassman*, 175 Wn.2d at 704-705 (citing *State v. Pete*, 152 Wn.2d 546, 553–55, 98 P.3d 803 (2004)).

The “long-standing rule” is that “consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.’” *Id.* at 555 n. 4, 98 P.3d 803 (quoting *State v. Rinkes*, 70 Wash.2d 854, 862, 425 P.2d 658 (1967) (emphasis omitted)); see also, e.g., *State v. Boggs*, 33 Wash.2d 921, 207 P.2d 743 (1949), *overruled on other grounds* by *State v. Parr*, 93 Wash.2d 95, 606 P.2d 263 (1980).

Glassman, 175 Wn.2d at 705. In *State v. Pete*, 152 Wn.2d 546, 98 P.3d 803 (2004), the Supreme Court explained evidence that is “outside all the evidence admitted at trial, either orally or by document[]’..... is improper because it is not subject to objection, cross examination, explanation or rebuttal.” *Pete*, 152 Wn.2d at 552-553 (emphasis in original) (citations omitted).

In *Glassman*, the prosecutor altered admitted evidence to influence the jury to find the defendant guilty. *Id.* Specifically, the prosecutor put captions under a bloody, disheveled photographic image of Glassman that challenged his veracity. The Court held that “the prosecutor’s modification of photographs by adding captions was the equivalent of unadmitted evidence. There certainly was no photograph in evidence that asked [for example] ‘DO YOU BELIEVE

HIM?” *Glassman*, 175 Wn.2d at 706.

The Court held that altering evidence was prejudicial in the same manner as the admission of facts not in evidence because both involved the improper use of the “prestige associated with the prosecutor’s office [] [and] because of the fact-finding facilities presumably available to the office.” *Glassman*, 175 Wn.2d at 706.

In *Pete*, the prosecutor inadvertently sent to the jury Pete’s written signed statement and a police report. *Pete*, 152 Wn.2d at 553. The report and statement were inculpatory; the police report indicated that Pete was involved in the beating; and Pete’s written statement indicated that he took property from the victim. *Pete*, 152 Wn.2d at 554. The Court reversed holding that the introduction of these two documents was prejudicial because one indicated that Pete took property which was inculpatory and the other contradicted his defense which “seriously undermined” his general denial defense by *Pete*, 152 Wn.2d at 554-555.

In *State v. Rinkes*, 70 Wn.2d at 855, 425 P.2d 658, the prosecutor inadvertently sent a newspaper editorial and cartoon highly critical of “lenient court decisions and liberal probation policies”. *Rinkes*, 70 Wn.2d at 862-863. Although inadvertent, the court held

that the material was “very likely indeed” to be prejudicial and assumed that “the requisite balance of impartiality was upset” because the material was “clearly intended to influence the readers” and “may well have evoked” “the necessity for being stricter and less careful about observing legal principles and procedure in dealing with defendants accused of crime.” *Rinkes*, 70 Wn.2d at 862–63.

Here, the introduction of facts not in evidence was not inadvertent, rather it was deliberate. The prosecutor argued to the jury that Hammons was a bonded repossession agent- a fact not in evidence. The prosecutor used this non-evidence to bolster Hammons credibility. First he argued that Hammons was bonded, and then argued that Hammons “has to be bonded if you’re going to be a repo person. Is she going to risk her bond on this old truck.” RP 146.

The prosecutor argued facts not in evidence and used his position of authority, the “prestige” of his office to tell the jury that because Hammons was “bonded”, an official state licensing title, she was credible and Vassar not credible. This combined argument of facts not in evidence and misuse of the prestige of prosecutor’s office was prejudicial because not only was it designed to influence the jury into believing Hammons was more credible “it very likely indeed”

prejudiced Vassar because it tilted “the requisite balance of impartiality”. *Rinkes*, 70 Wn.App. at 863. The arguments here are in many respects more egregious than those found prejudicial in *Pete* and *Rinkes*, and more akin to those in *Glassman*, not only because they were intentional but also because they directly rather than tacitly informed the jury that Hammons was credible. Here the balance was destroyed creating a substantial likelihood that this misconduct affected the jury verdict. *Id.*

Glassman like *Pete* and *Rinkes* supports reversal because the impact of the prosecutor’s improper use of the prestige of his office to argue facts not in evidence destroyed the balance required for a fair trial.

d. Reversible Not Harmless Error

Pete, *Rinkes*, and *Glassman*, condemn the use of facts not in evidence to sway a jury into finding a state’s witness more credible than the defendant. In *Glassman*, despite a lack of objection from trial counsel, the Court held such misconduct to be so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *Glassman*, 175 Wn.2d at 707.

Vassar’s case was based on the credibility of Vassar and

Hammons. Once the prosecutor tipped the balance of impartiality and swayed it toward Hammons and against Vassar, there was no possible way to undo this damage. Here as in *Glassman*, despite a lack of objection from trial counsel, the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *Glassman*, 175 Wn.2d at 707. For this reason, this Court should reverse the conviction and remand for a new trial.

e. Cumulative Error

Cumulative error is another basis for reversal in this case. *State v. Venegas*, 155 Wn.App. 507, 523, 228 P.3d 813, *review denied*, 170 Wn.2d 1003, 245 P.3d 226 (2010). Here the cumulative effect of multiple and varied instances of prosecutorial misconduct denied Ms. Vassar her right to a fair trial. The misconduct consisted of: (1) improper cross-examination provoking Ms. Vassar to call the other witnesses liars or mistaken; (2) abusing the prestige of the prosecutor's office to sway the jury by bolstering the credibility of the state's witnesses; (3) arguing facts not in evidence; (and 4) misstating the law and shifting the burden of proof to the defense.

The cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of

instructions can erase their combined prejudicial effect. *Venegas*, 155 Wn.App. at 523.

The Court in *Venegas*, a credibility contest case like the instant case, held the cumulative effect of the prosecutor's improper comments on Venegas's presumption of innocence, excessive discovery sanctions that prevented the defense from challenging the credibility of the victim's testimony and improperly admitted evidence warranted reversal of Venegas's convictions under the cumulative error doctrine. *Venegas*, 155 Wn.App. at 526–27.

Similarly *State v. Walker*, 164 Wn.App. 724, 265 P.3d 191 (2011), is another credibility contest case in which the prosecutor's improper arguments could easily serve as the deciding factor. The disputed facts in *Walker* included whether Walker was the lone gunman; whether he fired into a crowd of people or just at Key and Tavarrus; whether Walker fired before or after Key and Tavarrus began to fight; the level of harm Tavarrus faced; and, whether Walker was the first aggressor.

In addition to these disputed facts, the prosecutor repeatedly made improper comments to develop themes throughout closing argument, such as the repeated references to the jury's duty to

declare the truth and that the jury would not have done it too. These statements were only further emphasized by the prosecutor's PowerPoint slides. The Court reversed holding that there was a substantial likelihood that the prosecutor's mischaracterization and minimization of the reasonable doubt standard, improper argument that the jury declare the truth, and misstatement of the defense of others standard affected the jury's verdict, and that further instructions would not have cured the effect of the prosecutor's comments. *State v. Walker*, 164 Wn.App. at 739-740

Ms. Vassar's case was a credibility contest like *Vengas* and *Walker* where the prosecutors impermissibly tipped the balance by making multiple repeated improper arguments that the state's witnesses were credible rather than the defendants; by arguing the wrong burden of proof and presumption of innocence; and by arguing facts not in evidence.

The Court found reversible error in *Venegas* where the prosecutor mischaracterized and minimization of the reasonable doubt standard; improperly argued that the jury declare the truth; argued facts not in evidence to bolster the credibility of the state's witnesses; and misstated the defense of others standard.

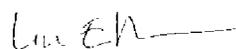
Here as in *Venegas* and *Walker*, the prosecutor did not commit just once type of misconduct but rather committed multiple instances of misconduct, such as: (1) improper cross examination designed to provoke Ms. Vassar in stating that both the police and complainant were liars; (2) arguing that to believe Ms. Vassar would have to believe that dispatch, the police and Ms. Hammons were “mistaken”; (3) arguing that Ms. Vassar did nothing to prove her innocence; (4) and using the prestige of the prosecutor’s office to argue facts not in evidence. RP102, 141-142, 146-147. While some of the misconduct in this case is different than in *Venegas*, under the cumulative error doctrine, it is inescapable that the prosecutor ultimately tipped the balance of fairness beyond repair, which denied Ms. Vassar her right to a fair trial. The remedy is remand for a new trial. *Walker*, 164 Wn. App. at 739; *Venegas*.

D. CONCLUSION

Brenda Vassar respectfully requests this Court reverse her conviction for ineffective assistance of counsel and remand for a new trial.

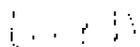
DATED this 28th day of April 2014.

Respectfully submitted,



LISE ELLNER
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Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Lewis County prosecutor's appeals@lewiscountywa.gov and Brenda Vassar 210 SW 13th St Apt #3 Chehalis, WA 98532 a true copy of the document to which this certificate is affixed, on April 28 2014. Service was made to Ms. Vassar by depositing in the mails of the United States of America, properly stamped and addressed and electronically to the prosecutor.



Signature

ELLNER LAW OFFICE

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