

NO. 47161-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROSS CRANOR,

Appellant.

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

The Honorable Amber L. Finlay, Judge
The Honorable Toni Sheldon, Judge

BRIEF OF APPELLANT

JENNIFER WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the appellant's motion to sever bail jumping charges from the underlying charges.

2. The appellant was denied the effective assistance of counsel when his attorney failed to renew the motion to sever those charges.

3. Prosecutorial misconduct in closing argument denied the appellant a fair trial.

4. The appellant was denied the effective assistance of counsel when his attorney failed to object to the State's misconduct.

Issues Pertaining to Assignments of Error

1. The appellant was charged with second degree burglary and possession of stolen property. The State added two counts of bail jumping for failing to appear in court at hearings on the first two charges. Defense counsel moved to sever on the grounds that the appellant planned to present a defense he was incarcerated in a neighboring county during the missed hearings. Counsel also notified the court that, in his experience, jurors harbor animosity toward individuals accused of bail-jumping, a fact borne out by the comments of individual jurors during jury selection in this case.

The trial court denied the motion. Inexplicably, counsel did not renew the motion to sever during trial before or at the close of the

evidence, as is required to preserve the objection. CrR 4.4(a)(2). Where the bail jumping charges, and the only defense available to the appellant on those charges, encouraged the jury to improperly infer that the appellant had a criminal disposition, was defense counsel ineffective for failing to renew the motion to sever, and did counsel's ineffectiveness prejudice the appellant as to all charges?

2. The prosecutor argued in rebuttal that there was no evidence the appellant was in jail in a neighboring county when he failed to appear for court in Mason County. But the State had itself introduced exhibits, admitted at trial, providing just such evidence. Where the prosecutor misstated the evidence, and where such misconduct was both flagrant and prejudicial, did the prosecutor's misconduct deny the appellant a fair trial on the bail jumping charges?

3. Was defense counsel ineffective for failing to object to the misstatement of the evidence in rebuttal argument?

B. STATEMENT OF THE CASE¹

1. Charges, motion to sever, and verdicts

The State charged Ross Cranor with second degree burglary, first degree possession of stolen property, and two counts of bail jumping.² The bail jumping incidents were alleged to have occurred on July 22, 2013 and May 27, 2014. CP 64-68. The State moved to add those charges on the eve of Cranor's November 2014 trial. Supp. RP 2.

Cranor's counsel moved to sever the bail jumping charges on three separate occasions before the presentation of evidence began. The first time, on November 5, after the State moved to amend the information to add the bail jumping charges, Cranor argued the charges should be severed because (based on discussions with jurors in previous cases) bail jumping,

¹ This brief refers to the verbatim reports as follows: 1RP – 11/6/14, 11/7/14, and 11/12/14; 2RP – 11/12/14, 11/13/14, 12/15/14 and 1/5/15; and Supp. RP – 11/5/15 pre-trial hearing and 11/6/14 and 11/7/14 voir dire.

² Under RCW 9A.76.170(1), “[a]ny person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state . . . and who fails to appear . . . as required is guilty of bail jumping.” The elements of bail jumping are satisfied if the accused (1) was held for, charged with, or convicted of a particular crime; (2) had knowledge of the requirement of a subsequent personal appearance; and (3) failed to appear as required. State v. Downing, 122 Wn. App. 185, 192, 93 P.3d 900 (2004). “[T]he knowledge requirement is met when the State proves that the defendant has been given notice of the required court dates.” State v. Fredrick, 123 Wn. App. 347, 353, 97 P.3d 47 (2004).

by its nature, is almost always prejudicial as to any underlying charges. Supp. RP 3-8. The State argued against severance, pointing out the jury would be instructed to consider each of the charges separately, and jurors were presumed to follow courts' instructions. Supp. RP 5-6.

The court denied the motion, stating only that the prejudice to Cranor did not overcome the court's interest in efficiency in trying the charges together. Supp. RP 3-8.

The following day, November 6, counsel moved again to sever the charges. He argued that, based on his recent review of the State's discovery materials, it appeared Cranor had been unable to appear in court on the dates in question because he was then in custody in Kitsap County. To defend the bail jumping charge,³ therefore, Cranor would have to reveal he was in custody at the time. Thus, joinder of the bail jumping charges was fraught with even more prejudice than in the typical case. 1RP 2-6. The court denied the motion without further explanation. 1RP 5.

³ RCW 9A.76.170(2) provides an affirmative defense to a charge of bail jumping as follows:

It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

Under RCW 9A.76.010(4), moreover,

“[u]ncontrollable circumstances’ means an act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of a human being such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.”

See also CP 59 (Instruction 28).

The next day, November 7, after a day's voir dire, defense counsel renewed the motion to sever. 1RP 22-23. The previous day, during individual questioning, various jurors had expressed strong negative feelings toward any individual accused of bail jumping. 1RP 22; Supp. RP 32-33, 36-41, 54-66. Such sentiments were consistent with counsel's conversations with jurors in other cases in which bail jumping charges were joined. 1RP 22-23. The court acknowledged the potential jurors interviewed the previous day had been "very opinionated." But the court denied the motion, "not having heard counsel's portion of the voir dire." 1RP 27.

During the general voir dire that followed, a number of jurors expressed—in the presence of the panel—disdain for any defendant who has been accused of bail jumping. Supp. RP 131-35. Only one of six who spoke on the matter indicated bail jumping charges would not influence that juror's decision-making on the underlying charges. Supp. RP 130.

Counsel did not renew the motion to sever after that portion of voir dire or after the jury was selected. 1RP 38-44. Counsel likewise failed to renew the motion during trial, either at the close of all the evidence or before. 1RP 173-74.

A jury convicted Cranor as charged. CP 81-85. The court sentenced Cranor to concurrent sentences totaling 68 months of

confinement, reflecting the high end of the standard range. CP 9; 2RP 232. Cranor timely appeals. CP 2-3

2. Trial testimony and closing argument

The morning of October 4, 2012, Mason County resident Marilyn Campbell looked out her window and saw a man on her private beach, located across the road from her residence. 1RP 46. Campbell alerted her husband, Scott. 1RP 46-47. Scott went out onto the porch and yelled, “[c]an I help you?” 1RP 74.

Approaching the house, the man asked to use the phone. He explained he had been fishing when his boat motor’s propeller broke. 1RP 47-48, 74. The man dialed a number but did not talk to anyone or leave a message. 1RP 75.

After using the phone, the man returned to the waterfront portion of the Campbells’ property. Marilyn soon observed the man dropping items from her dock onto the beach below. 1RP 53. Scott saw the man appear to place a black bag in a boat. Scott could not, however, see the boat from his vantage point. 1RP 76. Marilyn later saw the man row away in a boat. 1RP 53. Suspicious, the Campbells called the police, and Scott followed the boat by walking along the shore. 1RP 54, 77.

Meanwhile, Marilyn noticed that items in the Campbells’ beach cabana had been disturbed. A barbecue grill had been moved from the

wall to the center of the structure. 1RP 54, 69. The grill cover was missing and there was no propane left in the tank. 1RP 54-55; 1RP 88. Marilyn testified the grill was not in that condition the previous day. 1RP 63-64. Marilyn also noticed an ax and wood had been placed near the beach fire pit, as if someone had attempted to started a fire. 1RP 54, 62, 67; see also 1RP 88-90 (Scott's testimony regarding condition of fire pit).

Scott continued to follow the boat along the shore. When the boat drew even with a property parcel adjacent to a public boat ramp, he lost sight of the boat behind a fence. He entered the wooded property to investigate and heard rustling. 1RP 77.

The man who had been on the beach earlier came out from behind a fence carrying three large black bags. Scott followed the man through the boat ramp parking lot, but the man pointed at a sign and told Scott not to follow him past the sign. Scott complied. The man walked up a hill and disappeared. 1RP 78.

Meanwhile, a sheriff's deputy arrived at the Campbell's property. 1RP 78. Scott beckoned the deputy the boat ramp area, where Scott had found a boat pulled up on the shore. 1RP 78, 82. The Campbells' barbecue cover was in the boat. 1RP 80, 88. Scott also saw a number of other items in and near the boat, including a mantle clock, a 12-volt

battery, a Makita drill, a Hewlett-Packard printer, and other items. 1RP 83-85, 127.

Deputies unsuccessfully searched the area where the man was last seen. 1RP 126. Each Campbell later selected Cranor from a photomontage as the man on the beach. 1RP 55-57, 93, 143-45.

Gordon Walgren testified his summer cabin, located on the same road as the Campbells' residence, was burglarized while he was on vacation. He did not discover the break-in until returning from vacation. 1RP 102. After contacting police on October 14, Walgren identified the boat, motor, and number of items found in the boat as his, although he acknowledged many of the items were not truly "unique." 1RP 102-09, 117, 152. He received a \$5,800 insurance payment related to the items taken from the cabin. 1RP 108. He later recovered some, but not all, of the items. 1RP 108, 111, 120.

Sharon Fogo, a Mason County Superior Court clerk, was the sole witness regarding the July 22, 2013 and May 27, 2014 bail jumping charges. 1RP 154. Through Fogo, the State introduced various official court documents in case number 13-1-00287-6, including an order establishing conditions of release, Ex. 33, an order setting an omnibus hearing for July 22, 2013, Ex. 38, and the clerk's minutes for the July 22 hearing, Ex. 40. 1RP 154-60. The minutes state: "Message received from

clerk's office indicating [defendant] currently in Kitsap [County] jail.”

Ex. 40.

The State introduced additional exhibits regarding the 2014 charge. 1RP 161-64. It introduced an order setting a trial date of May 27, 2014. Ex. 43. The clerk's minutes for May 27, also introduced by the State, indicate “[d]efendant failed to appear as he is in Kitsap [County] jail.” Ex. 46. All related exhibits were admitted without objection. 1RP 155-64; Exs. 33-46.

On cross-examination, Fogo acknowledged the clerk's minutes indicated Cranor was in the Kitsap County jail during both hearings. 1RP 165. Fogo surmised that either the clerk's office had been contacted or Cranor's counsel provided the information to the court. 1RP 165.

In closing argument, the State argued that Cranor did not meet the elements of the bail jumping defense. 1RP 197-98.

Cranor argued in closing that although Cranor was not an “angel,” on both occasions his absence was explained to the court. 1RP 200.

In rebuttal, the State argued that while there was an “assertion” by the defense that Cranor was incarcerated on the bail jumping dates, it was “just an assertion. No evidence has been provided to you of that.” 2RP 206. Defense counsel did not object to the argument.

C. ARGUMENT

1. CRANOR WAS DENIED EFFECTIVE ASSISTANCE BECAUSE COUNSEL FAILED TO RENEW THE MOTION TO SEVER THE CHARGES DURING TRIAL.

Defense counsel was ineffective for failing to renew the severance motion during trial, before or at the close of all the evidence. CrR 4.4(a)(2). A renewed severance motion would likely have been granted, and there is a reasonable probability that the outcomes of separate trials on bail jumping and on the underlying charges would have been different. This Court should, accordingly, reverse all the charges and remand for a new trial.

Every accused person is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and Article I, Section 22 of the state constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

An accused asserting ineffective assistance must show (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor performance prejudiced him. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010) (citing Strickland, 466 U.S. at 686; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). This Court reviews claims of ineffective assistance of counsel de

novo, as they present mixed questions of law and fact. A.N.J., 168 Wn.2d at 109.

With respect to the deficient performance prong, “[t]here is a strong presumption that defense counsel’s conduct is not deficient,” but an accused rebuts that presumption if “no conceivable legitimate tactic explain[s] counsel’s performance.” State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

To meet the prejudice prong, an accused must show a reasonable probability “based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel’s deficient representation.” McFarland, 127 Wn.2d at 337.

CrR 4.4 governs severance of charges in a criminal trial. Counts that are properly joined may be severed “to promote a fair determination of the defendant’s guilt or innocence of each offense.” CrR 4.4(b). A defendant’s motion to sever “must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require.” CrR 4.4(a)(1). A pretrial severance motion denied by the court may be renewed until the close of all the evidence. CrR 4.4(a)(2). Failing to renew an unsuccessful severance motion constitutes a waiver. Id.; State v. Henderson, 48 Wn. App. 543, 545, 551, 740 P.2d 329 (1987).

Joinder is “inherently prejudicial.” State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). An accused may be prejudiced by having to present separate defenses, the jury may use evidence of one or more of the charged crimes to infer a criminal disposition, or the jury may cumulate evidence of the charges and find guilt when, if considered separately, it would not. State v. Harris, 36 Wn. App. 746, 750, 677 P.2d 202 (1984). A more subtle prejudicial effect may be present in a “latent feeling of hostility engendered by the charging of several crimes as distinct from only one.” Id. (quoting Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964)).

In determining whether to sever charges, therefore, a court must consider (1) the strength of the State’s evidence on each count; (2) the clarity of defenses as to each count; (3) whether the court instructs the jury to consider each count separately; and (4) the admissibility of evidence of the other charges, even if not joined for trial. State v. Sutherby, 165 Wn.2d 870, 884-85, 204 P.3d 916 (2009). Where counsel’s failure to litigate a motion to sever is the basis of an ineffective assistance claim, prejudice is demonstrated by evidence the motion should have been granted, and but for counsel’s deficient performance, the outcome of the proceeding would have been different. Id.

Here, counsel's failure to renew the motion to sever fell below the standard expected for effective representation. As evidenced by the original motions to sever, trial counsel was well aware of the harm that could result from joinder of the bail jumping charges, particularly in light of his only available defense, which required Cranor to reveal he was incarcerated on other charges when the hearings were held. Failure to renew the motion after general voir dire, and again after the close of the State's case, was deficient representation. Nothing happened during jury selection or trial to mitigate the prejudice counsel anticipated when the motion was initially brought. Rather, the veniremembers made a series of comments on November 7 indicating hostility to bail-jumpers, just as other potential jurors had a day earlier. At trial, as anticipated, evidence was admitted that tended to show Cranor was incarcerated in a neighboring county on both of the bail jumping dates. Thus, there was no reasonable trial strategy that would lead counsel to abandon the motion to sever. Counsel simply neglected to renew the motion, as required by the rules. See State v. Kyлло, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules). Such neglect demonstrates deficient performance. Sutherby, 165 Wn.2d at 887.

The next question is whether counsel's defective representation prejudiced Cranor. In light of the comments made during general voir dire and the evidence presented at trial, and after proper application of the four severance factors, the trial court would likely have granted a renewed motion for severance. Id. at 884-85 (where ineffective assistance was raised on appeal, finding that had counsel made motion to sever charges, trial court was likely to have granted it).

First, the State's case as to the burglary/ possession of stolen property charges was strengthened significantly by the bail jumping charges and the asserted defense. "[P]rejudice may result from joinder . . . if use of a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition." State v. Bryant, 89 Wn. App. 857, 867, 950 P.2d 1004 (1998) (quoting State v. Russell, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995)). A single trial allowed the jury to infer that Cranor had a criminal disposition. The situation presented Cranor with a true dilemma: Defend the charges by arguing he was in jail,⁴ or allow jurors to believe he lacked respect for the court system and for others. Many veniremembers made it clear that they were hostile to those who failed to appear for court. Cranor chose to

⁴ Arguably, Cranor could have asked for redaction of the clerk's minutes to avoid mention of his incarceration.

defend the bail jumping charges. Yet that same evidence permitted jurors to infer a criminal disposition. In summary, without such evidence suggesting Cranor had a criminal disposition, it is reasonably likely that the jury would have acquitted Cranor of the property crimes. The joinder of the charges also prejudiced Cranor as to the bail jumping charges. The character of the underlying charges, which suggested disrespect for the rights of others, was likely have made the jury less sympathetic to Cranor regarding his excuse for failing to appear, i.e., incarceration on still more charges.

The second factor, clarity of defenses, also favored severance. As stated above, prejudice from assertion of the defense on the bail jumping charges was likely to have bled over to the underlying charges.

The third factor also supports severance, despite instructions informing the jury it must “decide each count separately.” CP 35 (Instruction 4). The jury’s ability to compartmentalize the evidence of various counts is an important consideration in assessing the prejudice caused by joinder. Bythrow, 114 Wn.2d at 721.

In Bythrow, the Court found joinder was appropriate, noting the trial lasted only two days, the evidence of the two counts was generally presented in sequence, different witnesses testified as to the different counts, the jury was properly instructed to consider the counts separately,

and the issues and defenses were distinct. Id. at 723. On that basis, it was unlikely the jury was influenced by joinder of the crimes. Id.

Unlike in Bythrow, the jury in this case was unlikely to be capable of compartmentalizing the evidence. Given the asserted defense, that Cranor was in jail elsewhere, the jury was likely to infer he had a criminal disposition despite the limiting instruction. See State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990) (“A juror’s natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended.”), review denied, 116 Wn.2d 1020 (1991). The third factor likewise supports severance.

The fourth factor also favors severance. The State never argued, and the court never found, the charges were cross-admissible, to show, for example, consciousness of guilt on the underlying charges. Cf. State v. Cobb, 22 Wn. App. 221, 224, 589 P.2d 297 (1978) (defendant’s failure to appear at trial admissible as circumstantial evidence of guilt). In fact, any such argument would have been improper, considering that it was undisputed why Cranor did not appear for court.

There was no legitimate reason for counsel to fail to renew the severance motion. Because the court was likely to have granted the motion following the veniremembers’ comments about bail-jumpers and the evidence presented at trial, the failure to do so was prejudicial. Cranor’s

constitutional right to effective assistance counsel was violated, and a new trial is required on all charges. Sutherby, 165 Wn.2d at 888 (reversing on grounds of ineffective assistance all charges for which Sutherby demonstrated prejudice).

2. THE STATE COMMITTED FLAGRANT, PREJUDICIAL MISCONDUCT IN REBUTTAL ARGUMENT BY MISREPRESENTING THE EVIDENCE AT TRIAL.

The State argued in rebuttal that there was “[n]o evidence” the appellant was in jail in a neighboring county when did not appear for court in Mason County. 2RP 206. This argument misstated the evidence in a manner that was both flagrant and so prejudicial it could not have been cured by instruction from the court. The prosecutor’s misconduct therefore denied Cranor a fair trial on the bail jumping charges.

“A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law.” State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011) (citing State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956) (quoting People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497 (1899))). At the same time, a prosecutor “functions as the representative of the people in a quasijudicial capacity in a search for justice.” Monday, 171 Wn.2d at 676.

A prosecutor fulfills neither role by securing a conviction based on proceedings that violate a defendant's right to a fair trial. Rather, such convictions undermine the integrity of the criminal justice system as a whole. State v. Walker, 182 Wn.2d 463, 476, 341 P.3d 976 (2015). When a prosecutor commits misconduct, he may deny the accused a fair trial. Id. at 518; U.S. Const. amend. 14; Const. art. 1, § 3.

Here, the prosecutor committed misconduct in closing argument by arguing there was no evidence, only a defense assertion, that Cranor was incarcerated on the court dates in question. 1RP 206.

This argument seriously misrepresented the evidence. Official court documents introduced by the State and admitted by the court provided ample circumstantial evidence that Cranor was, in fact, incarcerated in Kitsap County. See, e.g., State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004) (circumstantial and direct evidence have equal weight). Nowhere in the record did the State dispute the accuracy of the information in the clerk's minutes, except before the jury in rebuttal. The prosecutor's argument, however, may have suggested to jurors that the information in the minutes had been debunked.

Although not an identical factual scenario, this case is analogous to cases in which the State has been held to commit misconduct by suggesting that there exists additional inculpatory evidence the jury is not

being permitted to see. For example, a prosecutor who asks questions that imply the existence of a prejudicial fact must be prepared to prove that fact. State v. Miles, 139 Wn. App. 879, 886, 162 P.3d 1169 (2007). It is therefore flagrant misconduct for a prosecutor to ask questions that imply the existence of a prejudicial fact without proving that fact by means of extrinsic evidence. Id. at 888.

Miles involved a charge of delivery of a controlled substance. Id. at 881. Miles claimed he was incapacitated at the time he was alleged to have delivered the substance. Id. at 882. The prosecutor committed flagrant misconduct by questioning defense witnesses about Miles's participation in boxing matches during the time Miles claimed to be incapacitated, without producing evidence those matches actually occurred. Id. at 881, 888.

Miles follows a long line of cases holding it is misconduct for the prosecutor to ask questions implying the existence of a prejudicial fact without introducing evidence of the fact. See, e.g., State v. Beard, 74 Wn.2d 335, 338-39, 444 P.2d 651 (1968) (prosecutor questioned the accused about several prior convictions but produced no evidence of those convictions upon denial of their existence); State v. Babich, 68 Wn. App. 438, 441-42, 842 P.2d 1053 (1993) (prosecutor attempted to impeach defense witnesses by questioning them about contents of allegedly

recorded conversation; but prosecutor did not enter recorded conversation into evidence after witnesses either denied making the statements or stated they could not remember making them); cf. State v. Ra, 144 Wn. App. 688, 702, 175 P.3d 609 (finding reversible misconduct where prosecutor introduced evidence suggesting Ra was a gang member without seeking a court ruling to admit such evidence), review denied, 164 Wn.2d 1016 (2008).

The prosecutor's rebuttal argument misrepresented the evidence and, like the cases cited, did more, suggesting Cranor was not, in fact, incarcerated at the time.

Where a defendant fails to object to prosecutorial misconduct, reversal is required if the misconduct is so flagrant and ill intentioned that it results in prejudice incurable by a curative instruction. State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006), overruled on other grounds by State v. W.R., Jr., 181 Wn. 2d 757, 336 P.3d 1134 (2014). Courts should “focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” State v. Lindsay, 180 Wn.2d 423, 431 n. 2, 326 P.3d 125 (2014) (quoting State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012)).

The misconduct was prejudicial. It informed jurors they must disregard the statements in the minutes indicating Cranor was incarcerated on the bail jumping dates, and therefore Cranor had no basis to assert the statutory defense. RCW 9A.76.170(2); see State v. Fredrick, 123 Wn. App. 347, 353-54, 97 P.3d 47 (2004) (defendant has the burden of establishing the defense by a preponderance of the evidence).

The misconduct was, moreover, so prejudicial it could not be remedied by curative instruction. Cranor acknowledges that, had there been an objection, the Court may have sustained it. But it is doubtful the court could have provided an effective curative instruction—one that informed jurors the clerk’s minutes *did* provide circumstantial evidence of incarceration—without wading into territory forbidden by Article IV, section 16. Under that provision, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.”

The prosecutor misrepresented the evidence in rebuttal, flatly stating there was no evidence to support the statutory defense despite the fact that the State’s own evidence established the contrary. The prosecutor misconduct was so prejudicial and of such a character no curative instruction would have been effective. This Court should, accordingly, reverse Cranor’s bail jumping convictions and remand for a new trial.

3. COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO THE PROSECUTOR'S MISCONDUCT, THEREBY DENYING THE APPELLANT A FAIR TRIAL.

Every accused person is guaranteed the right to the effective assistance of counsel. Strickland, 466 U.S. at 685-86. As stated above, a defendant asserting ineffective assistance must show (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor performance prejudiced him. A.N.J., 168 Wn.2d at 109.

Counsel's failure to object to the prosecutor's misstatement of the evidence was both objectively deficient and prejudicial to Cranor. First, as argued in section 2 above, the prosecutor seriously misstated the evidence by arguing there was no evidence Cranor was incarcerated on the dates he did not appear for court. And no conceivable legitimate tactic explains counsel's failure to object. There was no reason to stand mute while the State misrepresented the evidence in a manner that may have suggested that the information in the minutes had been debunked. Even if counsel, for some reason, did not wish to highlight the improper closing argument, he could have moved for a mistrial outside the presence of the jury.

Second, the argument was prejudicial for the reasons explained in section 2 above. The State's argument informed jurors that, in effect, Cranor had offered no excuse for his failure to appear, despite his burden to do so in order to assert the defense.

Cranor has established both deficient representation and prejudice. For this reason as well, this Court should reverse his bail jumping convictions and remand for a new trial. Thomas, 109 Wn.2d at 232.

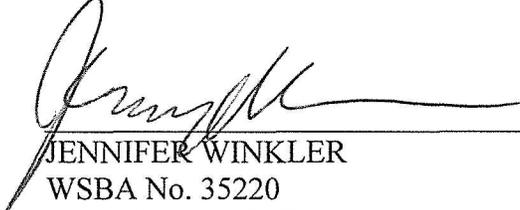
D. CONCLUSION

Because counsel provided ineffective assistance by failing to renew the appellant's severance motion, and because Cranor has shown prejudice as to all the charges, this Court should reverse and remand for a new trial on all charges. In any event, this Court should reverse the bail jumping charges based on flagrant, prejudicial misconduct in rebuttal argument. In the alternative, this Court should reverse the bail jumping charges based on counsel's failure to object to the serious misstatement of the evidence.

DATED this 27th day of July, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER WINKLER
WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 47161-2-1
)	
ROSS CRANOR,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22ND DAY OF JULY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ROSS CRANOR
DOC NO. 805616
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF JULY 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

July 22, 2015 - 3:02 PM

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