NO. 48081-6-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW L. FERGUSON,

Appellant.

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

The Honorable Stephen M. Warning, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct violated appellant Matthew Ferguson's due process right to a fair trial.

2. Mr. Ferguson was denied his constitutional right to effective representation when defense counsel failed to investigate and present expert witness testimony regarding accident reconstruction to support his testimony that the other car involved in a high speed collision had travelled into his lane and he was forced into the opposing lane in an effort to avoid hitting the car.

3. Defense counsel provided ineffective assistance in failing to object to prosecutorial misconduct.

4. Cumulative error deprived Mr. Ferguson of a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State's duty to ensure a fair trial precludes a deputy prosecutor from employing improper argument and tactics during trial. Where the deputy prosecutor appealed to the jury's passion and prejudice did this misconduct require reversal? Assignment of Error 1.

2. Where the position on the highway at the point of impact of two vehicles involved in a collision was critical to determination of recklessness under the vehicular assault statute, and where the point of

impact was the subject of extensive testimony at trial, did defense counsel's failure to present expert testimony in the form an accident reconstruction expert deny appellant effective representation where the appellant testified that he drove his pickup truck into the opposing lane in order to avoid a Mini Cooper approaching at highway speed in his lane of travel? Assignment of Error 2.

3. Whether counsel was ineffective in failing to object to prosecutorial misconduct where no legitimate reason justified the failure? Assignment of Error 3.

4. Even where no single error standing alone may merit reversal, an appellate court may nonetheless find a defendant was denied a fair trial where cumulative errors created a reasonable probability that the jury's verdict would have been different had the errors not occurred. In light of the above errors, does the cumulative error doctrine require reversal of Mr. Ferguson's convictions? Assignment of Error 4.

C. STATEMENT OF THE CASE

1. Procedural facts:

Matthew Ferguson was charged in Cowlitz County Superior Court by amended information with two counts of vehicular assault. RCW 46.61.522(1)(b). Clerk's Papers (CP) 9-11, 24-26. Appendix A. The State

also added aggravating factor to each charge, based upon the allegation that the defendant demonstrated an egregious lack of remorse and that the victims sustained injuries that exceeded the level of bodily harm necessary to satisfy the elements of the offenses. RCW 9.94A.535(3)(q), (y). CP 12.

The matter came on for jury trial on August 19, 20, and 21, 2015, the Honorable Stephen M. Warning presiding. 2Report of Proceedings[1] (RP) at 5-118, 3RP at 5-182, 4RP at 5-176. The jury found Mr. Ferguson guilty of both counts of vehicular assault as charged. 4RP at 136; CP 76, 77. The jury also answered "no" to the special verdict in each count. 4RP at 173; CP 84-87.

Mr. Ferguson had an offender score of "3" and a standard range of 13 to 17 months. 1RP (8/25/15) at 29. The State recommended 17 months, and the court imposed a standard range sentence of 15 months. 1RP (8/25/15) at 40; CP 93.

Timely notice of appeal was filed on September 2, 2015. This appeal follows.

2. <u>Trial testimony</u>:

A Ford F-150 pickup truck driven by Matthew Ferguson and a Mini

[1] The Verbatim Report of Proceedings consists of 4 volumes, designated as follows: 1RP (2/13/15); (4/15/15); (5/18/15); (8/13/15); (8/25/15)(sentencing); 2RP-8/18/15 (jury trial); 3RP-8/19/15 (jury trial); and 4RP-8/20/15,

Cooper driven by Isabella Wolf collided while traveling in opposite directions on a two lane highway 2RP at 121, 3RP at 56. The wreck took place on the West Side Highway near Kelso, Washington at approximately 1:30 a.m. on February 8, 2015. 4RP at 63-65.

The damage resulting from the collision was substantial. Mr. Ferguson sustained a broken pelvis, broken vertebra, and a broken ankle. 3RP at 22, 24; 4RP at 65. Ms. Wolf was found unconscious in the Mini Cooper and was treated at the intensive care unit at PeaceHealth Southwest Medical Center in Vancouver for injuries including six fractured ribs, a broken arm, and a broken leg. 3RP at 118, 122, 124. The passenger in the Mini Cooper—Melayna Hylton—was transported to a hospital in Longview where she was treated for lacerations to her forehead and left arm, and other injuries. 3RP at 141-45.

Both drivers were tested for alcohol. 3RP at 21. Medical personnel administered a blood draw of Mr. Ferguson several hours after the incident after obtaining a search warrant. 3RP at 18, 19, 23, 28-30. Mr. Ferguson had a blood alcohol content of .12 and also tested positive for marijuana with a result of 3.9 nanograms per milliliter of blood, below the level of presumed intoxication of 5 nanograms per milliliter. 3RP at 21, 93, 99, 102.

8/21/15 (jury trial).

Both women in the Mini Cooper had consumed alcohol prior to the wreck; responding police noticed the smell of alcohol emanating from the drivers of both vehicles. 2RP at 101. The physician who treated Ms. Hylton noted that she had the odor of alcohol when she was receiving medical attention in the emergency room. 3RP at 146-47. Ms. Wolf's blood alcohol concentration was .209. 3RP at 131.

Shortly prior to the collision, Mr. Ferguson's truck overtook and passed a car driven by Leslie Bradford, who was traveling north bound on the West Side Highway. 2RP at 55-57. After passing her car, Ms. Bradford testified that the truck merged back into the northbound lane. 2RP at 64. She stated that after completing the pass, the truck swerved several times, going over the center line and going half way into the opposite lane. 2RP at 54, 55, 56, 75. Ms. Bradford stated that the truck collided with a car travelling southbound on the highway. 2RP at 54. She said that she saw the headlights of the vehicle in the oncoming lane as it came around a bend in the highway, and that the car did not leave its lane of travel. 2RP at 75. She testified that she watched the position of the truck because she thought if someone was coming in the opposite lane they would be hit. 2RP at 73.

Ms. Bradford stated that she was travelling fifty miles per hour when the truck passed, and that she thought the truck was going fifty-five. 2RP at

63. The vehicle was three to four car lengths from her vehicle at the time of the collision. 2RP at 66.

After the collision Ms. Bradford stopped her vehicle and called 911. 2RP at 58. Mr. Ferguson got out of the truck and walked around. 2RP at 59, 60. She stated that the driver of the Mini Cooper appeared to be unconscious and the passenger had a split head. 2RP at 59.

Longview Police Officer Tim Deisher, who responded to the scene, said that the driver of the Mini Cooper was unconscious and the passenger was bleeding from an injury to her head. 2RP at 81-82. The passenger was conscious but not responsive and simply stared straight ahead when contacted by the officer. 2RP at 87.

Officer Deisher testified that the driver of the truck was walking around and identified himself as Matthew Ferguson. 2RP at 82. He testified that Mr. Ferguson was angry and yelling at the people in the car, calling them "hood rats" and saying they were "after his money because he was middle class and his family owned Ferguson Construction," and that the accident was not his fault. 2RP at 83-84. The officer asked him for his identification, and determined that it was not in his wallet. 2RP at 85. Mr. Ferguson said that he left it at a tavern as collateral for use of a pool cue. 2RP at 85.

Deputy Sheriff Dan O'Neill stated that when he arrived the driver of

the Mini Cooper was unconscious and a man was talking with Officer Deisher. 2RP at 100. He stated that the vehicles appeared have hit nearly head on. 2RP at 100. Deputy O'Neill stated that the man was belligerent and "yelling and screaming and swearing that he girls [had] wrecked his truck, and he was pretty unconcerned with any else but his truck and himself." 2RP at 101.

Deputy O'Neill stated that there were gouge marks in the asphalt five feet into the southbound lane, and that he believed that was the point of impact. 2RP at 103. He testified that the gouge marks indicated that the truck was in the southbound lane at the time of the impact and collided with the southbound Mini Cooper. 2RP at 109, 110.

Justin Maier, a Washington State Patrol Detective, testified that the gouge mark is created at the point of maximum engagement—or initial contact—of two vehicles, and this is caused when momentum forces one or both of the vehicles' frames into to asphalt. 3RP at 44. Detective Maier stated that the debris, marks on the road, and position of the vehicles indicates that the Mini Cooper was travelling southbound and the truck was going northbound. 3RP at 46-47. Neither vehicle appeared to swerve prior to the impact and no skid marks were visible. 3RP at 47.

Detective Maier stated that the "needle slap" mark in the speedometer dial indicated that the truck was going 55 to 56 miles an hour at the time of

impact. 3RP at 63. The detective testified that the needle slap evidence of the speedometer reading "supports what a witness, Ms. Bradfield, testified to her estimation of his speed—Mr. Ferguson's speed when he passed her at fifty-five miles per hour. It supports that." 3RP at 64.

Detective Maier stated that the pickup truck was approximately halfway over the center line of the road at the time of the collision. 3RP at 72

Washington State Patrol Trooper Evan Clark testified that the collision was nearly head on, with the driver's side of the Mini Cooper hitting the driver's side of the front the of the pickup. 4RP at 27, 37. He stated that the vehicles were coming around a slight corner in the highway and that both vehicles were in the southbound lane. 4RP at 37.

Mr. Ferguson testified that he had three to four beers at a friend's house at around 8:00 p.m. on February 7. 4RP at 56. He left at about 11:30 p.m. and met a friend at a casino and played pool. 4RP at 58. He did not drink at the casino, and left to give a friend a ride to the Silver Star, a sports bar in Longview. 4RP at 58. He got to the sports bar at approximately 1:20 a.m. and was told they were not serving and left at approximately 1:30 a.m. to give the friend a ride back to the casino. 4RP at 60.

Witnesses from the sports bar said that Mr. Ferguson did not appear to be intoxicated that morning, or even see him consume alcohol when he was at

the bar. 4RP at 44-45, 49, 50. He arrived after last call and was there for about ten to fifteen minutes and left after being told they the bar had stopped serving alcohol. 4RP at 44, 54. Witnesses stated that he left at approximately 1:25 a.m. 4RP at 44-45, 50.

Mr. Ferguson stated that after taking his friend back to the casino, he was driving on the West Side Highway to a friend's house where he often stayed when in town. 4RP at 61. He passed Ms. Bradfield's car and then returned to the northbound lane. 4RP at 62. He stated that after passing the car he saw headlights of a car approaching in his lane. 4RP at 63. He stated that to avoid the car, he quickly went into the southbound lane and that other driver corrected back into her lane and he then corrected back to his lane and the vehicles collided. 4RP at 64. He stated that he got out the truck and was very upset because the other driver was in his lane causing him to correct into the other lane in an attempt to avoid the crash. 4RP at 66.

Ms. Wolf testified regarding the injuries she sustained, including memory loss and broken ribs. 3RP at 155. She stated that her memory was diminished after the wreck and has to carry a note pad write down notes because she is forgetful. 3RP at 156. Ms. Wolf testified that she has not been able to return to work due to brain injury, but hoped that would be able to return to work in in the month following the trial. 3RP at 157. She did not

remember if she was wearing a seat belt at the time of the wreck. 3RP at 158. Ms. Hylton testified that she and Ms. Wolf went to the Vancouver Mall to go shopping and at about 7:00 p.m. they went to the house of a man they met at the mall. 3RP at 160, 170. She drank rum and cokes at the man's house with Ms. Wolf, who was also drinking alcohol. 3RP at 166, 171. They left the house after several hours, again with Ms. Wolf driving. 3RP at 167.

Just as Ms. Wolf testified, Ms. Hylton testified that she did not remember if she was wearing a seatbelt at the time of the accident. 3RP at 167. Ms. Hylton sustained injury to her neck, left knee where it hit the dashboard and a laceration to her forearm and forehead from hitting the front of the dashboard and windshield. 3RP at 163-64.

D. ARGUMENT

1. MR. FERGUSON'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY PROSECUTORIAL MISCONDUCT.

a. The prosecutor committed misconduct by appealing to the emotions of the jury in closing argument.

Prosecutorial misconduct violates the due process right to a fair trial when there is substantial likelihood the prosecutor's misconduct affected the jury's verdict. *Greer v. Miller*, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed.

2d 618 (1987); *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. Here, the prosecutor appealed to the emotions and sympathy of the jury during closing argument. Because a prosecutor's duty is to seek a verdict free from prejudice and based upon reason, he or she must refrain from arguments that deliberately appeal to the jury's passions or biases. *State v. Case*, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956); *State v. Belgrade*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); *In re Detention of Gaff*, 90 Wn. App. 834, 841, 954 P.2d 943 (1998) ("A prosecutor may not properly invite the jury to decide any case based on emotional appeals.").

Here, the deputy prosecutor injected emotion into his closing argument by portraying Mr. Ferguson as a "rich kid" who thinks the rules do not apply to him and that the women in the Mini Cooper were "hood rats" out to get his money. The prosecutor stated:

> Now, you heard a lot about the things that he was saying. Now, are these things that someone sober is going to be saying? This horrific crash just happened and he's concerned about his truck. He is concerned that these young women want his money. He calls them hood rats. He said that they were poor and they wanted his money because he's a Ferguson and his dad owns Ferguson Construction.
>
> He was eventually calmed down and put on a stretcher next to Isabella. At that point, with her being taken out of the car unconscious, on a stretcher, he again starts screaming at her that she's a hood rat and she's just out for his money. Who does that?

4RP at 111.

Even in the absence of objection, reversal of the convictions is required because the effect of the misconduct was prejudicial and incurable by instruction. In the alternative, counsel was ineffective in failing to object to the misconduct and seek curative instruction, as discussed in Section 2.b. *infra*.

A prosecutor, as a quasi-judicial officer, has the duty to ensure that a defendant receives a fair and impartial trial, which means a verdict free from prejudice and based on reason. *State v. Case,* 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956). Inflammatory comments that deliberately appeal to the jury's passion and prejudice are improper. *State v. Belgrade*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

Here, the prosecutor injected emotion and sympathy into the deliberation process by arguing that Mr. Ferguson cared only about the damage to the truck and his own injuries. The prosecutor also developed the theme of class differences and that Mr. Ferguson's father owns Ferguson Construction and that he therefore considers himself to be of a higher class than the "hood rats" in the other car, and that the "hood rats" are after his money. That constitutes an appeal to the passions of the jury. The jury's duty is to decide whether the State proved all the elements of the charged crimes

beyond a reasonable doubt based on the evidence produced at trial, not whether the appellant was loud, argumentative, angry and made obnoxious statements at the time of the incident.

b. Reversal of the convictions is required because the misconduct was prejudicial and impervious to curative instruction.

Defense counsel did not object to the prosecutor's improper comments and arguments. In the absence of objection, appellate review is not precluded if the misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). "[T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 707, 286 P.3d 673 (2012) (quoting *State vs. Walker*, 164 Wn. App. 724, 737,265 P.3D 191 (2011)).

There is a substantial likelihood that the misconduct of appealing to the jury's emotions and fomenting outrage in the jury affected the jury verdicts in this case. Statements made during closing argument are intended to influence the jury. *State vs. Reed*, 102 Wn.2d 140, 146, 684 P2d 699 (1984). Prosecutors, in their quasi-judicial capacity, usually exercise a great deal of influence over jurors. *State vs. Case*, 49 Wn.2d 66,70-71. 298 P 2d 500

(1956).

The case was closer than the prosecutor wished it to be, as shown by the fact that the jury declined to find the aggravating factors. The State's argument went far beyond what was necessary to prove the aggravating factor of RCW 9.94A.535(3)(q), which pertains to lack of remorse. Here, the prosecutor emphasized Mr. Ferguson's angry behavior, the fact that he was concerned about money and believed that the women were seeking money from his family's construction business. These comments do not pertain to lack of remorse for the accident. Moreover, the prosecutor's improper comments encouraging the jury to dislike Mr. Ferguson and his perceived attitude of entitlement, may have swayed jurors to convict Mr. Ferguson of assault where they otherwise would not have done so. Reversal is appropriate where, as here, the reviewing court is unable to conclude from the record whether the jury would have reached its verdicts but for the misconduct. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

2. MR. FERGUSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

The State and Federal Constitutions guarantee a defendant's reasonably effective representation by counsel. *Strickland v. Washington*, 466 U.S. 668,687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *State v. Thomas*, 109

Wn.2d 222, 225-226, 743 P.2d 816 (1987); U.S. Const. amend.VI; Const. art. 1, § 22. Ineffective assistance is established when a defendant shows that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. *Thomas*, 109 Wn.2d at 225-226.

The first prong of the *Strickland* test requires "a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *Thomas*, 109 Wn.2d at 226. The defendant must overcome the presumption that there might be a sound trial strategy for council's actions. *Strickland*, 466 U.S. at 689.

The second prong of *Strickland* requires the defendant to show only a "reasonable probability" that counsel's deficient performance prejudiced the outcome of the case. *Strickland*, 466 U.S. at 693; *Thomas*, 109 Wn.2d at 226.

The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland*, 466 U.S. at 693;*Thomas*, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine the confidence in the outcome of the case. *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 226.

a. Counsel was ineffective in failing to investigate and present accident reconstruction evidence to counter the State's testimony from the State

Troopers regarding the point of impact.

From the onset of the case it was clear that the position of the vehicles at the point of impact would be critical to the required element of driving while under the influence. CP 24. Mr. Ferguson told first responders and other witnesses that the Mini Cooper was in his lane and that it was other driver who forced him into the southbound lane and then corrected into the other lane, and that it was Ms. Wolf's erratic driving that caused the accident. ___RP at ___. Despite this, defense counsel did not have the accident investigated by an independent accident reconstructionist who could testify regarding Mr. Ferguson's statement that the Mini Cooper was in the northbound lane when he initially saw the vehicle's headlight coming around the corner, causing him to maneuver into the southbound lane. This was critical because no testimony was introduced regarding the sight line from the northbound lane to the curve in the road when a vehicle would first be visible to Mr. Ferguson. Nor did counsel have the vehicles and road examined by an who could testify about the placement of vehicles and whether the marks in the road constituted the point of impact, as asserted by the State Patrol Detective, Justin Maier. 2RP at 43-44. Counsel simply had Mr. Ferguson testify about seeing the Mini Cooper in the northbound lane when it came around the corner toward his truck, the fact that there was a river on the right

side of the road, so he quickly went into the southbound lane to avoid Ms. Wolf's car, assuming that evidence would be uncontested. 3RP at 63-65. There is considerable evidence to support Mr. Ferguson's testimony that the Mini Cooper crossed into the northbound lane when it came around the corner; Ms. Wolf's blood-alcohol concentration of .209 was over twice the presumed intoxication level of.08. There is reason to believe that she was so intoxicated that she could not stay in her lane. This contention was not investigated by Mr. Ferguson's counsel and not supported other than by Mr. Ferguson's own testimony.

Ordinarily, the decision whether to call a certain witness is a matter of trial tactics and does not support a claim of ineffective assistance of counsel. *State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). The presumption that counsel was competent can be overcome, however, by a showing that counsel failed to conduct appropriate investigations to develop a defense, adequately prepare for trial, or subpoena necessary witnesses. *State v.Maurice*, 79 Wn. App. 544, 903 P.2d 514 (1995); *State v. Jury*, 19 Wn. App.256, 263-64, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978).

In appropriate cases, defense counsel may need the assistance of an expert to help prepare a defendant's case. *State vs. Poulsen*, 45 Wn. App. 706,726 P. 26 1036 (1986).See also CrR3.1(f). In such cases, the failure to

consult with a competent and qualified expert constitutes ineffective assistance of counsel. *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987) (failure to ascertain qualifications of expert witness called to testify was ineffective); *Maurice*, 79 Wn.App. at 546. (defense counsel's failure to consult with forensic mechanical expert was deficient performance).

In *Maurice*, the defendant was charged with vehicular homicide. He believed that a mechanical malfunction had caused him to lose control of the vehicle, and mentioned that theory to his attorney. Counsel failed to investigate that claim or to call an expert witness for the defense, however. After he was convicted, Maurice hired an accident reconstructionist, who found evidence of mechanical failure. *Maurice,* 79 Wn. App. at 550-51. He then filed a personal restraint petition alleging he had been denied effective assistance of counsel. The Court of Appeals agreed that counsel's performance was deficient. In light of Maurice's insistence that the accident resulted from a mechanical malfunction, his attorney's failure to investigate that claim before trial could not be justified. *Id.* at 552.

Examination of this case reveals that (1) a defense of accident caused the by the other driver was Mr. Ferguson's only reasonable defense, and (2) the defense would have been greatly enhanced by expert testimony. Here, as in *Maurice*, Mr. Ferguson provided counsel with information regarding a key

piece of evidence for the State—the gouge mark indicating what Detective Maier called the point of "maximum impact." On its own, the alleged impact gouge in the southbound lane supports the State's theory that Mr. Ferguson was under the influence of alcohol, crossed the center line into the southbound lane and collided with Ms. Wolf's car. Had counsel investigated Mr. Ferguson's statement regarding of the incident, the impact gouge may have been determined to support Mr. Ferguson's explanation that his vehicle was partially in the southbound lane in order to avoid hitting Ms. Wolf's car which was being driven in the opposing lane, or it may have been determined to be a pre-existing gouge or other flaw in the roadway having no relation to the actual point of impact.

Had counsel investigated the matter, however, he could have presented testimony from an expert in accident reconstruction to confirm Mr. Ferguson's testimony. Failure to conduct an investigation constituted deficient performance. Trial counsel has a duty to make reasonable investigations, or to make reasonable decisions that particular investigations are unnecessary. *Strickland*, 466 U.S. at 691. Counsel's decision not to investigate the roadway, damaged vehicles, and sight lines along the curve in the highway was unreasonable and constitutes deficient performance.

Moreover, counsel's error prejudiced the defense. This case came

down to a credibility contest. The jury could not believe Ms. Bradford and State Troopers, and thus convict, if they believed Mr. Ferguson. Because of counsel's failure to investigate what could have been critical defense evidence corroborated by an accident reconstruction expert, the jury was left with almost no option but to convict. It is also reasonably likely that the perception that Mr. Ferguson was making unsubstantiated claims about Ms. Wolf crossing into his lane diminished his credibility to such an extent that the jury rejected his defense. Counsel's failure to investigate the vehicles, roadway, and sight lines of the curve, and present corroborating evidence, denied Mr. Ferguson a fair trial, and reversal is required.

b. Counsel was ineffective for failing to object to the misconduct or request curative instruction.

As argued *supra*, the prosecutor committed misconduct by arguing that Mr. Ferguson considered the women to be "hood rats" and were only after his family's money and that his father owned a local construction company. In the event this Court finds proper objection or request for a curative instruction could have cured the prejudice, or that the argument was authorized in order to prove "lack of remorse" under RCW 9.94A.535(3)(q) as alleged in the special verdict, then defense counsel was ineffective in failing to take such action.

If a curative instruction could have erased the prejudice resulting from

the prosecutor's misconduct, then counsel was deficient in failing to request such instruction. Cf. *State vs. Warren*, 165 Wn.2d 17 26-28,195 P.3d 940 (2008). (prosecutor's misstatement of the burden of proof and presumption of innocence during closing argument did not require reversal only because the court gave a strongly worded curative instruction). When a reviewing court decides misconduct occurred and instruction could have cured the prejudice resulting from that misconduct, it necessarily recognizes the presence of prejudice that was susceptible to cure. No legitimate strategy justified allowing the prosecutor's prejudicial comments about Mr. Ferguson's perceived arrogance and sense of entitlement to fester in juror's minds without court instruction that the improper comments should be disregarded.

Reversal is required where defense counsel incompetently fails to object to prosecutorial misconduct and there is a reasonable probability the failure to object affected the outcome. *State v. Horton*, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (reversing where defense counsel failed to object to prosecutor's improperly expressed personal opinion about defendant's credibility during closing argument). A new trial is required here because defense counsel was ineffective in failing to object to the prosecutorial misconduct and request curative instruction.

3. **CUMULATIVE ERROR DEPRIVED MR.**

FERGUSON OF A FAIR TRIAL.

Pursuant to the cumulative error doctrine, even where no single error standing alone merits reversal, a reviewing court may nonetheless find the combined errors denied a defendant a fair trial. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 685 P.2d 668 (1984). The doctrine requires reversal where the cumulative effect of otherwise nonreversible errors materially affected the outcome of the trial. *State v. Alexander,* 64 Wn. App. 147, 150-51, 822 P.2d 150 (1992).

Here, Mr. Ferguson contends that each error set forth above, viewed alone, engendered sufficient prejudice to merit reversal. Alternatively, however, he argues the errors, taken together, created a cumulative and enduring prejudice that was likely to materially affect the jury's verdict and the integrity of the verdict cannot be assured. This Court must reverse his conviction and order a new trial.

E. CONCLUSION

Ineffective assistance of counsel and prosecutorial misconduct combined to deny Mr. Ferguson a fair trial. This Court should reverse his convictions and remand for a new trial.

DATED: April 22, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on April 22, 2016, that this Appellant's Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following:

Mr. Ryan Jurvakainen
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Court of Appeals
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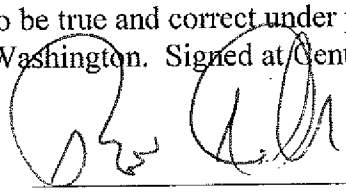
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on April 22, 2016.



PETER B. TILLER

APPENDIX A

RCW 46.61.522 Vehicular assault—Penalty

(1) A person is guilty of vehicular assault if he or she operates or drives any vehicle:

(a) In a reckless manner and causes substantial bodily harm to another; or

(b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another; or

(c) With disregard for the safety of others and causes substantial bodily harm to another.

(2) Vehicular assault is a class B felony punishable under chapter 9A.20 RCW.

(3) As used in this section, "substantial bodily harm" has the same meaning as in RCW 9A.04.110.

TILLER LAW OFFICE

April 22, 2016 - 4:49 PM

Transmittal Letter

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Court of Appeals Case Number: 48081-6

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