

66907-9

66907-9

NO. 66907-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY PINES, JR.,

Appellant.

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

The Honorable David A. Kurtz, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it failed to investigate whether a juror was sleeping through testimony.

2. Prosecutorial misconduct deprived appellant of his constitutional due process right to a fair trial.

Issues Pertaining to Assignments of Error

1. Appellant's constitutional right to a fair jury trial required each juror to consider all the evidence before reaching a verdict. During trial, the court was alerted by a law clerk that a juror was having "challenges staying awake." The court noted it had not observed the juror. Without first soliciting the parties' input, the court chose not to question the juror to determine whether he was sleeping.

a. Did the trial court commit reversible error by failing to question the juror after receiving reliable information the juror may have been sleeping?

b. Was defense counsel ineffective for failing to object to the trial court's failure to question the juror?

2. During closing argument the prosecutor gave "an everyday example of what a reasonable doubt is" by comparing the standard to factors that could influence a decision to drive somewhere. Defense counsel did not object.

a. Is reversal required where the prosecutor's improper arguments diminished the beyond a reasonable doubt standard and created a substantial likelihood the misconduct affected the verdict?

b. Was defense counsel ineffective in failing to object to this misconduct?

B. STATEMENT OF THE CASE

1. Procedural History

The Snohomish County prosecutor charged appellant Anthony Pines, Jr. with four counts of first degree assault with a firearm and one count of unlawful possession of a firearm. CP 85-86, 91-92. A jury found Pines guilty on all counts. CP 18, 21, 24, 27, 30. The jury returned special verdicts finding Pines was armed with a firearm during each assault. CP 19, 22, 25, 28.

Pines' was sentenced to 339 months plus a consecutive 60 months for using a firearm on the first assault count. His sentence on each remaining assault count was 168 months plus a consecutive 60 month firearm enhancement. The assault and firearm enhancement sentences were run consecutive to each other, for a total sentence of 840 months. 6RP¹ 30; CP 3-14. Pines' timely appeals. CP 1-2.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – February 28, 2011 (Voir Dire and Opening Statements); 2RP – February

2. Trial Testimony

On January 12, 2010, Pines went with friends to McCabe's American Music Café (bar). Pines' was wearing a red hat and jacket when he arrived at the bar after midnight. 3RP 15-17, 42, 56, 60, 81-82, 127, 146, 177, 188, 196. Approximately 200 people were already inside the bar. 3RP 132, 194, 202, 206; 4RP 34.

Bouncer Brock McDonald did not remember frisking Pines or checking his identification at the door. 3RP 43. McDonald had no problems with Pines as he entered the bar. Pines remained in the bar without incident until "last call." 3RP 41, 44, 81-83, 199.

Pines took two bottles of liquor from the bar after being denied a drink following "last call." 3RP 18, 81, 91, 175-76, 195. Manager Melease Small called police and McDonald escorted Pines out of the bar. 3RP 38-39, 46, 176, 180. Pines, however, reentered the bar and was ushered out by McDonald and fellow bouncer Jacob Garl. 3RP 20, 22-23, 46, 201; 4RP 10-12. Garl and McDonald testified Pines told them if he was kicked out they would not make it home. 3RP 21; 4RP 11.

After Pines left, Garl went to the back of the bar to escort other people out. 4RP 13, 16, 42. As he did this, Garl saw a person in a red hat

28, 2011; 3RP – March 1, 2011; 4RP – March 2, 2011; 5RP – March 3, 2011; 6RP – March 4 and 30, 2011.

and jacket walk from a silver Jaguar toward the bar. 4RP 17, 22, 38. Garl did not see the person's face. 4RP 18. As he walked toward the front of the bar, Garl heard a gunshot. 4RP 19. The Jaguar drove away one to two minutes after the gunshot. 4RP 19-20, 22-23, 39-40. Garl did not see Pines inside the Jaguar and could not identify the driver. 4RP 31, 35.

Cashier Jodi Nelson saw a person in a red jacket with a hand in his pocket approach the bar one to two minutes after Pines left. 3RP 125, 127, 129-32, 143-146. Nelson did not see a hat or the person's face. 3RP 131, 144. Nelson assumed it was Pines because no one else in the bar wore a red jacket. 3RP 131, 135. Nelson ducked behind a table because she "assumed he had a gun." 3RP 132, 149. Nelson heard a gunshot, smelled smoke, and heard people screaming. 3RP 133-35. She never saw a gun. 3RP 133, 135, 145.

Taxicab driver Thomas Brophy was parked outside the front of the bar when he saw an African-American man walk toward the bar. 4RP 44-47. The man was wearing a red shirt and hat and was walking, "normally up to the door." 4RP 47. The man had no threatening mannerisms. 4RP 51. Brophy did not see the person's face. 4RP 47, 57. He saw nothing in the man's hands and never saw him reach for anything or put his hands inside his pockets. 4RP 50-51, 63. The person raised his right hand approximately one foot from McDonald's head and Brophy heard a

“bang” and saw a flash. 4RP 46, 49-50, 64. Brophy did not believe there was a gun before witnessing the bang and flash. 4RP 50-51.

Brophy called 911 and saw the person enter a silver Jaguar. 4RP 52-55. Brophy was unable to follow the Jaguar as it left the bar and did not note the car’s license plate number. 4RP 54, 64. Brophy did not speak with police the day of the incident and was not asked to identify the shooter. Brophy did not give a statement to police until nine to 10 months after the event and after watching news about the incident. 4RP 56-57.

McDonald heard a loud shot while standing at the front of the bar two minutes after removing Pines. He did not feel anything and was not hit. 3RP 26-27. He smelled gunpowder but did not see smoke. 3RP 56. McDonald did not see a gun or who fired the shot. 3RP 28, 35, 48-49.

Mary Clark was standing about 10 feet from the front of the bar when she heard a gunshot and felt her chest “burning.” 3RP 67-69, 73-74. Clark did not see a gun or the shooter. 3RP 73. Officer Travis Katzer saw a “slight abrasion” near Clark’s breast, but “no apparent major injury.” 4RP 71-72. Clark suffered no internal injuries. Bullet holes were found in Clark’s blouse and bra, and Dr. Liam Yore testified her wound was consistent with a gunshot. 4RP 96, 174-49.

Oscar Herrera Gonzales suffered an injury to his left arm consistent with a gunshot. Gonzales had no broken bones or

neurovascular damage from the injury. No foreign material was found in Gonzales' body and he was discharged from the hospital the same day. 4RP 106-08. Alendra Fallon had chest and deltoid wounds consistent with a gunshot. Fallon suffered no neurovascular or lung damage. 4RP 101-05. Gonzales and Fallon did not testify at trial.

Police found a bullet and shell casing outside the bar. 4RP 188-90; 5RP 25-26, 35. Forensic scientist Brian Smelser could not conclusively establish the bullet and shell casing "were at one time together." 4RP 152, 163. Smelser testified the bullet was a "hollow point" and had front end damage consistent with "hit[ting] something hard." 4RP 161-62. Smelser testified several things could have caused the damage to the bullet, including, human flesh, metal, wood, or concrete. 4RP 165-66. No blood, tissue, or particles were found on the bullet. 4RP 163, 166, 173.

Police did not have a suspect identified when they arrived at the bar. 4RP 188. Winnie Chan had prior contact with Pines and later identified him to police. 4RP 135-38, 193. McDonald and bartender Tiffany Henken identified Pines from a photomontage. 3RP 36, 98; 4RP 194-96.

Police found a silver Jaguar in the garage of Pines' uncle, Andrew Evan. Evan told police Pines' brother dropped the car off after using it. The car was not registered to Pines. 5RP 18-19. Documentation in the car

had Pines' name on it. 5RP 20-22. A red baseball hat found in the trunk was not the same hat worn by Pines the night of the incident. 5RP 23-24, 39. Pines was arrested two months after the incident. 5RP 26.

No firearms or red jackets were found. 5RP 29. No video surveillance footage depicted the shooting or the scene outside the bar the night of the incident. 5RP 31.

3. Sleeping Juror

During the second day of trial, Judge Kurtz received a note from his law clerk indicating juror 4 was having "challenges staying awake." Judge Kurtz said he had "not really" observed anything, but noted "folks may want to keep an eye on him." 4RP 129-30. The trial court also stated, "we can, perhaps, address that further at some point as well." 4RP 130. The trial court did not question the juror to determine whether he was sleeping. Nor did the court ask either party for input. The issue of whether the juror was sleeping was not addressed again.

4. Prosecutorial Misconduct

Pines did not dispute he was at McCabe's the morning of the shooting. 5RP 128. Instead, Pines defense theory was that he was not the shooter. The State acknowledged the main question was the shooter's identity: "is it the defendant who did this?" 5RP 108. In arguing the State

had proven Pines was the shooter beyond a reasonable doubt, the prosecutor told the jury:

[O]ften attorneys try to give an everyday example of what a reasonable doubt is...There's always a chance when you get in your car and get on the road and drive somewhere, say to the courthouse here, that you could get in a serious accident and be seriously injured or killed, that's the facts of life. That's a possibility. But we still every day get up, get in our cars, and go places. We come to the courthouse, we live our lives because although there's a possibility of that happening, there's not a reason to think that would happen.

But let's say, you wake up in the morning and you looked out this morning and it had snowed a foot and all the roads were covered in sheer ice and you didn't have a four-wheel drive and you are not good at driving in the snow or ice. That is a reason to doubt that you will get to the courthouse.

Or, let's say, you get up and you turn on the news and you hear on the news that you have to drive on I-5 to get here and you hear on the news that the way you have to drive there's a sniper that is out on the road that's shooting people on I-5. That could also be a reason to doubt that you might get to the courthouse safely.

These are reasons to doubt that you will get to your destination safely, and that is an example of what reasonable doubt is. It's a doubt for which there is a reason. There's always a possibility that something can happen, but do you have a reason to doubt?

5RP 105-06.

Defense counsel did not object to the prosecutor's comments. Nor did counsel request a curative instruction.

C. ARGUMENT

1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO INVESTIGATE WHETHER A JUROR WAS SLEEPING DURING TRIAL.

a. The Court Had A Duty To Voir Dire The Juror

Both the United States and Washington constitutions guarantee the right to a fair and impartial jury trial. U.S. Const. amend. V, VI; Wash. Const. art. I, §§ 3, 22. The failure to provide defendant with a fair trial violates minimal standards of due process. State v. Jackson, 75 Wn. App. 537, 543, 879 P.2d 307 (1994), rev. denied, 126 Wn.2d 1003 (1995); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3. A constitutionally valid jury trial must be free of disqualifying jury misconduct. State v. Tigano, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991), rev. denied, 118 Wn.2d 1021 (1992).

Sleeping during trial is a form of juror misconduct warranting removal. State v. Jordan, 103 Wn. App. 221, 226, 230, 11 P.3d 866 (2000), rev. denied, 143 Wn.2d 1015 (2001); People v. Valerio, 141 A.D.2d 585, 586, 529 N.Y.S.2d 350 (N.Y. App. Div. 1988). To serve, a juror must take an oath that in substance promises to “well, and truly try, the matter in issue . . . and a true verdict give, *according to the law and evidence as given them on the trial.*” RCW 4.44.260 (emphasis added). The jury in Pines’ case was accordingly instructed to render a verdict after

consideration of all of the evidence. CP 31 (Instruction 1). A sleeping juror cannot listen to all the evidence and fulfill his oath to base his verdict on all the evidence. “A juror who has not heard all the evidence in the case . . . is grossly unqualified to render a verdict.” Valerio, 141 A.D.2d at 586.

Under RCW 2.36.110, the judge has a duty “to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of . . . *inattention* . . . or by reason of conduct or practices incompatible with proper and efficient jury service.” (emphasis added). CrR 6.5 states that “[i]f at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged.” RCW 2.36.110 and CrR 6.5 place a “continuous obligation” on the trial judge to investigate allegations of juror unfitness and to excuse jurors who are found to be unfit. State v. Elmore, 155 Wn.2d 758, 773, 123 P.3d 72 (2005).

The trial judge is afforded discretion in its investigation of jury problems. Elmore, 155 Wn.2d at 773-74. Discretion does not mean immunity from accountability. Carson v. Fine, 123 Wn.2d 206, 226, 867 P.2d 610 (1994). “A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds[.]” State v. Lamb, ___ Wn. App. ___, 262 P.3d 89, 95 (2011). “A court’s decision is

manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997). At some point, the judge makes a decision outside the range of acceptable discretionary choices and thereby abuses discretion. State v. Williamson, 100 Wn. App. 248, 257, 996 P.2d 1097 (2000). “The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law.” State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

The trial judge abused its discretion by failing to investigate the potentially sleeping juror. “[I]f there is a sufficient showing of juror inattentiveness, the appropriate remedy is to engage in a fact finding process to establish a basis for the exercise of discretion.” State v. Hampton, 201 Wis.2d 662, 672-73, 549 N.W.2d 756 (Wis. 1996). Inquiry should be conducted if there is a real basis for concluding a juror was sleeping. Commonwealth v. Braun, 74 Mass. App. Ct. 904, 905, 905 N.E.2d 124 (Mass. App. Ct. 2009). A judge’s receipt of “reliable information” that a juror is asleep “requires prompt judicial intervention to

protect the rights of the defendant and the rights of the public, which for intrinsic and instrumental reasons also has a right to decisions made by alert and attentive jurors.” Commonwealth v. Dancy, 75 Mass. App. Ct. 175, 181, 912 N.E.2d 525 (Mass. App. Ct. 2009).

The law clerk was a licensed attorney. 1RP 4. As such, he “is an officer of the court,” and owes a “duty of frankness and honesty.” State v. White, 94 Wn.2d 498, 502, 617 P.2d 998 (1980). Counsel’s duty of candor prevents him from making a knowingly false statement of fact to the court. RPC 3.3(a)(1). There is no indication the law clerk reported anything but honest information regarding the juror’s conduct. Accordingly, the report that juror 4 was having “challenges staying awake” should be deemed a reliable source of information necessitating further inquiry beyond what was done here.

Because sleeping juror cases are highly fact specific, there is no case factually identical with Pines’ case. Comparison with similar cases, however, reveals the court here failed in its obligation to conduct proper investigation into whether juror 4 was sleeping.

In People v. South, the trial court committed reversible error in failing to conduct proper inquiry after defense counsel informed the court a juror was sleeping, even though the court only acknowledged the juror had closed his eyes for short periods of time. 177 A.D.2d 607, 607-08,

576 N.Y.S.2d 314 (N.Y. App. Div. 1991). Under these circumstances, the trial court should have conducted “a probing and tactful inquiry to determine whether juror number 9 was unqualified to render a verdict based upon her apparent sleeping episodes.” South, 177 A.D.2d at 608.

In Valerio, the trial court committed reversible error in failing to inquire of two jurors, where the court noted they were dozing during a readback of testimony and defense counsel suggested the court conduct an in camera inquiry of one juror whose eyes were closed and seemed asleep. Valerio, 141 A.D.2d at 586. Valerio recognized a defendant is deprived of his constitutional right to a jury trial and entitled to a new one when the court unjustifiably fails to investigate an allegedly sleeping juror and allows that juror to deliberate on the defendant’s guilt. Valerio, 141 A.D.2d at 586. “It is incumbent upon the trial court to conduct a probing and tactful inquiry to determine whether a sworn juror is unqualified. The court may not speculate upon the juror’s qualifications but must ascertain the juror’s state of mind and must place its reasons for excusing or retaining the juror on the record.” Valerio, 141 A.D.2d at 586.

In Braun, the judge abused his discretion by failing to voir dire the juror where there was a real basis for concluding the juror was sleeping during testimony and the judge’s instructions. Braun, 74 Mass. App. Ct. at 905. The juror’s inattentiveness was not a momentary lapse, but an

inattention that spanned all or portions of the testimony of two witnesses and the judge's instructions. Braun, 74 Mass. App. Ct. at 905. "That the judge was not certain whether the juror was sleeping and was unwilling to make such a finding should not have ended the inquiry. Uncertainty that a juror is asleep is not the equivalent of a finding that the juror is awake." Braun, 74 Mass. App. Ct. at 905.

By not conducting a voir dire, the judge in Pines' case "prevented himself from obtaining the information necessary to a proper exercise of discretion." Braun, 74 Mass. App. Ct. at 905; see also State v. Reevey, 159 N.J. Super. 130, 133-34, 387 A.2d 381 (N.J. Super. Ct. App. Div. 1978) (defense counsel informed court juror was sleeping; trial judge should have conducted a hearing and questioned the juror as to whether she was in fact dozing or sleeping, or whether she was listening to the summations and the charge with her eyes closed), cert. denied, 79 N.J.471 (1978); cf. People v. Buel, 53 A.D.3d 930, 931, 861 N.Y.S.2d 535 (N.Y. App. Div. 2008) (upon realizing juror appeared to be sleeping, court questioned juror; juror informed court he was tired but had heard the testimony and had not fallen asleep; based on this appropriate inquiry, court had an adequate basis for its conclusion that the juror had not missed significant portions of the trial testimony and, therefore, was not grossly unqualified to continue to serve as a juror).

Under these circumstances, it could not fairly be determined whether juror 4 was in fact sleeping without asking the juror himself. The judge maintained he did not observe the juror, but did not dispute the veracity of his law clerk's report. On this record, whether the juror was sleeping is a question that can only be answered by resorting to speculation. By choosing to remain ignorant of whether the juror's sleeping or sleepiness undermined his ability to participate in the case and deliberate upon the evidence, the court abused his fact-finding discretion.

In Jorden, the appellate court was unwilling to impose a mandatory format for establishing whether a juror engaged in misconduct. Rather, the court held: the trial judge has discretion to resolve the issue "in a way that avoids tainting the juror and, thus, avoids creating prejudice against either party." Jorden, 103 Wn. App. at 229. Pines is not asking this Court to impose a mandatory format. On the particular facts of this case, the trial court had a duty to conduct further investigation and abused its discretion in failing to conduct that inquiry.

The Jorden court held the trial judge did not err in failing to ask a juror if she had been sleeping because the judge, based on independent observation, was able to determine the juror was in fact sleeping without the need for further inquiry and there was *no dispute* that the juror was

sleeping at a hearing on the matter. Jorden, 103 Wn. App. at 228. In Pines' case, whether the juror was sleeping was uncertain.

Unlike in Jorden, Pines' constitutional right to a fair jury trial was on the line. In determining the constitutional interest affected, there is a difference between removing a juror for sleeping and keeping that juror on to deliberate on guilt. A defendant has the right to an impartial jury composed of 12 individuals. A defendant has no right to an impartial jury of 12 particular individuals. Jorden, 103 Wn. App. at 229. By removing the offending juror in Jorden, the defendant's right to a fair and impartial jury trial was protected because the remaining jurors were qualified to serve.

In contrast, the juror in question here remained on the jury after the court refused to conduct further inquiry and was one of the jurors who convicted Pines. As recognized by Jorden, that difference is significant in determining whether a trial court abuses its discretion. Jorden, 103 Wn. App. at 228.

In Jorden, the Court of Appeals did not fault the trial judge for not questioning the juror because (1) questioning may have been embarrassing to the juror; (2) if the judge had questioned her, the parties presumably would also have been entitled to question her, which may have put her in an adversarial position with the State; and (3) if the juror denied sleeping,

the State may have proposed calling other jurors to report their observations, which could have put the juror in an adversarial position to the other juror-witnesses. Jorden, 103 Wn. App. at 228.

These concerns arguably retain validity in a case where the defendant's constitutional right to fair jury trial was not actually implicated by juror *removal*. Such concerns, however, must give way to a defendant's constitutional right to a fair trial when the issue is whether a juror accused of sleeping should be allowed to *remain* on the jury.

To the extent, if any, the Jorden court's concerns are applicable to the latter situation, its reasoning is flawed. The Jorden court's resolution of the inquiry issue was to assume *any* inquiry would taint the juror and prejudice one of the parties. A tactful and sensitive inquiry makes the realization of these concerns a remote possibility. If accepted as a per se rule, the Jorden approach shields all sorts of jury misconduct from appropriate scrutiny, given that there is always a theoretical possibility a juror may be embarrassed by questions about an ability to follow his or her oath.

In any event, preventing embarrassment to a juror should not trump a defendant's constitutional right to a fair trial. Moreover, the possibility that the sleeping juror could have been placed into an adversarial position with one of the parties or other jurors is theoretical

speculation untethered from the facts of this case or any other. Again, the solution is tactful inquiry, not dispensing with inquiry altogether.

Questioning of other jurors would not take place in the presence of the juror alleged to have been sleeping. In camera questioning avoids the theoretical problem of intra-juror hostility. The offending juror would not know what other jurors said. If the offending juror were removed after other jurors confirmed he was asleep and guessed other jurors said he was asleep, then the question of whether the excused juror felt hostile towards remaining jurors becomes irrelevant to the question of whether the defendant receives a fair trial. If the offending juror were not excused, then there would be no basis for supposing questioning would cause an adversarial relationship between jurors.

Where inquiry into whether the juror actually fell asleep is inadequate, there is no way for the reviewing court to fairly determine whether proper grounds existed to justify discharge of that juror. On the facts of this case, this Court should hold the trial court had a duty to investigate the potential sleeping juror by asking the juror whether he had fallen asleep.

b. The Court's Failure To Conduct Appropriate Inquiry Is Reversible Error.

Juror misconduct that causes prejudice warrants a new trial. State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968). The defendant bears the burden of showing that the alleged misconduct occurred. State v. Kell, 101 Wn. App. 619, 621, 5 P.3d 47 (2000), rev. denied, 142 Wn.2d 1013 (2000). Prejudice is presumed once juror misconduct is established, and the State bears the burden of overcoming this presumption beyond a reasonable doubt. State v. Boling, 131 Wn. App. 329, 333, 127 P.3d 740 (2006), rev. denied, 158 Wn.2d 1011 (2006); Kell, 101 Wn. App. at 621. If juror 4 was in fact sleeping, that juror's conduct prejudiced Pines' right to a fair trial because he was convicted by a jury that included one member who had not heard all the evidence. Jorden, 103 Wn. App. at 228.

Pines, however, is entitled to a new trial regardless of whether the record shows misconduct occurred. This case presents the question of what should happen when the trial court fails to conduct adequate inquiry into juror misconduct, thereby preventing the defendant from adequately showing the misconduct in fact occurred. Under that circumstance, courts have held the failure to conduct inquiry when needed is reversible error. Valerio, 141 A.D.2d at 586; South, 177 A.D.2d at 607-08; Dancy, 75 Mass. App. Ct. at 181; Braun, 74 Mass. App. Ct. at 905; cf. People v.

McClenton, 213 A.D.2d 1, 6, 630 N.Y.S.2d 290 (N.Y. App. Div. 1995) (removal of a juror could have proved unnecessary had the court conducted appropriate inquiry into the claimed misconduct, but lack of such inquiry “means that it will never be known whether this defendant was tried by a jury which did not engage in premature deliberations, did not commence deliberations with a predisposition toward a finding of guilt, or did not operate under a time constraint for reaching its verdict.”).

Inquiry is needed in other contexts to ensure the protection of important constitutional rights. For example, reversal of a defendant’s conviction is required if the trial court knows or reasonably should know of a potential attorney-client conflict and the trial court fails to conduct an adequate inquiry after timely objection. State v. Regan, 143 Wn. App. 419, 425-26, 177 P.3d 783 (2008), rev. denied, 165 Wn.2d 1012 (2008); State v. McDonald, 143 Wn.2d 506, 513-14, 22 P.3d 791 (2001). Due process requires inquiry once reason to doubt competency exists. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001).

Protection of a defendant’s fundamental constitutional right to a fair jury trial is entitled to no less consideration. There was a sufficient basis for the trial court to reasonably know the juror was potentially sleeping. Voir dire of the juror was needed to ensure Pines’ right to a fair trial.

c. Counsel Was Ineffective In Failing To Object To The Trial Court's Failure To Question The Juror.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington 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). Defense counsel is ineffective where (1) his performance is deficient and (2) the deficiency prejudices the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). To demonstrate prejudice, the defendant need only show a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Thomas, 109 Wn.2d at 226.

There was no legitimate reason for defense counsel not to object to the trial court's failure to question the juror or request permission to question the juror himself. As discussed above, it could not fairly be

determined whether juror 4 was in fact sleeping without asking the juror himself. Defense counsel did not dispute the juror may have been sleeping. By choosing to nevertheless remain ignorant of whether the juror's sleeping or sleepiness undermined his ability to participate in the case and deliberate upon the evidence, defense counsel was deficient.

Defense counsel's deficient performance also prejudiced Pines. The juror in question remained on the jury after the court chose not to conduct further inquiry and was one of the jurors who convicted Pines. If the juror was in fact sleeping, then Pines was convicted by a juror who necessarily did not consider all the evidence.

Counsel's failure to request questioning of the juror undermines confidence in the outcome of Pines' case. This Court should reverse his convictions.

2. PROSECUTORIAL MISCONDUCT VIOLATED PINES' RIGHT TO A FAIR TRIAL

a. The Prosecutor Committed Misconduct In Diminishing The Burden Of Proof Beyond A Reasonable Doubt.

The prosecutor, as an officer of the court, has a duty to see the accused receives a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper

methods calculated to produce wrongful conviction as it is to use every legitimate means to bring about a just one.” Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935). Prosecutorial misconduct may deprive the respondent of a fair trial and only a fair trial is a constitutional trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. V and XIV; Wash. Const. art. 1, § 3.

Here, by comparing the burden of proof standard to the “everyday example” of driving, the prosecutor improperly diminished the beyond a reasonable doubt standard. A similar comparison constituted prosecutorial misconduct in State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), rev. denied, 170 Wn.2d 1002 (2010).

In Anderson, the prosecutor stated in closing argument: “[B]eyond a reasonable doubt is not a phrase that you folks use in your daily lives. You don’t get up and say, I’m convinced beyond a reasonable doubt that I’m going to have Cheerios for breakfast. But, it is a standard that you apply every single day.” Anderson, 153 Wn.2d at 424.

The prosecutor in Anderson gave other examples of situations in which the jurors might be convinced beyond a reasonable doubt to make a decision: when leaving their children with a babysitter or changing lanes on the freeway. Defense counsel did not object or request a curative instruction during this time. Anderson, 153 Wn. App. at 425.

The Court of Appeals held the prosecutor's comments discussing the reasonable doubt standard in the context of everyday decision-making were improper because they "minimized the importance of the reasonable doubt standard and of the jury's role in determining whether the State has met its burden." Anderson, 153 Wn. App. at 425.

More recently, the Court of Appeals found an everyday decision-making comparison to be flagrant and ill-intentioned misconduct. State v. Walker, ___ Wn. App. ___, ___ P.3d ___, 2011 WL 5345265 (39420-1-II, filed November 8, 2011).

During Walker's murder trial, several witnesses testified about events occurring before the murder. Testimony conflicted about whether a fight occurred, how many people were involved in the fight, who was standing where during the fight, who and how many people fired guns, how many gunshots were fired, and how much risk of harm the victim faced during the incident. Witnesses agreed Walker retrieved a gun from a car and fired warning shots into the air before shooting at the person holding onto the victim. The jury found Walker guilty. Walker, 2011 WL 5345265 *1.

During closing argument the prosecutor contended the reasonable doubt standard "is a common standard that you apply every day" and compared it to having surgery and leaving children with a babysitter.

Walker did not object and no curative instruction was given. Walker, 2011 WL 5345265 *3.

Relying on Anderson, the Walker Court found the prosecutor's arguments improper: "By comparing the certainty required to convict with the certainty people often require when they make everyday decisions—both important decisions and relatively minor ones—the prosecutor trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case[.]" Walker, 2011 WL 5345265 *3 (citing Anderson, 153 Wn. App. at 431).

Like Anderson and Walker, by comparing the certainty required to convict Pines with the certainty people require when deciding whether to drive, the prosecutor "trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case" against Pines. Anderson, 153 Wn. App. at 425.

This argument was improper for another reason as well. By focusing on the degree of certainty the jurors would have to be willing to act, rather than that which would cause them to hesitate to act, the prosecutor confused the jury's duty to find Pines not guilty unless the State proved its case against him beyond a reasonable doubt with the idea that it should convict him unless it found a reason not to. This essentially amounted to an invitation to the jury to render a decision based on a

standard less than what is constitutionally required. Anderson, 153 Wn. App. at 432.

The Supreme Court condemned the kind of “willing to act” language used by the prosecutor in this case more than a half century ago. Holland v. United States, 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150 (1954). Since Holland, “courts have consistently criticized the ‘willing to act’ language” as inviting the jury to render a decision based on a standard less than that constitutionally required. Tillman v. Cook, 215 F.3d 1116, 1126-27 (10th Cir. 2000) (citing cases), cert. denied, 531 U.S. 1055 (2000). “Being convinced beyond a reasonable doubt cannot be equated with being ‘willing to act. . . in the more weighty and important matters in your own affairs.’” Scurry v. United States, 347 F.2d 468, 470 (D.C. Cir. 1965), cert. denied, 389 U.S. 883 (1967).

b. The Prosecutor’s Misconduct Requires Reversal.

Prosecutorial misconduct is grounds for reversal where there is a substantial likelihood the improper conduct affected the jury. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Misconduct that directly violates a constitutional right requires reversal unless the State proves it was harmless beyond a reasonable doubt. State v. French, 101 Wn. App. 380, 386, 4 P.3d 857 (2000), rev. denied, 142 Wn.2d 1022 (2001); State v. Fleming, 83 Wn. App. 209, 213-216, 921 P.2d 1076

(1996), rev. denied, 131 Wn.2d 1018 (1997). Because such misconduct rises to the level of manifest constitutional error, the absence of a defense objection does not preclude appellate review. Fleming, 83 Wn. App. at 216.

Moreover, even where there was no objection, appellate review is not precluded if the misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. Fisher, 165 Wn.2d at 747. The standard for showing prejudice remains a substantial likelihood that the misconduct affected the verdict. Fisher, 165 Wn.2d at 747.

A prosecutor may not attempt to diminish the burden of proof in closing argument. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). The Court of Appeals has already determined a prosecutor's comparison between the reasonable doubt standard and everyday decision-making is flagrant misconduct. Walker, 2011 WL 5345265 *7.

In Walker, the Court concluded the prosecutor's improper arguments were flagrant and ill-intentioned because they were the deciding factor in a case involving disputed facts, including: whether Walker was the lone gunman; whether he fired into a crowd or just at the victim; whether Walker fired before or after the victim began to fight; the level of harm the victim faced; and, whether Walker was the first aggressor. Walker, 2011 WL 5345265 *7.

Like Walker, the prosecutor's arguments improperly trivialized the burden of proof in Pines case, which also involved disputed facts. Pines' defense theory was that he was not the shooter. No witnesses saw Pines with a gun or weapon the night of the incident. No surveillance video revealed a gun or the identity of the shooter. No gun was ever found. Indeed, the State acknowledged the main question for the jury was the shooter's identity: "is it the defendant who did this?" 5RP 108.

The State cannot show, as it must, that the misconduct was harmless beyond a reasonable doubt. Prosecutors, in their quasi-judicial capacity, usually exercise a great deal of influence over jurors. State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956). Statements made during closing argument are presumably intended to influence the jury. State v. Reed, 102 Wn.2d 140, 146, 684 P.2d 699 (1984).

Jurors would be particularly tempted to follow the prosecutor's approach because his comments had the ring of truth. To a layperson, the prosecutor's description of reasonable doubt — what must occur to find the defendant "not guilty" and what reasonable doubt means when compared to matters of ordinary life — sounds correct and provided a simple (albeit mistaken) way for jurors to decide guilt or innocence.

By misstating reasonable doubt and rendering the presumption of innocence inapplicable, the prosecutor eased the State's constitutional

burden. This increased the odds jurors would convict Pines rather than acquit him outright or convict him of lesser offenses.

Some misstatements of the law can be overlooked because they are relatively minor or so obvious that even lay jurors can act without prompting on the instruction to disregard any argument not supported by the court's instructions. But some misstatements are not so easily dismissed, particularly those pertaining to the State's burden and proof requirements. See Fleming, 83 Wn. App. at 213-14 (argument that jury could only acquit if it found a witness was lying or mistaken misstated the State's burden of proof, was "flagrant and ill-intentioned," and required a new trial).

Even though the jury is presumed to follow the instructions of the trial court, prosecutorial misconduct in some circumstances can be so prejudicial that neither objection nor instruction can cure it. State v. Stith, 71 Wn. App. 14, 23, 856 P.2d 415 (1993) (prosecutor's personal assurance of defendant's guilt was flagrant misconduct requiring reversal).

Although jurors are instructed to disregard any argument not supported by the court's instructions, the problem is that the jury was in no position to determine whether the prosecutor's trivialization of the burden of proof was actually supported by the trial court's instructions. The prosecutor's arguments have a seductive attraction even though they are

wrong. The harm in this case is that jurors concluded the prosecutor's misstatements of the law were consistent with the jury instructions and provided a convenient and understandable way to decide Pines' guilt.

Appellate courts are not required to "wink" at prosecutorial misconduct under the guise of harmless error analysis. State v. Neidigh, 78 Wn. App. 71, 79-80, 95 P.2d 423 (1995) (when asked at oral argument why prosecutors continue to engage in clear misconduct, the prosecutor responded, "it's always been found to be harmless error" when no objection is raised). Without a remedy, there is little incentive for prosecutors to avoid intentional misconduct.

c. Counsel Was Ineffective In Failing To Object To The Misconduct.

The most obvious responsibility for putting a stop to prosecutorial misconduct "lies with the State, in its obligation to demand careful and dignified conduct from its representatives in court. Equally important, defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line." Neidigh, 78 Wn. App. at 79. In the event this Court finds a proper objection or request for a curative instruction could have cured the prejudice resulting from any misconduct, then defense counsel was ineffective in failing to take such action.

Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26; U.S. Const. amend. VI; Wash. const. art. I, § 22.

There was no legitimate reason not to object given the prejudicial nature of the prosecutor's arguments. Pines derived no benefit from letting the jury consider those misstatements of the law as it deliberated on his fate. Reasonable attorney conduct includes a duty to investigate and research the relevant law. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). As this Court recognized in Neidigh, "defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line." Neidigh, 78 Wn. App. at 79. Defense counsel needed to protect his client's right to a fair trial when the prosecutor failed to honor its duty of ensuring one.

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. No legitimate strategy justified allowing the prosecutor's prejudicial comments to fester in the juror's minds without an instruction from the court that the improper argument should be disregarded and play no role in their deliberations.

Reversal is required where, as here, defense counsel incompetently fails to object to prosecutorial misconduct and there is a reasonable probability the failure 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). This makes sense because the purpose behind both the prohibition against prosecutorial misconduct and the right to effective assistance is to protect the defendant's right to a fair and impartial trial. Strickland, 466 U.S. at 684. Charlton, 90 Wn.2d at 664-65.

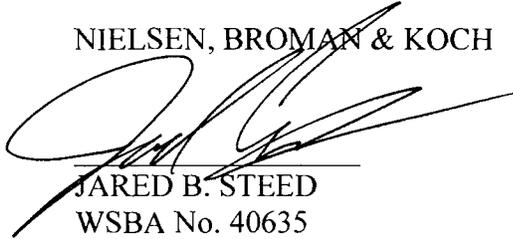
D. CONCLUSION

For the reasons discussed above, this Court should reverse Pines' convictions and remand for a new trial.

DATED this 30th day of November, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 66907-9-1
)	
ANTHONY PINES, JR.,)	
)	
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 30TH DAY OF NOVEMBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201

- [X] ANTHONY PINES, JR.
DOC NO. 808342
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF NOVEMBER 2011.

x *Patrick Mayovsky*