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NO. 72004-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD GRANT,

Appellant.

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

The Honorable Jeffrey M. Ramsdell, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct deprived appellant a fair trial.
2. The trial court erred when it denied appellant's motion for mistrial where prosecutorial misconduct during closing argument deprived appellant a fair trial.
3. The judgment and sentence erroneously indicates an offender score of 10.

Issues Pertaining to Assignments of Error

1. Appellant was charged with two counts of possession of methamphetamine. Each charge was tried separately before a jury. During closing argument on the first trial, the prosecutor repeatedly told jurors the only way they could find the evidence insufficient to convict appellant was if they believed the police officer who testified was lying. During closing argument on the second trial, the prosecutor disparaged defense counsel by likening defense counsel's arguments to "Alice's rabbit hole." 11RP¹ 72. Is reversal required because the prosecutor committed prejudicial misconduct during closing arguments by

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – March 19, 2014; 2RP – March 20, 2014; 3RP – March 24, 2014; 4RP – March 25, 2014; 5RP – March 26, 2014; 6RP – March 27, 2014; 7RP – March 31, 2014; 8RP – March 31, 2014 (voir dire); 9RP – April 1, 2014 (voir dire); 10RP – April 1, 2014; 11RP – April 2, 2014; 12RP – May 28, 2014.

disparaging defense counsel and by arguing that to find appellant not guilty the jury would have to conclude the officer lied?

2. Did the trial court err in denying appellant's motion for a mistrial based upon prosecutorial misconduct during closing argument?

3. Grant was sentenced based upon an offender score of 10. Grant had eight prior convictions, each of which counted as one point, and one concurrent offense. The trial court erroneously imposed sentence using an offender score of 10 rather than 9. Although the standard range remains the same using the correct score of 9, must this Court remand for correction of the judgment and sentence?

B. STATEMENT OF THE CASE

1. Procedural History

The King County prosecutor charged appellant Richard Grant with three counts of violation of the Uniform Controlled Substances Act for possessing methamphetamine on April 17, 2013, May 23, 2013, and May 25, 2013. CP 7-10.

Grant's motion to sever the counts was granted, and the case proceeded on separate jury trials for the April 17 and May 23 incidents. 1RP 5, 12, 25. Separate juries found Grant guilty of both the April 17 and May 23 incidents. CP 16, 34; 6RP 105-08; 11RP 77-79.

Grant was sentenced to concurrent sentences of 20 months on each possession conviction. CP 55-63; 12RP 30. After sentencing, the May 25 charge was dismissed. CP 35; 12RP 16, 35. Grant timely appeals. CP 65-66.

2. April 17 Incident

King County Sheriff Robert Nishimura was working on Vashon Island in the early morning hours of April 17, 2013. 6RP 6, 12-13. While on patrol, Nishimura saw a truck that he did not recognize heading toward him. Nishimura noticed the truck did not signal until after it had already started to turn. 6RP 14-16, 19, 22, 43. Nishimura stopped the truck for signaling late. 6RP 21, 43. Nishimura recognized Grant in the passenger seat of the truck. 6RP 22-23, 47. He did not recognize the female driver of the truck. 6RP 22.

Nishimura knew Grant had an outstanding warrant for third degree theft. 6RP 23-24. Nishimura arrested Grant on the warrant. 6RP 24. Nishimura gave the driver of the truck a verbal warning and let her leave. 6RP 21, 27.

Nishimura searched Grant after arresting him. Inside Grant's pockets Nishimura found an electronic scale, and a carton containing a pipe and a substance Nishimura believed was methamphetamine. 6RP 24-26, 35-36, 38-39. Grant told Nishimura he bought methamphetamine for

sixty dollars in Seattle. 6RP 26. The substance tested positive for methamphetamine. 5RP 30, 34-35.

3. May 23 Incident

On May 23, 2013, King County Sheriff Deputies Jeff Hancock and Joel Anderson went to Grant's house to arrest him on a warrant for the April 17 incident. 10RP 25, 30-33, 56-57; 11RP 4, 6-8. The day before, an unrelated charge against Grant was dismissed. As a result, the State filed charges and issued a warrant for Grant's arrest for the April 17 incident. 3RP 4-5, 25; 10RP 22, 34, 48, 54-55; 11RP 16-17, 20.

Anderson learned of Grant's arrest warrant on May 23. 10RP 56, 66-67; 11RP 31. Anderson and Hancock developed a ruse to lure Grant out of the house in order to arrest him. Anderson and Hancock went to Grant's house under the guise of congratulating him on having the prior case dismissed. 10RP 34; 11RP 15, 21

Hancock knocked on the front door while Anderson remained behind the house. 11RP 9. When Grant's girlfriend answered the door Hancock told her he was there to congratulate Grant. Grant came outside and spoke with Hancock. 10RP 35, 59; 11RP 18-19, 25. Grant explained he felt as though he had a new lease on life. 10RP 60. Hancock then arrested Grant. 10RP 35-36, 59-60. Grant was cooperative but believed the arrest warrant was fake. 11RP 10, 16.

Hancock searched Grant after arresting him. Inside Grant's pocket Hancock found a baggie containing a pipe and a substance Hancock believed was methamphetamine. 10RP 36, 39, 44-45; 11RP 10-13. The substance tested positive for methamphetamine. 10RP 77, 81-82.

Grant told Hancock it was his constitutional right to use methamphetamine if he wanted. 10RP 53. Grant told Hancock he would agree to wear a wire for the police if Hancock returned his methamphetamine, took him home, and apologized for arresting him on a fake warrant. 10RP 51-52, 61.

4. Prosecutorial Misconduct

a. April 17 Trial

During closing argument, at the April 17 trial, defense counsel noted the State's case rested on Nishimura's testimony. 6RP 61. Defense counsel argued:

One person's assertion is insufficient for conviction, and not only doesn't it matter if the person that is making the assertion is a police officer, it's worse if you allow that, because you continue to allow police abuses if you do that. Even potential police abuses.

6RP 69.

Defense counsel noted the State's "version of reality" was that Nishimura testified truthfully. 6RP 69. Counsel noted however, that the State had no corroborating evidence of Grant's guilt such as video,

fingerprints, and a written statement that would connect Grant to the methamphetamine. 6RP 72, 79-80. Defense counsel argued:

[T]he only way that we end up in a conviction is if you habitually, automatically, and instinctively believe an officer and rubber-stamp. I'm telling you, you are not going to know when officers aren't telling the truth. Officers might even think they are doing a good thing in some twisted way, but they are not. If you don't hold them to any standard, this is the kind of evidence, or lack thereof, that juries are going to get all the time. Actually, it's literally insulting. It's scary as a defendant, it should be scary as community members, and it's corrosive literally to the judicial system when we allow convictions predicated on the assertion of one person's word and it's avoidable. And it's avoidable.

6RP 72-73.

Defense counsel maintained the State failed to demonstrate beyond a reasonable doubt that Grant was guilty of the charged crime and simply asked jurors to reject the notion that police officers are inherently truthful and reliable. 6RP 63, 68, 71-73.

On rebuttal, the State argued, "The only way for you to determine that that's not sufficient evidence to convict this evidence [*sic*] is if you believe that the defendant – I apologize, if you believe the deputy was lying when he took the stand." 6RP 83. Defense counsel objected. The trial court sustained counsel's objection, telling the State to "simply rephrase." 6RP 83.

The prosecutor continued, “As far as I can remember, he [defense counsel] didn’t bring out any evidence that this deputy, Deputy Nishimura, had been accused of lying ever in the past –“ 6RP 83-84. Defense counsel again objected and the trial court overruled the objection, telling the jury it was their job to determine credibility. 6RP 84. The prosecutor then stated, “Nothing – nothing that you heard during this relatively short trial undercut the deputy’s credibility.” 6RP 84. Defense counsel objected for a third time and the trial court sustained the object, telling the prosecutor to “simply rephrase.” 6RP 84. The prosecutor continued:

Again, defense counsel said again and again that you heard no evidence. I believe that he doesn’t pay attention to the fact that the witness, that deputy, told you exactly what he found on the defendant and when. The only way you can break that link between those drugs and that defendant is if you find that Deputy Nishimura was lying

6RP 84-85. Defense counsel again objected and the trial court again sustained the objection. 6RP 85. The prosecutor continued:

You can always cast some shadow on the evidence that you hear. There is always some doubt, because we are not there. That’s true. I admit that. That’s easy. That’s clear. But what we do have is the testimony of the deputy that was there. His job, his duty is what all police officers are meant to do.

6RP 86. Defense counsel’s fifth timely objection was overruled.

Finally, the prosecutor argued:

We have more than enough, because the police officer – the deputy did his job that night, and he’s here – he was here explaining to you the results of his investigation, the results of his job. And the only way you find that link broken between his testimony and those drugs and that defendant is if you find that he wasn’t truthful.

6RP 86. Defense counsel objected for a sixth time, explaining “he [prosecutor] can’t keep talking about that.” 6RP 86. The trial court sustained the objection and instructed the jury to “disregard that portion of the argument that pertains to that being the only way they could acquit the defendant.” 6RP 87.

After closing arguments ended, the trial court suggested the prosecutor review case law explaining, “there is an abundance of case law out there that it’s misconduct if you cross the line and suggest to the jury that the only way they can acquit is to find a particular witness not credible.” 6RP 92. The trial court further explained that it seemed the prosecutor’s argument went beyond just refuting defense counsel’s closing argument. 6RP 93-94.

Defense counsel moved for a mistrial on the basis of prosecutorial misconduct. 6RP 92, 96. The State deferred to the trial court. 6RP 96, 100, 102.

The trial court denied the motion for mistrial, citing four reasons. 6RP 100. First, the trial court explained it believed the prosecutor was

simply trying to refute the defense argument and therefore didn't engage in any "intentional misconduct." 6RP 101. The trial court also believed there was no harm caused by the prosecutor's argument because "the jury knows that the credibility calls are theirs to make[.]" 6RP 101. Third, the trial court reasoned there was "no real benefit to be gained by granting a mistrial and doing it all over again." 6RP 101-02. The trial court explained that a new trial would be detrimental to the defense because it would allow the State an opportunity to reinforce its evidence. Finally, the trial court reasoned that unlike State v. Fleming,² here the court had an adequate opportunity to fix on the record what happened during closing argument. 6RP 102.

b. May 23 Trial

During closing argument, at the May 23 incident trial, defense counsel attempted to undermine the officer's testimony, noting the State was missing corroborating evidence such as video, fingerprints, and a written statement that would connect Grant to the methamphetamine. 11RP 49-54, 59. Defense counsel asserted that:

Now, the State might say well, we provided evidence, and then the defense would just says yeah, well, but it's not good enough. So, like if there was a fingerprint, I would dispute the fingerprint; if there was admissions [*sic*] on

² 83 Wn. App. 209, 214, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997).

videotape, I'd say they forced it. And maybe I would. Who knows what I would do? But they didn't do any of that. I mean, they're not obviated or given permission and not provide evidence because I might question that too. They didn't provide any objective, verifiable evidence, and they could have.

11RP 59.

Defense counsel argued the State failed to demonstrate beyond a reasonable doubt that Grant was guilty of the charged crime and asked jurors to reject the notion that police officers are inherently truthful and reliable. 11RP 61-64.

On rebuttal, the State accused defense counsel of arguing "in essence, what the defense is claiming is that this is a large conspiracy. Won't say it outright –" 11RP 68. Defense counsel objected but his objection was overruled. 11RP 68. The prosecutor continued, "as I said previously, defense is basically asserting that this is a conspiracy[.]" 11RP 70. Defense counsel objected again and the trial court overruled the objection again. 11RP 70.

The prosecutor continued, arguing that if police had taken a picture of the drugs next to Grant, "Defense would be claiming that well, they planted those drugs there, those drugs are placed by the deputies, there is no proof that he actually possessed them – " 11RP 72. Defense counsel objected a third time for inflammatory and prejudicial argument, which

the trial court again overruled. 11RP 72. The prosecutor then argued, “so if you want to follow the defense down Alice’s rabbit hole and start thinking about all the possible things that could have been provided, you are going to be looking at an infinite number of possibilities, none of which are reasonable in the circumstances.” 11RP 72.

C. ARGUMENT

1. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT AT THE APRIL 17 TRIAL DENIED GRANT A FAIR TRIAL

A prosecutor is a quasi-judicial officer who has a duty to ensure a defendant in a criminal prosecution is given a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Because of their unique position in the justice system, prosecutors must steer wide from unfair trial tactics. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice.

Id.

Defendants are among the people the prosecutor represents and, therefore, the prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Id. When a prosecutor

commits misconduct, she may deny the accused a fair trial. Id.; U.S. Const. amend. 14; Wash. Const. art. 1, § 3.

Prosecutorial misconduct violates the defendant's right to a fair trial and requires reversal of the conviction when the prosecutor's argument was improper misconduct and there is a substantial likelihood the misconduct affected the verdict. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). In general, arguments that have an inflammatory effect on the jury are not curable by instruction. State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158, rev. denied, 175 Wn.2d 1025 (2012).

In this case, the prosecutor committed misconduct by repeatedly telling jurors the only way they could find the evidence insufficient to convict Grant was if they believed the police officer was lying. Despite sustaining defense counsel's objections, reversal of the conviction is required because the misconduct was incurable through instruction and resulted in a substantial likelihood that the verdict was affected.

- a. The Prosecutor Undermined the Presumption of Innocence by Arguing the Jury Could Only Acquit if it Believed the Officer was Lying.

The presumption of innocence and the corresponding burden to prove every element of the crime charged beyond a reasonable doubt is the "bedrock upon which the criminal justice system stands." State v. Bennett,

161 Wn.2d 303, 315, 165 P.3d 1241 (2007). Indeed, the failure to properly instruct jurors on these principles is structural error and requires reversal. Sullivan v. Louisiana, 508 U.S. 275, 280-81, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

“Statements made by the prosecutor or defense to the jury must be confined to the law as set forth in the instructions given by the court.” State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984); State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). A prosecutor’s misstatement of the law is a particularly serious error with “grave potential to mislead the jury.” Davenport, 100 Wn.2d at 763. Thus, a prosecutor may not attempt to shift or diminish the burden of proof beyond a reasonable doubt in closing argument. State v. Cleveland, 58 Wn. App. 634, 647, 794 P.2d 546, rev. denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991); see also People v. Harbold, 124 Ill. App. 3d 363, 371, 464 N.E.2d 734, 742 (Ill. App. 1984) (“[A]rguments which diminish the presumption of innocence are forbidden.”).

A prosecutor undermines the presumption of innocence and shifts the burden of proof by arguing the jury must find the State’s witnesses are lying in order to acquit the defendant. E.g., State v. Wheless, 103 Wn. App. 749, 758, 14 P.3d 184 (2000); State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997). This

argument misleads the jury by presenting a false choice: “The testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved. The testimony of two witnesses can be in some conflict, even though both are endeavoring in good faith to tell the truth.” State v. Castaneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74 (improper cross examination to repeatedly ask defendant if police witnesses were lying), rev. denied, 118 Wn.2d 1007 (1991).

Here, the prosecutor thrice told the jury the only way they could find the evidence insufficient to convict Grant was if they believed Nishimura was lying. 6RP 83-86. As the prosecutor argued, “The only way for you to determine that that’s not sufficient evidence to convict this [defendant] is if you . . . believe the deputy was lying when he took the stand.” 6RP 83.

Case law in existence well before Grant’s trial clearly warned against the prosecutor’s improper conduct in this case. Fleming, 83 Wn. App. at 214. In Fleming, this Court held, “[I]t is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State’s witnesses are either lying or mistaken.” 83 Wn. App. at 213. In that case, the prosecutor argued, “to find the defendants. . . not guilty. . . you would either have to find that [D.S.] has lied about what

occurred in that bedroom or that she was confused[.]” Fleming, 83 Wn. App. at 213. This Court held this argument misstated both the role of the jury and the burden of proof. Id. The Court explained:

The jury would not have had to find that D.S. was mistaken or lying in order to acquit; instead, it was required to acquit unless it had an abiding conviction in the truth of her testimony. Thus, if the jury were unsure whether D.S. was telling the truth, or unsure of her ability to accurately recall and recount what happened in light of her level of intoxication on the night in question, it was required to acquit. In neither of these instances would the jury also have to find that D.S. was lying or mistaken, in order to acquit.

Id. The court went on to conclude this argument was flagrant and ill-intentioned misconduct and reversed Fleming’s conviction. Fleming, 83 Wn. App. at 214, 216; See also Wheless, 103 Wn. App. at, 758 (prosecutorial misconduct to state that “in order to find [Wheless] innocent, the police of Seattle, W.A., must be lying.”)

The closing argument in Grant’s case was likewise misconduct because the only direct evidence linking Grant to the methamphetamine was the testimony of Nishimura. The prosecutor presented the jury with a false choice because it did not need to necessarily find Nishimura was lying to acquit Grant. Rather, like Fleming, even if the jury believed Nishimura was not intentionally lying, it would have been required to acquit Grant if it was unsure of Nishimura’s ability to accurately recall and recount what happened the night of the incident. Indeed, Nishimura acknowledged he could not

remember certain facts from that evening, such as whether he was parked or driving when he saw Grant's car and whether Grant's car failed to stop at a stop sign. 6RP 16, 43-44.

Here the prosecutor's argument improperly shifted the burden of proof and undermined the presumption of innocence, denying Grant a fair trial.

b. Reversal Of The Conviction Is Required Because The Misconduct Could Not Be Cured By Court Instruction And There Is A Substantial Likelihood That It Affected The Outcome.

Defense counsel objected six times to the prosecutor's misconduct. 6RP 83-86. Only after the fourth sustained objection, did the trial court instruct the jury "to disregard that portion of the argument that pertains to that being the only way they could acquit the defendant." 6RP 87. The misconduct here was not the type to be remedied by a curative instruction. "This is one of those cases of prosecutorial misconduct in which '[t]he bell once rung cannot be unrung.'" State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991) (quoting State v. Trickel, 16 Wn. App. 18, 30, 533 P.2d 139 (1976), rev. denied, 88 Wn.2d 1004 (1977)), rev. denied, 118 Wn.2d 1013 (1992).

Statements made during closing argument are intended to influence the jury. State v. Reed, 102 Wn.2d 140, 146, 684 P.2d 699 (1984).

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). The cumulative effect of misconduct can overwhelm the power of instruction to cure. Glasmann, 175 Wn.2d at 707; State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

Looking at each individual comment in isolation, a case could be made that instruction could have cured any prejudice. But that is not how repetitive misconduct is reviewed on appeal. Repeated instances of misconduct and their cumulative effect must be considered as a whole: “the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.” Glasmann, 175 Wn.2d at 707 (quoting Walker, 164 Wn. App. at 737).

Nishimura’s credibility was central to the State’s case. He was the only witness who allegedly saw Grant possess methamphetamine. He was the only witness who allegedly heard Grant’s statements. The prosecutor’s repeated assertions that the only way jurors could find the evidence insufficient to convict Grant was if they believed Nishimura was lying combined to create a cumulative prejudicial force that deprived Grant of his due process right to a fair trial. This was not the type of

argument the jury could simply be instructed to ignore. See Walker, 164 Wn. App. at 738 (improper comments used to develop theme in closing argument impervious to curative instruction). Under the circumstances of this case, a feeling of prejudice was engendered in the minds of the jury, which prevented Grant from having a fair trial.

Powell is instructive in this regard. Powell was charged with first degree child molestation. Powell, 62 Wn. App. at 915. During rebuttal closing argument in Powell's case the prosecutor told the jury a "not guilty verdict would send a message that children who reported sexual abuse would not be believed, thereby 'declaring open season on children.'" Powell, 62 Wn. App. at 918.

On appeal, the State conceded the comments were improper but argued there was no basis for appeal given the sustained objection and lack of a request for a curative instruction. Powell, 62 Wn. App. at 918-19. The Court of Appeals rejected the State's argument, noting it was pure speculation as to whether a curative instruction could have remedied the prejudicial effect of the prosecutor's flagrant remarks. Powell, 62 Wn. App. at 919.

The Court of appeals concluded the prosecutor's comments denied Powell a fair trial because the remarks were made during the final closing argument, "immediately prior to the jury beginning their deliberations."

Powell, 62 Wn. App. at 919. Thus, the Court found the bell of prosecutorial misconduct could not be unring. Id.

Like Powell, here the prosecutor's theme of repeatedly telling the jury only way it acquit Grant was to find Nishimura was lying was made during the final closing argument. Thus, like Powell, despite the trial court's sustained objections and instruction to disregard, this is an instance of prosecutorial misconduct in which the bell "cannot be unring." Powell, 62 Wn. App. at 919.

Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case. Fleming, 83 Wn. App. at 215. The evidence against Grant was not overwhelming. It came down to the credibility of Nishimura. Reversal is appropriate where, as here, the reviewing court is unable to conclude from the record whether the jury would have reached its verdict but for the misconduct. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

c. The Trial Court Erred In Denying Grant's Motion for a Mistrial Based on Prosecutorial Misconduct.

A trial court should grant a mistrial when the defendant has been so prejudiced that nothing short of a new trial can insure the accused

receives a fair trial. State v. Jungers, 125 Wn. App. 895, 901-02, 106 P.3d 827 (2005). This Court reviews the trial court's denial of a motion for a mistrial for abuse of discretion. Id.

As discussed above, the prosecutor committed misconduct during closing argument. The trial court abused its discretion by denying Grant's motion for a mistrial. Each of the reasons cited by the trial court as a basis for denying the motion is without merit.

First, the trial court reasoned it had adequately instructed the jury to disregard the prosecutor's comments and the jury was aware that credibility determinations were theirs to make. 6RP 101-02. Jungers is instructive here.

In Jungers, the defendant was charged with possession of methamphetamine. Jungers told police officers the drugs were hers even though they were found in someone else's bedroom. Jungers, 125 Wn. App. at 897-98. At trial Jungers denied the drugs were hers, explaining that she only told officers they were so the owner would not get in trouble. Jungers, 125 Wn. App. at 900.

At trial, the prosecutor asked the officer about his belief that the drugs belonged to the defendant. Jungers, 125 Wn. App. at 902. The court sustained the objection, and the witness did not answer. Jungers, 125 Wn. App. at 902-03. But the prosecutor referred to the opinions twice

in closing argument and displayed a butcher paper chart of what the “three officers believed.” Jungers, 125 Wn. App. at 903. The trial court denied Jungers’ motion for a mistrial based on prosecutorial misconduct. Jungers, 125 Wn. App. at 903-04.

The Court of Appeals noted “credibility was central” and evidence arguably supported Jungers’ trial testimony that the drugs did not belong to her. Jungers, 125 Wn. App. at 905. Although there was no answer to the improper question at trial and the chart reference to the officers’ beliefs was stricken, the Court noted the trial court did not mitigate the prosecutor’s improper closing argument by reminding the jury to disregard the previously stricken testimony. Id.

The Court concluded the prosecutorial misconduct required a mistrial because there was a substantial likelihood the cumulative effect of the prosecutor’s improper conduct usurped the jury’s fact-finding and credibility-determination functions. Jungers, 125 Wn. App. at 905-06.

Similarly, here, the prejudice could not be cured and nothing short of a new trial could ensure a fair trial because the prosecutor repeatedly emphasized the only way jurors could acquit Grant was to find that Nishimura was lying. The misconduct was flagrant and ill intentioned because it continued even after multiple objections were sustained. As in Jungers, here there was a substantial likelihood that the cumulative effect

of the prosecutor's repeated misconduct usurped the jury's credibility determination function.

Finally, the trial court denied the motion for mistrial believing the prosecutor committed no "intentional misconduct." This reasoning is also misplaced. The touchstone of due process analysis is the fairness of the trial: regardless of whether the prosecutor deliberately committed misconduct, the question is whether the misconduct prejudiced the jury thereby denying the defendant a fair trial guaranteed by the due process clause. Davenport, 100 Wn.2d at 762 (citing Smith v. Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)); accord State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). If prosecutorial "mistakes" deny a defendant fair trial, then the defendant should get a new one. State v. Fisher, 165 Wn.2d 727, 740 n.1, 202 P.3d 937 (2009). Thus, whether the prosecutor engaged in intentional or accidental misconduct is of no moment where the result of the misconduct was to deny Grant a fair trial.

For the reasons set forth above, the prosecutor repeatedly committed misconduct during closing argument. Nothing short of a new trial can ensure Grant receives a fair trial. The trial court erred in concluding otherwise.

2. THE PROSECUTOR'S DISPARAGEMENT OF DEFENSE COUNSEL DURING CLOSING ARGUMENT AT THE MAY 23 TRIAL DENIED GRANT A FAIR TRIAL

“[A] prosecutor must not impugn the role or integrity of defense counsel.” State v. Lindsay, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014). “Prosecutorial statements that malign defense counsel can severely damage an accused’s opportunity to present his or her case and are therefore impermissible.” Id. at 432 (citing Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983) (per curiam)). Even when there was no objection to the argument at trial, reversal is required when the misconduct was so flagrant and ill intentioned as to be incurable by instruction. Glasmann, 175 Wn.2d at 703-04.

Our Supreme Court has found improper disparagement of defense counsel where the prosecutor characterized defense counsel’s arguments as “sleight of hand” and “bogus.” State v. Thorgerson, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011). Our Supreme Court also determined the prosecutor’s argument was improper when he described defense counsel’s argument as a “classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing.” State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008) (quoting verbatim report of

proceedings). The prosecutor's comments about defense counsel's closing were in the same vein as those disapproved in Thorgerson and Warren and accordingly require reversal.

The prosecutor's arguments that likened defense counsel's arguments to "Alice's rabbit hole" was the equivalent of calling defense arguments "sleight of hand," "bogus," and "twisting" the facts. Cf. Thorgerson, 172 Wn.2d at 451-52; Warren, 165 Wn.2d at 29. The State's arguments expressly told jurors that the defense was using trickery, distraction, and confusion to avoid a conviction. These arguments attributed deception and unfair tactics to defense counsel and the defense's theory of the case. The prosecutor's choice to malign defense counsel severely damaged Grant's presentation of his version of events and theory of the case. The prosecutor's disparagement constituted egregious misconduct.

Moreover, the trial court legitimized the prosecutor's disparagement of defense counsel by overruling defense counsel's multiple objections. Davenport, 100 Wn.2d at 764. The trial court's refusal to sustain defense counsel's objections all but endorsed the State's argument that the only way to acquit Grant was to follow his lawyer down "Alice's rabbit hole" or to depart from the realm of reasonable thought.

Contrary to the prosecutor's characterization, defense counsel was not attempting to deceive jurors and his argument was both reasonable and thoughtful. Defense counsel merely asserted that the jury should hold the State to their burden and in so doing, question why additional corroborative evidence was not presented. The prosecutor's disparagement deprived Grant of this legitimate argument in his defense. No instruction could have cured the prosecutor's prejudicial disparagements. The prosecutor's denigration of Grant and his lawyer requires reversal.

3. THE TRIAL COURT IMPOSED GRANT'S SENTENCE
BASED ON A MISCALCULATED OFFENDER SCORE

Grant presented to the sentencing court with eight countable prior convictions, two for residential burglary, and one each for attempting to elude a pursuing police vehicle, no contact order violation, 2nd degree burglary, violation of the Controlled Substances Act, possession of a controlled substance without a valid prescription, and domestic violence felony violation of a no contact order. Supp. CP ____ (sub no. 74, Presentence Statement of King County Prosecuting Attorney, dated 5/5/14, at 11). Each conviction counts as one point. RCW 9.94A.525(13).

Grant was sentenced for the April 17 and May 23 convictions for violation of the controlled substances act at the same time. Thus each of

those convictions counted toward the other as one point for an ‘other current offense.’ RCW 9.94A.525(1). The State’s presentence statement however, also counts the charged offense of May 25, 2013 as one point. Supp. CP ____ (sub no. 74, Presentence Statement of King County Prosecuting Attorney, dated 5/5/14, at 9-10). This is was clearly error as Grant was never convicted of this offense and the charge was dismissed. CP 35; 12RP 16, 35.

Grant’s offender score should have been 9, not 10. Despite the failure to timely object, Grant may raise the issue for the first time on appeal because a sentencing court acts without statutory authority when it imposes a sentence based on an erroneous offender score. State v. Winston, 135 Wn. App. 400, 411, 144 P.3d 363 (2006). See State v. Knippling, 141 Wn. App. 50, 56, 168 P.3d 426 (2007) (“[A] defendant is free to challenge an erroneous sentence based on a miscalculated offender score at any time.”), aff’d, 166 Wn.2d 93 (2009).

Despite the error, Grant’s standard range remains 12 to 24 months. RCW 9.94A.517. The error in the judgment and sentence is effectively a scrivener’s error. The proper remedy for a scrivener’s error is to remand to the trial court to correct it. See In re Personal Restraint of Mayer, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005) (citing CrR 7.8(a), which provides that “clerical mistakes in judgments, orders, or other parts of the

record and errors therein arising from oversight or omission may be corrected by the court at any time’’)).

This Court should therefore remand the judgment and sentence for correction of the offender score from 10 to 9.

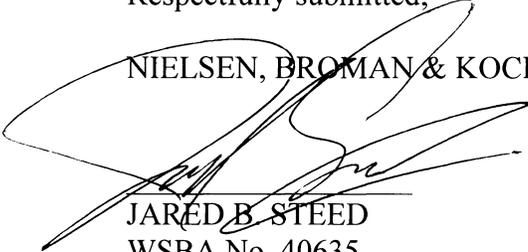
D. CONCLUSION

For the reasons set forth, this court should reverse Grant’s convictions and remand for new trials.

DATED this 10th day of March, 2015.

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. 72004-0-1
)	
RICHARD GRANT,)	
)	
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 10TH DAY OF MARCH 2015, 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] RICHARD GRANT
DOC NO. 731281
REYNOLDS WORK RELEASE
410 4TH AVENUE
SEATTLE, WA 98104

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF MARCH 2015.

X *Patrick Mayovsky*