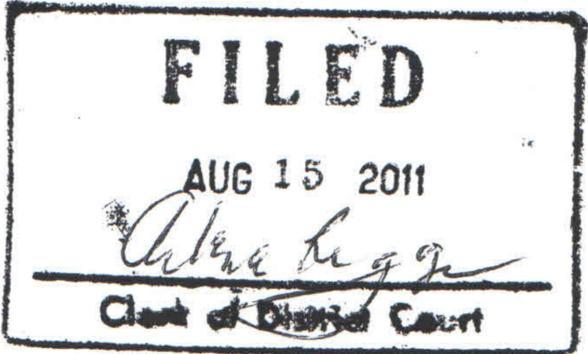


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MONTANA SEVENTH JUDICIAL DISTRICT COURT, RICHLAND COUNTY

ALVIN DUNCAN,	)	Cause No.: DV 09-106
	)	
Petitioner,	)	ORDER GRANTING DEFENDANT'S
	)	PETITION FOR POST-CONVICTION
v.	)	RELIEF
	)	
STATE OF MONTANA	)	
	)	
Respondent.	)	
	)	

The Petitioner filed his Petition for Post Conviction Relief on October 5, 2009. In the Petition, he raised two issues: defense counsel treatment of a prospective juror during *voir dire* and defense counsel's failure to object to statements the Prosecutor made in closing arguments. Despite administrative delays, this court ultimately assigned counsel to represent the Petitioner. On July 22, 2010, the Petitioner, through counsel, filed his Supplemental Brief in Support of Verified Petition for Postconviction Relief (Docket #21). In the Supplemental Brief, the Petitioner raised three new issues: ineffective assistance of counsel during the entire venire, ineffective assistance of counsel in closing arguments as to the State's burden of proof, and cumulative error. On February 28, 2011, at the start of the hearing on the Petition, on grounds that the Petitioner untimely raised new issues in an improper form, the Respondent State orally moved this court not to consider the three new issues the Petitioner raised in his

CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served  
 by mail upon Howell A. Irigoin at their address this  
15 day of July 2011.  
 Clerk of District Court  
K. Irigoin  
 Sidney, MT 59270

Supplemental Brief in Support of Verified Petition for Postconviction Relief, filed seven months earlier on July 22, 2011 (Docket #21). This court directed the parties to brief the Respondent State's oral Motion. Based upon the briefs, this court determined that the new issues should be heard, in its Order Denying State's Motion *in Limine* and Granting Defendant's Motion to Strike State's Brief in Support of Motion to Dismiss (Docket #57).

Of the five arguments the Petitioner (hereinafter "Duncan") raised, two of them are dispositive: (1) ineffective assistance of counsel by failing to object to the Prosecutor's statements in closing arguments suggesting that Duncan was required to "refute" the State's proof, and (2) ineffective assistance of counsel by mischaracterizing the burden of proof in closing argument. The Prosecutor repeatedly told the jury, without Duncan's trial attorney objecting, that Duncan failed to "refute" the State's case. This deprived Duncan of a fair trial and violated Duncan's fundamental constitutional right to due process under the Fourteenth Amendment to the United States Constitution and Article II, Section 17 of the Montana Constitution; and Duncan's right to counsel guaranteed by the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution. Furthermore, Duncan's attorney explained to the jury that beyond a reasonable doubt means that, if the evidence when placed on the scales of justice "doesn't tip in favor of the State, they haven't proved their case beyond a reasonable doubt and, therefore [Duncan] is entitled to an acquittal on that basis, and that basis alone." This misrepresentation violated Duncan's right to a fair trial, violating the same provisions of the United States and Montana Constitutions already mentioned. Duncan's attorney did not afford him effective assistance of counsel that *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984) requires. These

arguments are dispositive, and the court consequently will not address the other three arguments.

**I. PROSECUTOR'S COMMENTS IN CLOSING ARGUMENT UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PRODUCTION AND PERSUASION**

To determine whether a prosecutor's comments require reversal, a court first examines whether the prosecutor's comments were improper. If so, a court then determines whether the comments prejudiced the defendant's right to a fair and impartial trial. *State v. Kolb*, 2009 MT 9, ¶10, 349 Mont. 10, 200 P.3d 504 (*citing State v. Sanchez*, 2008 MT 27, ¶51, 341 Mont. 240, 177 P.3d 444). A court considers alleged improper statements during closing argument in the context of the entire argument. *State v. Makarchuk*, 2009 MT 82, ¶24, 349 Mont. 507, 204 P.3d 1213 (*citing State v. Roubideaux*, 2005 MT 324, ¶15, 329 Mont. 521, 125 P.3d 1114).

In addition, courts may not presume prejudice from the alleged misconduct; rather, the defendant must show that the prosecutor's argument violated his substantial rights. See *Makarchuk*, ¶24 (*citing Roubideaux*, ¶11). Moreover, "while the prosecutor may not comment on evidence not in the record and may not offer a personal opinion about the credibility of witnesses, the prosecutor may comment on contradictions in testimony as well as comment on evidence presented and suggest inferences the jury may draw therefrom." *State v. Michael J. Daniels*, 2003 MT 247, ¶26, 317 Mont. 331, 77 P.3d 224; see also, *State v. Green*, 2009 MT 114, 350 Mont. 141, 205 P.3d 798; and *State v. Rose*, 2009 MT 4, ¶106, 348 Mont. 291, 202 P.3d 749 ("A prosecutor invades the jury's province and engages in highly improper behavior when any attorney characterizes the defendant or witnesses as liars or offers personal opinions on a

witness's credibility."), *citing State v. Racz*, 2007 MT 244, ¶36, 339 Mont. 218, 168 P.3d 685; *State v. Hanson*, 283 Mont. 316, 326, 940 P.2d 1166, 1172 (1997). A prosecutor's misconduct may be grounds to reverse a conviction and grant a new trial if the conduct deprives the defendant of a fair and impartial trial. *Clausell v. State*, 2005 MT 33, ¶11, 326 Mont. 63, 106 P.3d 1175, *citing State v. Gray* (1983), 207 Mont. 261, 266-67, 673 P.2d 1262, 1265-66.

During closing argument, the Prosecutor repeatedly told the jury that Duncan did not "refute" the evidence presented against him. Duncan's trial attorney did not object. Specifically, regarding C.S.'s allegations, the Prosecutor said, "[a]nd that allegation has not been refuted by the Defendant." (Trial Tr. at 535.) Regarding whether C.S. consented to Duncan's alleged sexual assault, the Prosecutor argued, "[t]he proof of that element has not been refuted by this Defendant . . . . That proof has not been refuted by the Defendant." (Trial Tr. at 536.) In addition, the Prosecutor argued, "[s]o the time frame has not been refuted. The fact that the Defendant acted knowingly has not been refuted, that there was sexual contact has not been refuted, and that the sexual contact was without consent has not been refuted. Count I has been proven." (Trial Tr. at 536-37). Regarding the allegations of another alleged victim, N.M., the Prosecutor argued, "[t]hat act of sexual contact has not been refuted." (Trial Tr. at 537.) The Prosecutor added, "[s]exual contact with [N.M.] has not been refuted by this Defendant" and "[t]he fact that the Defendant acted knowingly when he had sexual contact with [N.M.], when he touched her breast, has not been refuted." (Trial Tr. at 538.) Regarding the allegations of yet another alleged victim, V.G., the Prosecutor

concluded his closing argument, saying, “[n]one of that’s been refuted, Ladies and Gentlemen.” (Trial Tr. at 540.)

In rebuttal argument, the Prosecutor said, “[t]he Defendant doesn’t have to prove anything. That’s what our Constitution tells us. It’s the law of the United States of America and also the State of Montana. But it might be a good idea to refute some of the proof against him, and it simply hasn’t been done in this case, with the exception of Dr. Rauh. Dr. Rauh did some refuting, but that was on one element of one count.” (Trial Tr. at 562.) The United States and Montana Constitutions do not permit such a shift of the burden of proof, no matter what prelude a prosecutor articulates before shifting the burden.

The record reveals that the Prosecutor’s closing arguments undermined Duncan’s constitutional right to be presumed innocent, and Duncan’s trial attorney failed to afford Duncan effective assistance by failing to object to the Prosecutor’s statements suggesting that Duncan bore the burdens of production and persuasion to “refute” the State’s “proof against him.” Although counsel, in closing argument, may infer facts from the evidence for the jury, a prosecutor may not shift the burden of proof or persuasion to the defendant or undermine the defendant’s constitutionally-guaranteed presumption of innocence. Whether to object lies within defense counsel’s discretion; however, failure to object must, beyond being error, also prejudice the defendant before a court may grant post-conviction relief. *State v. Campbell* (1996), 278 Mont. 236, 250, 924 P.2d 1304, 1313. As a trial tactic, however, defense counsel may reasonably refrain from objecting during opening statement and closing arguments. *Dawson v. State*, 2000 MT

219, ¶105, 301 Mont. 135, 10 P.3d 49 (failure to object during closing argument and opening statement is within the “wide range” of permissible professional legal conduct).

A defense attorney’s failure to object at the time of the prosecutors’ statements has been determined to waive the right to preserve the issue for review (See e.g. *State v. Rose*, 2009 MT 4, ¶ 106, 348 Mont. 291, 202 P.3d 749). However, failure to object to very serious instances of prosecutorial misconduct is compelling evidence of defense counsel’s incompetence and grounds to reverse a defendant’s conviction. *Gravelly v. Mills*, 87 F.3d 779, 785 (6<sup>th</sup> Cir. 1996); see also *State v. Newman*, 2005 MT 348, ¶¶16-20, 330 Mont. 160, 127 P.3d 374. To afford a defendant due process that both the United States Constitution and the Montana Constitution guarantee, the State must prove every element of each offense charged beyond a reasonable doubt. *State v. McClaslin*, 2004 MT 212, ¶24, 322 Mont. 350, 96 P.3d 722 . The State’s burden of proof is closely related to the Defendant’s right to be presumed innocent as §46-16-204, MCA, codifies. It states that “[a] defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether the defendant’s guilt is satisfactorily shown, the defendant must be found not guilty.” *State v. Howell* (1901), 26 Mont. 3, 5, 66 P. 291, 292 (the presumption of innocence “comes to the aid of the defendant at every stage of the case, and is finally rebutted and overturned only by evidence establishing every element of the crime charged to the satisfaction of the jury beyond a reasonable doubt.”); *State v. Martin* (1903) 29 Mont. 273, 279, 74 P. 725, 727 (the presumption of innocence can only be removed “by evidence which satisfies the minds of the jurors beyond a reasonable doubt. The presumption of innocence is in effect the very thing against which the prosecution is

directed.”); *City of Missoula v. Shea* (1983), 202 Mont. 286, 294, 661 P.2d 410, 414 (the presumption of innocence is a “constitutional due process requirement.”); and *Estelle v. Williams* (1976), 425 U.S. 501, 503, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126 (“The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment” to the United States Constitution).

Duncan relies, in part, on *State v. Newman*, 2005 MT 348, 330 Mont. 160, 127 P.3d 374 (Nelson, J., specially concurring), but the Montana Supreme Court has stated that *Newman* provides no precedential value for this issue because it is a plurality decision. *State v. Kolb*, 2009 MT 9, ¶ 26, 349 Mont. 10, 200 P.3d 504; and *State v. Makarchuk*, 2009 MT 82, ¶25, 349 Mont. 507, 204 P.3d 1213. Therefore, the court analyzes this issue without giving *Newman* precedential value as to the issue that the State’s closing argument was improper. But this case is nonetheless distinguishable from *Kolb* and *Makarchuk*.

Here, the Prosecutor repeatedly asserted that Duncan did not refute the State’s evidence. This prosecutorial argument is significantly different than commenting on conflicts and contradictions in testimony or commenting on the evidence presented from which the jury may infer facts as the Montana Supreme Court allowed in *State v. Gladue*, 1999 MT 1, ¶15, 293 Mont. 1, 972 P.2d 827.

The Prosecutor’s repeated assertion that Duncan did not “refute” the State’s evidence differs significantly from the prosecutor’s assertions in *Kolb*. There, the defendant and another were accused of choking and punching Madsen and Hughes and taking their money. The two alleged victims, Madsen and Hughes, testified at trial that Kolb and his co-defendant brandished a handgun and threatened to shoot Hughes.

After Kolb and his co-defendant left the room, Hughes ran after them into a parking lot and kicked their truck and pounded on its windows before they left. In his opening statement, defense counsel raised, for the first time, the issue that three witnesses who saw Hughes chasing Kolb and his co-defendant across the parking lot did not see a gun. None of the three witnesses testified at trial. On cross-examining Hughes, defense counsel asked whether it was true that three witnesses saw him yell at Kolb and others as they ran across a parking lot. In closing argument, defense counsel pointed out that the State failed to call any of the parking lot witnesses. In closing argument, the State told the jury that Kolb failed to call the parking lot witnesses who allegedly observed Kolb and Hughes in the parking lot, suggesting that those witnesses would not have contradicted the State's evidence. The Montana Supreme Court in *Kolb* found that the prosecutor's statements did not shift the burden of proof and therefore the prosecutor's comments were not improper and did not prejudice Kolb's right to a fair trial (*Kolb*, ¶¶23-29).

In *Kolb*, (1) the prosecutor acknowledged during closing argument that he bore the burden to establish the case beyond a reasonable doubt, and (2) the defense first introduced at trial the matter of three witnesses whom the prosecution had failed to call as witnesses, thus opening the door to debate fairly before the jury the defendant's failure to subpoena witnesses. Here, the Prosecutor acknowledged that Duncan did not have to prove anything but then immediately said, "[b]ut it might be a good idea to refute some of the proof against him, and it simply hasn't been done in this case . . . ." (Trial Tr. at 536.) Here, Duncan did not suggest that the State's failure to present testimony of witnesses suggested that the jury may infer facts in his favor as the defense did in

*Kolb*; instead, it was the Prosecutor here who flat out asserted that the law obligates Duncan to refute some of the State's proof against him.

Similarly, the Prosecutor's statements here differ significantly from the *Makarchuk* prosecutor's suggestion that the jury should infer guilt from the defendant's failure to subpoena phone records or have certain witnesses testify, which the Montana Supreme Court found did not shift the burden of proof. (*Makarchuk*, ¶¶22-26). In *Makarchuk*, Makarchuk argued that the prosecutor's remarks during rebuttal closing argument deprived him of his right to a fair trial and due process of law, as the Fourteenth Amendment to the United States Constitution and Article II, Section 17 of the Montana Constitution guarantee, in that it "'impinged on [his] presumption of innocence and attempted to mislead the jury about the burden of proof' when the prosecutor 'criticized [Makarchuk] for failing to present certain evidence . . . and for failing to call particular witnesses . . . ." *Id.*

The Montana Supreme Court has distinguished the prosecutor's duty to comment on evidence actually presented from that not presented, as follows:

While it is improper for the prosecution to comment on the failure of a defendant to testify, 'the prosecution is permitted to point out facts at issue which could have been controverted by persons other than the defendant, but were not.' *State v. Rodarte*, 2002 MT 317, ¶14, 313 Mont. 131, 60 P.3d 983, (citing *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954 (1978)). Moreover, while the prosecutor may not comment on evidence not in the record and may not offer a personal opinion about the credibility of witnesses, the prosecutor may comment on contradictions in testimony as well a comment on evidence presented and suggest inferences the jury may draw therefrom. *State v. Daniels*, 2003 MT 247, ¶26, 317 Mont. 331, 77 P.3d 224.

*Makarchuk* at ¶24. The Montana Supreme Court rejected Makarchuk's argument on the following three grounds. First, the State corrected any attempt by the prosecutor to

mislead the jury about the burden of proof because the prosecutor correctly explained to the jury that the State retained the burden of proof and the obligation to prove its case. Second, the State only referred to phone records and lack of testimony of two witnesses in rebutting Makarchuk's defense attorney's lengthy attack, in closing argument, against the State's case in light of Makarchuk's testimony that he telephoned persons to come to the camper. The prosecutor's rebuttal argument, in *Makarchuk*, constituted proper argument to "point out facts at issue which could have been controverted by persons other than the defendant." *Rodarte*, ¶14." Third, the prosecutor, in closing argument, asked the jury to evaluate Makarchuk's credibility, which was important because the defense relied primarily on Makarchuk's testimony. "[A]rgument about witness credibility is well within the permissible scope of closing argument." *Makarchuk* at ¶26.

Here, the Prosecutor went beyond commenting on evidence presented and suggesting what the jury may infer factually when he repeatedly said Duncan had not refuted evidence and asserted it would have been a good idea for Duncan to refute some of the proof against him. Here, the Prosecutor specifically said, in closing: "The Defendant doesn't have to prove anything. That's what our Constitution tells us. It's the law of the United States of America and also the State of Montana. But it might be a good idea to refute some of the proof against him, and it simply hasn't been done in this case . . . ." (Trial Tr. at 536.) Unlike *Makarchuk*, the State, here, did not effectively correct its attempt to mislead the jury about the burden of proof. Instead, the Prosecutor told the jury it would have been a good idea for Duncan to "refute" some of the proof against him, which is quite disconcerting because "disprove" is a recognized synonym to "refute." *Webster's Collegiate Thesaurus* (1976). The Prosecutor's closing

argument, here, responded to nothing Duncan argued. The Prosecutor's closing argument was not about witness credibility. The content of the Prosecutor's argument here distinguishes this case from *Kolb* and *Makarchuk*.

In *State v. Lindberg*, 2008 MT 389, 347 Mont. 76, 196 P.3d 1252, Lindberg asserted that he was denied his right to due process and a fair and impartial trial when the prosecutor improperly commented upon the credibility of witness (calling a defense witness a liar and offering a personal opinion as to the credibility of the prosecution's evidence) and improperly asserted that Lindberg was responsible for establishing his innocence. In particular, the prosecution referred to Lindberg's failure to call witnesses to refute the prosecution witnesses' testimony and failure to call a particular witness (*Id.* at ¶30) and commented upon Lindberg's failure to present evidence to corroborate his defense theory, categorized a witness as a "liar," and argued that the State's evidence was genuine and truthful (*Id.* at ¶33). Lindberg's attorney did not object. On appeal, the State argued that Lindberg's attorney's failure to object to the comments was fatal to Lindberg's appeal and that the claims should not be reviewed under the common law plain error doctrine. The Montana Supreme Court declined to invoke plain error review of Lindberg's claims because Lindberg's trial attorney had not objected to the prosecutor's comments at trial, but characterized the prosecutor's comments as being "improper" and mentioned that it had "routinely chastised prosecutors for making improper comments on the credibility of the evidence before a jury, and in particular categorizing witnesses as 'liars.'" *Id.* at ¶34.

Refusing to review prosecutor misconduct about which ineffective counsel does not object makes no sense. Routinely chastizing prosecutor misconduct does not

sufficiently discourage future legal error. Depriving a citizen of constitutional rights like due process and a fair trial because another constitutional right to an attorney is not afforded because of ineffective trial counsel is illogical and irrational.

## II. DEFENSE COUNSEL'S MISCHARACTERIZATION OF THE BURDEN OF PROOF IN CLOSING ARGUMENT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL

In his closing argument, Duncan's trial attorney said:

"but the way that I find it easier to determine what reasonable doubt means, beyond reasonable doubt, we've got these scales of justice around here somewhere in front of this building, you've all seen them, they hand down with the chains and deal with, we're thinking an old gold scale, and they tip one way or the other (indicating), put the evidence on either side of those on those pans and see what way it tips. And if it doesn't tip in favor of the State, they haven't proved their case beyond a reasonable doubt and, therefore, he is entitled to an acquittal on that basis, and that basis alone.

(Trial Tr. at 559-560.)

Duncan's trial attorney mischaracterized and diminished the State's burden of proof. The court's jury instructions, while correct, did not overcome Duncan's attorney's mischaracterization of the State's burden of proof. The court gave Duncan's attorney an opportunity to correct his mischaracterization, but he declined. (Trial Tr. at 565-66.) Duncan's current attorney seeking post-conviction relief cites to the following cases to support his contention that Duncan's trial attorney's mischaracterizing the burden of proof constituted ineffective assistance of counsel. *Estelle*, 425 U.S. at 503; *Strickland v. Washington*, 466 U.S. at 685, 104 S. Ct. at 2063; *State v. Daniels*, 2003 MT 247, ¶26; and *State v. Henderson*, 2004 MT 173, ¶17. Duncan's post-conviction attorney's arguments are persuasive.

For the reasons stated, this court grants Duncan's Petition for Post-Conviction Relief and request for a new trial on the grounds of ineffective assistance of counsel and prosecutorial misconduct.

Dated this 15<sup>th</sup> day of August, 2011.

  
KATHERINE M. IRIGOIN  
District Court Judge