No. 41970-0-II

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

STATE OF WASHINGTON,
Respondent,

v.

ODIES D. WALKER,
Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

OTHER CASES

FEDERAL STATUTES

STATE STATUTES

MISCELLANEOUS

I. INTRODUCTION/SUMMARY OF THE ARGUMENT

The defendant-appellant in this case, Odies D. Walker, a first-time offender, appeals his convictions for crimes related to the robbery and death of Kurt Husted, an employee of an armored truck company, at the Walmart store in Lakewood, Washington. Mr. Walker was not present when his codefendants, Calvin Finley and Marshawn Turpin, killed and robbed Mr. Husted and wounded another individual with the bullet that passed through Mr. Husted.

On appeal, he argues that the jury instructions improperly allowed conviction for premeditated murder if the State proved either he or an accomplice premeditated the intent to kill. These jury instructions, which did not require the State to prove the shooter premeditated the crime, both relieved the State of its burden of proving premeditated murder and violated Mr. Walker's right to a unanimous jury.

In addition, Mr. Walker argues the State's improper comments, both individually and taken together, deprived him of his right to a fair trial. These comments included telling the jury during opening statements that Mr. Walker had been "lying like crazy" during a police interview, showing the jury 137 slides stating "**DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER,**" offering three improper analogies which trivialized the State's burden of proof, making numerous comments undermining the jury's role by

urging it to declare the truth with its verdict, and providing an inaccurate definition of premeditation which allowed the jury to find premeditation if the thought occurred in a "split second" with the kind of deliberation a driver uses to stop at a stop sign.

Finally, Mr. Walker argues that his counsel was ineffective when he failed to request a cautionary instruction about the use of the testimony of codefendant Tonie Williams-Irby, the star witness for the State, and also ineffective in failing to object to all the instances of prosecutorial misconduct.

II. ASSIGNMENT OF ERROR

A. Assignment of Error

1. The superior court erred in instructing the jury in a manner that relieved the State of its burden of proving Finley committed premeditated murder.

2. The superior court erred in instructing the jury in a manner that violated Mr. Walker's right to a unanimous verdict.

3. The superior court erred in allowing the State to make improper, prejudicial comments during opening statements and closing arguments.

4. The superior court erred in allowing the State to redefine premeditation in a manner that lessened its burden of proof.

5. The superior court erred in allowing Mr. Walker to be tried in violation of his right to effective counsel.

B. Issues Pertaining to Assignment of Error

1. When the jury instructions in this case allowed the jury to convict Mr. Walker if either he or a codefendant premeditated the death of Mr. Husted, did the instructions both violate Mr. Walker's due process rights by relieving the State of its burden of proving all the elements of premeditated first degree murder and violate his right to a unanimous jury?

2. When the State made numerous improper, prejudicial comments in opening statements and closing arguments, including showing the jury 137 slides declaring **DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER**; making three trivializing analogies regarding the burden of proof, including two burden-shifting analogies; calling Mr. Walker a liar in opening statements; and denigrating his case and attorney by accusing him of attempting to mislead the jury seven times and declaring him desperate five times, did the State's misconduct deprive Mr. Walker of a fair trial?

3. When the legal definition of "premeditation" requires that a decision be "thought over beforehand" in "more than a moment in point of time," was Mr. Walker prejudiced by the State's redefining the term to the jury as an act that could occur in a "split second" and involve the kind of deliberation used when a driver stops at a stop sign?

4. Was Mr. Walker's trial attorney ineffective when he a) failed to seek a cautionary jury instruction regarding the testimony of codefendant Williams-Irby, the single most damaging witness in the case, much of whose testimony was uncorroborated and b) failed to object to several of the prosecutor's improper comments when the harm caused by those comments was prejudicial under the Strickland standard?

III. STATEMENT OF THE CASE

A. Procedural History

The first information in this case was filed June 4, 2009; three amended informations were subsequently filed. Clerk's Papers (CP) 1-2; CP 3-6; CP 7-10, CP 11-14. The final information, filed February 3, 2011, charged the following four crimes occurred on June 2, 2009: **Count I**: Aggravated Murder in the First Degree of Kurt Husted committed as an accomplice with premeditation and in furtherance of the crime of Robbery in the First Degree in violation of RCW 10.95.020(11)(a) and 9A.32.030(1)(a); **Count II:** Murder in the First Degree committed while committing or attempting to commit the crime of Robbery in the First Degree in violation of RCW 9A.32.030(1)©, additionally alleging the aggravating factors that the offense involved a high degree of sophistication or planning pursuant to RCW 9.94A.535(3)(m) and/or it involved a destructive and foreseeable impact on persons other than the victim pursuant to RCW

9.94A.535(3)® such that the State would seek an exceptional sentence under RCW 9.94A.537; **Count III:** Assault in the First Degree committed as an accomplice with a firearm or deadly weapon against Wilbert Pena in violation of RCW 9A.36.011(1)(a); **Count IV:** Robbery in the First Degree committed as an accomplice in violation of RCW 9A.56.190 and 9A.56.200(1)(a)(I). The State gave notice of firearm enhancements as to each of these crimes. The information charged two final crimes, both alleged to have been committed on or about the period between May 1 and June 2, 2009: **Count V:** Solicitation to Commit Robbery in the First Degree in violation of RCW 9A.56.190 and 9A.56.200(1)(a)(i)(iii) [sic], committed in violation of RCW 9A.28.030; and **Count VI:** Conspiracy to Commit Robbery in the First Degree, with Calvin Finley, Marshawn Alex Turpin, and/or Tonie Williams-Irby in violation of RCW 9A.28.040. CP 11-14.

Calvin Finley, Marshawn Alex Turpin, and Tonie Williams-Irby were named as codefendants. CP 11.

Prior to trial, the court, the Honorable Bryan E. Chushcoff presiding, denied Mr. Walker's motion to suppress evidence and deemed admissible statements he made to law enforcement officers. CP 55-57; 281-91. Mr. Walker proceeded to trial, which lasted from March 2 through March 22, 2011. Verbatim Report of Proceedings, volumes 1 through 13 (1VRP through 13VRP). The

codefendants pleaded guilty. Williams-Irby testified for the State at trial. *See* 7VRP-8VRP.

After the State rested it case, Mr. Walker moved to dismiss the aggravating factor as to Count I because the State failed to prove he was a major participant in the acts causing the death of Mr. Husted or in the robbery. The court denied the motion. 11VRP 1312-17. It also denied his motion to dismiss the aggravating factor as to Count II, that Mr. Walker used a high degree of sophistication or planning when committing the crime. 11VRP 1317-21.

Mr. Walker was convicted of all the charged crimes. CP 256-61. In addition, the jury returned special verdicts as to Count I, finding the crime was committed in the furtherance of robbery in the first degree; Count II, finding Mr. Walker used a high degree of sophistication or planning when committing the crime and that the crime involved a destructive and foreseeable impact on persons other than the victim; and Counts I-IV, finding Mr. Walker was armed with a firearm at the time of the commission of such crimes. CP 262-67.

Sentencing occurred April 8, 2011 (14VRP). The parties agreed Count II (felony murder) should merge with Count I (premeditated murder) and Mr. Walker argued Count II should be vacated. The court merged the counts, declined to vacate Count II, but did not include that count in the Judgment and Sentence. 14VRP 1473-75; CP 268-79. It imposed: life in prison without the

possibility of release plus 60 months for the weapon enhancement on Count I; 123 months on Count III plus 60 months for the weapon enhancement, both to run consecutively to the sentence imposed on Count I; 144 months on Count IV plus the 60-month weapon enhancement, to run concurrently; and 108 months on Counts V and VI, also to run concurrently. 14VRP at 1488; CP 273-74. Finally, the court imposed costs, fees, assessments and restitution. CP 272.

This appeal followed. CP 307-08.

B. Substantive Facts

1. Overview

On June 2, 2009, Calvin Finley, Marshawn Alex Turpin and Mr. Walker were accomplices in the armed robbery of Kurt Husted, a custodian for the Tacoma Loomis Armored Car Company, as Mr. Husted was picking up cash receipts from a Walmart store in Lakewood, Washington. *See* 4VRP 169-70, 175, 178-79; 11VRP 1225-26.

Turpin and Finley entered the Walmart to commit the crime. 6VRP 373; Pl. Exh. 68. Finley fired a single shot into Mr. Husted's head, causing his death. 6VRP 373; Pl. Exh. 67; 11VRP 1294. The bullet passed through Mr. Husted and lodged in the left shoulder of a bystander, Wilbert Pina, where it remains and impairs his use of that shoulder. 4VRP 98, 104 & 108; *see generally* Pl. Exh. 9.

Mr. Walker did not enter the Walmart. At trial, he was identified as the driver of the getaway car. 5VRP 243; *see* 5VRP 231-37; 293-99.

At the time of the crimes, Mr. Walker lived with codefendants Tonie Williams-Irby, his common-law wife, and Calvin Finley, his cousin. 7VRP 626, 633.

2. Williams-Irby's Testimony

Mr. Walker had been Williams-Irby's boyfriend since 2002; they referred to each other as husband and wife. 7VRP 626-27. At the time of the robbery, they were living together in Tacoma, raising five children, three of Mr. Walker's, Alexis, Odies and Jawon, 7VRP 629, and two of Williams-Irby's, Darrell Parrott, age 21, and China Irby, 17. 7VRP 626, 628. Mr. Walker had several cousins in Tacoma, including Calvin Finley. 7VRP 628.

Finley moved in with Mr. Walker and Williams-Irby around February 20, 2009, sharing a room with Mr. Walker's son, Odies Junior. 7VRP 633-34. Mr. Walker and Finley had a largely negative relationship; Mr. Walker did not trust Finley, calling him a coward and sneaky. 7VRP 634-35. Mr. Walker treated Finley like a child, hollering at him and demeaning him. However, he let him stay at the house because he was family. 7VRP 644-45. Finley lived with them up until the robbery, never holding a job. 7VRP 650-51.

Williams-Irby began working at the Lakewood Walmart in 2007; promoted to manager in March 2008. 7VRP 645-47. She occasionally attended the daily Walmart staff meetings at which the previous day's profits were announced. 7VRP 647-49. In early 2009, she worked the early shift, from 5 a.m. to 2 p.m., changing in March or April to a 4 p.m. finish time. 7VRP 649. Mr. Walker had worked at the store as a greeter from in November 2006 through February 2007. 7VRP 646. Mr. Walker generally took Williams-Irby to and from work; they lived five minutes away. 7VRP 649-50.

In late February 2009, while parked in Mr. Walker's green Tahoe SUV outside the Walmart, Williams-Irby, Finley, Walker and a person known at trial only as "Jonathan" discussed the Loomis armored truck that picked up the daily cash receipts from Walmart. Mr. Walker asked Williams-Irby how much she thought the truck took out each day. Williams-Irby estimated $100,000. 7VRP 653-55. Mr. Walker asked her about the daily profit at Walmart two or three times a week from the beginning of March until the robbery. 7VRP 668.

Williams-Irby overheard Mr. Walker speaking about a robbery to various people several times between March 2009 and the crime. The first time was shortly after the conversation outside the Walmart, when she heard Mr. Walker, Finley and Jonathan talking about the armored truck. Mr. Walker said it would be easy money. 7VRP 656.

Williams-Irby heard Mr. Walker speak about the roles each person would have in the robbery. Mr. Walker would be the getaway driver because he could drive the best and could not enter the store for fear he would be recognized as the former employee with the disabled arm; Finley would take the bag; and Jonathan would back Finley up. 7VRP 664.

In mid-March, Williams-Irby heard Mr. Walker angrily talking about the robbery with Finley and Jonathan. He wanted to know "why were they taking so long to do what they had to do." 7VRP 658, 659. He told them "if they did it without him, he would kill them." 7VRP 658. He told Jonathan, an alcoholic, not to go into the Walmart drunk because "he would mess it up, and everybody would go to jail" and Mr. Walker would get more time than anyone because he planned it. 7VRP 658-59, 660-61.

A similar conversation occurred in mid-April, this time between Mr. Walker, Finley, and Turpin. Again Mr. Walker warned the others about hurrying up with the job and told them if they messed up he would kill them because they would all go to jail. He also told them that if they did the job without him, he would kill them. 7VRP 659-60. Before getting involved in the robbery scheme, Turpin, age 21, was a friend of Williams-Irby's son, Darrell Parrott. 7VRP 662-63.

In early March or late February, Williams-Irby heard Mr. Walker say he, Finley and Turpin would sit in the Walmart parking lot, timing the movements of the Loomis truck. Although Williams-Irby never saw them there, she had reason to believe it was true. 7VRP 661-62. Mr. Walker knew that one guard from the armored truck entered the Walmart. 8VRP 700.

In April 2009, Williams-Irby heard Mr. Walker and Finley talking about the planned robbery. Mr. Walker told Finley, "do what you got to do" to get the money, which Williams-Irby interpreted as killing the Loomis guard. 7VRP 665. Mr. Walker told Finley he could use a silver 9-millimeter gun Walker obtained from someone named Courtney. The gun was usually kept in a cereal box in the closet in their bedroom. 7VRP 666-67.

Williams-Irby also heard Mr. Walker speak to an individual named Jessie Lewis about the matter. She believed Lewis's involvement occurred in April or May. Williams-Irby heard Mr. Walker tell Lewis that if he was scared, he should not do it because he would get them locked up. 7VRP 679-81.

According to Williams-Irby, beginning in February 2009, Mr. Walker unsuccessfully tried to rob the Loomis guard every day. 7VRP 681. Williams-Irby said Mr. Walker stated that robbery attempts were made at the Walmart "every time he talked about it." 8VRP 700. From about the end of February until the robbery, a car borrowed from Finley's girlfriend was secretly stored at the

residence where Walker, Williams-Irby and Finley lived. 7VRP 683. The car was a white Buick ultimately used as the getaway car. 8VRP 717-19. Mr. Walker told the car's owner not to report it stolen until they did the job. 7VRP 683.

Williams-Irby said Mr. Walker obtained a black .45 pistol from a woman named Natalie. She and Finley went with him to Natalie's house to buy the gun. 7VRP 690-91. Finley's friend lived with Natalie. 8VRP 718. It was his idea for Mr. Walker to get the gun from Natalie. 8VRP 786. Later in the trial, the woman's full name was revealed to be Natalie Brechbeil. *See, e.g.*, 8VRP 835.

The day of the robbery, Williams-Irby attended the Walmart daily staff meeting because Mr. Walker wanted to know the store's profit from the previous day. After the meeting, using a code, she told Walker the take was $207,000. 8VRP 701-02. About 30 minutes after the robbery occurred, Mr. Walker called her to make sure she was okay. 8VRP 710. About 10 minutes later, while she was standing outside the Walmart with other employees, she saw him walking across the parking lot. He said he had come to get Turpin's car, a gold Maxima, and told her to give him a hug and play it off. 8VRP 710-13.

Williams-Irby saw the gold Maxima at her house when she got home from work that day. 8VRP 714. The white Buick was gone. 8VRP 715. Mr. Walker, her son Darrell Parrot, and her daughter China were there. Walker was watching

the news, but urged her to hurry because they had to leave. 8VRP 716. Driving the green Tahoe, they picked up the younger children at school (Alexis and Odies Junior), then went together to wipe the fingerprints off the Buick, which was parked at Natalie Brechbeil's house. However, by the time they arrived, the police had already surrounded the car. 8VRP 717-19.

Next they drove to Finley's sister Callie's house. 8VRP 719. Mr. Walker went inside for 5 to 10 minutes while the others sat in the truck. Next Mr. Walker drove to Al Trevino's residence. During the drive there, Finley called Mr. Walker, who told him to quit calling because he would see him in a minute. 8VRP 721-22.

Also during that drive, Mr. Walker told Williams-Irby he was outside in the getaway car during the robbery, on the phone with Finley. 8VRP 723. When Finley asked for the bag of cash, the guard laughed at him. Mr. Walker told Finley, "kill the mother fucker." 8VRP 729.

Al Trevino, Finley and Turpin were already at the Trevino residence. 8VRP 733. Walker, Finley and Turpin went into the bathroom with the bag from the robbery, staying there for 15 or 20 minutes. Mr. Walker came out and put $10,000 in Williams-Irby's purse. 8VRP 734-35. He put another bundle of money totaling around $2,500 into his pocket and $10,000 more into her purse. 8VRP 736. The $2,500 was for her and the kids to pay bills. Mr. Walker said his

share of the robbery proceeds was $20,000, although that did not include the money he put in his pocket. Turpin got $10,000. 8VRP 738-39. The three put into a black plastic bag the clothes Finley and Turpin wore during the robbery, the bag taken in the robbery, and a phone. Mr. Walker had brought clothes for the men to change into. 8VRP 737-38.

While at the Trevino's, Williams-Irby saw a red Samsung cell phone on a table in the house that she had not seen before. Later, when they were back in the Tahoe, she opened the phone and saw "I love you, Lexi" written in it and a phone number with a 404 area code. Mr. Walker's nine-year-old daughter is named Alexis, but Williams-Irby did not believe it was her phone. 8VRP 739-42.

Eventually, Trevino, Finley and Turpin left. Mr. Walker and his family remained at the house for about 30 more minutes, during which time Mr. Walker gave Williams-Irby $1,000 and each of the kids $100. 8VRP 743-44.

Back in the Tahoe, Mr. Walker took the money from Williams-Irby's purse, tied it in his daughter's sweatshirt, and put it inside a speaker. Then Mr. Walker drove to a motel in Fife to meet Finley. When Finley arrived with Trevino, Trevino got him a room and Mr. Walker went inside to speak with Finley. 8VRP 745-46.

Next they drove to a Walmart in Federal Way to buy safes to put the money in, as well as some other items. 8VRP 746-49. Then they returned to the

motel in Fife to give Finley one of the safes, before returning home. At some point in the evening, Mr. Walker gave Finley his own phone because Finley's battery was dead. 8VRP 750-51.

Once home, Williams-Irby's son carried the safe into the house where it was put in the master bedroom closet; Mr. Walker retrieved the money from the car and put it in the safe. He also brought the .45 into the house and put that in the safe. 8VRP 752-54. Williams-Irby put the $2,500 given to her for bills in an envelope in her undergarment drawer. 8VRP 756-57.

Mr. Walker changed his clothes because the white T-shirt he was wearing came from Finley and had gun residue on it. 8VRP 763-64. The family then left the house, taking Finley some food, visiting Mr. Walker's son, and going to the Red Lobster for dinner. 8VRP 764-66. Before leaving, Mr. Walker told Williams-Irby that if she crossed him, he would kill her. 8VRP 765. At the Red Lobster, Mr. Walker bragged, "[T]his is how you do it. This is how you murder these niggers and get this money. The next time, it will be more money." 7VRP 773.

3. Other Evidence of Mr. Walker's Involvement

Jessie Lewis, an acquaintance of Mr. Walker, testified that in May 2009, Mr. Walker spoke to him on two separate occasions about assisting with a robbery. 9VRP 902-03 & 943-45; 913-14 & 946-48. Walker told Lewis his role

would be to shoot the armored guard. 9VRP 903-04. Mr. Walker showed Lewis a 9-millimeter gun he could use. 9VRP at 905. Regarding Finley's role, Lewis said Mr. Walker told him to go into the store, Finley would be there too, and "do whatever we had to do, shoot him or whatever." 9VRP 906. Walker told Lewis they would split up the stolen money. 9VRP 906.

Mr. Walker, Finley, Turpin and Lewis went to Walmart in the white Buick on a failed attempt to rob the guard. When the armored truck arrived, Walker stayed in the car, Finley and Lewis walked into the store; Turpin was in the back of the store. Finley carried a .45; Mr. Walker had offered Lewis the 9-millimeter, but he declined. 9VRP 908-11.

Once in the store, Lewis changed his mind because he feared someone would be killed. Finley and Mr. Walker called him a bitch for backing out. 9VRP 912. Mr. Walker said something like, "we're going to get away, man" and tried to persuade him to do the job. 9VRP 913.

Williams-Irby's son, Darrell Parrott, testified that Mr. Walker also approached him about a robbery. In May 2009, Mr. Walker offered Parrott and Jawon, Mr. Walker's son, $5,000 each to enter the Walmart with Calvin Finley as part of the robbery of an armored car. Walker told the youth he would have to have a gun "to watch Calvin's back." No killing was mentioned. 9VRP 968-69.

Parrott said Turpin had been his close friend. Turpin drove a gold Maxima and lived with his girlfriend, Brittney Maas-Baines. 9VRP 962-63; 10VRP 1087-88. In the spring of 2009, Turpin began spending time with Mr. Walker and Finley instead of Parrott. In April, Parrott learned Turpin was involved in the Walmart plan. 9VRP 964. Parrot had heard Mr. Walker say to Turpin and Finley something to the effect of, it was sweet out here in Washington to hit a bank truck. 9VRP 966.

The day of the robbery, Turpin took Maas-Baines's gold Nissan Maxima when he left their residence. He had one set of keys, she had the other. 10VRP 1091. When he returned home around 2 p.m. that afternoon, he was with Finley, who was carrying a bag. 10VRP 1092. Maas-Baines drove them to the Trevino residence. 10VRP 1094-95, 1113-14. Maas-Baines later retrieved Turpin from a house in Auburn and her Maxima from Mr. Walker's home. 10VRP 1095, 1098.

The getaway car was a white Buick. Two witnesses saw the white Buick in the Walmart parking lot at the time of the robbery. Both remembered seeing a black man driving the car. One witness identified Mr. Walker as the driver. 5VRP 243; see 5VRP 231-37; 293-99. Prior to the crime, the white Buick had been kept at the Walker home. 9VRP 968. The car belonged to Sartara Williams, the mother of Finley's child. 9VRP 1023-26. Williams gave Finley the keys to

the car. It remained there until the robbery. Finley asked Williams to report the car stolen. She reported it stolen in April 2009. 9VRP 1031-33.

The video surveillance data from the Walmart cameras showed that Finley appeared to have a cell phone in his hand, and was holding it up to his face during the crime. 6VRP 414-15. The video also showed Turpin grabbing the money bag; in his left hand is a pistol. 6VRP 421. The shell casing recovered from the scene was a 9-millimeter casing from a semi-automatic pistol. 6VRP 429. The photos show Finley holding a chrome handgun. 6VRP 430; *see generally* Pl. Exh. 9.

At 1:20:55 on the afternoon of the crime, a phone call of two to three minutes was made from the cell phone with the number (253) 230-7514 to the phone with the 404 area code. The murder occurred at 1:22:30. Several other calls were made between those phones the day of the crime. 11VRP 1282-83. The phone with the 253 area code was found on Finley when he was arrested; the one believed to have the 404 area code was recovered from Mr. Walker's Tahoe when he was arrested. 4VRP 156-58. However, evidence supported the State's theory was that Finley and Mr. Walker switched phones the evening following the crime when the battery ran out on Finley's phone. *See* Pl. Exhs. 184, 186.

After the robbery, the white Buick was left in an alley near the duplex where Natalie Brechbeil lived. 8VRP 835, 855-56. A neighbor saw three black

men, including Finley, enter Brechbeil's apartment. 8VRP 835, 844-46, 852. The neighbor recognized Mr. Walker as one of the three men. 8VRP 847-51. When he realized the car parked in the alley near his house matched the description of the getaway vehicle from the Walmart robbery, he contacted the police. 8VRP 855-56.

Two men renovating a duplex near the Brechbeil residence saw the three men head from the alley toward the Brechbeil residence. 8VRP 872, 875-76; 10VRP 1079-80. Five or ten minutes after the three entered her apartment, the witnesses saw Brechbeil's car leave. A white female was driving and an unknown number of black males were passengers. 8VRP 877; 10VRP 1081. The car returned fifteen or twenty minutes later and Brechbeil returned to her apartment. 8VRP 878.

Police secured the white Buick around 3 p.m. that afternoon. 9VRP 893-96.

Al Trevino testified that, on the afternoon of the robbery, Finley and Turpin came to his house. 10VRP 1114-15, 1127. Finley, carrying a bag, used Trevino's phone. 10VRP 1028-29. Mr. Walker and his family arrived not long after. 10VRP 1130. Walker told Trevino, "If you say anything, it is your family, nigger." 10VRP 1143.

Trevino drove Turpin to a friend's house in Auburn and got Finley a room at a motel in Fife. 10VRP 1133. When Trevino was driving with Finley, Finley told him to go to the Puyallup River and stop the car. Finley took a plastic bag, ran toward river, and came back empty-handed. 10VRP 1136-37. Trevino's wife, Jennifer picked Finley up from the motel the next day in their Oldsmobile. 10VRP 1141.

When Darrell Parrott returned home with his sister the day of robbery, Mr. Walker was watching the TV news coverage about the robbery. 9VRP 973. Walker asked him to drive Turpin's gold Maxima to the back of the house. 9VRP 974. His mother came home from work that day panicky. When she asked Mr. Walker why he would do something like this, he told her to "shut the F up, because if he was going to get caught he was going to put her all up in it." 9VRP 982. He did not deny involvement in the Walmart crimes. 9VRP 984.

Parrott's testimony corroborated that of his mother regarding the sequence of events the afternoon following the crime. 9VRP 985-87. He testified about Turpin, Finley and Mr. Walker going into the bathroom at Trevino's house, Mr. Walker giving Williams-Irby a stack of money when they left the bathroom, Turpin changing clothes, Trevino leaving with Turpin and Finley, and Mr. Walker giving the kids money. 9VRP 988-90. He corroborated the money in the speaker, the trips to see Finley at the motel in Fife, to Walmart, to take a safe to

Finley, back home, to Mr. Walker's son's, and finally to the Red Lobster. 9VRP 991-98. Parrott said that at dinner, Mr. Walker said, "I told you this is how you rob these motherfuckers." 9VRP 998. When Parrott's mother responded in anger, Mr. Walker told her to "shut the fuck up." 9VRP 999.

From a Coach purse found in Mr. Walker's vehicle, police officers recovered a receipt dated June 2, 2009 from a Walmart in Federal Way. Among other items, the receipt showed Mr. Walker purchased a camera, two safes, a Wii game, and video game accessories totally $577.28. He paid in cash. 4VRP 160-62. Surveillance photographs from the Walmart showed Mr. Walker shopping with his family the evening of the robbery. 6VRP 449-51. The safes purchased at the Walmart were consistent with two safes containing large quantities of cash (over $40,000 between the two) recovered during the investigation. One was recovered from the trunk of the Oldsmobile Finley was in when he was arrested, the other from Mr. Walker's closet. 6VRP 453-55, 459, 462-65, 9VRP 1058-59, 1067. The murder weapon was not recovered. 6VRP 460; 10VRP 1149.

The safe recovered from Mr. Walker's residence contained, in addition to the cash, a .44 caliber loaded pistol and a spare magazine. 6VRP 491-93; 7VRP 528-29. Police also recovered from the master bedroom of the residence two hundred dollars from a man's suit jacket in paper currency; shoes containing two full boxes of 9 millimeter ammunition, plus a single extra round; and a holster in

an empty cereal box. 6VRP 482-85; 7VRP 521-22. In a drawer of women's clothing was found an envelope containing nine hundred dollars cash. 7VRP 525-26, 534. In a closet in another bedroom, an identification card for Finley was found. 7VRP 523-24. Apparently, no other evidence was recovered indicating Finley lived in the house. 7VRP 537. In a safe found in a shed, a small black box containing three loose rounds of ammunition for a 9-millimeter was recovered. 7VRP 530-32.

The afternoon of the robbery, police observed Mr. Walker driving his green Tahoe to his cousin Callie's residence, arriving, leaving his car and entering the house. 7VRP 581-86; 9VRP 1045.

When Mr. Walker was arrested, police recovered $322 dollars and no weapons from his person. Mr. Walker spontaneously said that his wife, who worked, gave him the money. 7VRP 543-44. When interrogated at the police station, Mr. Walker was angry and hostile. 7VRP 557. He was extremely upset that guns were pulled on the children in his vehicle when it was stopped. 7VRP 607.

Mr. Walker stated he and Williams-Irby had no involvement in the Walmart robbery. 7VRP 595. However, he acknowledged he was at the store on the day of the robbery to pick up a gold Maxima belonging to his cousin, Calvin

Finley. Finley had called him to ask him to get the car. He did not explain how he got the car keys. 7VRP 560-62, 577.

Mr. Walker said he routinely picked up Williams-Irby in front of the Walmart when she finished her shift. He admitted seeing the armored truck on numerous occasions and explained that it would arrive at the end of Williams-Irby's early shift. 7VRP 596-97.

When showed a photograph of the two suspects fleeing the scene, he told the officers that one of them was Finley, but claimed not to recognize Turpin. 7VRP 563-64. When confronted with the information known to the police, Mr. Walker admitted the situation seemed to make him look suspicious, but maintained he had nothing to do with the crime. 7VRP 596.

A latent fingerprint of indeterminate age taken from the driver's seatbelt clip in the white Buick was determined to have been left by Mr. Walker. 10VRP 1158-59, 1209, 1219. A small reddish spot that appeared to be blood was collected from the rear passenger door handle of the Buick, but it was too small for analysis. 10VRP 1173-74; 11VRP 1246. A DNA swab of the gearshift knob of the Buick resulted in DNA with a mixed profile (meaning the sample contained more than one person's DNA); the major component of which likely came from Mr. Walker. 10VRP 1179-80; 11VRP 1242-44. However, the technician could not conclude the DNA was his. 11VRP 1253.

A DNA swab from the pistol recovered from Mr. Walker's safe tested positive through a presumptive test for blood. 10VRP 1181-83. It contained DNA from at least four different people. Mr. Walker could not be excluded from the sample, but Finley and Turpin were excluded. 11VRP 1249-50. This DNA profile matched about half the world's population. 11VRP 1256.

4. The State's Statements and Arguments

a. The State argued both Walker and Finley Premeditated the Killing[1]

The prosecutor argued premeditation was proven both by Mr. Walker's and Finley's words and actions. For example, the State argued Mr. Walker, not Finley, had the motive for the crime:

> Defendant Walker is guilty as an accomplice to the murder because he had the motive to commit murder, and that motive was money. . . . We know in this case -- time and time again we heard from witnesses that the defendant spoke about robbing the Loomis truck because he thought it would be easy. He described it as easy money.

12VRP 1345. The accompanying slide read:

DEFENDANT WALKER GUILTY OF
PREMEDITATED MURDER
DEFENDANT HAD MOTIVE

- The State does not need to prove motive
- Defendant Walker spoke about robbing the Loomis truck and stated it was "easy money"

Pl. Exh. 243 at 7.

Later, when the prosecutor recounted Williams-Irby's testimony that Mr. Walker told Finley to "do what you have to do," meaning kill the guard, the accompanying slide stated, "**DEFENDANT WALKER GUILTY OF**

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1. Two prosecutors tried this case. One prosecutor made the opening statement and rebuttal closing argument; the other presented the closing argument. Thus, "the prosecutor" may sometimes be referred to herein as "he" or "she."

PREMEDITATED MURDER." 12VRP 1381; Pl. Exh. 243 at 70, 71 ("**THIS IS PREMEDITATION**"). In recounting Mr. Walker's offer of the use of a gun to Finley, she stated, "That is premeditation." 12VRP 1381; Pl. Exh. 243 at 71. Next, she stated, "He recruited Jessie Lewis to be the shooter . . . [and] called Jessie Lewis a bitch for walking out of the Walmart store before the guard exited with the money. This is premeditation." 12VRP 1381-82; Pl. Exh 243 at 71 ("**THIS IS PREMEDITATION**").

Then she focused on Finley and Turpin, noting they were armed at the time of the crime, and telling the jury, "A person does not arm themselves with a firearm unless they intend to use it. This is premeditation." 12VRP 1382; Pl. Exh. 243 at 72 ("**THIS IS PREMEDITATION**"). She stated that not saying "put your hands up" and firing within two seconds of raising the gun was also premeditation, "That is premeditation." 12VRP 1382; Pl. Exh. 243 at 73 ("**THIS IS PREMEDITATION**"). Shooting the guard in the face, not the chest where he was wearing a protective vest was also stated to be premeditation, "This is premeditation." 12VRP 1382; Pl. Exh. 243 at 73 ("**THIS IS PREMEDITATION**").

Returning to Mr. Walker's mental state, the prosecutor maintained that when he told Williams-Irby about "listening on the cell phone and yelling, 'Shoot the motherfucker.' That is premeditation." 12VRP 1382; Pl. Exh. 243 at 73

("**THIS IS PREMEDITATION**"). And again, commenting on Mr. Walker's braggadocio at the Red Lobster the night of the crime, the prosecutor informed the jury, "This is premeditation." 12VRP 1382-83; Pl. Exh. 243 at 74 ("**THIS IS PREMEDITATION**"); ("There is no doubt that this was a **PREMEDITATED MURDER**").

b. The State's Arguments and Comments to Which Mr. Walker Objects on Appeal

i. "He is lying like crazy to the police."

In his opening statement, after explaining that Williams-Irby and Mr. Walker lived together, the prosecutor asserted: "You will learn in this case that Ms. Williams-Irby was -- it was wrong for her to be with this guy." Supplemental Verbatim Report of Proceedings for March 7, 2011 ("SVRP") 13. Prior to trial, the parties had stipulated that neither party would present to the jury any "allegations of Toni Williams Irby [sic] of domestic violence (both physical and verbal) by the Defendant." CP 53.

Later, the prosecutor stated, after explaining who Darrell Parrott was: "Calvin Finley committed cold-blooded, premeditated murder and, by the same bullet, First Degree Assault upon Mr. Pina." SVRP 16. He continued, "The evidence will show you that he had an equally depraved heart lacking any conscience whatsoever." *Id.*

When discussing the fact that Mr. Walker denied he or Williams-Irby were involved in the crime when interrogated by police officers, the prosecutor told the jury, "He is lying like crazy to the police." SVRP 48.

Mr. Walker did not object to any of these statements.

ii. "DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER"

The State accompanied its closing argument with a 266-slide PowerPoint presentation. Pl. Exh. 243. On more than half of those slide, or fully 137 slides, the State emblazoned in bold and all capital letters:

DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER

Pl. Exh. 243 at 6-77. In fact, with a few exceptions, including slides reprinting jury instructions and those addressing the other charges, the State captioned almost every text-based slide with this heading. *See* Pl. Exh. 243 (exceptions included title slide, two slides titled "**THE MASTERMIND**," one stating "HEAD SHOT = INTENT TO KILL").

On each slide, this caption was followed by text in smaller, non-bolded, non-capitalized print. The text on the slides ranged from evidence from which the State could fairly argue the captioned assertion to text utterly unrelated to the captioned claim, statements of law, or evidence related to the murder but not

necessarily to either Mr. Walker's involvement or the premeditation issue. For example:

DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER

- Today you must make a decision that is made everyday in courtrooms across the country

Pl. Exh. 243 at 7.

DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER

- The blood loss caused Kurt's heart to stop which lead [sic] to his death

Pl. Exh. 243 at 13.

DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER

- While you cannot alone look to the defendant's actions after the event to conclude the defendant is an accomplice

Pl. Exh. 243 at 17.

DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER ENCOURAGED LEWIS

- Lewis dissuaded by Lopez

Pl. Exh. 243 at 35.

DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER AIDED THE BAGMAN

- Reasonable inference to be drawn is that defendant Walker was with Turpin during the course of the murder and robbery

Pl. Exh. 243 at 56.

DEFENDANT WALKER GUILTY OF

PREMEDITATED MURDER

- Premeditation does not require devising a plan **days** in advance
- Premeditation does not require devising a plan **hours** in advance

Pl. Exh. 243 at 70.

Other slides asserted Mr. Walker was guilty of the other charged crimes. Twice the State argued in a slide, "**DEFENDANT WALKER GUILTY OF ASSAULT IN THE FIRST DEGREE.**" Pl. Exh. 243 at 83. Three times it argued, "**DEFENDANT WALKER GUILTY OF SOLICITATION TO COMMIT ROBBERY.**" Pl. Exh. 243 at 85-86.

Mr. Walker did not object to these slides.

The State made other comments about Mr. Walker's guilt. It told the jury, "This case is different than most cases because there is absolutely no doubt that the defendant is guilty beyond a reasonable doubt. When you put all the pieces of the puzzle together, it is clear that the defendant is guilty beyond a reasonable doubt." 12VRP 1393.

A similar comment was made in the State's rebuttal argument when the prosecutor stated, "Ladies and gentlemen, you might be asking yourselves, what are we doing here? The evidence is so strong." 12VRP 1434.

Mr. Walker did not object to these comments.

iii. "Imagine . . . a jigsaw puzzle of the Tacoma Dome"

In discussing the reasonable doubt standard, the State used a puzzle analogy:

> Reasonable doubt is not an impossible standard. It is not magic. Imagine, if you will, a jigsaw puzzle of the Tacoma Dome. There will come a time when you are putting that puzzle together, that you will be able to say with some certainty beyond a reasonable doubt what that puzzle is. The Tacoma Dome.
> . . .
> If you know in your gut, if you know in your heart, that the defendant is guilty as an accomplice, then you are convinced beyond a reasonable doubt.

12VRP 1393; Pl. Exh. 243 at 87.

The State used another reasonable doubt analogy to counter the defendant's strategy of pointing out the weaknesses in the State's evidence:

> [I]magine, if you will, a set of railroad tracks in the countryside. You have the two steel rails. Those are like the elements that we have to prove. Underneath that, supporting those elements, are a whole bunch of railroad ties. Those are like the individual pieces of evidence that you have in this case.. . .
> Well, some of the ties, if you will, some pieces of evidence might not be that strong in your mind. You might give little weight to certain testimony or pieces of evidence. Still, the State can readily prove its case because the elements, themselves, that which we have to prove are still supported by ample solid evidence. If you take away some of the railroad ties, you still have well-supported rails.
> It is the elements that have been proven beyond a reasonable doubt, not ever[y] bit of evidence.

12VRP 1432.

The third reasonable doubt analogy was a basketball analogy. The State argued it need not have played a flawless game:

> People's memories can be fallible. There is no such thing as a perfect case. The defense is going to score a bucket or two on occasion. When the State has scored 40 points to the defendant's 2 points, that doesn't mean that there is reasonable doubt in the case.

12VRP 1433.

iv. "It is your job to decide what the truth is"

In rebuttal argument, the State told the jury its job was to find the truth:

> The truth needs to come out. A trial is a search for the truth. Now . . . it is your job to decide what the truth is. I say to you that, you know, finding the truth, that's justice. Justice is like, you know, a multifaceted diamond. There are different parts of it. One facet of justice is the revelation of the truth. That's what we're trying to accomplish here.

12VRP 1435. Later, the prosecutor added, "you have to set [your concerns about penalties] aside and tell us the truth of what happened by your verdicts." *Id.* It added that its star witness, Williams-Irby, explained "that part of her motivation in testifying is that she wants the Husted family to know the truth. The true facts coming out in this courtroom is a powerful form of justice." *Id.* at 1435-36. When the prosecutor appeared to be continuing with this line of argument, Mr. Walker objected, asking that the jury be excused. Counsel argued, "It's not a search for the truth. It's whether you have proven your case or not. It is not a search for the truth." *Id.* at 1436-37. He later pointed out, "It is reversible error. That's what is wrong with it." *Id.* at 1437.

The court did not address the "search for the truth argument" but cautioned the State against asking the jury to send a message to the victim's family instead of following the law. 12VRP 1437-38. The court said it would not prohibit the State from asking the jury to return true verdicts, but cautioned that the jury's verdict should not be made "on behalf of the community, not on behalf of the family, but on behalf of the instructions that they have received." *Id.* at 1438.

When the jury returned, the State concluded by asking the jury to "remedy" the crimes committed against "the peace and dignity of the people of the state of Washington" by returning "true verdicts":

> Now, when a crime is committed against the public, to put it mildly, the peace and dignity of the people of the state of Washington is offended by the crimes that are committed, by the defendant's crimes, the remedy in this public trial is for you to return true verdicts, finding the defendant guilty as charged. On behalf of all the honorable people --

12VRP 1438-39. Mr. Walker objected; the court implicitly overruled the objection, allowing the State to conclude its argument by thanking the jury. *Id.* at 1439.

v. "Another example of desperate attempts to mislead you"

In its closing argument, the defense had asked the jury to have "a healthy distrust for government," 12VRP 1397, in reviewing the State's evidence and the inferences the State sought to establish because "they are trying to sell you something:"

> They are trying to sell you a case of circumstantial murder based on accomplice liability. That is a mouthful of lawyerese. They are saying he is involved because we have bits of information. We don't have any direct evidence, but we have some bits of information. We want you [to] do the work and connect the dots to make a coherent story out of it.

12VRP 1398-99, *see id.* at 1396-99, 1402 ("If someone is trying to sell us something, we ask questions about it. If you are going to buy a car, you ask, what kind of mileage does it get? . . . take their case for a test drive, kick the tires.").

Specifically, defense counsel argued the State selected photographs from the video surveillance footage that were consistent with its witness's testimony that the window of the getaway car was down, when another State's witness and other photos showed that it was up. 12VRP 1397-98. He argued the State did not need to show the jury the autopsy photos or the video of the murder since the parties had stipulated Finley murdered Mr. Husted by shooting him in the face. 12VRP 1399. Counsel argued the State showed the jurors the victim's Kevlar vest as an appeal to their emotions. 12VRP 1399. He read the jury instruction

requiring the jurors not to "let your emotions overcome your rational thought processes." 12VRP 1400. Throughout his argument, counsel continually sought to emphasize the weaknesses in the State's case and argue its evidence did not prove Mr. Walker's guilt beyond a reasonable doubt. 12VRP 1403-21.

The State responded by asking the jury to question the defendant's trustworthiness: "The defense invites you repeatedly to distrust the government. . . . I want to discuss whether the defense has been trustworthy in this case." 12VRP 1425-26. It explained it needed to use the autopsy photos since the stipulation did not actually specify that Finley murdered Mr. Husted. *Id.*[2] It then began to allege Mr. Walker or defense counsel was trying to mislead the jury. 12VRP 1425-26.

It alleged Mr. Walker had attempted to mislead both a witness and the jury:

> Next, the defendant's effort to mislead Ms. Williams-Irby when she was on the stand by – trying to mislead her – and to mislead you [about the circumstances of Williams-Irby's guilty plea].

12VRP 1426. It added, "The defense stood up here minutes ago and [tried] to mislead you again [about the circumstances of Williams-Irby's guilty plea].. . .

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2. The same prosecutor who belittled defense counsel by arguing, "the defense claims that, my goodness, that they stipulated that Mr. Husted was, quote, murdered," 12VRP 1426, told the jury in his opening statement that "Calvin Finley committed cold-blooded, premeditated murder," SVRP 16, as though it were a fact to which the parties had stipulated.

That's misleading. That's wrong. What that is, is a desperate attempt to cast doubt." 12VRP 1427.

The State continued linking the defendant's "desperateness" with his alleged attempts to mislead the jury. The prosecutor referred to defense counsel's questioning of Williams-Irby about her court clothes:

> Another example of the desperation by the defense, when counsel . . . gave Ms. Williams-Irby a hard time about [her clothing in an] effort to impeach her credibility. . . . The defense gratuitously tries to put her down. That is desperation."

12VRP 1427. The prosecutor added, "Another example of desperate attempts to mislead you, misstating the testimony of witnesses in this case." 12VRP 1427. The State alleged defense counsel was trying to cast Jessie Lewis as the getaway driver, and labeled the tactic, "Another example of desperation by the defense to mislead." 12VRP 1428. The State later added, "That is desperation." 12VRP 1429.

Mr. Walker did not object to any of these arguments.

vi. "Stopping at a stop sign . . . is deliberation"

During its closing, after reading to the jury the definition of "premeditation" from the court's jury instructions, the State added, "Decisions that you make every day in your lives require some thought beforehand. Deliberation occurred just seconds before we act. Just by . . . stopping at a stop

sign or a railway crossing, that is deliberation. You formulate the intent, and then you act." 12VRP 1376.

Slides accompanied the argument. The first read:

DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER

- Decisions are made everyday which require some thought beforehand
- Deliberation can occur just seconds before we act

Pl. Exh. 243 at 69. The second was captioned:

"PREMEDITATION"
Everyday Decisions
When you see these SIGNS

Pl. Exh. 243 at 69. This slide contained images of two traffic signs, a stop sign and a sign notifying drivers of a railway crossing. A box on the bottom left of the slide read:

Look to the left
Look to the right
Decide if it is safe to enter
• Then go forward

Pl. Exh. 243 at 69. A large arrow pointed from that box to a box on the bottom right of the slide reading:

That split second decision
Involved DELIBERATION
Is it safe to enter involved
PREMEDITATION
Weighing beforehand

Id.

Mr. Walker objected to this argument and the slide. 12VRP 1376-77. He maintained that the State's manner of "defining [premeditation] as of things we do every day . . . seems to be lessening the standard of beyond a reasonable doubt." 12VRP 1377. He also argued that the State's definition changed the element required to be proven by "lessening the standard by which this jury has to find an element of the crime. . . . To analogize it to something as simple as whether or not you stop at a stop sign would seem to be lessening that burden significantly." 12VRP 1377.

The court overruled the objection, stating:

> I think it is trying to explain what it thinks the instruction means. To the extent that one redefines the instruction, I don't think that the State is doing that. If one does redefine the instruction, then one is getting away from what the law is, and that's a problem. I don't think that they have done that.

12VRP 1380.

c. The State's Reliance on Williams-Irby's Testimony

In its opening statement, the State relied heavily on the expected testimony of Williams-Irby and the inferences that could be drawn from it. Its references to her testimony accounted for roughly twenty per cent of its entire opening statement. SVRP 12, lines 14-25; 13, lines 1-25; 14, lines 1-25; 15, lines 1-19; 16, lines 8-25; 17, lines 8-25 (only Williams-Irby testified Walker "cased" the Walmart); 18, lines 12-25; 21, lines 24-25; 22, lines 1-5 & 15-19; 24, lines 13-

25; 25, lines 1-5; 26, lines 17-25; 27, lines 1-11; 29, lines 24-25; 30, lines 1-8; 37, lines 24-25; 38, lines 1-11; 40, lines 17-25; 42, lines 3-25; 43, lines 1-5; 44, lines 18-25; & 45, lines 1-14.

In addition, its theory of the case was that Mr. Walker was the mastermind of the crime, an argument that largely rested on Williams-Irby's testimony. *See* SVRP 4 ("It was the defendant's followers who carried out his plan."); 12 ("The defendant led the team, criminal team. It was his plan."); 15 ("the defendant's plot"); 16 ("it was the defendant's plan"); 24 ("the defendant was in charge . . . it was his plan"); & 32 ("the defendant's plan").

Its reliance on Williams-Irby's testimony was repeated in the State's closing arguments, where the State's opening line was "Shoot the motherfucker," the order Williams-Irby alleged Mr. Walker made to Finley during the robbery. 12VRP 1335. The State continued maintaining Mr. Walker was the mastermind of the crimes, organizing and directing the others' efforts: "The defendant masterminded the robbery and the murder and threatened his accomplices, that if they committed the crime without him, he would kill them, but he knew that he needed help." 12VRP 1335; *see e.g.*, 12VRP 1350 ("he planned the commission of the crimes"); 12VRP 1351 (planned the crimes); 12VRP 1353 (same); 12VRP 1354 ("The defendant was clearly the mastermind behind this crime", he "manipulated Calvin Finley"); 12VRP 1355 ("he was, clearly, the mastermind,"

"it was his plan"); 12VRP 1370 ("he is the one, the main man, the mastermind"); Pl. Exh. 243 at 3.

5. Jury Instructions

The court gave the following standard jury instructions, *inter alia*, without objection:

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and exhibits. The law is contained in my instructions to you. You must disregard any remark, statement or argument that is not supported by the evidence or the law in my instructions.

CP 203 (Excerpt from Jury Instruction No. 1).

> A person commits the crime of premeditated murder in the first degree, as charged in Count I, when, with a premeditated intent to cause the death of another person, he or an accomplice causes the death of another person.

CP 212 (Jury Instruction No. 10).

> Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

CP 213 (Jury Instruction No. 11).

> To convict the defendant of the crime of premeditated murder in the first degree, count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about [the] 2nd day of June, 2009, the defendant or an accomplice

acted with intent to cause the death of Kurt Husted;

(2) That the intent to cause the death was premeditated;

(3) That Kurt Husted died as a result of the defendant's or an accomplice's acts; and

(4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 215 (Jury Instruction No. 13).

IV. ARGUMENT

Point I: Two Jury Instructions Regarding Premeditated Murder Relieved the State of its Burden of Proving the Charged Crime and Violated Mr. Walker's Right to a Unanimous Verdict

Two jury instructions given regarding Count I, premeditated first degree murder, were unconstitutional because they a) relieved the State of its burden of proving that premeditated murder was committed in this case and b) violated Mr. Walker's right to a unanimous verdict.

A. Mr. Walker's Due Process Rights Were Violated

The jury instructions in this case relieved the State of proving every element of the charged crime. "Due process requires a criminal defendant be convicted only when every element of the charged crime is proved beyond a reasonable doubt." State v. O'Hara, 167 Wn.2d 91, 105, 217 P.3d 756 (2009);

U.S. Const. amend. XIV; Wash. Const. art I, § 22. "To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case." O'Hara, 167 Wn.2d at 105 (citation omitted). Here, the jury instructions were misleading and relieved the State of its burden of proving every element of the charged crime.

Proof of premeditated first degree murder requires that the person causing the death possess premeditated intent: "A person is guilty of murder in the first degree when: (a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person." RCW 9A.32.030(1). Because Finley shot and killed Kurt Husted while Mr. Walker remained outside the Walmart, to prove premeditated murder, the State was required to prove Finley possessed premeditated intent. It could not establish the crime with Mr. Walker's intent.

Proof of Finley's premeditation was also required under the type of vicarious liability with which Mr. Walker was charged. Significantly, the State charged Mr. Walker as an accomplice. CP 11; CP 211 (Jury Instruction No. 9); RCW 9A.08.020(2)(c). An accomplice is a person who promoted and facilitated

the commission of the crime by another. RCW 9A.08.020(3).[3] The State did not charge Mr. Walker as the culpable person who caused an innocent or irresponsible person to commit a crime under RCW 9A.08.020(2)(a):

> A person is legally accountable for the conduct of another person when: (a) Acting with the kind of culpability that is sufficient for the commission of the crime, he causes an innocent or irresponsible person to engage in such conduct.

RCW 9A.08.020(2)(a).

If the State had charged Mr. Walker under subsection (a), his premeditated intent would have been at issue. Since it charged him under subsection (c), however, Finley's premeditated intent was the concern. Thus, under both the first degree murder statute and the applicable prong of the accomplice liability statute, the State had to prove Finley, the shooter, possessed premeditated intent to kill Mr. Husted, before it could find Mr. Walker guilty of that crime as an accomplice. *See* State v. Thomas, 166 Wn.2d 380, 387-88, 208 P.3d 1107 (2009) (to convict an accomplice of premeditated murder in the first degree, the State must "prove that the defendant knew his actions would facilitate the crime for which he was eventually charged").

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3. A person is an accomplice of another person in the commission of a crime if:
(a) With knowledge that it will promote or facilitate the commission of the crime, he
(i) solicits, commands, encourages, or requests such other person to commit it; or
(ii) aids or agrees to aid such other person in planning or committing it; or
(b) His conduct is expressly declared by law to establish his complicity.
RCW 9A.08.020(3).

Notably, however, the to-convict jury instruction relieved the State of its burden of proving Finley premeditated the intent to kill Mr. Husted when it required only that "the intent to cause the death was premeditated":

> To convict the defendant of the crime of premeditated murder in the first degree, count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about [the] 2nd day of June, 2009, the defendant or an accomplice acted with intent to cause the death of Kurt Husted;
>
> (2) That the intent to cause the death was premeditated;
>
> (3) That Kurt Husted died as a result of the defendant's or an accomplice's acts; and
>
> (4) That any of these acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 215 (Jury Instruction No. 13) (emphasis added). With the inclusion of the phrase "the defendant or an accomplice" in naming the first element, and the use of the passive tense in naming the second, the instruction allowed the jury to find premeditated murder regardless of whether Mr. Walker, Finley, or another accomplice had the premeditated intent to kill Mr. Husted.

Similarly, the instruction defining premeditated murder also erroneously allowed conviction if an accomplice possessed the premeditation and the shooter lacked it:

> A person commits the crime of premeditated murder in the first degree, as charged in Count I, when, with a premeditated intent to cause the death of another person, he or an accomplice causes the death of another person.

CP 212 (Jury Instruction No. 10).

Further, the State's argument only compounded the problem. The State argued that both Mr. Walker and Finley premeditated the killing. The prosecutor argued Mr. Walker had premeditation when he offered the use of a gun to Finley, 12VRP 1381, recruited Jessie Lewis to be the shooter and derided him for backing out of the crime, 12VRP 1381-82, directed Finley to shoot the guard during the crime, 12VRP 1382-83, and bragged to his family at the Red Lobster the evening following the crime. 12VRP 1383. The prosecutor argued Finley had premeditation because he and Turpin were armed at the time of the crime, he failed to say "put your hands up" before shooting, and he shot the guard in the face, not the chest. 12VRP 1382. Accordingly, taking the misleading jury instructions together with the State's argument, the jury was directed to convict if it found either Mr. Walker or Finley premeditated the crime.

The prosecutor made these arguments even though it was irrelevant whether Mr. Walker premeditated the killing. To establish a person's guilt as an accomplice, the State must first establish that the charged crime was actually committed: "A person is guilty of a crime <u>if it is committed</u> by the conduct of another person for which he is legally accountable." RCW 9A.08.020(1)

(emphasis added); RCW 9A.08.020(6) ("A person legally accountable for the conduct of another person may be convicted on proof of the commission of the crime and of his complicity therein."). Indeed, it is axiomatic that "[c]onviction for accomplice liability is improper where there is no proof that a principal 'actually committed the crime.'" State v. Peterson, 54 Wn. App. 75, 78, 772 P.2d 513 (1989), *citing*, State v. Nikolich, 137 Wn. 62, 66-67, 241 P. 664 (1925), and State v. Taplin, 9 Wn. App. 545, 547, 513 P.2d 549 (1973); *see* State v. McPherson, 111 Wn. App. 747, 756-57, 46 P.3d 284 (2002) ("An accomplice is charged with, and liable for, a particular crime committed by his principal."). This is because accomplice liability "is in essence liability for" a crime committed by another. Peterson, 54 Wn. App. at 78.

Accordingly, in this case, for the charged crime to be "actually committed" by the shooter, Finley, the prosecutor had to prove he acted with premeditation. The misleading jury instructions, however, allowed conviction even if the jury believed Finley pulled the trigger but Mr. Walker premeditated the crime, thereby relieving the State of its burden of proof.[4]

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4. Notably, Mr. Walker does not argue Finley had to be found guilty of premeditated murder. To the contrary, he argues merely that the State had to prove to the jury facts supporting, beyond a reasonable doubt, the conclusion that Finley committed first degree murder. *See* RCW 9A.08.020(6) (accomplice may be found guilty of crime committed even "though the person claimed to have committed the crime has not been prosecuted or convicted or has been convicted of a different crime or degree of crime or has an immunity to prosecution or conviction or has been acquitted").

Although one court has held that the intent to commit a crime and the act of committing it may be split among accomplices to the crime, no court has held that the premeditation of a person who is not the shooter and not present when the crime is committed may establish a premeditated murder. In State v. Haack, 88 Wn. App. 423, 958 P.2d 1001 (1997), the defendant was charged with first degree assault. He and his brother (who was a fugitive at the time of trial) had broken into the victim's house, confronted him and chased him downstairs, where the defendant tackled the victim from behind and wrestled with him. When the victim stabbed the defendant, the brother stabbed the victim eight times in retaliation. 88 Wn. App. at 429. Given those facts, the Court found it "highly unlikely that any juror concluded that anyone other than [the defendant's brother] both possessed the requisite intent and did the stabbing." *Id.* at 430. However, it also averred that it would have been permissible for the jury to split the elements of the crime between the two brothers, finding one had the intent and the other was the actor. *Id.*

Haack does not allow the State to prove premeditated murder with Mr. Walker's premeditation and Finley's actions for several reasons. First, Haack did not involve premeditated murder. To prove an accomplice guilty of premeditated murder, the one committing the act must have had premeditated intent. State v. Carothers, 84 Wn.2d 256, 264, 525 P.2d 731 (1974) (State must prove "that the

victims were shot with premeditated design [and] . . . that the petitioner had participated"). Although in this case the State proved Mr. Walker's participation, Mr. Husted was shot with premeditated intent only if Finley had such intent. Premeditated design cannot be possessed solely by an absent accomplice. *See* RCW 9A.32.030(1)(a); *cf.* State v. Hoffman, 116 Wn.2d 51, 103-05, 804 P.2d 577 (1991) (when two defendants both shot at victim with premeditation, holding jury need not have decided which defendant actually killed victim).

Next, the facts of Haack and this case differ significantly. The evidence in Haack unequivocally showed the defendant's brother both possessed the necessary intent and committed the actual assault. Moreover, the State's theory of the case was that the brother committed the crime and the defendant was guilty as an accomplice. 88 Wn. App. at 430. By contrast, here, the evidence unequivocally proved Finley was the shooter. The State argued Mr. Walker was the mastermind whose premeditation contributed that element to the crime. Thus, in contrast to the situation in Haack, here, the State invited the jury to split the elements of the crime between Finley and Mr. Walker.

Moreover, to the extent Haack allows the State to prove an accomplice guilty of a crime without first establishing that such crime was actually committed, the decision is contrary to both statutory and case law. RCW

9A.08.020(1); McPherson, 111 Wn. App. at 756-57 (holding accomplice liable for "a particular crime committed by his principal").

Finally, Haack's inaptness is further illustrated by the hypothetical the Court employed in its decision. The Court discussed a hypothetical situation where several accomplices participate in beating and seriously injuring a victim, such that the State cannot determine who caused the serious injuries and who possessed the requisite intent. All would be guilty of first degree assault as accomplices, even the person participating merely as a lookout, so long as one person involved in the beating had the necessary intent. 88 Wn. App. at 428-29.

Significantly, the hypothetical assumes that one of the people actively involved in the beating possessed the necessary intent. *Id.* It does not consider the situation where the State proves that only the lookout possessed the requisite intent. If the victim in the court's hypothetical were injured only by individuals *not* intending to cause injury, the State would not be able to establish first degree assault.

A hypothetical closer to the instant situation reveals the need for the State to prove the shooter's premeditation: Two people plan to commit a robbery; one has the premeditated intent to kill the victim, the other does not. The one who premeditates the killing hands the other a gun and tells him to do whatever it takes. The other takes the gun, but has no intention of harming anyone; he only

wants to use a show of force to commit the crime. While the accomplice with the gun is committing the robbery, the accomplice with premeditation is at home watching TV. The robbery goes wrong, the gun accidentally discharges, and the victim is killed. The premeditation of the person sitting at home watching TV does not convert the accidental shooting by his accomplice into premeditated murder. Only the shooter's premeditated intent to kill could establish premeditated murder. *See* RCW 9A.32.030(1)(a).

In other words, because Mr. Walker was an absent accomplice to the shooting, whether he premeditated the killing was irrelevant to whether the killing by Finley was premeditated. Only if the State proved Finley possessed premeditation could Mr. Walker be convicted of premeditated murder as charged. Because the jury instructions permitted a conviction if jurors found either Mr. Walker or Finley premeditated the crime, the instructions were erroneous and the State was relieved of its burden of proving premeditated murder. *Cf.* State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000) (holding erroneous, in capital case, to-convict jury instruction permitting a finding of guilt if either the defendant or an accomplice stabbed victim when defendant cannot be put to death solely due to accomplice liability); State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004) (finding similar error but holding it harmless). For these reasons, the challenged jury instructions violated Mr. Walker's due process rights.

Although Mr. Walker did not object to the instructions in the trial court, the error is a manifest error of constitutional magnitude that may be heard on appeal. RAP 2.5(a)(3); Wash. Const. art. 1, §§ 21 & 22; U.S. Const. amend. XIV.

First, the error was of constitutional magnitude. The Supreme Court has held that omitting an element of the crime charged is an error of constitutional magnitude. State v. O'Hara, 167 Wn.2d 91, 100, *citing*, State v. Johnson, 100 Wn.2d 607, 623, 674 P.2d 145 (1983) (failure to instruct jury as to underlying crime intended to be committed as in burglary), *overruled on other grounds by* State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985). While the instructions in this case did not omit an element of the crime, they sufficiently misled the jury as to give rise to a similar constitutional error. The error was of constitutional magnitude because the instructions permitted the State to obtain a conviction if either Mr. Walker or Finley premeditated the crime. *See* State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004) (in capital case, holding instructional error in allowing jury to find guilt if either defendant or accomplice acted was of sufficient constitutional magnitude to be raised for first time on appeal).

Next, the error was manifest. Manifest error requires a showing of actual prejudice. Actual prejudice requires evidence that the asserted error "had practical and identifiable consequences in the trial of the case." O'Hara, 167

Wn.2d 91, 99, (quotations and internal quotation marks omitted). In this case, the error had practical and identifiable consequences because it allowed conviction for premeditated murder if no such crime was committed, that is, if only Mr. Walker or another accomplice, not Finley, possessed premeditated intent to kill.

Appellate courts apply a harmless error analysis to erroneous jury instructions that omit an element of the charged offense or misstate the law. State v. Brown, 147 Wn.2d 330, 339-40, 58 P.3d 889 (2002), *citing*, Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed.2d 35 (1999). "Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless." Brown, 147 Wn.2d 330, 340 (citation omitted). To hold instructional error harmless, the appellate court "must thoroughly examine the record" before it and "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." Brown, 147 Wn.2d at 341 (citation omitted).

In this case, it cannot be concluded beyond a reasonable doubt that the jury verdict would have been the same without the error because the State only proved Mr. Walker's premeditation, not Finley's. "Premeditation is the deliberate formation of and reflection on the intent to take a human life and involves the mental process of thinking beforehand, deliberating on, or weighing the contemplated act for a period of time, however short." State v. Ra, 144 Wn. App. 688, 703, 175 P.3d 609 (2008). It must involve more than a moment in time.

RCW 9A.32.020(1). The following circumstance may support a finding of premeditation: motive, prior threats, multiple wounds inflicted or multiple shots, striking the victim from behind, assault with multiple means or a weapon not readily available, and the planned presence of a weapon at the scene. Ra, 144 Wn. App at 703; *see also* State v. Gentry, 125 Wn.2d 570, 598, 888 P.2d 1105 (1995).

In this case, the State failed to prove Finley premeditated the crime. There was no direct evidence of how Finley planned to commit the robbery, only circumstantial evidence from which the State asked the jury to infer his premeditation to kill. "Premeditation may be proved by circumstantial evidence where the inferences drawn by the jury are reasonable and the evidence supporting the jury's finding is substantial." Gentry, 125 Wn.2d 570, 598. No such substantial evidence existed in this case. The State established Finley, Mr. Walker and Turpin had planned for some time to rob the Loomis guard and that Mr. Walker was prepared for the guard to die during the robbery. However, it did not prove that Finley was similarly prepared. To the contrary, unlike the situation with Mr. Walker, Finley was never heard to speak of a plan to kill the guard. Moreover, he killed Mr. Husted within seconds of encountering him, with a single

shot to the head, when Mr. Walker directed him over his cell phone to "shoot the motherfucker." None of these facts evidences Finley's premeditation.[5]

The only fact arguably showing his premeditation is the planned presence of the weapon on the scene. But in the cases finding premeditation when the defendant brought a gun to the crime scene, additional facts besides the presence of the gun supported the finding. For example, in Ra, this Court found premeditation had been established when the defendant intentionally brought a loaded firearm to the scene, provoked a confrontation with the victim, fired two shots at him, missed, and fired a third time into his chest, with a pause between shots. 144 Wn. App. 688, 703-04. In this case, by contrast, the shot to the head indicates the intent to kill, but since it was a single shot fired without pause in response to direction by a third person, the facts fail to establish the premeditation proven in Ra. Similarly, in State v. Massey, not only did the defendant bring a gun to the scene, but he or his accomplice also shot the victim twice, once in the stomach, once in the head, and stabbed him seven times. 60 Wn. App. 131, 134, 803 P.2d 340 (1990). By contrast, in this case, the single factor indicating premeditation was the planned presence of the gun.

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5. The instructional error was compounded by the State's redefining of the term "premeditation," to allow the jury to find premeditation could occur reflexively, in a mere split second. *See* Point II(F), *infra*.

Moreover, it was undisputed in this case that the reason Finley confronted Mr. Husted in the Walmart was to rob him. Thus, that a gun was present for the robbery does not establish Finley premeditated the killing. Needing the gun for the robbery distinguishes this case from State v. Griffith, where the only reason for the presence of the loaded firearm was to shoot someone. 91 Wn.2d 572, 577, 589 P.2d 799 (1979) (premeditation found where defendant took the time after confrontation to go to his car and retrieve a loaded gun he then used to kill man who came to his door).

For all these reasons, the record is insufficient to enable this Court to "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." Brown, 147 Wn.2d at 341. Accordingly, the instructional errors were not harmless and this Court should reverse and remand Mr. Walker's conviction for premeditated murder.

B. Mr. Walker's Right to a Unanimous Jury was Violated

In addition, because the instructions allowed the jury to convict if either Mr. Walker or Finley premeditated the killing, they violated Mr. Walker's right to a unanimous verdict. "A fundamental protection accorded to a criminal defendant is that a jury of his peers must unanimously agree on guilt." State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007); Wash. Const. art. 1, § 21. While most unanimity cases involve multiple acts that could be used to prove the charged

crime, *see, e.g.*, State v. Coleman, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007), this case involves multiple accomplices. Here, the jury instructions allowed conviction if any accomplice possessed premeditation and the State argued both Finley and Mr. Walker premeditated the crime. Accordingly, some jurors could have voted to convict because they believed Finley premeditated the killing, others could have voted to convict because they believed Mr. Walker premeditated the killing. Under these circumstances, Mr. Walker's right to a unanimous verdict was violated.

"Where there is neither an election nor a unanimity instruction in a multiple acts case, omission of the unanimity instruction is presumed to result in prejudice." Coleman, 159 Wn.2d 509, 512, *citing*, State v. Kitchen, 110 Wn.2d 403, 411-12, 756 P.2d 105 (1988). "The presumption of error is overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged." Coleman, 159 Wn.2d 509 citing State v. Kitchen, 110 Wn.2d at 411-12.

The presumption of prejudice cannot be overcome here. As discussed in Part A, above, the State failed to prove Finley premeditated the crime. Thus, rational jurors could have reasonable doubt as to whether he premeditated the killing. Even if the Court finds the State proved Finley had premeditation, however, the unanimity problem remains. For the reasons explained in Part A, only Finley's premeditation could suffice to prove the crime. Yet the jury

instructions and the State's argument invited jurors to convict based on Mr. Walker's premeditation. Because there is no means of ensuring that no juror based proof of the premeditation element on Mr. Walker's premeditation, the error was not harmless. Accordingly, this Court should reverse Mr. Walker's conviction for premeditated murder.

Point II: Prosecutorial Misconduct Deprived Mr. Walker of His Right to a Fair Trail

Mr. Walker was deprived of his right to a fair trial by the prosecutors' misconduct in this case. "Prosecutorial misconduct may deprive a defendant of his right to a fair trial." State v. Evans, 163 Wn. App. 635, 642, 260 P.3d 934 (2011); *citing*, State v. Jones 144 Wn. App. 284, 290, 183 P.3d 307 (2008). While "the prosecuting attorney has wide latitude to argue reasonable inferences from the evidence" in closing arguments, State v. Thorgerson, — Wn.2d —, ¶21, 258 P.3d 43, 49 (2011) (citations omitted), the prosecutor also owes the defendant a duty to ensure the right to a fair trial is not violated. State v. Ramos, — P.3d —, 2011 WL 4912836, *3, No. 65213–3–1 (October 17, 2011), *citing*, State v. Monday, 171 Wn.2d 667, 676, 297 P.3d 551 (2011).

To prevail on appeal, Mr. Walker must show "that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial." Thorgerson, — Wn.2d —, ¶8, 258 P.3d 43, 46 (citations omitted). "Remarks of the prosecutor, even if they are improper, are not grounds

for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." State v. Russell, 125 W.2d 24, 86, 882 P.2d 747 (1994).

Conduct is prejudicial if the Court finds "a substantial likelihood the misconduct affected the jury's verdict." State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). This Court reviews prosecutors' comments "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions." Evans, 163 Wn. App. 635, 642, *citing*, State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). When the trial court overruled a defense objection, the trial court's ruling is reviewed for abuse of discretion. State v. Ish, 170 Wn.2d 189, 195, 241 P.3d 389 (2010) (citations omitted).

Misconduct that was not objected to below is considered waived on appeal "unless the misconduct is so flagrant and ill-intentioned that it evinces an enduring prejudice the trial court could not have cured by an instruction." Evans, 163 Wn. App. 635, 642-43, *citing*, State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). In this case, the conduct trial counsel objected to was improper and prejudicial and the unobjected-to conduct was so flagrant and ill-intentioned as to

have been incurable. Moreover, considering all the instances of misconduct together, the cumulative error doctrine requires reversal.

A. Calling Mr. Walker a Liar Was Flagrant and Incurable

The State made flagrant and ill-intentioned comments during its opening statement. "A prosecutor's opening statement should be confined to a brief statement of the issues of the case, an outline of the anticipated material evidence, and reasonable inferences to be drawn therefrom." State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (quotation and internal quotation marks omitted) (reversing where prosecutor made repeated remarks regarding the war on drugs). "Argument and inflammatory remarks have no place in the opening statement." *Id.*

In open defiance of any standard of prosecutorial conduct, the prosecutor told the jury in its opening statement, Mr. Walker "is lying like crazy to the police." SVRP at 48. *See* State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984) (finding it was clearly improper for prosecutor to call defendant a liar four times). In this case, the comment referred to Mr. Walker's interrogation by the police after his arrest.

Saying Mr. Walker lied "like crazy" to the police was a flagrant and ill-intentioned remark by the prosecutor, who owes a duty of fairness to the defendant:

> A prosecuting attorney represents the people and presumptively acts with impartiality in the interest of justice. As a quasijudicial officer, a prosecutor must subdue courtroom zeal for the sake of fairness to the defendant.

Thorgerson, — Wn.2d —, ¶9, 258 P.3d 43, 47, *citing*, State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). Coming in the prosecutor's opening statement, the comment established the tone of the case: The prosecutor believed Mr. Walker was not only guilty, but a liar, and was not afraid to share his opinion with the jury. For a prosecutor to say the defendant was "lying like crazy" in a portion of the trial in which argument, let alone opinion, is not permitted, was flagrant and ill-intentioned.

Next, it was also flagrant and ill-intentioned misconduct for the prosecutor to offer its opinion of the primary issue to be proven in the case as a fact: "Calvin Finley committed cold-blooded, premeditated murder and, by the same bullet, First Degree Assault upon Mr. Pina." SVRP 16. The context of the statement makes clear that this was not an inference drawn from the evidence but an inappropriate assertion of the State's opinion. *See id.* Its follow-up remarks were similarly improperly prejudicial: "The evidence will show you that he had an equally depraved heart lacking any conscience whatsoever." *Id.* The evidence does not reveal what is in a person's heart or conscience; thus this is another statement of the prosecutor's opinion.

Finally, it was flagrant and ill-intentioned for the prosecutor to say, "You will learn in this case that Ms. Williams-Irby was -- it was wrong for [Williams-Irby] to be with this guy." SVRP 13. This was a clear reference to the allegations of domestic violence, which the parties had agreed not to discuss before the jury. CP 53.

Together, these statements told the jury Mr. Walker was a liar; Finley's guilt for premeditated, cold-blooded murder was already established; and Mr. Walker was generally a bad man. Such assertions were directed to the emotions and prejudices of the jury, not the facts at hand. Thus, their resonance was emotional and not subject to remedy with a curative instruction. *See* State v. Case, 49 Wn.2d 66, 70, 298 P.2d 500 (1956) (holding curative instruction could not have remedied prosecutor's reference to defense witnesses as a herd). Accordingly, this Court should reverse Mr. Walker's convictions.

B. Telling the Jury 137 Times That Mr. Walker Was Guilty of Premeditated Murder Was Flagrant and Incurable Misconduct

The State also defied professional standards with a PowerPoint presentation that hammered into the jury's consciousness the State's opinion that Mr. Walker was guilty. It is well established that the State may not offer its opinion that the defendant is guilty during trial. Reed, 102 Wn.2d at 145 (noting in 1956 it had found it "reprehensible for one appearing as a public prosecutor to assert in argument his personal belief in the accused's guilt"), *citing*, State v. Case,

49 Wn.2d 66, 298 P.2d 500 (1956). Indeed, this Court has held that "Any attempt by the prosecutor to impress upon the jury his personal belief in the defendant's guilt is unethical and prejudicial." State v. Traweek, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986) (holding prosecutor's improper comments did not prejudice defendant), *overruled on other grounds by* State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991.

On the other hand, a prosecutor is free to both argue the defendant's guilt as a deduction from the evidence and respond to the defendant's arguments. *See* State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006) (holding four instances prosecutor used the word "guilty" were not expressions of prosecutor's personal opinion as to defendant's guilt). An appellate court must review the prosecutor's challenged comments in context to determine whether the prosecutor expressed a personal opinion of the defendant's guilt. *Id.* at 53-54.

Here, the prosecutor presented 137 PowerPoint slides during closing argument titled **DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER**. Pl. Exh. 243. The prosecutor was not responding to any argument when she presented its these slides. Moreover, the assertion, **DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER**, could only have been a deduction from evidence related to Mr. Walker's involvement as an accomplice and Finley's premeditation. While some of the slides discussed those facts, many

did not. *See* Pl. Exh. 243. Thus, the majority of the statements were expressions of the State's opinion.

That the State did not precede these statements with language such as "The State believes" does not convert these expressions of personal opinion into deductions from the evidence. The context of the PowerPoint presentation itself established the statements to be beliefs possessed by the prosecutors. Indeed, in this context, an "I believe" qualifier might even have ameliorated the problem as it would have allowed the inference that the statement,

DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER,

was merely the State's interpretation of the facts, not the irrefutable truth it was declared 137 times to be.

Moreover, in contrast to the situation in McKenzie, where the prosecutor said the word "guilty" a total of seven times in its argument, in this case the prosecutor created 137 slides calling Mr. Walker guilty, in addition to calling him guilty in argument. Slide after slide flashed on the screen, asserting:

DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER.

One hundred and thirty seven slides was no inadvertent slip, but a calculated subversion of Mr. Walker's right to a fair trial, because the prosecutor obviously planned and prepared the slides before presenting argument. This preparation also

establishes that the improper argument was "ill-intentioned misconduct." Thorgerson, — Wn.2d —, ¶30, 258 P.3d 43, 51 (holding prosecutor's improper "sleight of hand" argument not prejudicial).

Similarly, the prosecutors made additional comments on Mr. Walker's guilt. These included, "This case is different than most cases because there is absolutely no doubt that the defendant is guilty beyond a reasonable doubt," 12VRP 1393, and "what are we doing here? The evidence is so strong." 12VRP 1434. These comments were not deductions from the evidence nor responses to the defendant's arguments, and compounded the prejudicial impact of the scores of PowerPoint slides that proclaimed the State's opinion about guilt.

Under these circumstances, the State's PowerPoint presentation and its other expressions of its opinion were game-changing and very likely resulted in Mr. Walker's conviction. For this Court to hold the issue waived because Mr. Walker did not object below would give the State license to see how far it can go in its closing arguments. Every time a hapless defense attorney fails to object, the State is vindicated in the use of an improper argument. Moreover, a curative instruction would not have helped in this case. The court would likely have overruled an objection to the first few slides, and once more than a few slides had flashed before the jury, the damage would have been done. The jury need not have viewed many of the State's slides proclaiming:

before believing it true. For all these reasons, this Court should reverse and remand Mr. Walker's conviction for premeditated murder.

For the same reasons, the slides proclaiming Mr. Walker guilt of assault and solicitation were also improper and prejudicial and require reversal of his convictions for those crimes as well. Pl. Exh. 243 at 83, 85-86.

C. The State's Reasonable Doubt Analogies Were Flagrant and Incurable Misconduct

The State also committed misconduct with three reasonable doubt analogies that trivialized the State's burden of proof. This Court has repeatedly held that trivializing the reasonable doubt standard by analogizing it to everyday decisions is prosecutorial misconduct. In Anderson, the Court held that a prosecutor's comments discussing the reasonable doubt standard in the context of everyday decision-making were improper because "the prosecutor trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case." 153 Wn. App. 417, 431, 220 P.3d 1273 (2009).

State v. Johnson built on Anderson, holding that prosecutorial commentary comparing reasonable doubt to making an affirmative decision based on a partially completed jigsaw puzzle was erroneous and improper because it "trivialized the State's burden, focused on the degree of certainty the jurors needed to act, and

implied that the jury had a duty to convict without a reason not to do so." State v. Johnson, 158 Wn. App. 677, 685, 243 P.3d 936 (2010). In Johnson, this Court held a jigsaw puzzle analogy, combined with the State's advising the jury it must "fill in the blank" to find reasonable doubt, were flagrant, ill-intentioned prosecutorial misconduct, incurable by a trial court's instruction.

A similar error was found in Jones, but this time the Court found no prejudice because there was considerable evidence against defendant and the error could have been cured with an instruction. The Jones Court found a Wheel of Fortune game show analogy trivialized the State's burden and was also "problematic in that there are instances where a game show contestant, and by analogy, a juror, is encouraged to guess the solution before he is certain beyond a reasonable doubt." State v. Jones, 163 Wn. App. 354, ¶29, 259 P.3d 351 (2011).

In this case, the jigsaw puzzle analogy was as improper as the puzzle analogies used in Johnson and Jones, because, like those analogies, it also trivialized the State's burden of proof. Moreover, using a jigsaw puzzle analogy, which this Court declared improper in 2010, was "ill-intentioned misconduct" because it was not conceived on the spur of the moment, but planned in advance. Thorgerson, — Wn.2d —, ¶30, 258 P.3d 43, 51.

Furthermore, the State compounded its error by using two additional, equally ill-considered analogies. First, asking the jury to convict if there were

sufficient evidence to support two steel rails was trivializing, an invitation to speculation, and an attack on the burden of proof. It trivialized the burden of proof in the same way game analogies trivialize the burden. In addition, the analogy invited jurors to consider what the minimum support for the case, or the railroad tracks, would be. Most egregiously, the message that the case is proven with a certain quantity of evidence decimates the reasonable doubt standard. 12VRP 1432 ("200-plus exhibits, testimony from lots and lots of witnesses, all of these photographs," "well-supported rails," "ample solid evidence"). It is not the quantity of the evidence that allows a conviction, but evidence of a quality that proves the case beyond a reasonable doubt. This argument was especially prejudicial here, where the State provided "lots and lots" of evidence, some of which had little to do with the issues either of premeditation or accomplice liability, and Mr. Walker did not present a case. The State essentially told the jury the sheer size of its case carried the day. In this regard, the argument also shifted the burden of proof to Mr. Walker, as it implied he could not match the State's case in size.

The use of a basketball analogy was equally problematic, trivializing the State's burden and shifting it as well: "When the State has scored 40 points to the defendant's 2 points, that doesn't mean that there is reasonable doubt in the case." 12VRP 1433. Again, the analogy implies that the defense must match the State's

evidence – or if not match, than at least sufficiently "score" – to prevail. Suggesting that the defense must beat or even match the State in points in order to prevail shifts the burden of proof.

In addition to shifting the burden of proof, the puzzle, railroad and basketball analogies "trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case." Anderson, 153 Wn. App. at 431. All three analogies also "focused on the degree of certainty the jurors needed to act, and implied that the jury had a duty to convict without a reason not to do so." Johnson, 158 Wn. App. at 685.

While this Court has held that one improper argument regarding the burden of proof is not prejudicial when the State's evidence is strong, persistent attacks on the State's burden take an unignorable toll on the defendant's right to a fair trial. In Evans, this Court reversed when it was unclear that a curative instruction could have overcome, among other things, the prosecutor's persistent attack on the State's burden of proof. 163 Wn. App. 635, 646-47 (citation omitted). Thus, as this Court reversed the convictions in Evans and Johnson, it should reverse in this case.

D. The State's Improper Urging of the Jury to Find the Truth and "Remedy" the Crimes Was Prejudicial

The State's repeated injunctions to the jury, over Mr. Walker's objection, "to decide what the truth is" were improper, prejudicial comments. *See* 12VRP

1435-37; *see, e.g., id.* at 1435 ("The truth needs to come out. A trial is a search for the truth. Now . . . it is your job to decide what the truth is. I say to you that, you know, finding the truth, that's justice."). Contrary to the State's exhortations, it is not the jury's job to solve a case. "Rather, the jury's duty is to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt. Thus, a prosecutor's request that the jury 'declare the truth' is improper. Evans, 163 Wn. App. at 644 (internal quotation marks omitted), *citing*, Anderson, 153 Wn. App. 417, 429.

In Anderson, the prosecutor argued, "by your verdict in this case, you will declare the truth about what happened." 153 Wn. App. at 424. This Court held the argument was improper, but not prejudicial when the evidence against the defendant was overwhelming – he was videotaped robbing a store. *Id.* at 429.

In Emery, this Court reiterated the holding of Anderson that "declare the truth" or "speak the truth" argument is improper; although, given the evidence against the defendant it did not find prejudice. State v. Emery, 161 Wn. App. 172, 253 P.3d 413 (2011).

In Evans, this Court found "the prosecution's exhortation to the jury 'to get to the truth' . . . particularly troubling because the jury heard only State witnesses." Evans, 163 Wn. App. at 644. With no conflicting testimony to resolve, a prosecutor who told the jury to find the truth "invited the jury to overlook any

credibility issues with the State's own witnesses." *Id.* (State urged that jury peel back layers of onion to get to truth). In the face of this argument, the Court reversed both because the State's evidence was not overwhelming and on cumulative error grounds.

Given the well-established law that a jury's role is not to find the truth, the trial court's ruling allowing the prosecutor to urge the jury to find the truth was an abuse of discretion. 12VRP 1438. "A court abuses its discretion when its decision is based on untenable grounds or is manifestly unreasonable or arbitrary. This includes when its discretionary decision is contrary to law." State v. Nation, 110 Wn. App. 651, 661, 41 P.3d 1204 (2002) (citations omitted). Here, as in Evans, the jury heard only the State's witnesses, making its exhortation "to get to the truth" particularly troubling. *See* Evans, 163 Wn. App. 635, 644. In addition, its repeated statements regarding the truth amounted to an assault on the jury's role. *See id.* at 940. For these reasons, the improper comments prejudiced Mr. Walker and this Court should reverse his convictions.

Similarly, the State's beseeching of the jury to "remedy" the crimes committed against "the peace and dignity of the people of the state of Washington" by returning "true verdicts," 12VRP 1438-39, was also improper and prejudicial. Prosecutors commit misconduct when they appeal to a community conscience for a verdict: "'A prosecutor may not urge jurors to convict a criminal defendant in

order to protect community values, preserve civil order, or deter future lawbreaking.'" State v. Ramos, 2011 WL 4912836, *6 (although evidence against the defendant was strong, reversing conviction based on prosecutor's cross examination of defendant and closing appeal to jury), *quoting*, United States v. Solivan, 937 F.2d 1146, 1153 (6th Cir. 1991). The prosecutor must seek a verdict based on the evidence, not the jury's passion or prejudice:

> Appeals to the jury's passion and prejudice are improper. It is the prosecutor's duty to "seek a verdict free of prejudice and based on reason." The prosecutor's duty to act impartially derives from his or her position as a quasi-judicial officer.

State v. Echevarria, 71 Wn. App. at 598 (citations omitted). In this case, the appeal to the jury's passion and prejudice was even more flagrant because the court had just finished instructing the prosecutor that the verdict could not be sought "on behalf of the community, not on behalf of the family, but on behalf of the instructions that they have received." 12VRP 1438. Yet the prosecutor instantly stood up and appealed to the jurors' prejudice, asking the jury to "remedy" the crime committed against "the people of the state of Washington" by "return[ing] true verdicts." *Id.*

Mr. Walker also objected to this argument without success. 12VRP 1439. For the same reasons the court's overruling of his objections regarding a "true verdict" was an abuse of discretion, its failure to address this objection was also an abuse of discretion.

For all these reasons, the State's improper appeal to the jury's passion and prejudice, by appealing to jurors to "remedy" the crime, combined with its attack on the jury's role with its improper urging of the jury to find the truth, prejudiced Mr. Walker. These improper arguments created a substantial likelihood the verdict was based on the jurors's passion and prejudices, combined with an incorrect idea of the jury's role, rather than the evidence against Mr. Walker. For these reasons, this Court should reverse Mr. Walker's convictions.

E. The State's Improper Comments Regarding Mr. Walker's "Desperate" Attempts to "Mislead" the Jury Were Flagrant and Incurable Misconduct

The State also committed misconduct with its harangue regarding the weakness of Mr. Walker's case, his "desperation," and his underhanded attempts to "mislead" the jury. 12VRP 1425-29. "It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity." Thorgerson, — Wn.2d —, ¶30, 258 P.3d 43, 50 (citations omitted), *citing*, State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008); Reed, 102 Wn.2d at 145-46 (holding improper prosecutor's statement that "defense counsel did not have a case, and that the petitioner was clearly a 'murder two'").

Three Supreme Court cases illustrate the range of acceptable prosecutorial comment on defense tactics. In Thorgerson, the Supreme Court held the prosecutor's presentation of the defense case as "bogus," involving "sleight of

hand" and "desperation," impugned defense counsel's integrity and "went beyond the bounds of acceptable behavior." Thorgerson, — Wn.2d —, ¶30, 258 P.3d 43, 51. The "sleight of hand" rhetoric was particularly troubling to the Court. *Id.* When the argument was planned in advance, the Court concluded it was ill-intentioned misconduct. *Id.* Nevertheless, the Court found no reversible error because a curative instruction would have remedied the prejudice. *Id.* at ¶32.

In Russell, the Supreme Court evaluated a prosecutor's statement that the defense had "attacked and vilified" an expert witness and would "stoop to any level" to call scientific evidence into question. Russell, 125 Wn.2d at 92. The defendant had not objected below. The Court found the prosecutor's remarks "arguably constitute a fair response to attacks made by the defense on the deputy prosecutor, her witnesses, and the work of government agents." *Id.* at 93. It held that while the remarks were "inflammatory," they were not so prejudicial that a curative instruction would have been ineffective. *Id.*

Similarly, in Gregory, the prosecutor had argued that the defense strategy was "to attack the scientists personally" and to "[d]istract, deflect, [and] divert" the jury's attention from the evidence. Gregory, 158 Wn.2d 759, 842. The Court held that the prosecutor's remarks "were no worse than the prosecutor's remarks in Russell." *Id.* at 843.

Here, by contrast, the State's rhetoric was much more persistent and inflammatory than that used in Thorgerson, Russell and Gregory. Unlike the one or two questionable comments in those cases, here the prosecutor applied the word "mislead" or "misleading" to Mr. Walker's strategy seven times and said he was desperate five times. 12VRP 1426-28. Saying defense counsel is trying to mislead the jury is another way of saying he is deliberately lying to the jury. Thus, in effect, the State repeatedly accused Mr. Walker of lying. Moreover, comments about Mr. Walker's desperation were implicit professions of the State's opinion of Mr. Walker's guilt, in other words, "unethical and prejudicial." Traweek, 43 Wn. App. 99, 107. Indeed, the State's repeated reference to so-called misleading tactics and to Mr. Walker's desperation were so prejudicial that, unlike in Thorgerson, a curative instruction would have been ineffective in this case.

Further, here, the prosecutor's attack was not a fair response to defense commentary. In this case, although the State premised its attacks as a response to the defendant's invitation to the jury to have "[a] healthy distrust for government," the State went well beyond responding to defense counsel's argument.

Mr. Walker presented no evidence. Thus, to effectively represent his client in closing arguments, defense counsel was required to point out any and all weaknesses in the State's case and to draw whatever helpful inferences were available to Mr. Walker. Even given his position, he never accused the State of

acting in an underhanded manner, as the State did of him. Instead, he merely argued it had selectively chosen some of its evidence, pointed out the inconsistencies in the witnesses's testimony, showed the limitations of the forensic evidence and asked the jury to view the State's case with healthy skepticism. The State, by contrast, retaliated with vituperative, inflammatory language, repeatedly declaring the defense both desperate and misleading. Its diatribe cannot be seen as a fair response to Mr. Walker's attempts to establish reasonable doubt.

Even when defense counsel did not object to the improper comment, the Supreme Court has "repeatedly explained that the question to be asked is whether there was a 'substantial likelihood' the prosecutor's comments affected the verdict." State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (in absence of defense objection, reversing for improper prosecutorial comment on supposedly violent group of which defendant was a member) (internal quotation marks omitted). In this case, the State's repeated references to Mr. Walker's desperation and his "misleading" tactics created a "substantial likelihood" that the verdict was affected. Accordingly, this Court should reverse and remand Mr. Walker's convictions.

F. The State Misinformed the Jury about Premeditation

The State misinformed the jury about what was required to find premeditation when it argued premeditation could occur in "just seconds" or in a

"split second" and used the example of obeying a stop sign. This argument was improper because the increments of time the State cited amount to less than a moment in time. Premeditation requires more than that:

> Premeditation "must involve more than a moment in point of time". It has been defined as "the deliberate formation of and reflection upon the intent to take a human life". It has further been held to involve "the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short."

State v. Gentry, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995) (citations omitted); RCW 9A.32.020(1) (premeditation "must involve more than a moment in time"); CP 213 ("Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed."). Thus, the State misstated the law, making it easier for the jury to find premeditation than legally permitted.

Moreover, its analogy to the thought required to stop at a stop sign was also misleading and inapt. When an experienced driver stops at a stop sign, it is often a reflexive, automatic response, not a premeditated decision. Few people deliberate about whether to obey the sign. Indeed, most drivers have experienced navigating stretches of road without a conscious memory of having done so, realizing only afterwards that they must have followed traffic signals and signs automatically. Thus, this argument and the accompanying slides were improper.

For these reasons, the trial court abused its discretion in permitting the State to go forward with the argument because the argument misstates the law. *See, e.g.*, Gentry, 125 Wn.2d 570, 597-98. A court abuses its discretion when its decision is contrary to law. Nation, 110 Wn. App. at 661.

Finally, the argument was prejudicial because of the State's theory regarding the shooting. The State argued Finley shot Mr. Husted when the defendant told him through the speaker phone as he stood in the Walmart to "shoot the motherfucker." SVRP 30; 12VRP 1335; 1363; 1365-66 & 1382; 8VRP 729. If Finley reflexively obeyed and pulled the trigger, he would have premeditated the shooting under the State's definition of premeditation, but not according to the legal definition, which required deliberation and "some time" to form the design to kill. Thus, to the extent jurors may have based the finding of premeditation on Finley's premeditation rather than on Mr. Walker's, they likely based the conviction on this count on an incorrect understanding of the law.

Moreover, even though the jury instructions provided the correct law to follow, the jury would have been justified in believing the State also provided the correct law because of the circumstances surrounding Mr. Walker's objection. When Mr. Walker objected to the State's interpretation of the statute, the jury was excused. When it returned, the State resumed its argument on premeditation and no instruction was given regarding the challenged argument. 12VRP 1376 &

1381. Thus, the effect of the improper argument was compounded because the jury could infer the trial court considered correct the message that premeditation could occur in a split second and entail the kind of reflexive action involved in stopping at a stop sign. *See* State v. Gonzales, 111 Wn. App. 276, 283-84, 45 P.3d 205 (2002) (holding effect of improper argument compounded and given additional credence when trial court overruled defendant's objection and stated, "that objection is not well taken").

For all these reasons, this Court should reverse Mr. Walker's conviction as to premeditated murder.

G. The State's Improper Comments Consistently Defied Judicial Directives and, Taken Together, Require Reversal

Taken all together, the State's persistent, improper comments denied Mr. Walker a fair trial. If the Court does not find prejudice in any of the individual instances of misconduct, it should find it in the whole of the State's presentation of the case. State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956) (when defendant did not object to all instances of prosecutorial misconduct, reversing on cumulative error grounds). Misconduct is prejudicial if the Court finds "a substantial likelihood the misconduct affected the jury's verdict." State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). Recently, this Court had the opportunity to revisit its position on cumulative error, stating, "we have never hesitated to reverse where several errors combined to deny the defendant a fair trial." Evans, 163 Wn. App. 635, 647 (citation omitted).

In Evans, the Court reversed when it was "unwilling to speculate that a curative instruction could have overcome the prosecutor's multi-pronged and persistent attack on the presumption of innocence, the State's burden of proof, and the jury's role." *Id.* at 648; *see also* State v. Henderson, 100 Wn. App. 794, 805, 998 P.2d 907 (2000) (reversing for cumulative error based on several instances of prosecutorial misconduct).

In this case, as in Evans, the State repeatedly attacked the burden of proof and the jury's role. In addition, it denied Mr. Walker a fair trial with its well-over-

137 verbal and written declarations of his guilt during both opening statements and closing arguments, its denigration of his case and his attorney's tactics, its outright or implicit statements that Mr. Walker was dishonest, its appeals to the jury's prejudice, and its re-defining of the definition of premeditation. The prosecutors' tactics in this case are reminiscent of the situation in Reed, where the Supreme Court held that the prosecutor's improper comments, including calling the defendant a liar, stating defense counsel had no case, and implying defense witnesses should not be believed when they were from out of town and drove fancy cars, made the trial akin to a scene from an absurdist novel: "These statements suggest not the dispassionate proceedings of an American jury trial, but the impassioned arguments of a character from Camus' 'The Stranger.'" Reed, 102 Wn.2d at 145-46. The prosecutor's actions in this case similarly deprived Mr. Walker of a fair trial.

Moreover, while the case against Mr. Walker was arguably fairly strong, reversal is required because Mr. Walker was deprived of a fair trial. Division 1 recently reversed for prosecutorial misconduct, even though the evidence against the defendant was strong, when the misconduct deprived the defendant of a fair trial. Ramos, 2011 WL 4912836 (reversing conviction based on prosecutor's cross examination of defendant and closing appeal to jury). In Ramos, an informant, a police officer, and a videotape connected the defendant directly to the charged

drug deal. Here, by contrast it was largely the testimony of Williams-Irby, a codefendant who testified in exchange for leniency, who connected Mr. Walker to the Walmart on the day of the robbery. Mr. Walker was not captured on videotape, the forensic evidence linking him to the getaway car could not establish when his fingerprints or DNA were left behind, he did not enter the Walmart, and neither Turpin nor Finley testified against him.

For all these reasons, as in Reed, Case, Evans, Ramos, and Henderson, no curative instruction could have cured the prosecutors' persistent misconduct in this case and this Court should reverse Mr. Walker's convictions.

Point III: Trial Counsel was Ineffective in Failing to Request a Cautionary Instruction Regarding the Jury's Use of Williams-Irby's Testimony and in Failing to Object to the Prosecutorial Misconduct

Mr. Walker's State and federal constitutional rights to effective counsel were violated by his attorney's failure to ask for a jury instruction cautioning the jury about its use of Williams-Irby's testimony and by counsel's failure to object to the prosecutorial misconduct. The right to counsel includes the right to effective counsel. See U.S. Const. amend. VI; Wash. Const. art. 1 § 22. To demonstrate ineffective assistance of counsel, the defendant must show both a) that defense counsel's representation fell below an objective standard of reasonableness and b) prejudice. Prejudice is shown as follows:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-36, 899 P.2d 1251 (1995).

The Court starts with a strong presumption of counsel's effectiveness. McFarland, 127 Wn.2d at 335, 899 P.2d 1251. Moreover, legitimate trial tactics fall outside the bounds of an ineffective assistance of counsel claim. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

A. Trial Counsel was Ineffective In Failing to Request a Cautionary Instruction Regarding the Jury's Use of Williams-Irby's Testimony

Counsel's failure to request a cautionary instruction about Williams-Irby's testimony when she was an accomplice who provided the bulk of the evidence against Mr. Walker was both deficient and prejudicial and can in no way be viewed as tactical. The pattern instruction that should have been requested reads:

> Testimony of an accomplice, given on behalf of the [State][City][County], should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

11 Wash. Practice: Pattern Jury Instr. Crim. WPIC 6.05 (3rd ed. 2008). Failure to give this instruction is "reversible error when the prosecution relies solely on accomplice testimony;" however, when the testimony is corroborated, whether the

instruction is required depends on upon the extent of corroboration. State v. Harris, 102 Wn.2d 148, 155, 685 P.2d 584 (1984), *overruled on other grounds by* State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988). "If the accomplice testimony was substantially corroborated by testimonial, documentary or circumstantial evidence, the trial court did not commit reversible error by failing to give the instruction." Id.; State v. Sherwood, 71 Wn. App. 481, 860 P.2d 407 (1993). However, in this case, no such corroboration of the key facts occurred.

Circumstantial evidence tied Mr. Walker to the crimes in this case, but only Ms. Williams-Irby's testimony painted him as the mastermind. Without a picture in their minds that Walker ran the show, the jury might not have returned guilty verdicts. Indeed, the State rested its case on the idea Mr. Walker was the mastermind.

Ms. Williams-Irby's testimony made Mr. Walker the mastermind of the robbery, murders and assault. She was the only witness to testify that Mr. Walker used to work at Walmart, that he asked her about how much cash the Walmart took in, and that he asked her to attend the staff meeting the day of the crime. Ms. Williams-Irby was the only witness who testified that Mr. Walker dominated Finley and Turpin and offered the use of a gun to Finley. Only Ms. Williams-Irby alleged Mr. Walker carried a .45 handgun from Trevino's house into their own residence, thereby tying Mr. Walker's gun to the crime. Only she provided

evidence Mr. Walker tried to involve a man named Jonathan, told Finley and Jonathan it would be easy money, gave them their roles in the crime, became impatient with them and Turpin for the crime not getting done and threatened them about doing it without him. Only Williams-Irby alleged Mr. Walker was staking out the Walmart parking lot, timing the movements of the guard. She is the only one who alleged Mr. Walker intended Finley to kill the guard. All of this testimony was uncorroborated. Thus, but for counsel's failure to request a cautionary instruction, the State would likely not have been able to establish its theory that Mr. Walker was the mastermind.

Most significantly, Williams-Irby is the only witness who testified Mr. Walker shouted to Finley during the crime to "shoot the motherfucker." 8VRP 729. The State used this statement to argue Mr. Walker directed Finley to kill Mr. Husted. SVRP 30; 12VRP 1335; 1363; 1365-66 & 1382; 8VRP 729. If given a cautionary instruction about Ms. Williams-Irby's testimony, the jury might not have believed this most damning of testimony and not returned guilty verdicts in the most serious crimes charged in this case.

A review of her testimony establishes that Williams-Irby was the single most damaging witness to testify for the State. Yet the jury may not even have considered her an accomplice – the only accomplices discussed at trial were Turpin and Finley. Indeed, Williams-Irby's involvement in the crimes appeared

incidental and even inadvertent. Under these circumstances, a cautionary accomplice instruction was particularly warranted. Moreover, Mr. Walker would likely not have been convicted of the most serious charges against him, premeditated murder, felony murder, assault and robbery, had counsel requested a cautionary instruction. Thus, but for counsel's deficient performance, the outcome of the case likely would have been different.

For all these reasons, trial counsel's performance was both deficient and prejudicial and this Court should reverse Mr. Walker's convictions as to all but the final two counts, solicitation and conspiracy.

B. Trial Counsel was Ineffective in Failing to Object to the Numerous Instances of Prosecutorial Misconduct in this Case

Counsel's failure to object to the prosecutorial misconduct in this case was both deficient and prejudicial and cannot be viewed as tactical. Point II of this Brief discusses the instances of prosecutorial misconduct, including the times Mr. Walker's counsel failed to object to such conduct. To the extent this Court finds unobjected-to misconduct that could have been cured with an objection and curative instruction, counsel's performance was necessarily deficient in failing to lodge an objection to that conduct. A competent attorney would object to prosecutorial misconduct when the objection would have cured the problem.

Mr. Walker was prejudiced by any instances of misconduct that could have been cured with a proper instruction, in other words, any misconduct this Court

deems waived on appeal for lack of objection. Significantly, the Court evaluates prejudice differently in the context of ineffective assistance than it does when considering the impact of prosecutorial misconduct. Under the Strickland standard, prejudice occurs if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. 668, 694. Notably, this standard is an easier standard to meet than the one required to obtain reversal for prosecutorial misconduct. Under that standard, conduct is prejudicial if the Court finds "a substantial likelihood the misconduct affected the jury's verdict." Stenson, 132 Wn.2d 668, 718-19.

The standards differ because finality concerns are lower in the context of ineffective assistance than in other appellate situations. In fact, in Strickland, the Supreme Court expressly rejected a standard similar to the one from Stenson. The Court held that to find prejudice only when the attorney's "deficient conduct more likely than not altered the outcome in the case" would be inappropriate in the context of ineffective assistance. Strickland, 466 U.S. 668, 693. It reasoned that finality considerations are weakened when trial counsel's performance was defective:

> An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding

> can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

Strickland, 466 U.S. at 694. Thus, the lower standard in the ineffective assistance of counsel context reflects the centrality of effective counsel to a fair trial.

For these reasons, just because the Court finds insufficient grounds to reverse for the unobjected-to error under the standards discussed in Part II, it does not necessarily follow that there was no prejudice under the Strickland standard. *Cf.* State v. Jones, 163 Wn. App. 354, ¶35, 259 P.3d 351 (2011) (holding, without discussing the standard applied, no ineffective assistance of counsel because no prejudice found). Indeed, counsel' deficient performance in failing to object to the State's PowerPoint presentation created "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." If counsel had properly objected to the State's slide show, the jury need not have seen the State declare Mr. Walker guilty 137 times. The improper slide show alone prejudiced Mr. Walker under the Strickland standard.

Alternatively, if this Court finds that none of counsel's errors, standing alone, meet the Strickland test, taken together, but for counsel's repeated failure to object, "there is a reasonable probability that . . . the result of the proceeding would have been different." Counsel's errors involved failing to object to the following misconduct: the State's improper comments in opening remarks, the

State's PowerPoint presentation, its denigration of Mr. Walker's attorney and trial strategy, and its three attacks on the State's burden of proof. Taken together, defense counsel's errors were prejudicial under Strickland and require reversal.

V. CONCLUSION

For all of these reasons, Mr. Odies D. Walker respectfully requests this Court to reverse his convictions.

Dated this 9th day of November, 2011.

Respectfully submitted,

/s/ *Carol Elewski*
Carol Elewski, WSBA # 33647
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 9th day of November, 2011, I caused a true and correct copy of Appellant's Brief to be served, by e-filing, on:

Respondent's Attorney
Pierce County Prosecutor's Office at pcpatcecf@co.pierce.wa.us

and, by U.S. Mail, on:

Mr. Odies D. Walker
DOC # 349910
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362.

/s/ *Carol Elewski*
Carol Elewski

ELEWSKI, CAROL ESQ

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

State of Washington,	)	
	)	No. 41970-0
Respondent,	)	
	)	Pierce Co. Sup. Ct. No. 09-1-02784-8
v.	)	
	)	
Odies D. Walker,	)	Certificate of Service
	)	
Appellant.	)	

I certify that on November 16, 2011, I served upon the Appellant, Odies D. Walker, a copy of the Verbatim Reports of Proceedings filed in this case to assist him with his Statement of Additional Grounds For Review. I served it by U.S. mail, postage prepaid, on:

Mr. Odies D. Walker
DOC # 349910
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362.

Dated this 17th day of November, 2011

/s/ Carol Elewski
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I certify that on November 17, 2011, I caused a true and correct copy of this Certificate to be served on the following by e-filing:

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