No. 41795-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROBERT MADDAUS,

Appellant.

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

The Honorable Christine Pomeroy, Judge
Cause No. 09-1-01772-1

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. SUPPLEMENTAL ISSUES.

1. Whether the prosecutor committed misconduct in closing argument where he showed a number of PowerPoint[1] slides which accurately depicted the evidence presented at trial, including one slide of a photograph of Maddaus with the word "guilty" superimposed over it, surrounded by a summary of the evidence against him.

2. Whether defense counsel was ineffective for failing to object to the State's closing argument.

B. SUPPLEMENTAL FACTS.

The prosecutor who tried this case used a number of PowerPoint[1] slides to illustrate his closing argument. All of the slides used in the trial have been made part of this record, CP 579-978, but it is clear that not all of them were used during the closing argument. RP 1978-2015. While there is no document that correlates the slides to the argument, it is most likely that the argument began with a slide naming the case and listing the charges. CP 753.

A number of exhibits admitted during trial were published to the jury, at the time they were admitted, by way of PowerPoint slides. For example, Exhibits 49, 50, and 51, photos of the neighborhood where the murder took place, were identified by the

[1] "PowerPoint" is a registered trademark of the Microsoft Company.

witness Michael Wallace. RP 533-34. Those exhibits were admitted without objection and the prosecutor published them. RP 542. The prosecutor handed Wallace a laser pointer and had him indicate various features on the photos, which leads to the conclusion that they were projected on a screen for the jury to see. RP 542-43. Those exhibits are in this record at CP 625-27. The slides in CP 579-752 appear to all be similar slides used to publish exhibits to the jury. Each one of them has a small white rectangle near the bottom of the slide with the exhibit number in it.

The slides contained in CP 753 to 978, when compared to the transcript of the State's closing argument, appear to be the ones to which the prosecutor was referring, although he apparently did not always use them in the same order in which they appear in the clerk's papers, and he likely did not use all of them. For example, the prosecutor discussed reasonable doubt, RP 1979-80, which corresponds to CP 781 and 870. He talked about circumstantial evidence, RP 1981-82, corresponding to CP 787-88. Several of the slides are duplicates, *e.g.*, 974 and 975. These slides are the text of a portion of a phone call Maddaus made from the jail; 975 contains a small icon of a speaker on it and

presumably was the one used when an audio portion of that phone call was played. RP 2013.

The final slide, CP 978, shows a photograph of Maddaus that he refers to in his Supplemental Brief as a booking photo, but it is not. Following Maddaus' arrest, the car in which he had been riding at the time he was arrested was searched pursuant to a search warrant. Among the items seized were a passport in the name of Chad Walker Vogt, and a blonde wig. RP 844-46. Detective Johnstone later obtained a court order requiring Maddaus to put on the wig and be photographed wearing it. RP 845-46. That photo matched the one on the passport. Photographs of the passport were admitted as Exhibits 149A and 149B, and are included in the slides identified as CP 733 and 734. RP 845. The photographs of Maddaus wearing the wig were admitted as Exhibits 148 and 149, RP 846, and are among the slides as CP 731 and 732. At a minimum, Exhibits 149 and 149A were displayed for the jury. RP 846, CP 732-33. This is the same photograph used in the last slide, CP 978; it was not a booking photo.

Some slides that were in the PowerPoint package were apparently not shown to the jury. The slides in CP 766 and 767 define accomplice liability, but there was nothing in the trial about

accomplices to anything. The jury was not instructed on accomplice liability, CP 413-450, and the prosecutor did not even mention it in argument. RP 1978-2015, 2070-77. There would have been no reason for these slides to even have been displayed, and the most reasonable explanation is that they were accidentally included.

C. ARGUMENT.

1. The State's closing argument was similar to the argument disapproved in State v. Glasmann only in that the final slide showed a photo of the defendant with the word "guilty" superimposed on it. Under the circumstances of this case, that cannot be construed as a statement of the prosecutor's personal opinion, and was not error. Even if it was, in the context of this trial, it was harmless.

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a "substantial likelihood the instances of misconduct affected the

jury's verdict." Id. A defendant's failure to object to improper arguments constitutes a waiver unless the statements are "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id. The absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

While it is true that a prosecutor must act in a manner worthy of his office, a prosecutor is an advocate and entitled to make a fair response to a defense counsel's arguments. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). *See also* State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005). A prosecutor has a duty to advocate the State's case against an individual. State v. James, 104 Wn. App. 25, 34, 15 P.3d 1041 (2000). It is not error for the prosecutor to argue that the evidence does not support the defense theory. State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990). A prosecutor's use of the words "I think" and "I believe" in closing argument do not necessarily indicate misconduct. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

Maddaus's supplemental argument relies entirely on the holding of In re Pers. Restraint of Glasmann, ___ Wn.2d ___, 286 P.3d 673 (2012), for his assertion that the argument in his case was so egregious that his convictions must be reversed. A comparison of the two cases shows that the only similarity between them is that the prosecutor in Maddaus's trial showed one slide with a photograph of Maddaus—not a booking photograph, but another photo that was in evidence—with the word "guilty" superimposed over it in red letters. Considering the totality of the prosecutor's argument in relation to the evidence produced in the case, the single word "guilty," even if in red, cannot be considered an expression of the prosecutor's personal opinion. Even if it were error, Maddaus did not object and it would require reversal only of there is a likelihood that it affected the outcome of the trial.

a. Glassman opinion.

The facts of the Glasmann case were significantly different from those of Maddaus's. Glasmann was charged with, and convicted of, second degree assault, attempted second degree robbery, first degree kidnapping, and obstruction. Glasmann, 286 P.3d at 675-76. Glasmann did not deny that he had committed the acts charged, but he did dispute the degree of the crimes, and

argued that he should be convicted of lesser included crimes. Id. at 676, 679-80. The charges resulted from an altercation that occurred after Glasmann and the victim, his fiancée, celebrated his birthday with alcohol, ecstasy, and methamphetamine. Glasmann punched and kicked the victim, dragged her out of their motel room to the car, and from the driver's seat attempted to pull her by her hair into the passenger seat of the car. While she was half in, half out of the car Glasmann ran the car onto her leg, then backed off and pulled her into the car. The victim was able to get the car stopped, grabbed the keys, and ran to a nearby convenience store, where she attempted to hide on the floor behind the cashier's counter. Police arrived. Glasmann shouted that he had a gun, invited the officers to shoot him, and put the victim in a choke hold, threatening to kill her. He held her between himself and the officers, until she was able to free herself enough that the officers could use a stun gun on Glasmann. He was taken into custody but struggled so fiercely that the officers injured him in the process. Id. at 675-76.

In closing argument, the prosecutor used a PowerPoint slide presentation in which he incorporated video from security cameras, audio recordings, photographs of the victim's injuries, and

Glasmann's booking photograph, which had been admitted into evidence. Id. at 675-76. The photograph showed "extensive facial bruising." Id. at 676. It was "digitally altered to look more like a wanted poster than properly admitted evidence." Id. at 683, J. Chambers concurring. Five slides used during the prosecutor's closing showed the booking photograph; one included the caption "DO YOU BELIEVE HIM?", one was captioned "WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?", and three showed the word "GUILTY" superimposed across it, an additional "GUILTY" on each successive slide. Id. at 676.

One of the slides showed a photograph, presumably taken from the security video, of Glasmann holding the victim in a choke hold while crouched behind the counter of a minimart, with the captions "YOU JUST BROKE OUR LOVE". Another showed the victim's injuries with two captions: "What was happening right before the defendant drove over Angel . . . ", and ". . . you were beating the crap out of me!" Id. Glasmann did not object to any of the slides. Id. at 677.

The prosecutor argued that the evidence overwhelmingly supported the charges filed, but also told the jury that to reach a verdict they must decide "Did the defendant tell the truth when he

testified?" and that they had a duty to compare the testimony of the State's witnesses to that of the defendant. Id. at 676.

The decision is Glassman is a plurality opinion, with four justices signing the lead opinion, one concurring, and four dissenting. However, the concurrence mirrors the lead opinion sufficiently that it can be treated as a five-four split of the court. The dissent disagreed primarily with the remedy, not the conclusion that the prosecutor committed misconduct. It is important, then, to examine exactly what the lead and concurring justices found improper about the State's argument and what it did not disapprove of. It started with the presumption that Glasmann had waived any error unless there was misconduct so "flagrant and ill intentioned that an instruction would not have cured the prejudice." Glasmann, 286 P.3d at 678.

It is error to show to the jury evidence not admitted at trial and is reversible error if there is reason to believe the defendant was prejudiced. Id. The court concluded that the booking photo, with the addition of "phrases calculated to influence the jury's assessment of Glasmann's guilt and veracity," was the equivalent of altered evidence. Id. The court noted that the depiction of Glasmann as "unkempt and bloody" would have had prejudicial

impact because of captions that challenged his truthfulness. Id. The court also found that the superimposed word "guilty" was even more prejudicial because it was in red letters, "the color of blood and the color used to denote losses." Id. at 680. It is important to note that the court did *not* say that the photographs with captions which included direct quotes from witnesses or summaries of evidence that was admitted constituted altered evidence or that displaying them to the jury was error.

The Glasmann court found that the photograph, with the additional captions, constituted the prosecutor's individual opinion that the defendant was guilty, Id. at 679, although it is not clear from the court's opinion why it is an individual opinion as opposed to the opinion of the State, which the prosecutor represented. The court found this to be misconduct. It discussed at some length the "prejudicial imagery" which is considered to be of such an impact that an instruction cannot overcome it. Id. The court concluded that the "multiple ways in which the prosecutor attempted to improperly sway the jury and the powerful visual medium he employed," combined with his closing argument, created such prejudice that a curative instruction would have been pointless. Id. at 679.

The only statement included in the oral part of the closing argument that the court found sufficiently objectionable to include in the lead opinion was the statement that the jury must determine whether or not Glasmann told the truth when he testified, in effect shifting the burden of proof to the defendant. While the court concluded that was misconduct it did not find it to be sufficiently egregious, standing alone, to warrant reversal. Id. at 682.

The court also placed emphasis on the fact that Glasmann was challenging only the degree of the offenses for which he was being tried, not his culpability. "Because Glasmann defended by asserting he was guilty only of lesser offenses, and nuanced distinctions often separate degrees of a crime, there is an especially serious danger that the nature and scope of the misconduct here may have affected the jury." Id. at 680. In its summary of the holding, the court said:

> The prosecutor's presentation of a slide show including alterations of Glasmann's booking photograph by addition of highly inflammatory and prejudicial captions constituted flagrant and ill intentioned misconduct that requires reversal of his convictions and a new trial, notwithstanding his failure to object at trial. *Considering the entire record and circumstances of this case*, there is a substantial likelihood that this misconduct affected the jury verdict. The principal disputed matter at trial was whether Glasmann was guilty of lesser offenses

> rather than those charged, and this largely turned on whether the requisite mental element was established for each offense. More fundamentally, the jury was required to conclude that the evidence established Glasmann's guilt of each offense beyond a reasonable doubt.
>
> It is substantially likely that the jury's verdict were (sic) affected by the prosecutor's improper declarations that the defendant was "GUILTY, GUILTY, GUILTY!", together with the prosecutor's challenges to Glasmann's veracity improperly expressed as superimposed messages over the defendant's bloodied face in a jail booking photograph.

Glassman, 286 P.3d at 682-83, emphasis added.

b. Argument in Maddaus's trial.

Like the defendant in Glasmann, Maddaus did not object at trial to any of the prosecutor's closing argument. Therefore, the same standard of review applies—his conviction must be affirmed unless the prosecutor committed misconduct and that misconduct was so flagrant and ill-intentioned that it could not have been cured by an instruction to the jury.

The slides used in the prosecutor's closing argument during Maddaus's trial, with the exception of the final slide, do not contain any of the "editorial" captions that the court found prejudicial in Glasmann. As noted, that court did not disapprove any of the slides which showed a photograph and also included a caption that

summarized a piece of evidence or contained a quote from a witness. Only the booking photograph and its captions were disapproved. Most of the slides which contain text contain only text, such as the elements of the various offenses or sections of the jury instructions. CP 755-65, 769-89, 869-79, 882-84, 897-901, 916-18. Some slides are duplicates and presumably only one was shown. For example, CP 882 and 887 are identical and it seems unlikely that both were shown. Some of the text-only slides were summaries of evidence, such as CP 880, which is a list of quotes from three different witnesses who testified that Maddaus threatened to kill the person who robbed him, which follows the slide defining premeditation, CP 879, and which corresponds to the prosecutor's argument at RP 1986. Also in this category are the slides at CP 913-15, 919-21, and 976-77.

Nothing in the Glasmann opinion disapproves of these text-only slides. There is nothing that can be characterized as prejudicial or the prosecutor's personal opinion.

The presentation included several slides showing pages of telephone records that were admitted into evidence. CP 922-38, RP 1161, 1446-64. Superimposed on each slide is a box with details pertaining to the call the prosecutor was describing. RP

2001-03. In addition there are slides containing the transcript of excerpts of phone calls made by Maddaus from the jail. CP 945-75. As noted above, many of these are duplicates and possibly one of each was shown to the jury while the other carried the audio itself, since several of the slides show a small icon of a speaker. CP 944-45 is one example. The phone calls were admitted in evidence during the trial, RP 1465-1509. The audio playback during closing argument is at RP 2003-13.

Nothing in the Glasmann opinion disapproves of slides emphasizing individual pieces of evidence or displaying a written transcript to accompany an audio recording. Audio recordings were not disapproved in Glasmann.

Finally, there are a few slides showing a photograph that was admitted into evidence along with some text. The slides at CP 881 and 885 show Exhibit 12, a photograph of the victim's bloody hands, in handcuffs, as well as a portion of his face, also bloody. At the top of the slide are superimposed the words, "Defendant: 'I'm not taking those cuffs off . . .". The portion of the argument corresponding to those slides is at RP 1987, 1989, and the testimony from which the words were taken is at RP 1341 and 1397. One slide shows Exhibit 110, a photo of Jessica Abear, the

victim of the kidnapping and second degree assault charges, on one side and on the other text that includes her name and the words "interrogated, maced, shot with a paintball gun, threatened with a pistol, hit with a pistol, and pulled trigger." CP 902. This slide was almost certainly displayed while the prosecutor was discussing the second degree assault charge. RP 1994. At CP 904 is a slide showing Exhibit 84, a photo of either Maddaus's or his mother's residence, RP 667, and the words "Defendant returned, Interrogation, Calling Hugo, and 'Torture the truth out of her.'" This slide corresponds with the prosecutor's argument at RP 1994, and reflects testimony from Abear at RP 656. Maddaus himself confirmed that he had called Hugo. RP 1821.

Maddaus argues that somehow the captioned slides were even more prejudicial because they contained the exhibit number, leading the jury to believe the slide was approved by the judge. Appellant's Supplemental Brief at 9. That conclusion does not seem to logically follow. The slides shown during the evidentiary portion of the trial contained the exhibit number, and it is entirely proper for a prosecutor to refer to and show to the jury during closing argument exhibits that were admitted during trial. "It is not improper for a prosecutor to comment on his own evidence." State

v. Bates, 96 Wn. App. 893, 901, 982 P.2d 642 (1999). In any event, the only captioned slides disapproved in Glasmann were the ones with the captions "DO YOU BELIEVE HIM?", "WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?", and "GUILTY" or "GUILTY, GUILTY, GUILTY." "In this case, the use of highly inflammatory images unrelated to any specific count was misconduct that contaminated the entire proceedings." Glasmann, 286 P.3d at 681. The captions used on the slides in Maddaus's trial were not inflammatory and they pertained to the count the slide and the oral argument were addressing.

Nothing in the Glasmann opinion disapproves of displaying writing summarizing testimony on the same slide as a photograph also admitted into evidence.

c. The oral argument in Maddaus's case.

The Glasmann opinion contains little detail about the prosecutor's oral argument other than what is summarized above. In Maddaus's case, the entire argument is in the record, and a reviewing court can evaluate the PowerPoint presentation in relation to it. The prosecutor here did not tell the jury it must decide whether Maddaus was lying, and did not tell it that it must compare the testimony of the State's witnesses to Maddaus's. He was

careful at all times to refer to the evidence and nothing he said could be considered a personal opinion. A few examples follow.

> "As I said to you about three weeks ago when I opened this case, and as the evidence has now proven, Shaun Peterson's killer is sitting just a few feet from you."

RP 1978.

> Matthew Tremblay on the early morning of November16th, he'd been drinking tequila. He'd been using meth. He just observed Shaun Peterson get shot. He was in shock. He was afraid. And he drove off with the defendant in the defendant's Jetta. And he testified about going every which way, zig-zaging (sic) around before he finally got to the freeway. On the other hand, you had Mr. Albert, who was awakened from a sound sleep on 17th Avenue, and he heard the gunshots. He saw the Jetta drive by. He saw the switch of the driver and the passenger and saw it drive off. Now, awakened from a sound sleep, Mr. Albert was better able—his ability to witness the events was better, I submit, than Matthew Tremblay, who was—who had been drinking, who had been using meth and who was in shock from what he had seen.

RP 1983.

> And I make reference to Mr. Maddaus specifically, ladies and gentlemen, because a corollary, if you will, a companion to the reasonable doubt instruction, that is the presumption of innocence enjoyed by this defendant, is that the defendant does not have to do anything. A defendant can sit mute and properly put the state to the burden of proof, put me, which is my burden, properly, to prove someone is guilty.

> However, when a defendant, such as Mr. Maddaus, goes on the witness stand, as Mr. Maddaus did, he becomes a witness. He becomes a witness who you must subject to the same scrutiny that you do any other witness and look at him and consider what he had to say and the manner in which he had to say it in determining what credibility, if any, to give his testimony
>
> Any bias or prejudice that the witness may have shown, and you can consider the reasonableness of the witness's statements in the context of the other evidence. Consider, for example, Mr. Maddaus's testimony that he—what did he say? He asked to put the handcuffs on Mr. Peterson? And Peterson did? I mean, that's poppycock. That's unreasonable under the law. That's crazy. Nobody voluntarily puts handcuffs on themselves, and besides, we have evidence, of course, that Mr. Peterson was literally under the gun at the time the cuffs were put on him.

RP 1983-84.

> [Leville] didn't see the shots, but he saw them walking in this direction, which is consistent, ladies and gentlemen, with the crime scene which showed the cartridge cases all located here.

RP 1995-96.

> Now, ladies and gentlemen, Falyn Grimes, Daniel Leville, Jessie Rivera and Matthew Tremblay are eyewitnesses to the events of the late evening of November 15th and November 16th. And they, like all the other witnesses, are—should be subjected to your scrutiny. All of those factors that bear on believability and weight come into play with respect to these four witnesses, and they certainly are witnesses that should be scrutinized. They were using methamphetamine at all times material to the murder of Shaun Peterson. And they also, with the exception

of Mr. Rivera, they have all been convicted of crimes, felony crimes, and you are instructed that you may consider the fact that a person has been convicted of a crime in sizing up their credibility.

RP 1999 (all four individuals were State witnesses).

But ladies and gentlemen, the case that proves this defendant guilty of murder and other crimes does not rest alone on the testimony of these four witnesses. The testimony of these four witnesses is borne out and corroborated by all of the other evidence in this case.

This defendant, when you consider the totality of the evidence, ladies and gentlemen, this defendant was the only person with a motive to kill.

RP 2000.

Now, ladies and gentlemen, in conclusion, this defendant was seen to walk out of 1819. He was seen to be armed on the evening of November 15th and the early morning of the 16th, armed with a firearm, handcuffing Shaun Peterson, walking outside and shooting Shaun Peterson. This defendant—these eyewitnesses, their testimony was corroborated by telephone records, objective telephone records. This defendant is the only person that had a motive to kill Shaun Peterson. This defendant was the only person to make threats about killing whoever it was that ripped him off. He's the only person that made threats to kill Shaun Peterson. The defendant became a fugitive, and when you're on the run, ladies and gentlemen, what is that circumstantial proof of? You're on the run because you've done something wrong, because you've done murder.

He adopted a disguise. He worked on a cover-up, and he worked like heck on this false alibi. I was in Tumwater. I was on a tattoo. And the jail phone calls where he's pumping at Grimes and Leville. He's working on Theodore Farmer. He's working on

> Chelsea Williams because he's guilty and he's got to get out from underneath all that evidence. This defendant, ladies and gentlemen, this defendant, is the only one with motive, the only one with the means and the only one who is guilty of murder in the first degree. He is guilty of all the crimes alleged in the Information. He is guilty as charged, ladies and gentlemen, and guilty as proven.

RP 2015. The final slide, CP 978, must have accompanied this portion of the argument.

There was nothing objectionable in the oral argument. The prosecutor certainly did not tell the jury that it could not reach a verdict without deciding whether the defendant told the truth. Even that statement, according to the Glassman court, was not by itself reversible error.

d. The word "guilty," used once, superimposed over a photograph of the defendant and surrounded by a summary of the evidence which proves him guilty, was not a personal expression on the part of the prosecutor.

The final slide shown during the State's closing argument, CP 978, showed the word "guilty" in red over a photograph of Maddaus. The photograph itself was not altered in any way, much less made to look like a wanted poster. *Compare* CP 732 and 978. Maddaus was not injured and there was nothing about the photograph to arouse any particular emotion in the jurors. The arrows pointing to the picture, leading from the captions

summarizing evidence, were not something disapproved in Glasmann. The word "guilty" was used once, not three times as in Glasmann, and it obviously was not a personal opinion as to guilt. It was surrounded by a summary of the evidence that listed eight separate categories. The prosecutor was clearly not indicating that Maddaus was "intrinsically GUILTY GUILTY GUILTY." Glasmann, 286 P.3d at 681. He was indicating that Maddaus was guilty because eyewitnesses identified him as the shooter, the telephone records incriminated him, he had a motive, he had threatened to kill the victim, he had made himself a fugitive, he had obtained a disguise and a cover-up, he attempted to create a false alibi, and he incriminated himself in the recorded phone calls from the jail. The conclusion that he was guilty was solidly based on the evidence and there is no suggestion that the prosecutor was using his "position of power and prestige to sway the jury." Id. at 879. Maddaus's argument assumes that even one "guilty" on a photograph constitutes prosecutorial misconduct, but the Glasmann court did not so find. That court was addressing three consecutive slides with the word "guilty" superimposed on an altered photograph of the defendant and apparently accompanied by inflammatory editorial comments rather than a summary of

evidence that proved guilt. A careful reading of Glasmann does not support the conclusion that that court would have found prosecutorial misconduct on the facts of Maddaus's case. "In this case, the use of highly inflammatory images unrelated to any specific count was misconduct that contaminated the entire proceedings." Glasmann, 286 P.3d at 681.

> When viewed as a whole, the prosecutor's repeated assertions of the defendant's guilt, improperly modified exhibits, and statement that the jurors could acquit Glasmann only if they believed him represent the type or pronounced and persistent misconduct that *cumulatively* causes prejudice demanding that a defendant be granted a new trial.

Id. at 680, emphasis added. That is not what happened in Maddaus's case.

Given the tremendous amount of evidence put before the jury in this lengthy trial, the length of the closing arguments, and the total number of slides displayed, that one slide cannot be said to have improperly influenced it. The court in Glasmann found that no instruction could have neutralized the *cumulative effect* of the improper slides and statements the prosecutor made during argument. Glasmann, 286 P.3d at 679-80. Here there was no error and no cumulative effect.

The court in Glasmann did not reject the use of computer-generated visual aids during argument. "Certainly, lawyers may and should use technology to advance advocacy and judges should permit and even encourage new techniques. But we must all remember that the only purpose of visual aids of any kind is to enhance and assist the jury's understanding of the evidence." Glasmann, 286 P.3d at 683, J. Chambers concurring.

A prosecutor has wide latitude in arguing inferences from the evidence. It is not misconduct to argue facts in evidence and suggest reasonable inferences from them. Unless he unmistakably expresses a personal opinion, there is no error. Bates, 96 Wn. App. at 901. A prosecutor may comment on the veracity of a witness as long as he does not express a personal opinion or argue facts not in the record. State v. Smith, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985). The State has been unable to find any cases which prohibit the use of visual aids, including PowerPoint slides, or audio recordings, during closing arguments.

The prosecutor in Maddaus's case reminded the jury that the "lawyers' remarks, statements, and arguments are not evidence." RP 2072. During the defense closing arguments, defense counsel made such statements as "Mr. Tremblay is lying to you," RP 2023,

" . . . which is a blatant lie that Mr. Tremblay made up," RP 2024, "He sat down there, and he told the truth," RP 2033, and "That's simply ludicrous. . . It's crazy." RP 2038. No one is claiming that those statements express the attorney's personal opinion of the case. Nor did the statements made by the prosecutor express his personal opinion.

Defense counsel in Maddaus's trial did not object during the State's closing argument, which indicates that it did not seem improper to him at the time. A review of the entire record shows that defense counsel was willing to contest, dispute, and argue over just about everything. Yet he did not object here.

Even if that one slide were error, considering all the facts and circumstances of the case, as the court did in Glasmann, it cannot be said that one slide so inflamed the jury that it ignored the evidence, disregarded the court's instructions, and abandoned its common sense to convict Maddaus when it otherwise would not have done so. This is not a case where, as in Glasmann, the defendant was contesting only the degree of crime of which he was guilty. Maddaus vigorously asserted his innocence of all the charges, and the "nuanced distinctions" noted by the court in

Glasmann were not present. Glasmann, 286 P.3d at 680. If this was error it was harmless and the convictions should be affirmed.

2. Maddaus did not receive ineffective assistance of counsel.

Maddaus argues that his counsel was ineffective for failing to object to the prosecutor's closing argument.

Deficient performance occurs when counsel's performance "[falls] below an objective standard of reasonableness." State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). As the Supreme Court noted, "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984).

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to

improve the quality of legal representation", but rather to ensure defense counsel functions in a manner "as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688-689; *See* Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which "make[s] the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Id. at 696. A reviewing court is not required to

address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . [then] that course should be followed [first]." Strickland, 466 U.S. at 697.

The only legitimate objection defense counsel could have made to the State's closing argument was to the final slide, CP 978. He did not do so, nor did the trial counsel in Glasmann. Until that case was decided it was not apparent that showing the jury a photograph of the defendant, with the word "guilty" superimposed on it, following a closing argument in which the prosecutor had argued at length that the defendant was guilty, could be error. It certainly cannot be said that in the context of this trial as a whole, defense counsel was deficient by the standards referenced above. There is no chance that the one slide in the State's closing argument changed the outcome of the trial, and thus even if it were error for defense counsel to fail to object to it, there is no prejudice to the defendant. The claim of ineffective assistance of counsel is not supported by the record.

D. CONCLUSION.

Based on the foregoing arguments and authorities, the State respectfully asks this court to affirm all of Maddaus's convictions.

Respectfully submitted this 27th day of December, 2012.

Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of Supplemental Brief of Respondent, on the date below as follows:

Electronically filed at Division II

TO: DAVID C. PONZOHA, CLERK
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--AND VIA US MAIL TO--

JODI BACKLUND, ATTORNEY FOR APPELLANT
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 28th day of December, 2012, at Olympia, Washington.

Chong McAfee

THURSTON COUNTY PROSECUTOR

December 28, 2012 - 8:39 AM

Transmittal Letter

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