NO. 46638-4-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

COLE RIFE,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

The due process right to an unbiased tribunal required the trial court to recuse itself when it recognized it had a longtime close relationship with Cole Rife's family. Even though the trial court tried to act without bias, its comments at sentencing betray this was not possible. The failure to recuse itself violated Washington's appearance of fairness test for judicial recusal and resulted in an unfair trial for Mr. Rife. This Court should remand this matter for a new trial.

This Court cannot be confident the trial court exercised its discretion appropriately. Whether it was because the court was trying to be fair to both sides by being more critical of Mr. Rife's requests or for some other reason, the trial court erred when it allowed the State to add new charges on the eve of trial, forcing Mr. Rife to choose between prepared counsel and his right to a speedy trial; when it ruled against Mr. Rife's motion to dismiss the attempted burglary in the first degree charge; when it allowed the State to commit misconduct; and when it failed to instruct the jury upon Mr. Rife's defense. These errors require a new trial.

This Court can also not be sure the trial judge's refusal to exercise discretion at sentencing was the result of a result of the court's attempt to be fair to the State because of his relationship with Mr. Rife's family or

the result of a misunderstanding of the law. Either way, the court's failure to exercise discretion was error which requires a new sentencing hearing.

B. ASSIGNMENTS OF ERROR

1. The court violated the appearance of fairness doctrine by failing to recuse itself when it disclosed a long time familiar relationship with Mr. Rife's family.

2. The late amendment of the information deprived Mr. Rife of due process in violation of the Fourteenth Amendment.

3. The court violated Mr. Rife's Sixth Amendment right to be present during when challenges to jurors was made in a bench conference.

4. Mr. Rife's right to a public trial under Article I, section 10 and the Sixth and Fourteenth Amendment was denied when challenges to the jury pool were made in a confidential bench conference.

5. In the absence of sufficient evidence, Mr. Rife's conviction of attempted burglary in the first degree deprived him of due process in violation of the Fourteenth Amendment.

6. The State's misconduct deprived Mr. Rife of his right to a fair trial under the Fourteenth Amendment.

7. Defense counsel's deficient performance deprived Mr. Rife of his Sixth Amendment right to effective assistance of counsel.

8. The court deprived Mr. Rife of due process in violation of the Fourteenth Amendment by providing improper instructions on self-defense.

9. The court erred in refusing to exercise discretion by failing to consider a sentence below the standard range.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Basic due process requires a case be tried before a fair tribunal. Washington's appearance of fairness doctrine requires the court to appear to be impartial. It applies regardless of whether a motion to disqualify is filed. Was Mr. Rife unfairly prejudiced by the decision of the court to not recuse itself after acknowledging the close relationship it had with Mr. Rife's family?

2. Where an amendment of an information prejudices a defendant's substantial rights, the court may reject the amendment. In order to establish grounds for dismissal, a defendant must establish arbitrary action or governmental mismanagement by the State and prejudice affecting the right to a fair trial. Was Mr. Rife unfairly prejudiced where the State moved to amend the information adding new facts which defense counsel was unable to investigate prior to trial?

3. No defendant should be forced to choose between the right to a speedy trial and the right to counsel prepared for trial. Where the State

amends the information adding new charges at the end of the speedy trial period which require additional investigation by defense counsel, the defendant is forced to choose between speedy trial rights and the right to competent counsel. Where defense counsel asks the court to sever the charges so the defendant is not prejudiced, it is error to refuse to sever the charges. Should the court have granted Mr. Rife's motion to sever the new charge so he could receive effective assistance of counsel?

4. An accused person has the right to be present at all critical stages of a proceeding. Was Mr. Rife's right to be present violated when the court heard peremptory challenges in a bench conference where he was not present?

5. The United States and Washington Constitution guarantee a right to a public trial. This right requires proceedings be held in open court unless the court makes specific findings to support closure. Did the court commit structural error when it heard peremptory challenges in a bench conference without making findings to support closure?

6. When no rational trier of fact could have found the State has proven all the essential elements of an offense, the court must dismiss the charged offense. Intending to commit a crime within a building is an essential element of attempted burglary in the first degree. It is insufficient to establish the person intended to commit a crime at a location outside a

building or was within the building unlawfully. Where the State provides insufficient evidence of intent to commit a crime within a building, should the court find insufficient evidence of attempted burglary in the first degree?

7. As a quasi-judicial officer, a prosecutor has a duty to act impartially and only in the interest of justice. It is misconduct for a prosecutor to ask a witness whether another witness is telling the truth, to comment in front of the jury upon punishment in order to mislead the jury as to the actual punishment the defendant is facing, and to improperly vouch for a witness by implying the defendant should have pled guilty like the co-operating co-defendant. Where the individual instances of misconduct and their cumulative effect impacted the integrity of the jury's verdict, should this Court order a new trial?

8. Where counsel's conduct so undermines the proper functioning of the adversarial process the trial cannot be relied upon as having produced a just result, the court should find ineffective assistance of counsel and order a new trial. Ineffective assistance occurs where no conceivable legitimate tactic can explain counsel's performance and the result of the proceedings would have been different but for counsel's deficient performance. Should a new trial be ordered because defense counsel failed

to object when the State vouched for the testimony of a witness and denigrated the decision of Mr. Rife to plead not guilty?

9. Jury instructions on self-defense must make the relevant legal standard manifestly apparent to the average juror. Misstating the law of self-defense amounts to constitutional error and is presumed prejudicial. Defendants are entitled to instructions supporting their theory of the case. Did the court commit reversible error when it refused to instruct the jury on the lawful use of force, actual danger and the duty to retreat, instead instructing the jury on the justifiable homicide defense of necessity?

10. While no defendant is entitled to a sentence below the standard range established by the Sentencing Reform Act, every defendant is entitled to ask the court to consider such a sentence and to have the alternative actually considered. Trial judges abuses their discretion when they categorically refuses to impose a sentence below the standard range. Where the trial court refused to consider a sentence below the standard range because the judge declared he was constrained to only sentence within or above the standard range, did the court so abuse its discretion as to entitle Mr. Rife to a new sentencing hearing?

D. STATEMENT OF THE CASE

Cole Rife was convicted of assault in the second degree and burglary in the first degree for conduct occurring in the front yard of 512 E. Maple

Street, Centralia, Washington. CP 65-69.[1] A number of students who played baseball for Centralia College were holding a party when Mr. Rife and a number of his friends arrived to pick up one of their girlfriends. 1 RP 62. They went into the building and then left when asked to do so by people in the house. 1 RP 89. No illegal conduct was alleged while Mr. Rife or others were inside the building. *Id.*

After Mr. Rife went back outside the building he began having words with Connor Atchinson, one of the people at the party. 1 RP 136. Mr. Atchinson alleged Mr. Rife said to him "Come outside and fight me." 1 RP 136. A fight then broke out between Mr. Rife and Logan Crump, which left Mr. Crump with a broken jaw and tooth. 1 RP 69. When the police arrived, Mr. Crump stated the fight was a misunderstanding. 1 RP 83. He did not ask the State to press charges until he discovered the extent of his injuries. 1 RP 83-84. The probable cause statement alleged Mr. Rife contacted Mr. Crump by telephone after the fight and before he had been charged and had told Mr. Crump he was sorry for the fight, offering to

[1] The verbatim report of proceedings contains six volumes. Three volumes are consecutively paginated. These volumes will be referred to by the volume on their cover page. Volume 4 refers to hearings which occurred on July 17, 2014 (Trial Confirmation) and August 27, 2014 (Sentence hearing). Volume 5 refers to July 21, 2014 (Voir Dire). Volume 6 refers to July 21, 2014 (Opening Statements). References to Volume 4-6 will be listed by date of proceedings rather than volume number, i.e., 7/21/2014.

help pay for his injuries. CP 3-4. It was later alleged he also asked Mr. Crump not to get the police involved. 1 RP 73.

Mr. Rife was charged with assault in the second degree on April 15, 2014. CP 3-4. The information was later amended to add a co-defendant, Tyler Burk, and a charge of attempted burglary in the first degree. CP 9-11. With speedy trial expiring and with the case being assigned for trial, the State amended the information to add witness tampering. 1 RP 6. The prosecutor said "frankly the state just became aware of" the new charges because it had not interviewed its witness until the week of trial. 1 RP 8. Mr. Rife objected to the late amendment and requested the new charge be severed from the original offenses, informing the court he had not had time to investigate or prepare for the additional charges. 1 RP 9. Finding "the evidence is identical," the court denied the motion to sever. 1 RP 9.

When Mr. Rife's case was assigned to a trial judge, the court informed the parties it had a long time familiar relationship with Mr. Rife's family. 1 RP 18-19. The trial judge stated he had vacationed with Mr. Rife's grandparents, presided over the wedding of his parents and had his hair cut by Mr. Rife's aunt. *Id.* Neither party objected to the court remaining on the case. 1 RP 19, 22. The court expressed the mistake it had made in remaining on the case at sentencing, stating "had I any alternative other

than to be the judge presiding over this case, I would not have chosen to do it." 7/17/2014 RP 18.

At trial, Mr. Burk had become a cooperating witness. In questioning Mr. Burk, the State asked whether he had pled guilty on the advice of counsel. 3 RP 405-06. These questions were repeated by defense counsel during cross-examination. This argument was the first one made by the State during rebuttal. 3 RP 474 Defense counsel did not object when the State made this argument. *Id.* When being cross examined on his cooperation, Mr. Burk was asked whether he was facing years in prison. The State interrupted the proceedings and declared before the jury "that's not what is a possibility in a crime like this," misrepresenting the maximum sentence he faced, along with his standard range under the SRA. 1 RP 98.

Mr. Rife moved to dismiss attempted burglary in the first degree when the State rested. 2 RP 218. Mr. Rife then presented a defense case, including the testimony of his brother, Bo Rife. In the first question to Bo Rife, the State asked him to compare his testimony to others, asking him "Are you sure you were at 512 Maple? You seem to have seen something that no one else saw." 2 RP 233.

Mr. Rife alleged he had acted in self-defense. He asked the court to instruct the jurors on lawful use of force, actual danger and the duty to

retreat. 2 RP 375-80. The court denied his request, instead instructing the jury on the instruction for necessity used in justifiable homicide cases. *Id.*

Mr. Rife was convicted of assault in the second degree and attempted burglary in the first degree. 3 RP 481. At sentencing, he requested a sentence from three to nine months, below the standard range. 7/17/2014 RP 11. In denying his request, the court stated he lacked the discretion to impose a sentence below the standard range, stating sentencing "seems to be a one-way street, and it's always seemed to be a one way street." 7/17/2014 RP 21-22. Without prior history, Mr. Rife was sentenced to 14 months for assault second degree and 19.5 months for the attempted burglary second degree. 7/17/2014 RP 23.

E. ARGUMENT

1. THE COURT'S VIOLATION OF THE APPEARANCE OF FAIRNESS DOCTRINE PREJUDICED MR. RIFE.

a. The appearance of fairness doctrine requires judges to disqualify themselves when their impartiality may be questioned.

A fair tribunal is a basic tenant of due process. *In re Murchison*, 349 U.S. 133, 136 (1955); U.S. Const. amend. XIV. Due process requires not only the absence of actual bias by the court, but also an appearance of fairness. *Id.*; *accord State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972) ("Next in importance to rendering a righteous judgment is that it be

accomplished in such a manner that it will cause no reasonable questioning of the fairness and impartiality of the judge.") *see also State v. Finch*, 137 Wn.2d 792, 808, 975 P.2d 967 (1999) (Washington's appearance of fairness doctrine not only requires a judge to be impartial, it also requires the judge appear to be impartial).

Judges shall disqualify themselves in proceedings where their impartiality might reasonably be questioned. CJC Canon 2.11 *accord Diimmel v. Campbell,* 68 Wn.2d 697, 699, 414 P.2d 1022 (1966) ("It is incumbent upon members of the judiciary to avoid even a cause for suspicion of irregularity in the discharge of their duties."). A judge's obligation not to hear or decide matters applies regardless of whether a motion to disqualify is filed. CJC Canon 2.11, comment 2.[2] "The CJC recognizes where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating." *Sherman v. State,* 128 Wn.2d 164, 205, 905 P.2d 355 (1995). Judges should disqualify themselves from proceedings in which "a reasonably prudent and disinterested person" might question their impartiality. *State v. Carlson*, 66 Wn. App 909, 918, 833 P.2d 463

[2] Washington has recognized where there is evidence of a judge's or decision maker's actual or potential bias, the failure to comply with the judicial canon violates the appearance of fairness doctrine. *State v. Post*, 118 Wn.2d 596, 619 n.9, 826 P.2d 599 (1992).

(1992). This doctrine prevents participation in the decision making process by a judge who is potentially interested or biased. *City of Hoquiam v. Public Employment Relations Comm'n of Wn.*, 97 Wn.2d 481, 488, 646 P.2d 129 (1982)

The standard for recusal is an objective test and not what a reasonable judge might think. *United State v. Jordan*, 49 F.3d 152, 156-57 (5th Cir. 1995) ("an observer of our judicial system is less likely to credit judges' impartiality than the judiciary"); *accord Sherman*, 128 Wn.2d at 206. A judicial proceeding satisfies the appearance of fairness doctrine only if a reasonably prudent and disinterested person would conclude all parties obtained a fair, impartial, and neutral hearing. *Tatham v. Rogers*, 170 Wn. App. 76, 96, 283 P.3d 583 (2012). "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. " Madry, 8 Wn. App. at 68, 504 P.2d 1156 (1972) (quoting *Murchison*, 349 U.S. at 136).

b. The court violated the appearance of fairness doctrine by not recusing itself after realizing it had a close relationship to Mr. Rife's family.

Very soon after being assigned this case, the court recognized it was "acquainted with the defendant's family, specifically his mother and his aunt and his grandparents, and have been for many years." 1 RP 17. The court acknowledged it had not only conducted the marriage ceremony of

Mr. Rife's parents, but had also "vacationed to Hawaii together, did things together" with Mr. Rife's grandparents." 1 RP 18. While the court told the parties he had not been close with Mr. Rife's family for 15 years and did not know Mr. Rife personally, his relationship with them was still close enough for the court to acknowledge "his aunt still cuts my hair, among other things." 1 RP 19. Both parties consented to the court's determination it should not recuse itself. 1 RP 22.

At sentencing, the court acknowledged the error it had made in not recusing itself. The court stated:

> [H]ad I any alternative other than to be the judge presiding over this case, I would not have chosen to do it. I would have had one of the other judges do it. Unfortunately, by the time that I realized just exactly who this defendant was, none of the other judges were available to do the trial, so I'm the one who ended up presiding over it. 7/17/2014 RP 18.

The appearance of fairness doctrine allows judges to avoid having to determine whether they have actual bias and prevents them from acting on biases they may not recognize. "People believe they are objective, see themselves as more ethical and fair than others, and experience a 'bias blind spot,' the tendency to see bias in others but not in themselves. . . . These tendencies make it difficult for judges to identify their own biases." Jennifer Robbennolt & Matthew Taksin, *Can Judges Determine Their Own Impartiality?*, 41 Monitor on Psychol. 24, 24 (2010). Judicial

perceptions of their own impartiality also suffer from the failure to acknowledge the existence of unconscious motivations. Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 Iowa L. Rev. 181 (2011); *see generally* Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 Or. L. Rev. 61 (2000) (noting judges are susceptible to various biases). The existence of unconscious motivations means honest and well-intentioned judges cannot necessarily trust in their own subjective belief they are and will remain impartial. Bassett, 97 Iowa L. Rev. at 207.

> [I]nstances of judicial preconception often are innocent in intent. Most judges genuinely believe that, despite their connections to a lawsuit, they can put aside their bias or interest, and decide the suit justly. What this ignores, unfortunately, is that partiality is more likely to affect the unconscious thought processes of a judge, with the result that he or she has little conscious knowledge of being swayed by improper influences. Furthermore, even if a judge were able to put aside bias and self-interest in a particular case, the appearance of impropriety remains, and is itself a serious problem that casts disrepute upon the judiciary.

Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned*," 14 Geo. J. Legal Ethics 55, 70 (2000).

c. The violation of Mr. Rife's due process right to a fair and impartial tribunal requires this Court to order a new trial.

There are many ways this relationship may have manifested itself in bias against Mr. Rife. The judge may have unconsciously been less likely to rule in favor of Mr. Rife because it wanted to show its lack of bias towards his family or because it felt it was helping the child of a family friend learn a lesson. Certainly, this bias may have influenced the court when it denied Mr. Rife's motion to dismiss the attempted burglary charge, his request for jury instructions and his request for a sentence below the standard range.

There is also no way to gauge the public's perception of the impact of this bias. The public cannot be confident the court's rulings would have been decided another way by a judge who did not have close ties to Mr. Rife's family. By failing to recuse itself, the court abused its discretion and unfairly prejudiced Mr. Rife.

The fact no other judges were available to hear this trial when it was assigned has no bearing on recusal. 1 RP 18. Inconvenience is not a sufficient reason for a trial court to not recuse itself. *See Collins v. Joshi*, 611 So.2d 898 (Miss. 1992); *Davis v. Neshoba County General Hosp.*, 611 So.2d 904 (Miss. 1992). This is especially true where no record was made prior to trial regarding the availability of other judges to hear the case.

There is no evidence the court made an effort to find a judge pro tempore. Even if there had been no other available hearing officers, good cause could have been found to continue the case until an unbiased judge became available. This would have eliminated the appearance of fairness issue.

The court should never have sought permission to remain on this case from the parties. While CJC 2.11(c) permits waiver if all parties are informed and agree, such waiver is not allowed for cases of personal or actual bias. *In re Disciplinary Proceeding Against Jones*, 182 Wn.2d 17, 42, 338 P.3d 842 (2014). The personal relationship the trial judge had with Mr. Rife's family created a conflict the court should never have waived. This Court should find Mr. Rife's due process right to a fair trial was violated by the court's failure to recuse itself. This Court should order a new trial.

2. MR. RIFE WAS PREJUDICED BY THE LATE AMENDMENT TO THE INFORMATION ADDING A NEW AND UNRELATED CHARGE.

a. Amendments to an information should be prohibited where there is governmental mismanagement and prejudice to the defendant.

The State may amend an information any time before verdict, unless the amendment prejudices the defendant's substantial rights. CrR 2.1(d). The court may consider dismissing the charges with prejudice where the

amendment prejudices the defendant's substantial rights. CrR 8.3(b). *See State v. Michielli*, 132 Wn.2d 299, 244, 937 P.2d 587 (1997). This rule exists to see a defendant is fairly treated. *State v. Whitney*, 96 Wn.2d 578, 580, 637 P.2d 956 (1981) *citing State v. Satterlee*, 58 Wn.2d 92, 361 P.2d 168 (1961).

In order to establish grounds for dismissal, the defendant must establish arbitrary action or governmental misconduct by the State and prejudice affecting the right to a fair trial. However, governmental misconduct "need not be of an evil or dishonest nature; simple mismanagement is sufficient." *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993). A defendant's right to a fair trial may be impermissibly prejudiced when he has to choose either his right to a speedy trial or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense. *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980).

b. The addition of new charges on the eve of trial was governmental mismanagement which prejudiced Mr. Rife.

i. The failure to investigate until the eve of trial is governmental mismanagement.

The State never made Mr. Rife aware of potential tampering with a witness charges until immediately before trial. In the probable cause statement filed on April 15, 2014, the State alleged "Crump also reported

that Cole called him and apologized for his actions." CP 3-4. The State never alleged Mr. Rife engaged in unlawful contact during this phone call or otherwise might have tampered with a witness at any other time during the pendency of the case. *Id.*

The State amended the information to add tampering on July 17, 2014, the day Mr. Rife confirmed he was ready for trial.[3] 1 RP 5. In objecting, Mr. Rife's attorney made clear "approximately two weeks ago when Mr. Rife wouldn't accept a plea bargain on that case, that a second charge with the Amended Information was done which adds this Attempted Burglary in the First Degree." *Id.* He then stated

> "And we didn't know about this at all. There was no indication of this. So any idea that this was, like, part of the plea negotiations, like, 'Take this or leave it,' there was no discussion or indication of a witness tampering charge at all."

1 RP 5-6. He further stated "I had a chance just 15 minutes ago to ask Mr. Crump about this, and he had previously made a written statement and also had made an oral statement which had been transcribed, neither of which mentioned anything about this." 1 RP 6.

Recognizing the case was at "the end of speedy trial," defense counsel asked the court to prohibit the State from amending the information to include this new charge. *Id.* Mr. Rife never requested a continuance of the

[3] The Information had been previously amended to add a co-defendant and to add the charge of attempted burglary in the first degree.

original charges. *Id.* Instead, he asked the new charge be severed so he would have an opportunity to deal with it. 1 RP 9. Mr. Rife made clear, allowing the late amendment prejudiced him because "Mr. Rife doesn't have an opportunity to evaluate the whole case and determine what he wants to do with it." 1 RP 10.

The prosecutor agreed he had not made Mr. Rife aware of the new charges until after "Friday during my discussion with the victim." 1 RP 7-8. He admitted this was because "this is something that frankly the State just became aware of." 1 RP 8. He stated to defense counsel "I'm still willing to accept a plea to the Second Degree Assault as previously offered by the State in this case, but if we don't, this is what we're going to be doing, just so you know." 1 RP 8. As a remedy for the late filing, the State argued Mr. Rife had not requested a continuance and should instead go forward on the new charges. He stated, "The idea that he has to either, one, give up his right to a speedy trial, which is a court right, not a constitutional right that he's arguing, or he has to accept this amendment and fight it." 1 RP 8.

Finding "the evidence is identical", the court denied the defendant's motion to sever and continue the added charge to a later date. 1 RP 9. The court found "the evidence was there from the outset" and the amendment wasn't done in retaliation for not pleading guilty. 1 RP 11. Instead, the

amendment was made because the State had not interviewed his witness until Thursday evening prior to confirmation for trial. 1 RP 11. He also excused the late amendment because the prosecutor had recently taken over the case from another prosecutor within his office.[4] 1 RP 12. The court found "this is not one of those situations where I think the defense is being put in a Hobson's choice of going to trial unprepared or ask for a continuance, thus waiving their right to speedy trial." 1 RP 16. This was because the court found "the evidence was there from the start." *Id.*

Dismissal under CrR 8.3(b) is appropriate for either arbitrary action or governmental mismanagement. *Michielli*, 132 Wn.2d at 244. With its frank admission, the State made clear it delayed interviewing its' primary witness until the eve of trial and when speedy trial was set to expire. 1 RP 7-8. At the very least, these facts suggest governmental mismanagement and may, at the worst, suggest less honorable motives. *See Michielli*, 132 Wn.2d at 243-44. Mr. Rife was entitled to understand the charges he was facing. Governmental mismanagement occurred when the State delayed investigating and then informing Mr. Rife of the charges it wished to proceed upon until speedy trial was set to expire.

[4] "And I might also add that this is a case, as I understand it, Mr. Halstead passed off to Mr. McClain last week because he was going to go on vacation this week. Again, if Mr. Halstead were here it would be a different thing, because as far as I'm concerned, he would be charged with knowledge that Mr. McClain is not charged with." 1 RPP 12.

Governmental mismanagement in this particular case is supported by the court's findings that late amendment is common in Lewis County. When the information was first presented for amendment, the court stated "I'll tell you all three of the judges here are getting real tired of having amended informations handed in and say, well, there's no prejudice because he knew all about it." 7/17/2014 RP 5. Even when the court allowed the amendment, it made the observation "I think all three of the judges in Superior Court in this county have made it abundantly clear that we dislike strongly this practice that the Prosecutor's Office has engaged in of basically saying to a defendant, "Plead to this, that, or the other or we're going to add this or that if you don't do it by the time we do the omnibus hearing." 7/17/2014 RP 14. The systemic governmental mismanagement practiced by the State supports Mr. Rife's individual assertion of governmental mismanagement in his case.

ii. The governmental mismanagement forced Mr. Rife to choose between exercising his right to prepared and competent counsel and his right to a speedy trial.

Mr. Rife was compelled to defend against charges factually distinct from the assault and burglary charges he had been prepared to defend against. In order to avoid the additional sentence range which would have resulted from a conviction for the new charge, Mr. Rife was compelled to spend significant time defending this new charge which he had not

prepared to defend against. Had the court granted Mr. Rife's motion to sever, he would have been able to focus upon the charges he had investigated and was prepared to face. Because these new charges were distinct from the original charges and were not charges Mr. Rife's attorney was prepared to defend, prejudice is established.[5]

CrR 8.3(b) requires Mr. Rife demonstrate prejudice as a result of the governmental mismanagement. Other than interview Mr. Crump immediately prior to trial, Mr. Rife was not able to conduct an independent investigation of the newly discovered evidence. *See* WSBA Performance Guidelines for Criminal Defense Representation, Guideline 4 (2011)[6] ("Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt.")

This Court should closely scrutinize cases where a defendant is forced to choose between the right to a speedy trial and the need to properly defend against amended charges. *Michielli*, 132 Wn.2d at 245 ([Our

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[5] The State's argument at trial that he was a newly assigned assistant prosecutor should also be rejected. Prosecutors are imputed with knowledge of those acting on behalf of the state; assistant prosecutors working in the same office should be treated no differently. *See In re the Pers. Restraint of Brennan*, 117 Wn. App. 797, 804, 72 P.3d 182 (2003) *citing Kyles v. Whitely*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

[6] The WSBA Performance Guidelines for Criminal Defense Representation are available online at http://www.wsba.org/~/media/Files/Legal%20Community/Committees_Boards_Panels/Council%20on%20Public%20Defense/Performance%20Guidelines%20for%20Criminal%20Defense%20Representation%20060311.ashx.

Supreme Court], 'as a matter of public policy[,] has chosen to establish speedy trial time limits by court rule and to provide that failure to comply therewith requires dismissal of the charge with prejudice.") *see also State v. Earl*, 97 Wn. App. 408, 412, 984 P.2d 427 (1999). Mr. Rife was presented with the same Hobson's choice: either sacrifice his right to a speedy trial or his right to be represented by counsel who had sufficient opportunity to prepare his defense. *State v. Sherman*, 59 Wn. App. 763, 769, 801 P.2d 274 (1990). The trial court should not have required Mr. Rife to choose between his right to a speedy trial and to effective counsel in order to accommodate the State's lack of diligence. *Id.* at 770.

This Court should reject the argument there was no prejudice because the original affidavit of probable cause contained sufficient facts for Mr. Rife to expect to be charged with the tampering offense. 1 RP2 3. In fact, the original probable cause statement has no indication there was any illegal contact between Mr. Rife and Mr. Crump after the original incident. *See* CP 3-4. Instead, the information alleges "Crump also reported Cole called him and apologized for his actions." *Id.*

Mr. Rife cannot be expected to anticipate every conceivable charge the State may choose to bring against him and allowing the late amendment without an opportunity to properly understand and investigate the implications of the new charge prejudiced Mr. Rife and his ability for a

fair trial. *State v. Jones*, 26 Wn. App. 1, 6, 612 P.2d 404 (1980) (Amendment to an information at trial may prejudice a defendant by leaving him without adequate time to prepare a defense to a new charge).

c. The decision of the trial court to allow the amendment was manifestly unreasonable and this case should remanded for a new trial.

When the trial court's decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons, dismissal is proper. *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). The trial court had the opportunity to preserve Mr. Rife's right to a speedy trial and effective assistance of counsel. If the court had granted Mr. Rife's motion to sever the charges, neither Mr. Rife nor the State would have been prejudiced. There would have been no violation of Mr. Rife's rights and the State would have been able to proceed on the additional charges. Because the tampering charges are distinct from the assault and burglary charges, no double jeopardy or other factors regarding the newly discovered charges would have precluded State from going forward on those charges on a later date. In fact, the State would have suffered no harm had the court severed the charges. The trial court's refusal to sever the charges was manifestly unreasonable and an abuse of discretion.

Mr. Rife was forced to go forward unprepared. This impacted the entire trial and not only the new charges. Because the court abused its

discretion by allowing the State to amend the information without providing Mr. Rife adequate time to defend himself against a new charge, this court should remand this matter for a new trial.

3. THE RIGHT TO BE PRESENT WAS VIOLATED WHEN THE COURT HEARD PEREMPTORY CHALLENGES OUTSIDE MR. RIFE'S PRESENCE.

a. Challenges to the jury pool is a critical stage of the proceeding requiring the presence of the defendant.

A criminal defendant has a fundamental right to be present at all critical stages of a trial. *State v. Irby*, 170 Wn.2d 874, 880-81, 246 P.3d 796, 799-800 (2011), *citing Rushen v. Spain*, 464 U.S. 114, 117, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983). Although the right to be present is rooted to a large extent in the confrontation clause of the Sixth Amendment to the United States Constitution, the United States Supreme Court has recognized this right is also "protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him." *Id., citing United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985). A defendant has a right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Id., citing Snyder v. Massachusetts*, 291 U.S. 97, 105–06, 54 S.Ct. 330, 78

L.Ed. 674 (1934), *overruled in part on other grounds sub nom. Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

b. Mr. Rife was denied his right to be present when the court heard challenges to the jury pool without him.

There is no transcript regarding peremptory challenges although clerk notes exist to suggest challenges took place off the record. 1 RP 39. The Court did not create a record after the parties made their arguments with regard to any challenges might have been made. *Id.* While it does not appear either side made challenges for cause or to seat a juror the other side struck, there is also no transcript to confirm this was the case. There is no record Mr. Rife was present when the court determined which persons should be placed in the jury. *Id.*

c. A new trial should be ordered because Mr. Rife's right to be present when jurors were selected was violated.

Mr. Rife had the right to be present at this critical stage in the proceedings. *Irby*, 170 Wn.2d at 802, *citing State v. Shutlzer*, 82 Wn. 365, 367, 144 P. 284 (1914) ("[I]t is a constitutional right of the accused in a criminal prosecution to appear and defend in person and by counsel … at every stage of the trial when his substantial rights may be affected."). Jury selection is a critical stage where Mr. Rife should have been present. The State must prove beyond a reasonable doubt this error was harmless. *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983). With no transcript

to determine whether Mr. Rife was present during the bench conference on jury selection, the State cannot show it has met its burden. This case should be remanded for a new trial.

4. THE COURT VIOLATED MR. RIFE'S RIGHT TO A PUBLIC TRIAL WHEN IT HEARD PEREMPTORY CHALLENGES IN A PRIVATE BENCH CONFERENCE.

a. Courtroom closure for challenges to jury selection should only occur after the court has made specific findings supporting closure.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee a defendant the right to a public trial. *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). This right requires proceedings be held in open court unless the court makes specific findings to support closure of the courtroom. *State v. Bone–Club*, 128 Wn.2d 254, 258–59, 906 P.2d 325 (1995).[7] A strong

[7] To assure careful, case-by-case analysis of a closure motion, the trial court must perform a weighing test consisting of five criteria:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.

2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

4. The court must weigh the competing interests of the proponent of closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.

State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325, 327-28 (1995).

presumption exists that courts are to be open at all stages of the trial. *State v. Sublett*, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

The purpose of the rule is to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. *State v. Brightman,* 155 Wn.2d 506, 514, 122 P.3d 150 (2005) *citing Peterson v. Williams,* 85 F.3d 39, 43 (2d Cir.1996). The right to a public trial is only overcome to serve an overriding interest based upon findings closure is essential and narrowly tailored to preserve higher values. *Sublett,* 176 Wn.2d at 70, *citing Waller v. Georgia,* 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

In analyzing public trial right cases, this Court examines (1) whether the public trial right is implicated; (2) if so, whether there was a closure; and (3) if there was a closure, whether it was justified. *State v. Smith*, 181 Wn.2d 508, 513, 334 P.3d 1049 (2014) (citing *State v. Sublett*, 176 Wn.2d 58, 92,292 P.3d 715 (2012) (Madsen, C.J., concurrence). The court has adopted an experience and logic test to determine when a closed courtroom violation does not implicate the core values the public right to trial serves. *Id.*, at 72. A violation of the right to public trial is structural and a violation of the right is presumed prejudicial. *Wise*, 176 Wn.2d at

13-14. Because it is a question of law, the right to a public trial is subject to de novo review by this Court. *Smith*, 181 Wn.2d at 508.

Ensuring jurors are selected in open court plays a critical role in ensuring a defendant receive a fair trial and has been typically open to the public. *State v. Strode,* 167 Wn.2d 222, 227, 217 P.3d 310 (2009).Where jurors are selected at a sidebar conference in a private manner, the right of the defendant to a fair trial is violated.[8]

Challenges to jurors have been historically open to the public. *In Re Pers. Restraint of Morris*, 176 Wn.2d 157, 174, 288 P.3d 1140 (2012) (Chambers, J., concurring); *see also State v. Jones*, 175 Wn. App. 87, 303 P.3d 1084 (2013) (public trial right attaches to alternative jury selection). Washington's legislature has recognized selection should be open to the public. *See* RCW 4.44.240 (which provides for testimony if needed to assess a question of jury bias); RCW 4.44.250 (which requires challenges, exceptions and denial may be made orally with the same placed upon the record, along with the substance of the testimony on either side).

Public access plays a significant role in the functioning of jury selection. Exercising challenges in open court implicates the core concerns of the right to a public trial. *State v. Saintcalle*, 178 Wn.2d 34, 41-42, 309

[8] This issue is currently pending in the Washington Supreme Court. *See State v. Love*, 181 Wn.2d 1029, 340 P.3d 228 (Table) (2015).

P.3d 326 (2013) (lead opinion). Public oversight furthers the goals of an impartial jury and a fair trial. *Id.* The peremptory challenge "is an important and substantial right which protects a party's constitutional right to trial by jury." *Id.*, at 61 (Madsen., J., concurring) *citing Smith v. Kent*, 11 Wn. App. 439, 523 P.2d 446 (1974).

b. No findings were made prior to closing the courtroom during challenges to the jury pool.

The clerk recorded the outcome of the jury selection process, however, no transcript of how the jurors were selected appears to exist. It is impossible to tell if there were arguments with regard to peremptory challenges were made. 7/21/2014 RP 49; 1 RP 39. While the court did inform the public of which jurors had been excused for hardship, it did not inform the public which jurors had been challenged. *Id.*

c. This matter should be remanded for a new trial because of the failure to make findings before courtroom closure occurred.

This Court cannot be confident jury challenges made in a bench conference without prior justification did not compromise Mr. Rife's due process rights. Because of this structural error, this Court should remand this matter for a new trial.

5. INSUFFICIENT EVIDENCE OF INTENT TO COMMIT A CRIME WAS SUBMITTED TO ESTABLISH ATTEMPTED BURGLARY IN THE FIRST DEGREE.

a. *Attempted burglary in the first degree requires sufficient proof the defendant intended to commit a crime within a building and not merely at an address.*

A conviction must be reversed unless, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the State did not prove the essential elements of the crime charged beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green,* 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Under this standard, this Court should dismiss the charge of attempted burglary in the second degree because the State failed to prove beyond a reasonable doubt Mr. Rife intended to commit a crime inside a building.

Intent to commit a crime inside the burglarized premises is an essential element of burglary in the first degree. RCW 9A.52.020.[9] Intent may be inferred only where the conduct of the defendant is "plainly indicated as a matter of logical probability." *State v. Johnson*, 159 Wn. App. 766, 774, 247 P.3d 11 (2011). Even where a defendant may be acting unlawfully

[9] A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a dwelling and if, in entering or while in the dwelling or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person therein. RCW 9A.52.020.

within a building, this behavior may not lead to sufficient criminal intent to establish a burglary. *See e.g., State v. Woods*, 63 Wn. App. 588, 592, 821 P.2d 1235 (1991) (evidence insufficient where two boys found trying to kick in door of one of their former apartments, claiming they only entered unlawfully to look for a rain coat).

The analysis is no different because the State charged an attempted crime. In order to establish an attempted crime, the State must show Mr. Rife took a substantial step towards committing the completed act. RCW 9A.28.020 (1).[10] The intent required is the intent to accomplish the criminal result of the base crime. *State v. DeRyke*, 149 Wn.2d 906, 913, 73 P.3d 1000 (2003). In order for conduct to comprise a substantial step, it must be strongly corroborative of the person's criminal purpose. *State v. Workman*, 90 Wn.2d 443, 452, 584 P.2d 382 (1978).

b. There was insufficient evidence Mr. Rife intended to commit a crime within a building.

While there is no dispute Mr. Rife was involved in an altercation in the front yard of 512 Maple Street, insufficient evidence exists to establish an intent to commit a crime *within* a building at 512 Maple Street. Tyler Burk testified "We walked up to the door and we went inside, and the people

[10] "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1).

inside didn't want us there so they asked us to leave, and we left and then we were outside the house." 1 RP 88. He further stated "They were polite about it and we realized that the situation was calm at that point." RP 89. Cole Holt testified "I don't think anybody really wanted to go there to start a fight." 1 RP 121. The evidence established Mr. Rife went into the residence and left with his friends when asked; no other evidence contradicted this. 1 RP 95.

Mr. Rife began having words with Connor Reopelle after he had left the building, stating at one point "Come outside and fight me." 1 RP 136. At some point after this contact, Mr Rife began fighting with Mr. Crump while outside the building. 1 RP 91. Mr. Rife never returned to the house after the fight or attempted to engage others within the house. Others knocked on the door of the house, but no witness testified anyone was trying to get into the house to commit a crime. All of the eyewitnesses testified they banged on the door after the fight to get people outside because Mr. Crump was injured and needed assistance. 1 RP 101, 1 RP 142, 1 RP 198.

This record did not establish Mr. Rife intended to enter 512 Maple Street with the intent to commit a crime. To the contrary, all of the evidence shows no fighting ever took place within the building and Mr. Rife and all of his friends left the building when asked. 1 RP 89, 1 RP 177,

1 RP 195. The angry words and assaultive behavior took place only after Mr. Rife had left 512 Maple Street and was again outside. Even then, no witness testified Mr. Rife attempted to return to the house to assault anyone. Instead, the witnesses consistently testified the only time anyone attempted to enter the house after the fight was to try to get help for Mr. Crump. 1 RP 101, 1 RP 142, 1 RP 198.

Intent to commit an assault and to enter a building with the intent to commit a crime are not the same thing. Presuming Mr. Rife developed the intent to commit an assault, no evidence was presented he intended to commit it within the building at 512 Maple Street. Instead, the evidence established Mr. Rife intended to commit an assault in front of the building, where the assault took place. The intent to commit this assault formed after he left the building. It is unrelated to any entry he or any other person made into 512 Maple Street.

There is also insufficient evidence an accomplice intended to commit a burglary at 512 Maple Street. To be guilty as an accomplice, one must associate with and participate in the criminal undertaking as something he desires to bring about and seeks to make succeed. *In re Welfare of Wilson*, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979). Physical presence at the scene and knowledge of the crime are not enough. *Id.*, at 491.

Neither Mr. Burk nor any other witness testified Mr. Burk engaged in significant illegal conduct. To the contrary, Mr. Burk testified he and his friends went to 512 Maple Street because "one of our friends was upset with his girlfriend so we went to go pick her up." 1 RP 87. When they went inside the building he stated after they were asked to leave, they "left and then we were outside the house." 1 RP 95. Mr. Burk denied fighting anyone outside the residence and then testified he knocked on the door because Mr. Cole was hurt and needed to get inside. 1 RP 101. No other witness testified significantly differently from Mr. Burk regarding entering the building at 512 Maple Street.

c. Because the State failed to establish sufficient facts to prove intent to commit a crime within a building dismissal of attempted burglary in the first degree is appropriate.

The State failed to establish Mr. Rife intended to enter the building at 512 Maple Street with the intent to commit a crime, this Court should find insufficient evidence and dismiss this charge.

6. THE STATE COMMITTED MISCONDUCT IN CROSS EXAMINATION BY COMPARING WITNESSES, MISSTATING THE SERIOUSNESS OF THE OFFENSES MR. RIFE FACED AND BY PRESENTING IMPROPER EVIDENCE IN CLOSING ARGUMENT.

"As a quasi-judicial officer representing the people of the State, a prosecutor has a duty to act impartially in the interest only of justice." *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). A "'[f]air trial"

certainly implies a trial in which the attorney representing the State does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.'" *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original) *quoting State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956); *see State v. Reed*, 102 Wn.2d 140, 145–47, 684 P.2d 699 (1984). The prosecutor owes a duty to defendants to see their rights to a constitutionally fair trial are not violated. *Monday*, 171 at 676.

a. Asking a defense witness to judge the testimony of other witnesses is misconduct.

Asking a witness to judge whether or not another witness is lying invades the province of the jury. *State v. Casteneda–Perez*, 61 Wn. App. 354, 363, 810 P.2d 74, *review denied*, 118 Wn.2d 1007, 822 P.2d 287 (1991) ("It is readily conceivable that a juror could conclude that an acquittal would reflect adversely upon the honesty and good faith of the police witnesses. .... It is for these reasons that most courts that have addressed the problem ... have condemned the practice and will not permit it."). In the first instance the State could question a defense witness, it asked "Are you sure you were at 512 Maple? You seem to have seen something that no one else saw." 2 RP 233. Mr. Rife objected to this improper question and his objection was sustained. However, no curative

instruction was given and jurors were not instructed to disregard it. *See State v. Suarez-Bravo*, 72 Wn. App. 359, 367, 864 P.2d 426 (1994); *State v. Davenport*, 100 Wn.2d 757, 762–63, 675 P.2d 1213 (1984) (defendant is denied his due process right to a fair trial where misconduct is material to the outcome of the trial and cannot be remedied.).

No witness to the fight told an entirely consistent story. The credibility of the witnesses was central to Mr. Rife's case. Bo Rife's testimony was critical to Mr. Rife's case. He was the first witness called to establish Mr. Rife acted in self-defense. Using the first question of a defense witness to force the witness to call others liars was incurable misconduct. It is grounds for dismissal under CrR 8.3(b).

b. The State misrepresented to the jury the punishment Mr. Rife was facing when the prosecutor testified during an improper objection..

A person being tried on a criminal charge can be convicted only by evidence, not by innuendo. *State v Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 181 (1950). Introducing evidence to the jury which the State cannot prove is misconduct. *Id.* at 139-41, *see also State v. Babich*, 68 Wn. App. 438, 445-46, 842 P.2d 1053 (1993). Arguments made to diminish a juror's personal responsibility by minimizing the punishment faced by the defendant are also improper. *See e.g. Caldwell v. Missippi*, 472 U.S. 320, 329-30, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985).

During the cross examination of Mr. Burk, he was asked "what kind of time he was looking at?" He replied "I'm not sure exactly what the maximum is." Mr. Rife's attorney asked "Years in prison?" 1 RP 98. In objecting to this question, the prosecutor declared *in front of the jury* "Mr. Groberg obviously knows that's not what is a possibility in a crime like this, and to ask that question, I don't know if that's going to entitle the State to -- he's talked about years in prison." 1 RP 98.

Mr. Burk was in fact facing the possibility of years in prison had he not cooperated. The State should not have testified to the contrary. Both assault in the second degree and attempted burglary in the first degree are B felonies. RCW 9A.36.021; RCW 9A.52.020. The maximum term for a B felony is ten years. RCW 9A.20.021. Although it is unclear whether Mr. Burk had criminal history, even with an offender score of zero before the commission of this offense, his standard range had he been found guilty of the charged offenses would have been 19.5 to 25.5 months, which is the sentence that Mr. Rife received.[11]

[11] Burglary is a Level VII offense. RCW 9.94A.515. The standard range for a Level VII offense when scoring an assault in the second degree would be 26-34 months. RCW 9.94A.510. An attempt to commit a crime reduces the range to 75%, making the range 19.5 to 25.5 months. RCW 9.94A.595.

Making this statement before the jury misled the jury into believing Mr. Rife was not facing significant punishment if they found him guilty. It was grounds for dismissal under CrR 8.3(b).

c. *Improperly vouching for a witness and shifting the burden by arguing the guilt of Tyler Burk and Cole Rife could be presumed because Mr. Burk's attorney had advised Mr. Burk to plead guilty was misconduct.*

A prosecutor commits flagrant and ill-intentioned misconduct by making burden-shifting arguments in closing. *State v. Johnson*, 158 Wn. App. 677, 685, 243 P.3d 936 (2010); *State v. Venegas*, 155 Wn. App. 507, 525, 228 P.3d 813 (2010).

> Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.

In re Glasmann, 175 Wn.2d 696, 706, 286 P.3d 673 (2012) *quoting* American Bar Association Standards for Criminal Justice std. 3-5.8. It violates the court's jurisprudence for a prosecutor to comment on the credibility of a witness or the guilt and veracity of the accused. *Monday*, 171 Wn.2d at 677.

In his first comments on rebuttal, the prosecutor argued "Ty's just as guilty as this guy is. That's why he took a deal. Because he's an

accomplice to this guy's actions. That's why an attorney advised him to take a deal." 3 RP 474.

When the prosecutor vouched for the testimony of Tyler Burk, he committed incurable misconduct. *See State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985) *see also State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984) (It is impermissible for a prosecutor to express a personal opinion as to the credibility of a witness of the guilt of a defendant). There are no circumstance in which the prosecutor should have argued Mr. Burk's lawyer had advised him to plead guilty and this was proof of Mr. Rife's guilt as well. This misconduct resulted in improper vouching, an impermissible shift of the burden and impugned the role and integrity of defense counsel. *See State v. Lindsay*, 180 Wn.2d 423, 431, 326 P.3d 125 (2014). By suggesting another lawyer might have advised Mr. Rife to plead guilty rather than go to trial by arguing this is what a different lawyer advised Mr. Burk to do on the same facts, the State impermissibly shifted the burden towards the defense. *Id. citing State v. Gregory*, 158 Wn.2d 759, 859–60, 147 P.3d 1201 (2006). Suggesting Mr. Rife should have taken responsibility in the same way Mr. Burk did was an improper argument which tainted the jury and resulted in irreparable harm. It is grounds for dismissal under CrR 8.3(b).

d. The cumulative effect of the misconduct entitles Mr. Rife to a new trial.

Each incident of misconduct warrants a new trial for Mr. Rife, but this Court should also find the cumulative effect of the misconduct entitles him to a new trial as well. *State v. Weber*, 159 Wn.2d 252, 149 P.3d 646 (2006). Because these acts of misconduct require prejudiced Mr. Rife and affected jury's verdict, he is entitled to a new trial.

7. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT WHEN THE STATE ELICITED IMPROPER EVIDENCE DURING TESTIMONY AND FOR FAILING TO OBJECT TO IMPROPER COMMENTS DURING CLOSING ARGUMENT.

a. Where counsel's conduct falls below a standard of reasonableness and results in prejudice to the defendant ineffective assistance of counsel occurs.

Claims of ineffective assistance of counsel are reviewed de novo, as they present mixed questions of law and fact. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 205, 80 L.Ed.2d 674 (1984). A defendant who raises an ineffective assistance claim "bears the burden of showing that (1) his counsel's performance fell below an objective standard of reasonableness

and, if so, (2) that counsel's poor work prejudiced him." *A.N.J.*, 168 Wn.2d at 109.

While there is a "strong presumption that defense counsel's conduct is not deficient," that presumption is rebutted if "no conceivable legitimate tactic explain[s] counsels' performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). To meet the prejudice prong, a defendant must show a reasonable probability "based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation." *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995); *Strickland*, 466 U.S. at 694.

b. Failing to object to improperly elicited testimony and improper comments in closing regarding advice by another attorney regarding pleading guilty resulted was ineffective assistance of counsel.

Mr. Rife's defense counsel failed to object when the State vouched for the credibility of Mr. Burk by asking him during "Is part of the reason that you entered into this agreement based on advice of counsel?" 3 RP 405. Defense counsel also failed to object in closing when the State alleged Mr. Burk was guilty and "that's why an attorney advised him to take a deal." 3 RP 474.[12] No legitimate trial strategy exists for not objecting during cross examination or closing argument on this issue.

[12] Mr. Rife's counsel made no objections during either the State's closing argument or rebuttal argument. *See* 3 VR 439-50, 3 VR 474-77.

c. Mr. Rife is entitled to a new trial free from ineffective assistance of counsel.

The error created by the State's misconduct with regard to these comments was not curable. Should this Court find the misconduct was curable, this Court should find the failure to request a curative instruction constituted ineffective assistance. Because Mr. Rife is entitled to competent counsel, this Court reverse his conviction and order a new trial.

8. THE COURT ERRED IN FAILING TO INSTRUCT THE JURY PROPERLY ON SELF-DEFENSE.

a. Misstating the law of self-defense is constitutional error and is presumed prejudicial.

Once the issue of self-defense is properly raised, the absence of self-defense becomes an element of the offense which the State must prove beyond a reasonable doubt. *State v. Roberts*, 88 Wn.2d 337, 345-46, 562 P.2d 1259 (1977). The prosecution bears the burden of disproving, beyond a reasonable doubt, a defendant reasonably believed force was necessary to defend himself against imminent bodily harm. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

Jury instructions on self-defense must more than adequately convey the law. *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996), *abrogated in part by State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009). The instructions "must make the relevant legal standard manifestly

apparent to the average juror." *LeFaber*, 128 Wn.2d at 900 (*quoting State v. Allery*, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)); *State v. Painter*, 27 Wn. App. 708, 713, 620 P.2d 1001 (1980), *review denied*, 95 Wn.2d 1008 (1981). "A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial." *LeFaber*, 128 Wn.2d at 900. Once a defendant produces some evidence of self-defense, the burden shifts to the State to prove the absence of self-defense beyond a reasonable doubt. *State v. Walden*, 131 Wn.2d at 473-74. Justifiable force is defined by "what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant." *Id.*, at 474, *citing State v. Bailey*, 22 Wn. App. 646, 650, 591 P.2d 1212 (1979).

b. Prejudicial error occurred when the court failed to properly instruct the jury on self-defense law.

Mr. Rife asked the court for self-defense instructions. 3 VR 396. He asked the court to instruct the jury on the lawful use of force,[13] actual

[13] WPIC 17.02 states: It is a defense to a charge of (fill in crime) that the force [used][attempted][offered to be used] was lawful as defined in this instruction.

[The [use of][attempt to use][offer to use] force upon or toward the person of another is lawful when [used][attempted][offered] [by a person who reasonably believes that [he][she] is about to be injured] [by someone lawfully aiding a person who [he][she] reasonably believes is about to be injured] in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.]

[The [use of][attempt to use][offer to use] force upon or toward the person of another is lawful when [used][attempted][offered] in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary.]

danger,[14] and the duty to retreat[15] based upon the WPIC instructions. Instead, the court offered to give a "necessity" instruction applicable to justifiable homicide.[16] The court committed error by providing the jury with improper instructions. The decision to rely upon the justifiable homicide instruction rather than those relevant to assault impermissibly lowered the state's burden to disprove Mr. Rife's self-defense claim because it did not make the legal standard on self-defense manifestly apparent to the jury. *See State v. McCreven*, 170 Wn. App. 444, 464, 284 P.3d 793 (2012), *review denied*, 176 Wn.2d 1015 (2013).

The person [using][or][offering to use] the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of [and prior to] the incident.

The [State][City][County] has the burden of proving beyond a reasonable doubt that the force [used][attempted][offered to be used] by the defendant was not lawful. If you find that the [State][City][County] has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty [as to this charge].

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.02 (3d Ed).

[14] WPIC 17.04 states: A person is entitled to act on appearances in defending [himself][herself][another], if [he][she] believes in good faith and on reasonable grounds that [he][she][another] is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.04 (3d Ed)

[15] WPIC 17.05 states: It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that [he][she] is being attacked to stand [his][her] ground and defend against such attack by the use of lawful force.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.05 (3d Ed)

[16] WPIC 16.05 states: Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 16.05 (3d Ed)

The refusal to give instructions on a party's theory of the case when there is supporting evidence is reversible error when it prejudices a party. *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010), *citing Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 266–67, 96 P.3d 386 (2004). Here, the trial court erred in refusing to instruct the jurors with respect to Mr. Rife's theory of the case. Through testimony, Mr. Rife established he was in imminent fear of harm, his belief was objectively reasonable and he exercised no greater force than was necessary. *State v. Callahan*, 87 Wn. App. 925, 929, 943 P.2d 676 (1997). There was sufficient evidence to warrant a self-defense instruction consistent with the assault statute. Providing WPIC 16.05 was insufficient to satisfy this standard under the facts of this case.

c. The prejudicial error resulting from the failure to instruct the jury on Mr. Rife's theory of defense requires a new trial.

Mr. Rife was entitled to jury instructions based upon his theory of defense. The failure to provide appropriate instructions entitles Mr. Rife to a new trial.

9. THE REFUSAL OF A SENTENCING COURT TO CONSIDER A SENTENCE BELOW THE STANDARD RANGE VIOLATES DUE PROCESS AND REQUIRES A NEW SENTENCING HEARING.

a. Failure of the court to consider exercising discretion at sentencing violates due process.

While trial judges have considerable discretion to sentence under the SRA, they are still required to act within its strictures and the principles of due process. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) *citing State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). No defendant is entitled to an exceptional sentence below the standard range but every defendant is entitled to ask the court to consider such a sentence and to have the alternative actually considered. *Id., citing State v. Garcia-Martinez*, 88 Wn. App 322, 330, 944 P.2d 1104 (1997). A trial court abuses its discretion when "it refuses categorically to impose an exceptional sentence below the standard range under any circumstances." *Id., see also In re Mulholland*, 161 Wn.2d 322, 333, 166 P.3d 677 (2007).

While trial courts should generally impose a sentence within the standard range, the SRA permits departures from the standard range. The "court may impose a sentence outside the standard range for that offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. The SRA sets forth a nonexclusive "illustrative" list of factors

the court may consider in exercising its discretion to impose an exceptional sentence. *Id.*

b. The court failed to consider exercising discretion when it refused to consider a sentence below the standard range.

After Mr. Rife asked the court to impose a sentence below the standard range, the court refused to exercise discretion. The court stated

> So it seems to be a one-way street, and it's always seemed to be a one-way street. I've always thought that was unfair. I've never particularly liked the SRA because, as far as I'm concerned, it takes the discretion away from me and every other trial judge who is elected to exercise it, and it gives it basically to the prosecutor, because the outcome of a case is determined by what they charge. And assuming they can prove to the satisfaction of a jury what it is they charge, then the court in essence is stuck, because I have to sentence within the requirements of the SRA.

7/17/2014 RP 21. The court further stated "I'm constrained by the SRA. I can't just do what I want to. Those days are long past, and they certainly haven't existed in this state with respect to felony offenses since 1981." *Id.* at 22.

Sentences below the standard range have of course been upheld, especially under circumstances similar to this case. Certain "failed defenses" may constitute mitigating factors support an exceptional sentence below the standard range. *See State v. Hutsell*, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993). This includes self-defense. *State v. Jeannotte*, 133 Wn.2d 847, 851, 947 P.2d 1192 (1997). By allowing failed defenses

to be treated as mitigating circumstances, the Legislature recognizes there may be "circumstances that led to the crime, even though falling short of establishing a legal defense, [that] justify distinguishing the conduct " from other similar cases. *Id.* at 852 *quoting Hutsell,* 120 Wn.2d at 921.

The court could also have considered Mr. Rife made a good faith effort to compensate the victim of the criminal conduct for any damage or injury sustained. RCW 9.94A.535(1)(b). At trial, Mr. Crump testified the altercation had been a misunderstanding. 1 RP 82. As evidenced by his acquittal on the tampering charge, it is likely when Mr. Rife approached Mr. Crump, he assumed there was no criminal investigation and his offer to pay medical bills was a clear attempt to compensate the victim before detection by the State.

c. Failure to consider exercising discretion at sentencing entitles Mr. Rife to a new sentencing hearing.

The trial court abused its discretion when it failed to consider Mr. Rife's request for a sentence below the standard range. Mr. Rife is entitled to a new sentencing hearing.

F. CONCLUSION

The court committed error when it failed to recognize recusal was mandatory to preserve the appearance of fairness. While the court attempted to remain fair, the court's comments at sentencing betray this was not possible. The court erred in allowing the State to amend the

information on the eve of trial, forcing Mr. Rife to choose between speedy trial rights and the right to competent counsel; in allowing peremptory challenges to take place without Mr. Rife and outside the presence of the jury; in allowing the State to commit misconduct during cross examination and in closing and not recognizing ineffective assistance when defense counsel failed to object; in failing to appropriately instruct the jury on the law of self-defense; and in refusing to exercise discretion at sentencing.

Mr. Rife's conviction should be reversed and a new trial ordered. In the alternative, a new sentencing hearing should be ordered.

DATED this 4th day of May, 2015.

Respectfully submitted,

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Attorneys for Appellant

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 46638-4-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered by other court-approved means to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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