

64725-3

64725-3

NO. 64725-3-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

FERNANDO CHIRINOS,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR.

1. The court failed to verify that Chirinos received a fair trial by an impartial jury when it recalled an alternate to replace a deliberating juror, contrary to the Sixth and Fourteenth Amendments and Article I, sections 21 and 22.

2. There was insufficient evidence to convict Chirinos of attempted robbery in the second degree.

3. The court improperly denied Chirinos's motion to dismiss the attempted robbery due to insufficient evidence.

4. The court erroneously admitted evidence of wrongful conduct that was not charged and portrayed Chirinos as having a propensity to commit a charged crime.

5. Multiple instances of prosecutorial misconduct cumulatively denied Chirinos a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. When an alternate juror is temporarily dismissed from the case and then recalled to participate in jury deliberations, the trial court must verify that the alternate remains unbiased and impartial. The trial court replaced a deliberating juror with an alternate juror without questioning whether the alternate remained free from outside influence and impartial. Was the court required to insure

that the alternate juror was qualified to participate in jury deliberations after having been dismissed from service and told it would be unlikely she would be needed further?

2. A person commits attempted second degree robbery by acting with the specific intent to retain another person's personal property by threat or use of force, and taking a substantial step. The prosecution theorized that Chirinos committed attempted robbery by demanding a stranger give him a ride in her car, and told the jury Chirinos only needed to try to get a ride in the car to commit the offense. Without evidence that Chirinos intended to take possession or control of the car, or that he intended or tried to use force to take property, did the State prove attempted second degree robbery? Did the prosecution influence the outcome of the case by diluting its burden of proof?

3. Evidence of uncharged criminal conduct has a great potential to affect the jury when it could be used to infer the accused person has a propensity to commit a charged offense. Here, the State declared before trial that it would not use any evidence of uncharged crimes, but during trial it elicited testimony from four witnesses that Chirinos may have stolen a car that he was not charged with taking. Did the State's failure to properly

disclose that it would rely on uncharged allegations of wrongful conduct, coupled with its efforts to paint Chirinos as a car thief, deny Chirinos a fair trial?

4. It is well-established that a prosecutor may not ask a witness to comment on whether another witness is telling the truth, refer to facts not in the record, or use closing argument to dilute its burden of proof. Did the State's resort to this myriad of improper tactics deny Chirinos a fair trial?

C. STATEMENT OF THE CASE.

Fernando Chirinos left the King County Jail, with a jail escort, to attend a day-long medical appointment at Harborview Hospital. 10/21/09RP 115, 121. After the appointment, he dropped his crutches and fled. 10/21/09RP 121. Several jail guards chased him. 10/21/09RP 66-67, 87-92, 122, 136; 10/22/09RP 126. Chirinos jumped down from a wall, further breaking his ankles in 19 places, and at the intersection of 7th and James, came upon many cars stopped in traffic. 10/21/09RP 126-28, 137-38; 10/22/09RP 53, 133, 136; 10/26/09RP 11-12; 10/28/09RP 99-100.

In one car, a woman motioned. Chirinos thought it was his friend Brandy. 10/28/09RP 101-02; 10/29/09RP 20. He threw part

of his body, headfirst, into an open passenger side window and said, "go, go, go." 10/26/09RP 14, 16; 10/28/09RP 104. His arms and head were tangled by the woman's knees after he leapt into the car. 10/26/09RP 16; 10/28/09RP 104; 10/29/09RP 21. The woman, Alana Turner, did not know Chirinos. She screamed and pulled the keys out of the ignition so they could not go.

10/26/09RP 15. A passenger grabbed Chirinos's feet, which were outside the car, and pulled him. 10/22/09RP 55. A jail guard responding to the report of an escaped inmate tackled Chirinos and held him while others arrived. 10/21/09RP 90-92. Chirinos was convicted of escape and attempted second degree robbery for this incident. CP 19-20, 131.

Chirinos explained that he was desperate to return to his home, from which he was about to be evicted, and he needed to retrieve the ashes left from the cremations of his young son and mother, whose deaths had been very hard on him. 10/28/09RP 96-97. Chirinos agreed he was not thinking clearly and had not planned as escape effort, but he thought Turner was his friend and could give him a ride to his house. 10/28/09RP 98-102.

At the time of this attempt to escape, Chirinos had been charged for a separate incident. The facts of this incident were

contested at trial, and the jury did not convict Chirinos of the most serious offenses charges relating to it. James Holt, a banker with a serious methamphetamine addiction, claimed that Chirinos came to his home and said he was an acquaintance of a man who regularly sold methamphetamine to Holt. 10/27/09RP 9, 25-27, 35-36.

Chirinos said that Holt's drug dealer had stolen Chirinos's iphone. 10/27/09RP 35-36, 38; 10/28/09RP 114-17. Chirinos demanded that Holt reimburse him for the lost phone and the value of the data stored therein. 10/27/09RP 63-64; 10/28/09RP 129-30. Holt responded that he would not have enough money until his paycheck was deposited into his bank account the next day, and Chirinos said he would wait with him in his apartment until the bank opened. 10/27/09RP 64-65; 10/28/09RP 130.

The next day, the two men went to Holt's bank, Holt withdrew money, and he gave either \$800 or \$1100 to Chirinos. 10/27/09RP 90; 10/28/09RP 137. Holt did not complain to anyone during the incident despite having an extended conversation with a friend during the evening of the incident and even though he personally knew all the bank tellers because he was a longtime employee of same bank and said hello to them while at the bank with Chirinos. 10/27/09RP 11, 65-66, 90; 10/28/09RP 15-16. Holt

did not report the incident to the police for two days. 10/27/09RP 110.

Holt claimed that Chirinos had a knife and threatened him, which Chirinos denied. 10/27/09RP 48; 10/28/09RP 127. The jury did not convict Chirinos of possessing a deadly weapon, first degree burglary, or first degree robbery, concluding there was insufficient evidence Chirinos had such a weapon. Chirinos was convicted of extortion, kidnapping in the first degree, and residential burglary for this incident, as well as one count of forgery for using one of Holt's checks. CP 124. Chirinos received a standard range sentence of 175 months. CP 127. Pertinent facts are addressed in further detail in the relevant argument sections below.

D. ARGUMENT.

1. BY SUBSTITUTING AN ALTERNATE JUROR WITHOUT VERIFYING THE REPLACEMENT JUROR'S IMPARTIALITY, THE COURT VIOLATED CHIRINOS'S RIGHT TO AN IMPARTIAL AND UNANIMOUS JURY

While the jury was deliberating, deliberations stalled due to one juror who became ill followed by other jurors who could not continue due to work obligations. After two and one-half days without deliberations, the court called a previously dismissed

alternate juror back to court. The alternate juror participated in deliberations and voted to convict Chirinos of the charged offenses. Before the deliberations resumed with the reconstituted jury, the court briefly told the jurors that they must begin deliberations anew. Yet the court did not speak with the alternate juror to verify that she remained impartial and unbiased. The court's failure to assess the partiality of the alternate temporarily dismissed juror deprived Chirinos of his right to an impartial and unanimous trial by jury.

a. Chirinos had a constitutionally protected right to a unanimous and impartial jury. The Sixth and Fourteenth Amendments to the United States Constitution and Article I, sections 3, 22 of the Washington Constitution guarantee a defendant the right to an impartial jury. Wainwright v. Witt, 469 U.S. 412, 429-30, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961); State v. Davis, 141 Wn.2d 798, 824-25, 10 P.3d 977 (2000). Moreover, Article I, section 21 of the Washington Constitution "provides greater protection for jury trials than the federal constitution." State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.2d 913, 918 (2010).

To ensure that the right to a unanimous and impartial jury is adequately protected, when a juror is discharged during deliberations and replaced with an alternate, the court must instruct the reconstituted jury to disregard all previous deliberations and begin deliberations anew. CrR 6.5; State v. Johnson, 90 Wn.App. 54, 72-73, 950 P.2d 981 (1998). The judge also “shall” take steps to ensure alternate jurors remain protected from outside influence if recalled to participate in deliberations. CrR 6.5.

The purpose of the rule is to insure the jury is fair, impartial, and unanimous. State v. Ashcraft, 71 Wn.App. 444, 466, 859 P.2d 60 (1993). “These are matters which relate directly to a defendant's constitutional right to a fair trial before an impartial jury and to a unanimous verdict.” Id. at 463. It is presumptively prejudicial for an unauthorized person to intrude into the jury room “unless it affirmatively appears that there was not and could not have been any prejudice.” State v. Cuziak, 85 Wn.2d 146, 150, 530 P.2d 288 (1975) (quoting State v. Carroll, 119 Wash. 623, 624, 206 Pac. 563 (1922)). This Court reviews a claim of constitutional error *de novo*. State v. Stanley, 120 Wn.App. 312, 314, 85 P.3d 395 (2004).

b. The trial court's failure to verify the alternate juror's impartiality violated Chirinos's rights to a unanimous and impartial jury. The process of recalling an alternate juror "clearly contemplates" a proceeding such as a "brief voir dire" of the recalled alternate to verify her impartiality. Stanley, 120 Wn.App. at 315; Ashcraft, 71 Wn.App. at 462.

In Stanley, the trial court replaced a deliberating juror with an alternate juror without instructing the reconstituted jury on the record to begin deliberations anew. Stanley, 120 Wn.App. at 313. In addition, the record failed to show whether Stanley or his counsel was present when the alternate juror was seated or whether the court conducted a hearing to assess the alternate juror's continued impartiality. Id. While the State conceded the trial court committed error, it argued that the error was harmless. Stanley, 120 Wn.App. at 316. Relying on Ashcraft, this Court held that the State bore the burden of proving beyond a reasonable doubt the harmlessness of the error, and the reviewing court must be able to determine *from the record* that jury unanimity was preserved. Id.

The process of recalling an alternate juror "clearly contemplates" a verifying the alternate juror's impartiality. Stanley,

120 Wn.App. at 315; Ashcraft, 71 Wn.App. at 462. It is “prudent” for the court to ensure, on the record, that the alternate had not been exposed to outside influence or interference during any period of absence from the court. Johnson, 90 Wn.App. at 72 (citing Cuziak, 85 Wn.2d at 149).

This Court must be able to “determine from the record that jury unanimity has been preserved.” Ashcraft, 71 Wn.App. at 466. The same on-the-record verification of juror impartiality applies when one juror has been released from service. Here, the record is silent that replacement juror had remained protected from “influence, interference or publicity, which might affect that juror's ability to remain impartial.” CrR 6.5

The right to an impartial, 12-person jury is of constitutional magnitude, and thus is not waived by any failure to object at trial. Cuziak, 85 Wn.2d at 149. The burden falls on the State to demonstrate that the alternate juror remained free from outside influence during the period of discharge. CrR 6.5.

The trial court discharged Juror 6 before deliberations commenced. 10/29/09RP 126. It informed her it would be “unlikely” that she would be recalled, and wished her well on a vacation she was about to take to celebrate her birthday. *Id.* The

judge did not order her to remain free from outside influence, although he said he would “appreciate” it if she continued to refrain from discussing the case with others. *Id.*

Juror 6 returned to court at the judge’s direction on November 3, 2009. 11/3/09RP 67-68. The court did not conduct any colloquy of the juror whatsoever before sending her to deliberate with the rest of the jurors. 11/3/09RP 71.

The record does not affirmatively show that Juror 6 remained impartial. It is the State’s burden to prove the temporarily discharged juror remained unbiased. Without any on-the-record demonstration of the juror’s impartiality after being excused from service, Chirinos is not ensured his right to a unanimous and impartial jury as required by the Sixth Amendment and Article I, sections 21 and 22.

2. WITHOUT EVIDENCE THAT CHIRINOS INTENDED TO FORCIBLY STEAL PROPERTY OF ANOTHER, THE PROSECUTION DID NOT PROVE ATTEMPTED ROBBERY IN THE SECOND DEGREE

a. The prosecution bears the burden of proving all elements of an offense, including the necessary intent. The most fundamental concepts of criminal procedure require the State to

prove to a jury every essential element of a crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d (1970); State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000) This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in article I, § 3 of the Washington Constitution¹ and the 14th Amendment of the federal constitution.² Sandstrom v. Montana, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984).

On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61

¹ Art. I, § 3 provides, "No person shall be deprived of life, liberty, or property, without due process of law."

² The Fourteenth Amendment provides in pertinent part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law." The Sixth Amendment expressly guarantees the right to a jury trial and the Fifth Amendment requires the State to establish all elements of guilt beyond a reasonable doubt; together, they guarantee a criminal defendant the right to have the fact-finder determine, beyond a reasonable doubt, every essential element of guilt. United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

L.Ed.2d 560, 99 S.Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The prosecution charged Chirinos with attempted robbery in the second degree, explicitly alleging that he attempted to steal a motor vehicle. CP 19-20. To prove this offense, the State needed to establish beyond a reasonable doubt that (1) he acted with the specific intent to take another's car by use or threat of force; and (2) he attempted to commit a robbery by taking a substantial step toward its commission. "[C]onduct is not a substantial step 'unless it is strongly corroborative of the actor's criminal purpose.'" State v. Workman, 90 Wn.2d 443, 451, 584 P.2d 382 (1978) (quoting Model Penal Code § 5.01(2) (Proposed Official Draft, 1962)).

b. Chirinos did not intend to forcibly possess another person's car. Robbery requires an intentional taking of property of another along with the use or threat force to take or retain the property. RCW 9A.56.190.³ A robbery "must encompass both a taking of property and a forcible taking against the will of the

³ A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking.
RCW 9A.56.190.

person from whom or from whose presence the property is taken.”
State v. Tvedt, 153 Wn.2d 705, 720, 107 P.3d 728 (2005).

A taking of property must last for some continued duration for it to constitute a theft of property. See State v. Walker, 75 Wn.App. 101, 106, 897 P.2d 957 (1994). Robbery does not include the theft of services, unlike a theft. See RCW 9A.56.020(1) (defining theft as the wrongful taking of “property or services”); RCW 9A.56.190 (defining robbery as unlawfully taking “personal property”). Accordingly, an attempted robbery must include proof of the intent to actually retain possession of another’s property.

Additionally, because attempted robbery cannot be the same as attempted theft, a perpetrator must also use, threaten, or demonstrate a purposeful intent to use force. Compare RCW 9A.56.030(1)(b) with RCW 9A.56.190. The distinguishing characteristic between theft and robbery is the actual or threatened use of force.

Statutes setting forth the essential elements of criminal offenses must be strictly construed. United States v. Lanier, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997); In re Carson, 84 Wn.2d 969, 973, 530 P.2d 331 (1975) (recognizing criminal statutes are strictly construed against State when they

involve a deprivation of liberty). Only conduct “clearly” covered by a criminal statute may be penalized. Lanier, 520 U.S. at 266.

“Under the rule of lenity, where a statute is ambiguous, we must interpret it in favor of the defendant.” State v. Jacobs, 154 Wn.2d 596, 603, 115 P.3d 281 (2005).

The prosecution specifically charged Chirinos with attempting to take Turner’s car. CP 19-20. Turner testified that Chirinos launched part of his body into her car and shouted, “Go.” 10/26/09RP 14. He urged her to drive her car. He did not have a weapon or indicate he was armed. 10/26/09RP 24. He did not threaten to use force or say he would hurt Turner. 10/26/09RP 25. He did not say he wanted to take her car or indicate she should get out of her car. 10/26/09RP 25. His entire body was not inside the car. 10/26/05RP 16.

Chirinos’s actions were consistent with his testimony: he wanted Turner to give him a ride home. Chirinos testified that he thought Turner was a friend, and believed her to be motioning toward him. 10/29/09RP 20. He conceded that he might not have been realistically perceiving the incident given his panicked and unplanned effort to flee from custody while injured. 10/28/09RP 98-101. Once he realized Turner was not his friend, and was not

interested in helping him, he got out of the car. 10/28/09RP 102, 104. He did not recall being pulled from the car. 10/29/09RP 23.

One eyewitness, an ambulance emergency medical technician, saw Chirinos dive into Turner's car and thought it looked like something "a buddy" would do into a friend's car. 10/22/09RP 65-66. He himself he had dived into his own friends' cars in this same manner. Id. at 66. He also agreed that the entire incident, in which Chirinos was inside Turner's car, was very quickly over. Id. at 62.

The prosecution convinced the trial court not to dismiss the attempted second degree robbery for insufficient evidence at the close of its case-in-chief by claiming it was enough that Chirinos tried to deprive Turner of temporary "use" of her car. 10/28/09RP 84. The prosecutor claimed that there was sufficient threat of force because Turner was afraid, regardless of Chirinos's actual intent: "she was scared her vehicle would get taken." Id. In her closing argument, the prosecutor argued that by saying "go, go, go," to Turner, Chirinos took "a substantial step toward trying to get away," which was sufficient evidence for attempted robbery. 10/29/09RP 86.

The jury puzzled over the sufficiency of the evidence, asking the court for clarification: "Is forcing the owner of a car to transport you in that car, 'Robbery'?" CP 116. The court responded, "Please reread your instructions." CP 117.

Contrary to the State's argument to the jury and to the court in response to the defense motion to dismiss, the intent to "get away," does not prove the intent to take another's property by use of force. 10/29/09RP 86. Nor is the intent to temporarily use another's car a theft of the car as required for robbery.

The intent to obtain a service, like a car ride, is not the same as the intent to take possession of another person's car that is necessary for robbery. The intent to "get away" does not show the intent to retain possession of another's car.

An attempted robbery must be proven by sufficient evidence to show the specific intent to take and retain property of another. The court denied Chirinos's half-time motion to dismiss by reasoning that it did not "see why you couldn't commit a robbery" by committing a theft and bringing the owner along. 10/28/09RP 84-85. The court also decided that if Chirinos was trying to obtain control of the car by force, by trying to drive the steering wheel or

pushing Turner's foot to accelerate, he could be "in control" enough to be in possession of the car. Id. at 85.

c. The insufficient evidence coupled with the State's misrepresentation of the legal elements of attempted robbery require reversal. Contrary to the State's efforts to save its prosecution, there was no rational evidence that Chirinos intended to take possession of Turner's car by force. Compounding the lack of proof of the offense is the prosecution's efforts to dilute its burden of proof and diminish the controlling legal standard.

The prosecutor told the jury that the legal requirement for a person to commit the attempted robbery charged was a substantial step, which means only that "he needs to have done something." 10/29/09RP 86. Well-established law dictates that a substantial step must be strongly corroborative of the actor's purpose, and that purpose must be the specific intent to complete the offense. Workman, 90 Wn.2d at 451. Whatever actions are taken, they must strongly corroborate the intent to take property by force or threat of force, yet the prosecution neglected this essential component when explaining the law to the jury.

It is a manifest constitutional error for the prosecution to misstate the governing law. State v. Davenport, 100 Wn.2d 757,

760, 675 P.2d 1213 (1984); State v. Fleming, 83 Wn.App. 209, 213, 921 P.2d 1076, rev. denied, 131 Wn.2d 1018 (1997). The prosecutor "has no right to mislead the jury." Davenport, 100 Wn.2d 760 (emphasis in original). Such arguments, made by a quasi-judicial officer invested with the prestige generally accorded to the prosecutor's office, are substantially likely to taint the jury's verdict. Id. The prosecution's misrepresentation of the law defining an attempted robbery was a flagrant effort to diminish its burden of proof of an essential element and when considered cumulatively with the insufficient evidence of the attempted second degree robbery, denied Chirinos a fair trial on this charged offense.

Absent proof of every essential element, the conviction must be reversed and the charge dismissed. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995). The lack of proof that Chirinos specifically intended to take and retain control of Turner's car by force requires reversal. Merely asking for a ride, even in an unusual manner, does not constitute an attempt to steal a car by force. Furthermore, the prosecution's calculated efforts to mislead the jury about the requirements of attempted robbery denied Chirinos a fair trial.

3. THE TRIAL COURT IMPROPERLY ADMITTED
IRRELVANT AND UNDULY PREJUDICIAL
EVIDENCE THAT CHIRINOS STOLE A CAR

a. Uncharged wrongful acts are inadmissible when unduly prejudicial or used to show the accused person's propensity for such behavior. Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. U.S. Const. amend. 14; Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Pulley v. Harris, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Due process is violated where the admission of evidence was arbitrary or so prejudicial that renders the trial fundamentally unfair. Walters v. Maass, 45 F.3d 1355, 1357 (9th Cir. 1995); Colley v. Sumner, 784 F.2d 984, 990 (9th Cir. 1986).

Uncharged misconduct or wrongful acts are presumed inadmissible. ER 404(b).⁴ Uncharged criminal conduct may be admitted into evidence only when it is materially relevant to an essential ingredient of the charged crime and its probative value outweighs its prejudicial effect. State v. Thang, 145 Wn.2d 630,

⁴ ER 404(b) provides:

642, 41 P.3d 1145 (2002); State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); ER 404(b). Doubtful cases should be resolved in favor of the defendant. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). “Regardless of whether the evidence is relevant or probative, in no case may evidence be admitted to prove the character of the accused in order to show that he acted in conformity therewith.” State v. LeFever, 102 Wn.2d 777, 782, 690 P.2d 574 (1984); see Saltarelli, supra at 362; ER 404(b).

Even if relevant, evidence should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. Prejudice is defined as that which suggests decision on an improper basis, commonly, though not necessarily, an emotional one. Fed.R. of Evid. 403, Notes of Advisory Committee on Proposed Rules. The evidentiary rules require that the trial judge carefully balance the evidence's probative value against its harmful effect. State v. Wade, 98 Wn.App. 328, 334, 989 P.2d 576 (1999). A trial judge's decision to admit evidence of uncharged misconduct is reviewed for abuse of discretion. State v. Trickler,

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

106 Wn.App. 727, 732, 25 P.2d 445 (2001). This Court reviews *de novo* whether a trial court correctly interpreted an evidentiary rule in deciding to admit evidence. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

b. The State claimed it had no uncharged acts evidence and then insisted on offering extensive evidence that Chirinos may have stolen a car. Before trial, Chirinos asked that the prosecution provide notice of any acts that it intended to introduce that could be characterized as uncharged wrongful conduct governed by ER 404. CP 23-24. The prosecution asserted that had “no intention of offering any [ER] 404(b) evidence.” 10/15/09RP 11.

During the trial, the prosecution elicited evidence that shortly after Chirinos left Holt’s home, Holt discovered his car was missing and reported it stolen to the police. He signed a “stolen vehicle report” that subjected him to the penalty of perjury. 10/26/09RP 62, 64-65; 10/27/09RP 122.

The prosecution elicited this evidence without proof Chirinos was involved in stealing this car, although it speculated that he may have done so. The State had four witnesses testify about Holt’s stolen car. 10/26/09RP 60-65, 85-100; 10/27/09RP 122. The

State elicited this testimony almost immediately after Turner testified that Chirinos tried to steal her car in a separate incident.

10/26/09RP 8-25.

Chirinos objected to the means and manner by which Holt's car was recovered as cumulative evidence regarding this uncharged offense. 10/26/09RP 79-80. He explained that even if the State could offer the evidence about the car theft as *res gestae*, because it was taken close in time to the incident, the extensive evidence about the car's theft, its recovery, and its condition when recovered was irrelevant, prejudicial, and implied Chirinos committed other uncharged offenses. *Id.* The court overruled the objection despite the fact that the prosecution conceded it had no proof connecting Chirinos to the stolen car and could not have charged him with taking it, and did not explain its probative value. 10/26/09RP 81.

The jury learned that after Holt signed a "stolen vehicle report" under penalty of perjury, another officer located his car abandoned in a park and ride lot. 10/26/09RP 62-64, 89; 10/27/09RP 122. On its recovery, the car was littered with trash and looked like it had been used. 10/26/09RP 92, 97. The police

located the car about two weeks after the incident in a “hot spot” where stolen cars routinely appeared. 10/26/09RP 87, 89.

The admission of the irrelevant evidence emphasizing the State’s suspicions that Chirinos stole and abandoned Holt’s car prejudiced Chirinos’s right to a fair trial. Chirinos vigorously contested his intent to steal Turner’s car as charged in count 6, and the evidence that Chirinos may have stolen Holt’s car made it far more likely that the jury would infer he similarly intended to take Turner’s car. See 10/26/09RP 24-25; 10/28/09RP 81-84, 102-04.

The State’s tactical choice to slip in the allegation that Chirinos may have stolen Holt’s car, after it had disavowed any intent to offer uncharged criminal acts before trial, precluded Chirinos from anticipating this testimony and the court from its mandatory evaluating as required by the rules of evidence. See Wade, 98 Wn.App. at 334. The State insisted before trial that it would not introduce evidence of uncharged crimes and yet the court allowed it to do so even if the uncharged crime was unfairly prejudicial. The State’s tactical maneuvers, in addition to the unduly prejudicial allegation that Chirinos stole another car in addition to his efforts to take Turner’s case, denied him a fair trial.

4. BY DEMANDING CHIRINOS CALL OTHER WITNESSES LIARS AND IMPLYING THAT CHIRINOS OR THE COURT WANTED THE JURY TO FIND HIM GUILTY OF LESSER OFFENSES, THE PROSECUTOR DENIED CHIRINOS A FAIR TRIAL

a. A prosecutor may not employ improper tactics to gain a conviction. Trial proceedings must not only be fair, they must “appear fair to all who observe them.” Wheat v. United States, 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). Misconduct by a prosecutor violates the “fundamental fairness essential to the very concept of justice.” Donnelly v. DeChristoforo, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) (quoting Lisenba v. California, 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed. 166 (1941)); U.S. Const. amend. 14; Wash. Const. art. I, §§ 3, 21, 22.

Prosecutors play a central and influential role in protecting the fundamental fairness of the criminal justice system. A prosecutor is a quasi-judicial officer and has a duty to act impartially, relying upon information in the record. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935); see State v. Hunson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969) (prosecutor’s “trial behavior must be

worthy of his office, for his misconduct may deprive the defendant of a fair trial.”). A prosecutor “may strike hard blows, [but] he is not at liberty to strike foul ones.” Id.

Because the public expects that the prosecutor acts impartially,

improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger, 295 U.S. at 88.

When reviewing prosecutorial misconduct, the court first considers whether the prosecutor’s actions were improper, and second, whether there is a substantial likelihood that the misconduct affected the verdict. State v. Fisher, 165 Wn.2d 727, 747, 202 P.2d 937 (2009). The failure to object to misconduct does not waive the error on appeal if the remark amounts to a manifest constitutional error. State v. Dixon, 150 Wn.App. 46, 57, 207 P.3d 459 (2009). Where a prosecutor’s remarks are so flagrant and ill-intentioned that they evince “an enduring and resulting prejudice,” the court will grant relief without regard to whether there was a trial objection. Fisher, 165 Wn.2d at 747.

b. The prosecutor asked Chirinos to declare that the State's witnesses must be lying. A prosecutor's efforts to induce an accused person to call the State's witnesses liars "rises to the level of flagrant misconduct." State v. Suarez-Bravo, 72 Wn.App. 359, 367, 864 P.2d 426 (1994); see also State v. Boehning, 127 Wn.App. 511, 525, 111 P.3d 899 (2005) ("Asking one witness whether another witness is lying is flagrant misconduct."). It invades the province of the jury to ask "a witness to judge whether or not another witness is lying." Id. at 366. Furthermore, it is "misleading and unfair to make it appear that an acquittal requires the conclusion" that the State's witnesses are lying. State v. Casteneda-Perez, 61 Wn.App. 354, 362, 810 P.2d 74, rev. denied, 118 Wn.2d 1007 (1991).

The prosecutor repeatedly asked Chirinos to comment on the honesty and accuracy of the State's witnesses. From the start of her cross-examination of Chirinos, she asked him to explain why his testimony was different from Detective Thompson. 10/28/09RP 144. The prosecutor also asked Chirinos to comment on Turner's recollection of the incident, and declare whether she was wrong in her account. 10/29/09RP 23. Chirinos objected to being asked to speculate about another witness's testimony but the court

overruled the objection. Id. The prosecutor continued asking several times if Turner's testimony was inaccurate. Id. at 23-24. The prosecutor also asked Chirinos whether Holt's testimony was "not true" or "a lie." 10/29/09RP 52. She insisted Chirinos say whether Holt was "telling the truth on the stand?" 10/29/09RP 57.

Chirinos objected to being asked to comment whether a State's witness was lying and the court overruled the objection, making further objections futile. Moreover, the well-established nature of this wrongdoing by the prosecution makes the use of this tactic flagrant and ill-intentioned. Boehning, 127 Wn.App. at 525; Suarez-Bravo, 72 Wn.App. at 367. No prosecutor should demand that a defendant say that the State's witnesses are lying. Id.

c. The prosecutor impermissibly informed the jury that Chirinos proposed that two offenses should be placed before the jury. The prosecutor began her closing argument by telling the jury that the defense had specifically requested that the jury receive instructions on two lesser offenses. 10/29/09 80. The defense objected in a sidebar, explaining that the prosecutor's argument diluted the State's burden of proof and made it appear that Chirinos wanted to be prosecuted and convicted of those lesser offenses. 10/29/09 80, 128-29. The court agreed that this information had no

place before the jury and sua sponte instructed the jury that “whether lessers should be given to the jury is a determination that is made solely by the court.” 10/29/09 80.

A court’s decision to give lesser included offenses requested by the defense is not “evidence” that the jury may consider, and thus, it may not be referred to during the prosecution’s closing argument. Boehning, 127 Wn.App. at 522. The prosecution may not ask the jury to infer that Chirinos endorsed his prosecution for those offenses. The prosecutor’s efforts to distance itself from lesser included offenses and imply that Chirinos had a role to play in selecting the offenses for which he was prosecuted improperly informed the jury of matters not in the record and encouraged a conviction on an improper basis. The fact that the jury ultimately convicted Chirinos of the lesser offenses he had requested shows the prejudicial nature of the prosecution’s comments.

d. The flagrant, cumulative misconduct denied Chirinos a fair trial. “The practice of asking one witness whether another is lying ‘is contrary to the duty of prosecutors, which is to seek convictions based only on probative evidence and sound reason.’” State v. Neidigh, 78 Wn.App. 71, 77, 895 P.2d 423 (1995) Id. at 77 (quoting Casteneda-Perez, 61 Wn.App. at 363).

Despite the prosecutor's ethical and legal duty to refrain from seeking a verdict by improper means, the prosecutor used a variety of improper tactics in the case at bar.

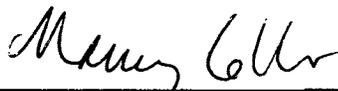
In addition to demanding Chirinos comment on the veracity or accuracy of the State's principal witnesses, the prosecutor misstated the legal standard for attempted robbery in the second degree. She elicited allegations of uncharged wrongful conduct despite explicitly telling Chirinos before trial that no such evidence would be offered. She told the jury that Chirinos thought there was sufficient evidence for the lesser offenses charged. These tactics, considered together, denied Chirinos a fair trial and require reversal.

E. CONCLUSION.

For the reasons stated above, Mr. Chirinos respectfully asks this Court to reverse his convictions, dismiss the attempted second degree robbery charge for insufficient evidence, and order a new trial.

DATED this 20th day of August 2010.

Respectfully submitted,



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

STATE OF WASHINGTON,)
)
 Respondent) NO. 64725-3
)
 v.)
)
 FERNANDO CHIRINOS,)
)
 Appellant.)

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 20TH DAY OF AUGUST, 2010, A COPY OF **APPELLANT'S OPENING BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

[X] King County Prosecuting Attorney
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SEATTLE WA 98104-2362

[X] Fernando Chirinos
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WASHINGTON CORRECTION CENTER
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SHELTON, WA 98584

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 AUG 20 PM 4:38

SIGNED IN SEATTLE, WASHINGTON THIS 20th DAY OF AUGUST, 2010

x. Ann Joyce