

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

NO. 36231-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

LOUIS FAZIO,

Appellant.

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

The Honorable Richard D. Hicks, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to convict appellant of the charged offense.

2. The prosecutor committed prejudicial misconduct in closing argument, depriving appellant of his constitutional right to a fair trial.

Issues Pertaining to Assignments of Error

1. Was the evidence insufficient to convict appellant of first degree robbery under the deadly weapon prong, where the evidence showed only that appellant was present when plans were made to rob the alleged victim, but did not show that appellant was present when his co-defendants obtained a firearm to use in the alleged robbery or that he was privy to conversations concerning the use of the firearm in the robbery?

2. Did prosecutorial misconduct deprive appellant of his right to a fair trial where the prosecutor argued facts not in evidence, thereby bolstering the credibility of a key witness for the state in direct violation of the court's in limine order excluding such evidence as unfairly prejudicial?

B. STATEMENT OF THE CASE

Following a jury trial in the Thurston County Superior Court, appellant Louis Fazio was convicted of conspiracy to commit robbery in

the first degree. CP 65, 107-17. By special verdict, the jury found that Fazio or an accomplice possessed a firearm at the time. CP 64. The jury was not able to reach a verdict on a second charge of rendering criminal assistance in the second degree. CP 61-62. Fazio was sentenced on the robbery conviction within the standard range. CP 107-17.

Fazio's alleged co-conspirators included Mary Yeldon and Ancil Jones, who were Fazio's co-defendants at trial. Yeldon had cooperated with investigating officers and gave several statements that were admitted at trial. 5RP 55-58.¹ In addition, before the state rested its case, Yeldon entered a plea agreement with the prosecution in which she agreed to testify for the state. 4RP 412-21. Fazio's trial counsel was granted a continuance to speak with Yeldon and to do follow-up investigation before she testified. 4RP 421-23.

The charges brought against Fazio stem from events occurring on November 25, 2006. CP 52. On that day, Yeldon, an acquaintance of Fazio's, was angry with Dean Hamlin, Yeldon's acquaintance and drug

¹ For purposes of this brief, the reports of proceedings (RP) are referred to as follows:

March 19, 2007 = 1RP
March 20, 2007 = 2RP
March 21, 2007 = 3RP
March 22, 2007 = 4RP
March 26, 2007 = 5RP
March 27, 2007 = 6RP.

dealer. 5RP 37, 44. Yeldon planned to exact revenge by stealing an ounce of methamphetamine from Hamlin. 5RP 37.

Yeldon's testimony and statements to police constituted the majority of the evidence concerning Fazio's purported role in the crime. Yeldon testified that spoke of her plan at a party in Roy, where Fazio was present. 5RP 37-8. Yeldon testified that she recruited Ancil Jones, who was also at the party, to assist in the plan. 5RP 38-9. Yeldon also testified that Fazio was listening when she asked Jones for help. 5RP 39. However, Yeldon's testimony was conflicting as to whether Fazio was included in any conversation about the plan. For example, Yeldon testified that Fazio was present while she discussed the plan with Jones, but stated that Fazio was otherwise occupied "flirting with [a] girl" at the party. 5RP 64. In addition, Fazio was using oxycontin throughout the evening, and Yeldon testified that he was sufficiently intoxicated that he was unable to drive his own car. 5RP 41, 59-60, 65.

Significantly, when discussed at the party, the plan did not involve a firearm. 5RP 39-40. Instead, the force contemplated was that "if [Hamlin] got rowdy, [Jones] could have roughed him up, because [Jones] is known for fighting." 5RP 39-40. Yeldon testified that while at the Roy party, Jones mentioned that he wanted to obtain a gun from a friend of

Yeldon's and Jones' named Erik Skau, to rob Hamlin. 5RP 42. Yeldon did not testify that Fazio heard this discussion. According to Yeldon, Jones asked a fellow partygoer for a gun, but the individual declined. 5RP 64. Yeldon testified that Jones proposed driving to Skau's house. 5RP 65.

Yeldon, Jones, and Fazio left the party and went to the home of Skau. 5RP 41-42. Yeldon drove Fazio's car, Fazio rode in the passenger seat, and Jones sat in the back seat. 5RP 41-42. Fazio stayed in the car while Yeldon and Jones went inside to speak with Skau. 5RP 43, 66. While inside, Yeldon reportedly told Skau that Jones wanted to use the gun, and Jones offered Skau a "quarter ounce of dope" to let him use the gun. 5RP 43.

Skau testified that Yeldon and Jones came to his house and asked to borrow his firearm. 3RP 19-21. Both Skau and Yeldon testified Fazio was not present during this conversation, as he had remained outside in his car. 3RP 322; 5RP 43, 66. Skau refused to loan his firearm to Yeldon and Jones, but offered to come along and provide the firearm at the moment it was needed. 3RP 319-21.

Yeldon testified Skau's gun was not visible when he entered the vehicle, as he "had his jacket on." 5RP 45, 67. Yeldon again drove Fazio's car, while Fazio sat in the front passenger seat, and Jones and Skau

sat in the back seat. 5RP 45-46. The group drove to a gas station where Yeldon had arranged to meet Hamlin, ostensibly, to buy drugs. 5RP 45-46.

When asked whether the plan to use the gun in the robbery was discussed while the four were riding in the car, Skau answered: "It could have been, but I didn't really pay attention." 3RP 323-24. When asked if he remembered anything being discussed, Skau similarly answered: "Not really, not until we got to the [store/gas station]." 3RP 324. On cross-examination, Skau confirmed that it was only upon the group's arrival at the gas station that the plan was discussed. 3RP 325. Skau did not claim that the group discussed the firearm or its use. 3RP 325-31. Rather, he testified only that the group discussed *robbing* Hamlin. 3RP 325-31.

Yeldon testified that the plan changed once the group arrived at the gas station. 5RP 46. At that point, Jones decided that he and Yeldon would take Hamlin's vehicle, and Skau would follow, driving Fazio's vehicle. 5RP 46.

According to Yeldon, Skau gave Jones the firearm, although Yeldon acknowledged that she did not observe this directly, since Skau and Jones were in the back seat, while she and Fazio were in the front seat. 5RP 69. Yeldon testified that Skau did not make "any type of grand gesture" in

handing over the gun to Jones, nor did Skau say anything about handing the gun over to Jones. 5RP 69-79.

Skau confirmed that he and Jones were in the back seat of the car, and Fazio and Yeldon were in the front seat when he gave his gun to Jones. 3RP 392. Although Yeldon testified Skau did not say anything about handing the gun to Jones, Skau claimed that Jones asked him for the gun. 3RP 329, 344; 5RP 69-79. Skau's testimony indicates that it was at that specific time that the plan was discussed. 3RP 392.

When Hamlin arrived, Yeldon and Jones got into his car. 5RP 49. Jones had the gun. 3RP 329-30. Yeldon got into the front seat of Hamlin's SUV and Jones got into the back. 5RP 49.

Hamlin testified that once he began driving, he showed Yeldon and Jones the ounce of methamphetamine he planned to sell them. 2RP 257, 5RP 49. Hamlin claimed that shortly thereafter, Jones hit Hamlin in the head, and Jones and Yeldon both ordered Hamlin to pull over and to give them his money and drugs. 2RP 242-43. Hamlin did not do so. Instead, he accelerated and intentionally flipped his SUV by making extreme turns. 5RP 49-50. In the commotion, Jones fired several shots, one of which hit Hamlin in the leg. 5RP 49-50; 1RP 43.

Meanwhile, Skau had followed in Fazio's car, with Fazio in the passenger seat. 3RP 331-32. When the SUV flipped, Yeldon and Jones emerged and ran to Fazio's car. 5RP 51. Yeldon and Jones did not take any money, drugs, or other property from Hamlin. 5RP 51-52.

The group drove off and quickly went their separate ways. 5RP 52-53.

During trial, the prosecutor sought to bolster Skau's credibility by seeking to admit evidence that Skau had no criminal history. 3RP 339. Fazio's counsel objected, asserting that Skau's lack of criminal history was not relevant. 3RP 339. The prosecutor argued as follows:

Your Honor, I believe it's relevant. Obviously the credibility of this witness is going to be called into question. The fact that he's not been convicted of a crime seems to me relevant to the issue of his credibility

. . . .

3RP 340. Fazio's trial counsel countered by making the following argument:

Your Honor, if somebody has been convicted of a crime of dishonesty, certainly that can be used to assess somebody's credibility. I don't believe there's any evidentiary rule that somebody's lack of criminal history can be mentioned for purposes of establishing the credibility of a witness. . . .

In addition, there's another factor here . . . either directly or indirectly, [the prosecutor] is trying to establish that this witness was offered a deal because he had no criminal history, the obvious implication is a deal wasn't

offered to anybody else because everybody else does have criminal histories, and that is very prejudicial. So I think the fact that somebody's criminal history, either lack of or extensive experience of, is not relevant unless it's allowed under Rule 609 or some other specific rule, and that has not been cited. The reason it hasn't been cited is because it doesn't exist. This is not relevant and it is very potentially damaging by implication.

3RP 340-41. The trial court sustained Fazio's objection, stating:

. . . I think it is potentially prejudicial, doing a balancing on the record under Evidence Rule 403. It's potentially prejudicial for the reasons stated by [Fazio's trial counsel], either for bolstering or by inference indicating that the others may have criminal history. I don't see where . . . the state's case turns on this. It may -- certainly his credibility is critical, but not this particular fact, so I'll stay with sustaining the objection.

3RP 342.

Despite this ruling, in closing argument, the prosecutor made the following argument:

Now, of four people who commit a crime, and since you are reasonable people, would you consider using the information of someone like Mary Yeldon, who, first of all, volunteered the information, who, in her own way, came forward and provided the police with information to help them resolve these violent events? I think you would. You might not like it, but what is the option? The option is serious crimes go unresolved.

And consider Erik Skau, consider would you deal with him, again, trying to get to the bottom of some violent events, Erik Skau

. . . you know, ladies and gentlemen, you're directed to consider the evidence and lack of evidence, and you know that Erik Skau, his background was thoroughly explored . . .

And you have seen a lot of cross-examination in this courtroom over the period of days. *Do you think that if he had criminal convictions, don't you think you would have heard about them? You didn't.*

So here you have someone like Mr. Skau, who, although, unfortunately, he has lapsed into drug usage *has no criminal history*, honorably served his country in the military, and when contacted by police, gave it up. Are you going to deal with that kind of person in order to get to the bottom of things and hopefully find the truth? I think you would.

6RP 104 (emphasis added).

C. ARGUMENT

1. **BECAUSE THERE WAS NO EVIDENCE THAT FAZIO WAS PRESENT WHEN THE DECISION WAS MADE TO USE A DEADLY WEAPON, THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION OF CONSPIRACY TO COMMIT FIRST DEGREE ROBBERY.**

Due process requires the state to prove every fact necessary to constitute the charged offense. U.S. Const. amend. 14; Const. art. I, § 3; In re Winship, 397 U.S. 358, 90 S. Ct. 1086, 25 L. Ed. 2d 368 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). A reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, when viewing the evidence in the light most favorable to the state, could have found the elements of the crime charged

beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980); State v. Israel, 113 Wn. App. 243, 54 P.3d 1218 (2002).

In Fazio's case, the elements of the crime of conspiracy to commit robbery in the first degree were set forth as follows:

- (1) That on or about the 25th day of November, 2006, the defendant agreed with one or more persons to engage in or cause the performance of conduct constituting the crime of robbery in the first degree;
- (2) That the defendant made the agreement with the intent that such conduct be performed;
- (3) That any one of the persons involved in the agreement took a substantial step in pursuance of the agreement; and
- (4) That the acts occurred in the State of Washington.

CP 89.

The elements of the crime of robbery in the first degree were set forth as follows:

- (1) That on or about the 25th day of November, 2006, the defendant or an accomplice unlawfully took personal property from the person of another;
- (2) That the defendant intended to commit theft of the property;
- (3) That the taking was against the person's will by the defendant's or accomplice's use or threatened use of

immediate force, violence or fear of injury to that person or to that person's property;

- (4) That the force or fear was used by the defendant or accomplice to obtain or retain possession of the property;
- (5) That in the commission of these acts or in immediate flight therefrom the defendant or accomplice was armed with a deadly weapon or displayed what appeared to be a deadly weapon; and
- (6) That the acts occurred in the State of Washington.

CP 83.

The evidence submitted to the jury in this case was insufficient to support Fazio's conviction of conspiracy to commit robbery in the first degree, because the evidence does not support a reasonable inference that Fazio agreed to participate in a crime involving a deadly weapon.

Yeldon, the only testifying witness who was present at the party in Roy, testified that Fazio was present at the party while she discussed the plan with Jones, but that Fazio was otherwise occupied "flirting with [a] girl." 5RP 64. Moreover, the plan at that point did not involve a firearm. 5RP 39-40. Instead, the threat of force contemplated was that "if [Hamlin] got rowdy, [Jones] could have roughed him up, because [Jones] is known for fighting." 5RP 39-40. Thus, the evidence concerning Fazio's alleged role in the crime, up to that point, does not support a conviction for a

conspiracy to commit robbery in the first degree, based on the use of a deadly weapon.

Moreover, when Yeldon and Jones went to speak with Skau about borrowing his firearm, Fazio waited outside in the car. 5RP 43, 66. Yeldon stated that Skau's gun was not visible as they re-entered Fazio's car. 5RP 67. In short, no witness provided evidence that Fazio knew that a gun had been procured, nor that he agreed to a conspiracy involving the gun up to that point.

In fact, Skau and Yeldon both testified that the only time the plan was discussed again was in the car once they arrived at the gas station. 3RP 324. At that time, Skau reportedly handed Jones the gun. Yeldon testified that she did not observe Skau hand Jones the gun directly, however, as she and Fazio were in the front seat. 5RP 69. Yeldon also testified that Skau did not make "any type of grand gesture" in handing the gun to Jones, and she did not hear Skau say anything about handing the gun to Jones. 5RP 69-79. Although Skau claimed Jones asked for the gun, there was no evidence that Fazio heard this request or observed Skau hand the gun to Jones. Put simply, no witness described any instance where Fazio said anything to anyone about the use of a gun, much less agreed to participate in armed robbery. In fact, the evidence was to the contrary and showed

only that the plan that was discussed when Fazio purportedly agreed to participate involved only a threat of "roughing up" Hamlin.

In State v. Israel, the appellate court held that Washington's criminal conspiracy statute does not impose vicarious substantive liability for acts committed by co-conspirators in furtherance of the conspiracy, unless the defendant has actual knowledge of the substantive crimes charged. 113 Wn. App. at 243. The defendant in Israel raised the same challenge that Fazio does here -- namely, that there is insufficient evidence that he knew of, or agreed to, the alleged co-conspirator's use of a deadly weapon and, thus, could not be convicted of conspiring to commit robbery in the first degree. Although the Israel court found that there was sufficient evidence to convict Israel, the analysis that the court employed compels a different result in this case. 113 Wn. App. at 284-87.

In Israel, the appellate court stated:

The . . . evidence allowed the jury to conclude that Israel . . . was deeply involved in the planning of the . . . robbery. From this, the jury could infer Israel knew details of the plan including that [a co-conspirator] would use weapons. Further, although [another con-conspirator] did not explicitly state that he and [the first co-conspirator] discussed the use of weapons with Israel, he testified that he told Israel "what we do." Implied in this statement is that Israel knew the details of the robberies, including the use of weapons. At least, that is one inference that the jury was entitled to draw from the evidence presented.

113 Wn. App. at 286.

By contrast, the evidence presented against Fazio is devoid of any indication that Fazio was "deeply involved" in the planning of the alleged crime. There was also no witness to testify that Fazio knew that Skau would provide a weapon or that Jones planned to use it. To the contrary, the witnesses testified that very little was said at all about the plan, and that most of the discussions took place while Fazio was either distracted or absent. Neither Skau nor Yeldon recounted any situation where Fazio was present while Yeldon, Jones or Skau discussed using the firearm to commit the planned robbery prior to the group arriving at the gas station. Even then, Yeldon denied mentioning or seeing a firearm. Although Skau testified that Jones asked for the gun at the gas station, he did not allege that the request was accompanied by any indication that it would be used. There was also no indication that Fazio heard this particular discussion.

Moreover, there was no testimony that Fazio did anything at that stage of the alleged crime, besides continue sitting in the passenger seat of the car.

There can be no implication in this case, as there was in Israel, that Fazio knew the details of the planned robbery, particularly that a gun might

be used. The evidence is insufficient to support Fazio's conviction. This Court should reverse and dismiss the charge.

2. THE PROSECUTOR'S CLOSING ARGUMENT DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL, BECAUSE THE PROSECUTOR ARGUED FACTS NOT IN EVIDENCE IN A MANNER THAT DIRECTLY TRANSGRESSED THE TRIAL COURT'S EXCLUSION OF SUCH EVIDENCE IN LIGHT OF ITS UNFAIRLY PREJUDICIAL NATURE.

In this case, the prosecutor stated in closing argument that Skau had no criminal history, showing complete disregard for the trial court's ruling that such evidence was inadmissible and inherently prejudicial. By so doing, the prosecutor improperly bolstered the credibility of the state's most important witness and improperly implied that Fazio has a criminal record. The prosecutor's conduct was highly prejudicial and deprived Fazio of his right to a fair trial.

Prosecutorial misconduct in closing argument can deny a defendant a fair trial. State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988). On review, an appellate court considers the improper remarks in the context of the totality of the argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Even where not objected to, reversal is required if the prosecutorial misconduct is so

prejudicial it could not have been cured by an instruction to the jury. Belgarde, 110 Wn.2d at 507. Prosecutorial misconduct requires reversal when the defendant demonstrates a substantial likelihood that the misconduct affected the verdict. State v. Barrow, 60 Wn. App. 869, 875, 809 P.2d 209 (1991).

When a trial court makes an in limine ruling excluding evidence, the attorneys must abide by the ruling. Washington courts often have found prejudicial misconduct where a prosecutor's arguments violate an in limine ruling. See, e.g., State v. Smith, 71 Wn. App. 14, 22, 856 P.2d 415 (1993) (prosecutor's violation of in limine ruling excluding evidence of defendant's prior drug-related offense "flagrantly improper"); State v. Ransom, 56 Wn. App. 712, 713, n.1, 785 P.2d 469 (1990). It is also improper for a prosecutor to intentionally argue facts unsupported by the evidence. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994); State v. Rose, 62 Wn.2d 309, 312, 382 P.2d 513 (1963).

The prosecutor violated Fazio's rights not only by arguing facts not in evidence, but arguing facts that the trial court expressly *excluded* as evidence. The prosecutor's conduct cannot be considered as anything but flagrant and ill-intentioned misconduct.

The prosecutor's misconduct in this case is analogous to that found in State v. Sargent, 40 Wn. App. 340, 345, 698 P.2d 598 (1985). There, this Court reversed a conviction on the basis of improper argument despite the lack of a defense objection or request for a curative instruction. The Sargent court held that the prosecutor deprived Sargent of a fair trial by personally vouching for the credibility of a key state witness. Because the prosecutor's comments bolstered the credibility of the only witness directly linking Sargent to the crime, because the other evidence against Sargent was circumstantial, and because the evidence was not overwhelming, this Court held that the prosecutor's remarks could not have been cured by an appropriate instruction. 40 Wn. App. at 345. Moreover, the remarks were so prejudicial as to deprive Sargent of a fair trial. Sargent, 40 Wn. App. at 345.

The same is true here. Like the witness in Sargent, Skau was a crucial witness for the state, as one of only two people to testify regarding Fazio's alleged involvement in the charged crime. Fazio maintains that the evidence -- including Skau's testimony -- is insufficient to establish Fazio agreed to any plan involving a firearm. Assuming this Court disagrees, however, Skau provided the only evidence upon which the jury possibly could have relied to infer that Fazio knew about a gun.

As recounted in the preceding section, Yeldon testified her discussion of the plan in Fazio's presence at the Roy party did not include a gun. Yeldon also testified that Fazio did not accompany her and Jones into Skau's residence, where the gun was acquired. Nor was the gun visible when Skau got in the car. And although Yeldon testified Skau gave Jones the gun at the gas station, she acknowledged she did not see the transfer because she was sitting in front, where Fazio was also seated. Accordingly, Yeldon's testimony failed to establish any knowledge on Fazio's part about a gun.

Although Yeldon testified Skau did not say anything about handing the gun to Jones, Skau claimed Jones asked Skau for the gun. Credibility determinations aside, Skau's testimony regarding the request is insufficient to establish Fazio's complicity. Assuming otherwise, however, Skau's credibility was vital to the state's case. Had the prosecutor not unfairly bolstered Skau's credibility by vouching for his lack of criminal history, the jury might have disbelieved Skau and decided the case differently. As the trial court properly recognized by excluding such evidence, introduction of the improper character evidence was highly prejudicial, especially since, as in Sargent, the evidence against Fazio was far from overwhelming.

But as the trial court also properly recognized, the introduction of the improper character evidence not only bolstered Skau's credibility, it invited jurors to speculate that Fazio must have a criminal background. After all, he and Jones were tried for their purported participation in the charged crime, whereas Skau, who had no criminal history, received favorable treatment in the form of a plea deal. The prosecutor's argument therefore invited jurors to make "the forbidden inference," namely, that Fazio has a propensity for criminality and is therefore more likely to have committed the charged crime. See, State v. Perrett, 86 Wn. App. 312, 319-20, 936 P.2d 426 (1997) (introduction of prior bad acts is misconduct); State v. Fullen, 7 Wn. App. 369, 387-88, 499 P.2d 893 (1972) (prosecutor's reference to murder defendant's prior robbery conviction and familiarity with guns improper but not reversible error because corrected by court); State v. Herzog, 73 Wn. App. 34, 49, 867 P.2d 648 (1994) ("The state may not show defendant's prior trouble with the law . . . even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime").

The use of evidence of other crimes or other acts, set forth in ER 404(b), is intended to prevent a conviction based on the theory of "Give a dog an ill name and hang him." United States v. Boyd, 446 F.2d 1267,

1273 (5th Cir. 1973). Where the evidence against Fazio was weak (at best), the prosecutor's implication that Fazio, unlike Skau, was not offered a favorable plea deal because of his background caused the precise harm against which ER 404(b) is intended to protect.

The prosecutor's argument was in direct contravention of the trial court's evidentiary ruling, and broached two topics that the trial court identified as prejudicial, one of which -- Skau's credibility -- the trial court recognized as "critical" to the state's case. 3RP 342. The improper argument concerning Skau's veracity and the implication that Fazio was not offered a deal because of his background, was so highly prejudicial that no curative instruction would have been sufficient to remedy the impact on the jurors. Sargent, 40 Wn. App. at 345; see also State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991) (where misconduct strikes at the heart of the defense case, a curative instruction is ineffective to "unring the bell"). This court should reverse.

D. CONCLUSION

Fazio was convicted of conspiracy to commit robbery in the first degree, a crime defined by the use of a deadly weapon by an accomplice. Because the evidence adduced at trial failed to establish the Fazio knew about or agreed to take part in the use of a deadly weapon to commit the

crime, his conviction should be reversed and the charge dismissed.
Alternatively, Fazio's conviction should be reversed because the prosecutor
flagrantly transgressed an evidentiary ruling concerning issues the trial court
described as "critical" to the State's case.

DATED this 25th day of October, 2007.

Respectfully submitted

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 36231-7-II
)	
LOUIS FAZIO,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 25TH DAY OF OCTOBER 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- JAMES C. POWERS
THURSTON COUNTY PROSECUTOR'S OFFICE
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WALLA WALLA, WA99362

07 OCT 29 AM 9:21
STATE OF WASHINGTON
BY _____ DEPUTY

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF OCTOBER 2007.

x Patrick Mayovsky

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 OCT 25 PM 4:12