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COURT OF APPEALS

NO. 37588-5

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STATE OF WASHINGTON

BY: 

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY SAKELLIS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Beverly G. Grant

No. 06-1-05885-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was an unanimity instruction required where the State clearly elected what actions formed the basis for each assault charge and where the State did not allege alternative means of committing assault in the second degree?
2. Did defendant waive his right to challenge the prosecutor's closing argument when he failed to object at trial? Has defendant failed to show that the prosecutor's challenged argument was flagrant and ill-intentioned?
3. Did defendant receive constitutionally effective assistance of counsel where defendant cannot show deficient performance or prejudice where counsel was a strong advocate for his client?

B. STATEMENT OF THE CASE.

1. Procedure

On December 14, 2006, the State charged defendant, Anthony Sakellis, with one count of murder in the second degree, one count of assault in the second degree for Roman Atofau and one count of unlawful possession of a firearm in the first degree. CP 1-2. The murder and assault charges also had firearm enhancements. CP 1-2. The State amended the information to add a second count of assault in the second

degree for Luis Bernal and a count of intimidating a witness on June 22, 2007. CP 10-13.

The case was assigned to the Honorable Judge Beverly Grant. 1RP 4.¹ Pre-trial motions were started on November 9, 2007. RP 3. The court accepted the stipulation that defendant made a knowing and voluntary waiver in regards to his CrR 3.5 statements. CP 58-60, RP 112, 165. The court did grant the motion to sever defendant's trial from the trial of his co-defendant, Abel Contreras. RP 338, CP 111-112.

Defendant stipulated that he was prohibited from possessing a firearm. RP 874, CP 113-114. A corrected information was filed on November 28, 2007 that renumbered some of the counts. CP 106-108.

The jury found defendant guilty of one count of assault in the second degree as it pertained to Luis Bernal. CP 302, RP 2948. The jury also found that defendant was armed with a firearm. CP 303, RP 2948.

The court held sentencing on April 11, 2008. RP 2948. Defendant was determined to have an offender score of nine. CP 311-322. The court sentenced defendant to 84 months, the high end of his sentencing range, with 36 months for the firearm enhancement. CP 311-322, RP 2968-69.

¹ The State will adopt defendant's method to refer to the verbatim report of proceedings which is as follows:

The 26 sequentially paginated volumes will be referred to as RP. The four non-sequentially paginated volumes will be referred to as:

May 21, 2007 will be 1RP, September 17 2007 will be 2RP, the PM session of November 27, 2007 will be 3RP and February 4, 2008 will be 4RP.

Defendant filed this timely appeal. CP 327-28, RP 2970.

2. Facts

Libby Wagner went to her son's apartment on December 11, 2006. RP 1344. Her son, Luis Bernal, the victim, was sleeping. RP 1352. Kelly Kowalski, Roman Atofau, and Abel Contreras, were in the apartment as well. RP 1351. Contreras was also known as Lalo. RP 1352, 1430.

Kelly Kowalski was friends with Mr. Bernal, or Taco as he was called. RP 1427-28. She hung out with the victim and they did drugs together. RP 1428. On December 11, 2006, she woke up at Mr. Bernal's apartment. RP 1432. Contreras came into the apartment with a gun which he eventually put away. RP 143, 1436. Later that day, Ms. Kowalski saw defendant jump up and pull a gun on Mr. Bernal. RP 1448. Defendant held the gun to Mr. Bernal's head and yelled at him about money. RP 1448. Mr. Bernal owed defendant money. RP 1449. The gun was the one that Contreras had brought into the apartment earlier. RP 1449. Ms. Kowalski then saw Contreras pointing a different gun at the whole room. RP 1452. Mr. Bernal was bleeding as Ms. Kowalski saw blood on his hands after he grabbed his head. RP 1453. A shot rang out and she ran. RP 1454. Defendant was right next to her, still with the gun in his hands as they ran out of the apartment. RP 1454-55. As she was leaving, Ms. Kowalski heard more gunshots from inside the apartment. RP 1456-57. Defendant contacted her a few days later to tell her to tell the

police that defendant had a remote control in his hand that day and not a gun. RP 1460-61, 1927-28.

Andrea Rideout was also a friend of the victim. RP 1498. She also knew defendant who went by the name, Face. RP 1518. The victim and defendant had a business relationship. RP 1520. On December 11, 2006, Ms. Rideout was in an apartment in the same complex as where the victim lived. RP 1531. She heard a gun shot and saw defendant run. RP 1531, 1542-43. Defendant had a handgun in his hand. RP 1544. Ms. Rideout also testified that a few days prior to December 11, 2006, defendant called Mr. Bernal's number. RP 1565. Ms. Rideout answered the phone and during the conversation defendant told her, "I am going to kill that fat fuck," referring to Mr. Bernal. RP 1569, 1624. Defendant was angry. RP 1569.

Toalie Mulitauaoepele, also known as T or Big T, lived in the same complex as the victim. RP 1646, 1647. Mr. Mulitauaoepele heard the shots on December 11, 2006 and saw Mr. Atofau, Contreras, and the defendant flee. RP 1651-52, 1654, 1655. Mr. Atofau told Mr. Mulitauaoepele that defendant and Contreras had, "jacked him." RP 1657. Mr. Atofau told Mr. Mulitauaoepele that the victim wasn't going to make it and that Contreras had shot the victim. RP 1658, 1660. Mr. Mulitauaoepele indicated that the victim had been making payments on a debt to defendant. RP 1663.

Jonathan Mayhall, who goes by Lanky, also knew the victim and was at the victim's apartment on December 11, 2006. 4RP 36, 37, 38. Defendant was at the apartment as well, smoking pot. 4RP 42. Contreras placed a gun on the table. 4RP 48, 90. Defendant eventually picked up that gun and pointed it at the victim. 4RP 53, 91, 146. Defendant said, "Remember Homey, just don't fuck me off." 4RP 53, 91. Defendant then pointed the gun on Mr. Atofau, who had brought his own gun into the apartment, and Contreras took the other gun from Mr. Atofau. 4RP 57, 58, 91. Defendant then backhanded the victim in the face with his hand that had the gun. 4RP 59, 91. The victim was then holding his nose. 4RP 60. Contreras then ran to the victim, hit him with extreme force in the back of the head and the gun went off. 4RP 61, 120. The victim screamed, blood ran out of his head and he leaned forward. 4RP 61. People, including defendant, started to flee. 4RP 62.

Roman Atofau was friends with the victim and also knew defendant. RP 2034, 2035. Mr. Atofau said that Contreras handed his gun to defendant. RP 2166-68. Defendant pointed the gun at the victim and said, "I want my shit." RP 2170. Defendant then pistol whipped the victim in the head with the gun. RP 2170-71, 2234. Defendant then said, "You fat mother fucker, you know what I could do to you?" RP 2205. The victim looked at Mr. Atofau and said, "I am bleeding Rome." RP 2171, 2234.

Blood was dripping from the victim's head. RP 2235. Defendant then aimed the gun at Mr. Atofau's head. RP 2171. Mr. Atofau heard a gun shot as he was leaving. RP 2175. Mr. Atofau said that the victim owed defendant money. RP 2251.

When police arrived on the scene, they found the victim, a heavysset male, with no pulse, lying next to a desk chair. RP 1704. The victim had bullet holes in his back. RP 1706.

The medical examiner found blood on the victim's face and noted that a blunt impact to the nose could be one of the causes of bleeding. RP 2079, 2080. There was no visible trauma to the nose but the medical examiner noted that it is possible to strike someone in the nose, make it bleed and not have external injuries. RP 2114, 2117.

Defendant told police that Contreras yelled at the victim and then pulled out a handgun and hit the victim on the head. RP 1728. When Contreras hit the victim on the head, the gun went off. RP 1728. Defendant said that he fled the apartment at that time. RP 1729. He claimed that the strike by Contreras was without warning. RP 1749, 1769. Defendant also said that the victim owed Contreras \$7,000 and that defendant himself had actually paid several thousand dollars to get the victim out of trouble with some drug dealers. RP 1730, 2315-16, 2444. Defendant claimed the only gun in the apartment was the one in

Contreras' possession. RP 1730. Defendant later changed his story and admitted there were two guns in the apartment as Mr. Atofau also had a gun. RP 1738, 1751. Defendant said that the victim was struck and killed because he owed money to a bunch of people but denied that the victim owed him any money. RP 1739, 1750, 2327

Defendant said he did not have a gun when he went to the victim's apartment. RP 2357. Defendant did admit that he grabbed the gun off the table and waived the gun. RP 2390-91. Defendant said he aimed the gun at the victim and said, "Don't fuck me off." RP 2391, 2516. He then pointed the gun at Mr. Atofau. RP 2392. Defendant then admitted to the jury that he hit the victim with his hand, but also admitted it was the hand with the gun. RP 2392. Defendant said he hit the victim in the face and that he wasn't sure if the gun made contact or not. RP 2393, 2515, 2516. Defendant also told the jury he was not claiming that he was justified in hitting the victim. RP 2394. Defendant said Contreras then ran to the victim, hit him in the head and the gun went off. RP 2395, 2396. When the gun went off, defendant ran. RP 2396, 2400, 2535. Defendant said the events in the apartment happened very fast, in a couple of seconds. RP 2659.

Defendant knew he wasn't supposed to possess a gun. RP 2423. Defendant buried the gun. RP 2412. Defendant denied saying he was

going to kill the victim. RP 2472. Defendant also claimed that he had to defend himself from Mr. Atofau which is why he picked up the gun. RP 2487. Defendant said he didn't intend to harm the victim but he did admit that he assaulted the victim. RP 2512.

C. ARGUMENT.

1. A UNANIMITY INSTRUCTION WAS NOT REQUIRED BECAUSE THE STATE CLEARLY INFORMED THE JURY WHAT CONDUCT FORMED THE BASIS FOR EACH ASSAULT COUNT AND THE STATE DID NOT CHARGE OR SUBMIT TO THE JURY MULTIPLE MEANS OF COMMITTING ASSAULT IN THE SECOND DEGREE.
 - a. A unanimity instruction was not required as the State clearly told the jury what conduct constituted each charge.

In Washington, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged has been committed. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). When the facts show two or more criminal acts that could constitute the crime charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specified criminal act. *State v. Crane*, 116 Wn.2d 315, 325, 804 P.2d 10 (1991). A separate unanimity instruction is not required, however, where the criminal acts are merely part of a continuing course of conduct. *Crane*, 116 Wn.2d at 330. Evidence tends to indicate a continuing course of

conduct if each of the defendant's acts promotes one objective and occurred at the same time and place. *See State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395, *review denied*, 129 Wn.2d 1016, 917 P.2d 575 (1996). "To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner." *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). In *Crane*, the Supreme Court held that the "continuous course of conduct" exception applied to an assault that occurred during a two-hour span. 116 Wn.2d at 330.

Here, consistent with RCW 9A.36.021(c), the trial court's unchallenged instructions informed the jury that it could find defendant guilty of assault in the second degree if it found beyond a reasonable doubt that defendant assaulted Luis Bernal with a deadly weapon. CP 259-296, instruction 21. The State was very clear what course of conduct constituted the assault against Luis Bernal that was charged in count X. *See* CP 106-108. In opening statement, the State told the jury that the assault in the second degree against Mr. Bernal was for defendant striking the victim in the face with a gun. RP 1323. The State told the jury in closing that defendant was guilty of assaulting Mr. Bernal with a gun. RP 2820. The State further clarified that Count X was uncontested in that defendant backhanded the victim in the face. RP 2827. The State went through the evidence that Ms. Kowalski, Mr. Mayhall, Mr. Atofau, and the defendant himself had all told the jury that defendant was armed with a

gun when he pointed the gun at the victim and then backhanded him with it. RP 2829. The State also made this clear in their PowerPoint presentation. *See* CP 239-258, page 2-4. The State clearly told the jury what behavior was the basis for the assault in the second degree committed against Mr. Bernal.

When spatial and temporal separations between acts are short, they can be said to be a continuing course of conduct. *See Love*, 80 Wn. App at 361 (*citing Petrich*, 101 Wn.2d at 571). When making this inquiry, the court looks to each of the acts that constitute the same course of conduct that make up one criminal charge. *Id.* Defendant's conduct meets the definition set out in *Love*, because it was a single enterprise with one objective. Defendant's actions—pointing the gun at Mr. Bernal, and then backhanding Mr. Bernal in the face with the gun, are inextricably linked and were done with the same objective of getting a message to the victim: not to “fuck him off.” *See* RP 2391, 2516. Defendant himself testified that these events took place in a manner of seconds. RP 2659. Defendant pointed the gun at the same person, Mr. Bernal, and then hit him with it immediately thereafter. Defendant's objective did not change during the brief series of events. Because defendant's actions were part of an ongoing enterprise with a single objective, no *Petrich* unanimity instruction was necessary.

Defendant argues that the State also told the jury that defendant assisted Contreras in committing an assault in the second degree on Mr.

Bernal. Brief of Appellant, page 17. However, the State clearly elected that this conduct, Contreras cracking Mr. Bernal across the skull, was the basis for the element of Murder in the Second Degree. The State told the jury that Contreras' assault on Mr. Bernal was the basis for defendant being an accomplice to the murder and that that particular assault made up the element of the murder charge. RP 2841, 2853-54. The State's PowerPoint also communicated the election of actions to the jury. CP 239-258, page 9-11. It was clear that the State elected what constituted an assault for the murder charge, in arguing the accomplice liability theory and what constituted assault in the second degree for Count X, in that defendant himself pointed a gun at Mr. Bernal and then struck him with it. There was no requirement for a *Petrich* instruction under these circumstances.

- b. The State did not allege alternative means of committing assault in the second degree and the definitional instruction did not create alternative means.

In Washington, the "assault" element is defined by the common law. *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994). The courts have arrived at three definitions of assault: actual battery, attempted battery, and creating an apprehension of bodily harm. *Id.*, *State v. Bland*, 71 Wn. App. 345, 353, 860 P.2d 1046 (1993) (citing *State v.*

Walden, 67 Wn. App. 891, 893-94, 841 P.2d 81 (1992)). To define assault, the trial court properly instructed the jury as follows:

An assault is an intentional touching or striking or cutting of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or cutting is offensive, if the touching or striking or cutting would offend an ordinary person who is not unduly sensitive.

An assault is also an act, done with the intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehensions and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 259-296, Jury Instruction No. 9.

These common law definitions do not constitute essential elements of the crime. *State v. Smith*, 159 Wn.2d 778, 788, 154 P.3d 873, 878 (2007). In *State v. Linehan*, 147 Wn.2d 638, 56 P.3d 542 (2002), the Washington Supreme Court held that alternative means of committing crimes are provided for in the Revised Code of Washington, not in the common law definitions. In *Smith*, the court further clarified the issue by holding that as the common law assault definitions are not alternative means of committing assault, they do not constitute essential elements of the crime; rather, the definitions “are merely descriptive of a term,

“assault,” that constitutes an element of the crime of second degree assault.” *Smith*, 159 Wn.2d at 788. Therefore, these definitions, or “manners,” are not essential elements of assault which the State must support with sufficient evidence. *Id.* With assault, the crime can be accomplished with actual force, a failed attempt at using force, or a threat of force. It does not matter in the laws’ eyes which manner the assault is committed, as long as the jury agrees that an assault occurred. *See Smith*, 159 Wn.2d at 789 (common law definitions of assault do not require jury unanimity or substantial supporting evidence on the record). This approach is logical given that it is often the case all three ways of committing the assault may occur simultaneously.

In the instant case, the State only charged defendant with one means of committing an assault in the second degree: assault with a deadly weapon. *See* CP 106-108, CP 259-296, Instruction 21. (*See* RCW 9A.36.021(1), seven different alternative means by which to commit assault in the second degree). The State did not charge any alternative means nor did the State allege any alternative means to the jury.² The State clearly charged and submitted to the jury only one means of committing assault in the second degree and that was under RCW 9A.36.021(1)(c), assault with a deadly weapon. As this is not an

² It appears that defendant has combined the standards for different acts and alternative means. The State will address these two different concepts separately.

alternative means case, the requirement of this Court to go through and determine whether sufficient evidence exists to support each separate means has not been triggered. See *Smith*, 159 Wn.2d at 790. The State did not create alternative means of committing an assault by proposing, and the court giving, the definitional instruction of assault. Further, the State only alleged and submitted to the jury one means of committing assault in the second degree. Finally, because the State only alleged one means of committing an assault, this Court does not need to engage in a sufficiency finding.³ Defendant's rights were not violated and no unanimity instruction was required.

2. WHERE THE PROSECUTOR'S ARGUMENT WAS NOT FLAGRANT OR ILL-INTENTIONED AS TO BE INCURABLE BY INSTRUCTION, THE DEFENDANT WAIVES THE ISSUE ON APPEAL WHEN HE FAILED TO OBJECT AT TRIAL.

- a. By failing to object to the prosecutor's remarks in closing argument, the defendant waived the issue on appeal.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged

misconduct is both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 718-19.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995), *citing State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Stenson*, 132 Wn.2d at 719, *citing Gentry*, 125 Wn.2d at 593-594.

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the

³ The State will address harmless error below in the second issue.

issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994), citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990).

Here, the trial court instructed the jury regarding burden of proof and reasonable doubt per WPIC 4.01:

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 259-296, Instruction 2.

The trial court also properly instructed the jury that:

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

statement, or argument that is not supported by the evidence or the law in my instructions.

CP 259-296, Instruction 1, *See* WPIC 1.02.

Defendant does not allege that the jury instructions were in error. Defendant did not object to the majority of the prosecutor's closing argument and specifically did not object to any of the arguments raised now in this appeal. That issue is waived unless defendant can show the remark is flagrant and ill-intentioned and prejudiced defendant. Defendant does not meet his burden.

- b. The prosecutor's argument was not flagrant or ill-intentioned and did not result in prejudice that could not have been cured by a jury instruction.

In the present case, as part of his explanation of reasonable doubt, the prosecutor made a "fill in the blank" reasonable doubt argument. RP 2894, CP 239-258, page 18. In two recent cases, this Court has found similar "fill in the blank" arguments to be misconduct. *See State v. Venegas*, 155 Wn. App. 507, 228 P.3d 813 (2010); *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009).⁴

⁴ It should be noted that this case was tried well before either the decision in *Anderson* or *Venegas*. This case was tried in January and February of 2008. *Anderson* was not decided until almost two years later on December 8, 2009. *Venegas* was not decided until over two years later on April 13, 2010.

Here, as in *Venegas* and *Anderson*, the prosecutor attempted to make a reasonable argument based on the law as given to the jury in the court's instructions. The prosecutor was clear in his argument that the burden of proof in a criminal case is on the State and that burden is proof beyond a reasonable doubt while defendant has the presumption of innocence. RP 2820, 2841, 2894. In rebuttal closing, the State reminded the jury again that the State bears the burden of proof. RP 2929. The prosecutor pointed the jurors to the reasonable doubt instruction and quoted the law directly from the jury instructions in his PowerPoint. RP 2893-4, CP 239-258, page 18. Nothing in the record indicates that he was acting in bad faith or trying to mislead the jurors. The prosecutor's statements were an attempt to expound on the concept of reasonable doubt. The language "a reasonable doubt is one for which a reason exists" is taken directly out of the instruction. CP 259-296, Instruction 2.

The State's argument mirrored the jury instruction and also explained the State's burden. "A 'reasonable doubt', at a minimum, is one based upon 'reason.'" "A fanciful doubt is not a reasonable doubt." *Victor v. Nebraska*, 511 U.S. 1, 17, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994) (citing *Jackson v. Virginia*, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A juror who has a reasonable doubt should be able to articulate a reason for that doubt and it can be as simple as "there was not enough evidence."

The explanation of the concept of “reasonable doubt” has challenged courts and attorneys for many years. In 1997, in considering a non-standard reasonable doubt instruction, Division I observed that: “Scholars will continue endlessly to debate the best definition of reasonable doubt.” *State v. Castle*, 86 Wn. App. 48, 62, 935 P.2d 656, review denied, 133 Wn. 2d 1014 (1997). That same year, Division I considered yet another nonstandard reasonable doubt instruction in *State v. Cervantes*, 87 Wn. App. 440, 942 P.2d 382 (1997). For a period of time, the *Castle* instruction was approved for general use. See 11 Washington Practice, Pattern Jury Instructions (2d edition, 1994), 4.01A (1998 pocket part). Eventually, in *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007), the Supreme Court requested that trial courts cease using the *Castle* instruction, in favor of the standard WPIC 4.01.

The appellate courts have found a number of different acts to be prosecutorial misconduct. *State v. Reed*, 102 Wn. 2d 140, 684 P.2d 699 (1984) is a notorious case where, despite defense objections, the prosecutor committed numerous acts of misconduct including insulting defense counsel and defense experts, pandering to the prejudices of the jury, and calling the defendant a liar. In *State v. Stenson*, 132 Wn.2d at 719-724, and *State v. Henderson*, 100 Wn. App. 794, 998 P.2d 907 (2000), the prosecutor elicited improper comments from witnesses regarding improper opinion (*Stenson*) and commented on the defendant’s right to remain silent (*Henderson*).

In *State v. Barrow*, 60 Wn. App. 869, 874-875, 809 P.2d 209 (1991), and *State v. Fleming*, 83 Wn. App. 209, 213- 214, 921 P.2d 1076 (1996), the prosecutor argued that in order to acquit, the jury had to find that the State’s witnesses were lying. In *Fleming*, the prosecutor also commented in closing on the defendant’s failure to present evidence. *Id.*, at 214. The Court of Appeals found that the prosecutor’s errors “pervaded” the closing. *Id.*, at 21.⁵

In the present case, the prosecutor did not engage in any of these flagrant acts. He attempted to argue reasonable doubt to the jury in the words of the instruction. This Court has subsequently found that argument improper. However, the jury was correctly instructed on the law. They were told what standards to apply and also to disregard any remarks that were not supported by the law or the court’s instructions. A jury is presumed to follow the court’s instructions regarding the proper burden of proof. *State v. Gregory*, 158 Wn.2d 759, 860-1-862, 147 P.3d 1201 (2006). The State’s remark was not flagrant or ill-intentioned. Even if this Court finds it was in error, the jury was still properly instructed and presumed to follow the court’s instructions on the law.

⁵ In contrast, see *State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007) (explaining that the term “prosecutorial impropriety” is a more appropriate term for a claim asserting improper statements by a prosecutor at trial than the traditional term of “prosecutorial misconduct”). Accord AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES http://www.abanet.org/leadership/2009/annual/summary_of_recommendations/One_Hundred_Eleven_A.DOC.

- c. The prosecutor's remarks were harmless error.

Any error in making the argument was harmless error. The central purpose of a criminal trial is to determine guilt or innocence. *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Neder v. United States*, 527 U.S. 1, 17, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)(internal quotation omitted). “[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” *Brown v. United States*, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973)(internal quotation omitted).

Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)(“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

In the present case, the jury clearly followed the court's instructions and held the State to its burden of beyond a reasonable doubt. The jury found defendant not guilty of murder in the second degree, which was charged under accomplice liability, not guilty of the assault in the second degree on Roman Atofau, not guilty of unlawful possession of a firearm and not guilty of intimidating a witness. CP 297, 299, 301, 305. In fact, the sole charge for which they returned a guilty verdict was on the count of assault in the second degree as it pertained to victim Luis Bernal. CP 302, RP 2948. The jury followed the court's instructions. It cannot be shown that the above argument in anyway caused a wrongful verdict. The jury held the State to its burden and found that it had only met its burden on one charge. They returned their verdict accordingly.

The State presented numerous witnesses who observed defendant point a gun at Mr. Bernal and then strike him with the gun. RP 1448, 2170, 2171, 2234, 4RP 53, 59, 91, 146. In fact, defendant himself admitted that he had a gun and that he hit Mr. Bernal with it. RP 2390-91, 2392, 2393, 2512, 2515, 2516. The charge of assault in the second degree against Luis Bernal was not disputed by the defense. In fact, in his closing, defense counsel told the jury, "I know and you know that he is guilty of assaulting Taco."⁶ RP 2927-28. There was clear evidence that

⁶ Defendant mistakenly attributes this remark to the State and uses it in their argument for a unanimity instruction. Brief of Appellant, page 25. The citation in their brief leads to the above quote which is clearly in defense counsel's closing.

defendant committed assault in the second degree against Mr. Bernal and defendant himself admitted such conduct. There is no evidence that the prosecutor's argument relieved the State of its burden or affected the jury's verdict. Any error in the argument was harmless.

3. DEFENDANT RECEIVED
CONSTITUTIONALLY EFFECTIVE
ASSISTANCE OF COUNSEL AS DEFENDANT
CANNOT SHOW DEFICIENT PERFORMANCE
OR PREJUDICE.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article 1, Sec. 22 of the Constitution of the State of Washington. The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* The court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that "the essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect."

The test to determine when a defendant's conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The test is as follows:

First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. See also *State v. Walton*, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995); *State v. Denison*, 78 Wn. App. 566, 897 P.2d 437, *review denied*, 128 Wn.2d 1006 (1995); *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995); *State v. Foster*, 81 Wn. App. 508, 915 P.2d 567 (1996), *review denied*, 130 Wn.2d 100 (1996).

State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 56 (1992), further clarified the intended application of the *Strickland* test.

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

Citing *Strickland*, 466 U.S. at 689-90.

Under the prejudice aspect, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Because the defendant must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel's performance was deficient. *Strickland*, 466 U.S. at 697, *Lord*, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d, at 335 (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S., at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510 U.S. 944 (1993). Defendant has the "heavy burden" of showing that counsel's performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of

a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S., at 689.

Defendant alleges that his counsel was ineffective for both failing to propose a unanimity instruction and failing to object to the State's closing argument. However, as shown above, no unanimity instruction was required as the State did not allege alternative means of committing assault in the second degree and clearly elected which acts should constitute each charge. In addition, defendant's counsel engaged in a prolonged discussion about jury instructions and even proposed instructions of his own. RP 2747-2781, 2786-2809, CP 230-238. As the unanimity instruction was not required, defense counsel was not required to propose one nor was there a basis for one to be given if it had been proposed. Counsel was not ineffective.

As to failing to object to the State's closing, defense counsel did object during the State's closing when he felt the State had misstated the legal standard or the law. RP 2821, 2942. However, as the State's fill in the blank argument mirrored the jury instructions, it's difficult to see how defense counsel should have known to object to the argument. Even if he had objected, it's not certain that his objection would have been sustained given that the argument did mirror the jury instruction and this Court had yet to render its decisions in *Anderson* or *Venegas*. Defense counsel cannot be said to be ineffective.

Further, the case law requires the court to view defense counsel's performance in a review of the entire record. In this case, defense counsel was a tireless advocate for his client. Defense counsel made many motions, made numerous objections, made halftime motions and put on a defense case. Defense was often successful, including getting defendant's trial severed from that of his co-defendant and not allowing his client to be referred to as "Scarface." RP 275, 338. Defense counsel was a true advocate and defendant cannot show that he was prejudiced in any way. The only count defendant was found guilty of was the one defendant himself admitted to and his defense counsel told the jury he did not have a defense for. Clearly defense counsel was a successful advocate for his client and defendant cannot show deficient performance or prejudice. Counsel was not ineffective.

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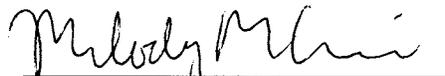
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D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the conviction and sentence below.

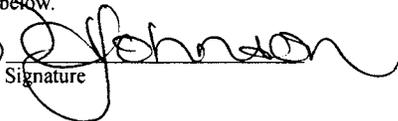
DATED: AUGUST 23, 2010.

MARK LINDQUIST
Pierce County
Prosecuting Attorney


MELODY M. CRICK
Deputy Prosecuting Attorney
WSB # 35453

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8/23/10 
Date Signature