

TABLE OF CONTENTS

A. Assignments of Error1

B. Issues Pertaining to Assignments of Error.....1

C. Statement of the Case.....3

 1. Procedural Facts.....3

 2. Trial Procedure.....8

 3. Trial Facts.....12

D. Argument.....14

 1. Joinder of Defendants for Trial was Error.....14

Co-defendants were joined by mistake by a void order of joinder. The cases were not joined by operation of the court rule; the cases should have been tried separately. Improper joinder resulted in violation of Ms. Cooper’s right to speedy trial.

2. Denial of Defendant Cooper’s Request to Call Victim Nate Hoffman in Her Defense24

Defendant Cooper was denied her 6th Amendment right to call relevant witnesses and present a defense due to trial court’s denial of her request to call the alleged victim, Nate Hoffman, as a witness.

3. Appearance of Fairness Doctrine, Cumulative Error and Prosecutorial Misconduct.....30

The trial court committed numerous errors; the prosecutor committed misconduct including expressing his personal opinion as to a witness’s veracity; cumulative error mandates reversal.

4. Insufficient Evidence to Sustain a Conviction of Robbery.....48
The evidence was insufficient to establish a conspiracy to
commit robbery 1, in that no witnesses testified to an agreement to rob
anyone, or to rob anyone by use of a firearm or weapon.

E. Conclusion.....49

TABLE OF AUTHORITIES

United States Constitution, amendment 6.....23, 26
 Amendment 14.....26

Washington Constitution, article 1, s. 22.....23

State Statutes

 RCW 9.28.040.....49

 RCW 9A.56.200.....49

United States Supreme Court cases:

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297
(1973).....26

Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333
(1980).....29

Galvan v. Press, 74 S.Ct. 737, 347 U.S. 522 (1954).....30

In Re Murchison, 349 U.S. 133, 75 S.Ct. 623 (1955).....31

Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019
(1967).....27

Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972)
.....26

Federal Cases:

U.S. v. Romano, 583 F.2d 1 (1st Cir. 1978).....30

State cases:

Chrobuck v. Snohomish County, 78 Wn.2d 858, 480 P.2d 489 (1971)...31

Esmieu v. Schrag, 88 Wn.2d 490, 563 P.2d 203 (1977).....14

Harris v. Hornbaker, 98 Wn.2d 650, 658 P.2d 1219 (1983.....31

In Re Carpenter, 160 Wn.2d 16, 155 P.3d 937 (2007).....28

Smith v. Skagit County, 75 Wn.2d 715, 453 P.2d 832 (1969)32

State v. Allen, 57 Wn. App. 134, 787 P.2d 566 (1990).....37

State ex. rel. Barnard v. Board of Educ., 19 Wn. 8, 52 P. 317 (1898).....32

State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007).....36

State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995).....37

State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956).....37

State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980).....48

State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001).....42, 43, 44

State v. Elliot, 121 Wn. App. 404, 88 P.3d 435 (2004).....27

State v. Hanson, 58 Wn. App. 504, 793 P.2d 1001 (1990)33

State v. Henderson, 100 Wn. App. 794, 998 P.2d 997 (2000).....40

State v. Jones, 144 Wn. App. 284, 183 P.3d 307 (2008).....38, 39, 40

State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991).....23

State v. Moreno, 147 Wn.2d 500, 58 P.3d 265 (2002).....31

State v. Ra, 144 Wn. App. 688, 175 P.3d 609 (2008)35

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992).....48

<u>State v. Sandoval</u> , 137 Wn. App. 532, 154 P.3d 271 (2007).....	36
<u>State v. Tidwell</u> , 32 Wn. App. 971, 651 P.2d 228 (1982).....	23
<u>Washington State Medical Disiplinary Board v. Johnston</u> , 99 Wn.2d 466, 663 P.2d 457 (1983).....	32
<u>Westside Hilltop Survival Committee v. King County</u> , 96 Wn.2d 171, 634 P.2d 862 (1981).....	31. 32
Court rules:	
CrR 2.1(b).....	23
CrR 3.2.....	4
CrR 3.3.....	23
CrR 4.3(b).....	4, 20
CrR 8.3(b).....	1, 18, 24, 35, 40
ER 612.....	47
RPC 1.6.....	28
RPC 1.7.....	28
RPC 3.4.....	29
RPC 3.8.....	29
RPC 8.3.....	29
CJC 3(D)(1).....	35

Treatises:

5D Washington Practice, Handbook on Washington Evidence, ER 612
(2008-09 ed.).....47

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it refused to vacate an order of joinder of defendants for trial.
2. The trial court erred when it ruled that the defendants were joined for trial by operation of a court rule.
3. The trial court erred when it refused to dismiss Dawn Cooper's case for violation of speedy trial or governmental mismanagement under CrR 8.3(b).
4. The trial court erred when it refused to allow Dawn Cooper to call the alleged victim of the charged crime in her defense, ruling that the victim's testimony was irrelevant.
5. The trial court erred when it refused to dismiss the case for prosecutorial misconduct, cumulative error and violation of the Appearance of Fairness Doctrine.
6. The conviction for conspiracy to commit robbery first degree must be reversed and dismissed because there was insufficient evidence to prove that Dawn Cooper conspired to commit a first degree robbery.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Did the trial court err when it refused to vacate an order of joinder that was entered without due process to the defendant Dawn

Cooper, where an order entered without notice and opportunity to be heard is void?

2. Did the trial court err in ruling that the co-defendants cases were joined by operation of court rule, where no part of the rule was complied with?

3. Did the trial court err when it refused to dismiss Ms. Cooper's case for violation of speedy trial and governmental mismanagement of the case, where she repeatedly asserted her right to speedy trial and her case was never properly joined with other defendants' cases due to improper joinder, her speedy trial time ran on February 4, 2008, and her trial started June 18, 2008?

4. Did the trial court err when it refused to allow Ms. Cooper to call the alleged victim of the offense in her defense, where the victim was named as a witness by the State, named in the State's opening and closing arguments, and would have been called by the State except for a conflict of interest of counsel for defendant David Reading that was not disclosed to Ms. Cooper?

5. Did the trial court err when it when it refused to dismiss for governmental mismanagement and prosecutorial misconduct, where the parties all agreed, pursuant to motions in limine, to exclude evidence of drugs, uncharged crimes, kidnapping, threats, etc., and the prosecutor

repeatedly violated the agreements by eliciting excluded evidence, repeatedly led witnesses on direct examination, and openly and unmistakably told the jury his personal opinion of a witness' credibility, elicited from a police officer her opinion of Ms. Cooper's veracity, and the trial court repeatedly displayed open anger towards defense counsel and bias towards the prosecutor?

6. Whether the charge of conspiracy to commit robbery first degree must be reversed and dismissed because there was insufficient evidence that Ms. Cooper had entered into an agreement to commit a first degree robbery?

C. STATEMENT OF THE CASE

1. Procedural Facts.

Dawn M. Cooper was arrested and jailed on November 30, 2007. (CP 6). On December 3, 2007, she was brought before the Thurston County Superior Court for a preliminary appearance. The court found probable cause for Conspiracy to Commit Robbery and Kidnapping 1, and held her in jail on bail. (CP 7). The case finally went to trial on June 18, 2008, (RP 7 6/18/08); Ms. Cooper had never waived her right to speedy trial.

An Information charging Ms. Cooper with Conspiracy to Commit Robbery in the First Degree was filed on December 5, 2007. That

information listed on the right hand side of the caption under a heading titled “Co-Defendant”, the names of Donald M. Waller, David W. Reading, and Janus Tuli Afo, with separate cause numbers listed for each of those defendants. (CP 8); CrR 4.3(b).

Ms. Cooper was arraigned on December 11, 2007 and trial was set for the week of February 4, 2008. (CP 9-11). Ms. Cooper’s last date for trial was then February 11, 2008, by court rule. CrR 3.2.

On January 7, 2008, the State filed a document entitled “Motion to Join Defendants For Trial (CrR 4.3(b))”. The motion requested that the court enter “an order to join the defendant’s criminal cases for trial for the following reasons: The defendant is charged with accountability for each offense included, that the offenses charges were part of a common scheme or plan, and were so closely connected in respect to time, place, and occasion that it would be difficult to separate proof of one charge from proof of the other.” (CP 18).

The State’s motion to join the defendants came on for hearing on January 17th, and Ms. Cooper requested a one-week continuance to review the motion. The trial court, Judge Anne Hirsch, granted that request and continued the motion to January 24th. (CP 20); (Verbatim Report of Proceedings, January 17, 2008, 7-9).

But, an Order Joining Cases for Trial was signed by Judge Hirsch by mistake on January 17th. The record does not reflect how that happened; it is signed only by Judge Hirsch and the prosecutor. (CP 21). The State's Motion to Join Defendants for Trial was never heard.

On January 24th, the case was not on the docket. The prosecutor told Ms. Cooper's counsel that there had been a mistake, so the case would not be called, and counsel could just leave and it would be handled at a later time. (CP 24-25); (CP 27).

Ms. Cooper appeared for hearing on January 30th. There, she learned for the first time that an order joining her case with the other defendants for trial had been entered on the 17th. Presumably, the prosecutor knew that the order had been mistakenly entered on January 17th; he did not tell Ms. Cooper. (RP 12, 1/30/08). Ms. Cooper (and Mr. Reading) objected to the joinder and objected to a continuance of the trial date, (RP 12, 16, 1/30/08); (CP 23), and asserted her right to a speedy trial. (RP 18, 1/30/08). The prosecutor argued that the cases were joined by operation of a local rule or a local custom that was adopted to conform to the Superior Court Administrative Rules. (RP 19). The Court ultimately continued Ms. Cooper's case beyond her speedy trial time, to March 17th. (RP 14, 22, 1/30/08); (CP 23). The court noted that "I'm not sure that an order should have been signed that day", referring to the order of joinder

that was entered on the 17th. (RP 1/30/08 pg. 66-67). The court also stated that Ms. Cooper needed to file a motion to sever. (RP 1/30/08 pg. 72).

On February 1, 2008, Ms. Cooper filed a Motion to Vacate Order of Joining Defendants for Trial. (CP 24). On February 12th, Ms. Cooper filed a Brief in Support of Separate Trial. (CP 26). That brief requested either severance of the defendants' cases or dismissal of her case for violation of her right to speedy trial. (CP 36).

Ms. Cooper's motions were noted for hearing on March 13th (CP 46), but was continued to the trial date of March 17th by the court. (CP 47). Ms. Cooper strenuously argued for severance and/or dismissal for violation of her right to speedy trial, but her motions were denied. (CP 48). Also on March 17th, the court again continued Ms. Cooper's trial date, to May 19th. The record does not disclose the reason for the continuance, nor does it show good cause for the continuance. (CP 49); (RP. 14-17, 25-31, 3/17/08).

At the March 17th hearing, the court stated as follows:

As far as the court is concerned, we are here for two matters today. One is to address dates for all the remaining court hearings in all three cases, including trial, and the other matter is regarding the motion by Ms. Cooper to vacate the court's order joining the matters for trial. Frankly, one of the reasons I made the comments I made last time is because it appears to the court that the earlier order was not properly entered. It was entered by some

kind of inadvertence or accident because the court had earlier indicated that it was going to have a hearing on Mr. Finlay's request that the matters be severed or his opposition to joinder, depending on how you want to phrase it.

I have reviewed each of the files. I reviewed them last week, I reviewed them again today, and I am pretty comfortable that this court never intended to sign that order.

(CP 77-78, 3/17/08).

On May 6th, the State filed a Motion to Continue Trial. That motion stated that Det. Liska was scheduled for training in Spokane during the week of May 19th, and the training had been scheduled in January, 2008. The State requested a one week continuance. (CP 173). There was no indication why the State did not tell the court about the officer's training at any of the prior hearings.

Ms. Cooper filed a Motion to Dismiss or for Other Relief Due to Violation of Time for Trial Due to Lack of Proper Joinder. That motion was denied by Judge Strophy by order dated May 29, 2008. (CP 174). The Motion to Dismiss was the subject of a motion for discretionary review and Motion for Emergency Stay of Trial filed by Ms. Cooper with this Court under cause number 37831-1-II. By order dated August 19, 2008, this Court consolidated the motion for discretionary review with this direct appeal. Therefore, this brief will attempt not to re-argue all of the facts and law set forth in the previous appeal, but Ms. Cooper requests that

all of her pleadings and exhibits in that appeal be incorporated into this appeal pursuant to this Court's order of consolidation.

2. Trial Procedure.

The case was called for jury trial on June 18, 2008, Judge Chris Wickham presiding. The court stated that it wanted "to put some things on the record related to what we spoke about earlier this morning". (RP 8, 6/18/08), referring to a chambers conference in which the parties had agreed to exclude reference to certain matters including uncharged crimes. (CP 181); (RP 7-10, 6/18/08).

Defendant Waller asked the court to exclude any mention of a baggie of marijuana found in the car that the three male defendants were in, and the court granted that; the prosecutor had no objection. (RP 8). Ms. Cooper requested that there be no mention of a nickname for Mr. Reading, "Boogeyman", no mention of uncharged crimes, and no mention that the object of the alleged crimes was a drug debt. The prosecutor stated that he would not talk about drug debts until there was evidence brought in on that subject, and that he would not mention the nickname "Boogeyman" in his opening statement but that it might go to identification. The court ruled that to the extent the motions were related to opening statement they were granted, and that during the evidentiary phase of the trial, it could be dealt with at sidebar. (RP 9-10).

Counsel for Mr. Waller then requested that the court exclude any mention of a prior incident involving Mr. Afo and witness Kristinna Whitt where Mr. Afo allegedly threatened and intimidated her into helping him find someone who owed him money. The prosecutor stated that he was not “going to go there”. (CP 26).

In his opening instructions to the jury, the trial judge stated that defendants Cooper, Reading, and Waller were charged with one count of conspiracy to commit either robbery in the first degree and/or burglary in the first degree. (RP 28). The court was referring to amended informations that had been filed by the prosecutor without the court’s permission and without an arraignment on those informations.

The court also instructed the jury on reasonable doubt as follows: “Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant’s guilt. There are very few things that we can know in this world with absolute certainty, and in criminal cases, the law not (sic) require proof that overcomes every possible doubt.” (RP 31). This is the disapproved *Castle* instruction, and Ms. Cooper was not given notice that the court intended to use it.

On June 23rd during the trial, a chambers conference was held. Afterward, Ms. Cooper informed the court on the record that she was objecting to the court’s ruling in chambers that she would not be allowed

to call David Nathan “Nate” Hoffman to the stand in her defense. Due to the court’s ruling, Ms. Cooper moved to sever her case from the others, and for a mistrial. (RP 220-222). The court indicated that in chambers conference, Ms. Cooper said that she would call Mr. Hoffman in her case, but the State objected. The court withheld ruling until the end of the State’s case. (RP 222-23).

After the State rested, Ms. Cooper informed the court again that she wished to call David Nathan Hoffman in her defense. Mr. Hoffman was originally listed as a State’s witness on the State’s original Witness List, (CP 22), its First Supplemental Witness List, (CP 38), and its Second Amended Witness List, (CP 165). Mr. Hoffman was not listed on the State’s three subsequent witness lists, due to a conversation that the State had with Mr. Woodrow, counsel for Mr. Reading, indicating a possible conflict of interest for Mr. Woodrow should Mr. Hoffman be called as a witness. This potential conflict of interest was not disclosed to either Mr. Waller or Ms. Cooper until the chambers conference during trial.

During the State’s direct examination of Kristinna Whitt, the prosecutor asked her whether she knew of anyone named David Reading, and she answered that she knew him as “**Boogeyman**”, that she had heard of him as the “**Boogeyman**”. (RP 245). Objection was proffered by Ms. Cooper, based on the motions in limine, and the court sustained the

objection and directed the jury to disregard the witness' statement. (RP 245). The prosecutor immediately followed up with the question, did the name David Reading mean anything to you? (RP 245). The prosecutor also asked Ms. Whitt if Mr. Afo told her why he was there, she answered that he wanted her to help him find somebody, an objection was sustained on the grounds of hearsay, and the jury was instructed to disregard the answer.

A bit later, the prosecutor asked Ms. Whitt, why she wanted to meet Mr. Afo at the store, and she answered that she didn't want anything happening at her parents' house. (RP 257). He also asked her whether she agreed to help find Nate, and **she answered that she didn't have any choice.** (RP 258). The prosecutor asked her, "**Now, you had been told to try to locate Nate?**" (RP 263). Later again, the prosecutor asked Ms. Whitt whether she heard Mr. Afo say anything to the other men, and she answered that he said, "**Should I take my hostage with us?**" Ms. Cooper objected on the grounds of the motions in limine. (RP 266-67). The court stated that it had reviewed the record on the motions in limine and said that this particular issue was not discussed on the record, although the judge recalled that there was a discussion about it in chambers. (RP 267-68). The court later recalled that there was an agreement not to mention uncharged crimes. (RP 276-77).

Counsel for Mr. Waller stated that his notes indicated that there was to be no mention of suspicion of kidnapping charge and no mention of prior kidnapping incident. (RP 268). Counsel for Ms. Cooper stated that he had made a motion to preclude any mention of uncharged crimes, of which kidnapping would be one, and again mentioned the potential for contradictory defenses if the kidnapping testimony came in, stated that there had been agreement by all parties in chambers, adopted by the court, that it not come in, and moved again for severance or for a mistrial. (RP 269-274). The prosecutor stated as follows: **“When we were in chambers last week, I agreed that I would not make any reference to a complaint about kidnapping, any pending charges of kidnapping, any allegations of kidnapping . . .”** The court agreed that there was an agreement not to mention uncharged crimes, and ordered that it be excluded. The court ruled that it would strike the response and instruct the jury to disregard it. (RP 276-77).

3. Trial facts.

November 27, 2007, at about 9:30 a.m. in broad daylight, three unknown men were seen approaching a duplex in Thurston County. (RP 44-45, 72, 89).

One man, later identified as defendant Waller, went to the front door of the residence, one of the other men went to the bay window area.

Mr. Waller may have pushed the door with his shoulder. (RP 75). The man at the bay window may have tried to open the window. (RP 76). One witness testified that the men were wearing hooded sweatshirts with their hoods on. (RP 76). No entry was made, and one of the man talked to a neighbor and asked if Nate was home. The neighbor didn't know who Nate was, the man said okay, and the three men then left. (RP 48).

The vehicle that the three men were in was chased by the police, and the driver, Mr. Reading, drove recklessly in a fruitless attempt to get away. The vehicle stopped and the men jumped out and ran, but were apprehended. Mr. Waller was wearing a mask for quad riding that covered the lower part of his face; a firearm was found in the vehicle. No witness saw any person with possession of the pistol. (RP 72-156).

The evidence showed that Dawn Cooper, Janus Afo, David Reading, and Kristinna Whitt had gotten together to try to find Nate Hoffman. Ms. Cooper, Ms. Whitt and Tara Miller stayed behind at a person named Kathy's house while the three men left to attempt to locate Mr. Hoffman's residence. Mr. Hoffman owed Mr. Reading money. There was no testimony about any agreement to rob or burglarize Mr. Hoffman or his residence; Mr. Afo testified that he personally believed that Mr. Hoffman might get beat up. He put the odds at 50/50. (RP 368). Ms. Cooper did not testify, but a detective questioned her when she voluntarily

appeared at the police station and testified that Ms. Cooper also thought Mr. Hoffman might get beaten up. That part of Ms. Cooper's statement was off the record at her request. (RP 246-367). The evidence suggested that Mr. Hoffman might have gotten beaten up over the debt if found, but he was not found, and he might not have gotten beaten up. There was no testimony that anyone planned to rob him.

D. ARGUMENT

I. Joinder of the defendants for trial. Ms. Cooper has argued extensively, both in the trial court and in the Court of Appeals in her motion for discretionary review that (a) the trial court should have vacated the erroneous and void order of joinder; (b) that the defendants were not joined by operation of court rule; and (c) that consequently, her right to speedy trial and to separate trial was violated.

The problem can be stated in a nutshell as follows: Dawn Marie Cooper's case was joined with the cases of three other defendants for trial when an order of joinder was mistakenly entered on January 17, 2008. That order was void for lack of due process; Ms. Cooper had no notice or opportunity to be heard prior to its entry, and had in fact requested and received a continuance of the hearing. "An order based on a hearing in which there was not adequate notice or opportunity to be heard is void." Esmieu v. Schrag, 88 Wn.2d 490, 497, 563 P.2d 203 (1977).

The trial court denied Ms. Cooper's oral request to vacate the order of joinder when Ms. Cooper first learned of it on January 30th; two weeks after the entry of the order. Ms. Cooper then filed a written motion to vacate the order or to dismiss the case. That motion was heard in March. The trial court ruled that the cases had been joined from the outset by operation of the charging documents and a court rule, so the order of joinder was superfluous, and denied the motion. However, as shown in the motion for emergency stay, there does not appear to be a good faith basis to argue that the cases were joined by the charging documents.

Therefore, since the original order of joinder was void, if the cases were not joined by operation of the charging documents, Ms. Cooper's conviction must be dismissed for violation of her right to speedy trial. Her speedy trial time expired on February 4th.

Dawn Cooper was originally charged with Conspiracy to Commit Robbery First Degree. (CP 8). That charge arose out of an incident that involved three other defendants, Janus Afo, David Reading, and Donald Waller. None of the defendants were charged with the same offenses and none of the charging documents contained an allegation that the offenses were part of a common scheme or plan or were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others.

The following is taken from the record of Ms. Cooper's motion for discretionary review, and is a list of the various defendants' original and amended charging documents with the various charged offenses:

Donald Waller:

- A. Original Information filed November 30, 2007
Charges: Unlawful Possession of a Firearm in the First Degree (UPF1).
Co-defendants listed: **David Reading, Janus Afo;**
- B. First Amended Information filed December 28, 2007.
Charges: UPF1, Conspiracy to Commit Robbery1
Co-defendants listed: David Reading, Janus Afo, Dawn Cooper.
- C. Second Amended Information filed March 6, 2008.
Charges UPF1, Conspiracy to Commit Robbery1 and/or Burglary 1.

Co-defendants listed: **None.**

David Reading:

- A. Original Information filed November 30, 2007.
Charges: UPF1; Attempting to Elude a Pursuing Police Vehicle (Felony Elude).
Co-defendants listed: **Donald M. Waller, Janus Afo.**
- B. First Amended Information filed 12-28-07.
Charges: UPF1; Felony Elude.
Co-defendants listed: Waller, Afo, Cooper.
- C. Second Amended Information filed 3-6-08
Charges: UPF1; Felony Elude; Conspiracy to Commit Rob1 and/or Burg1.
Co-defendants listed: **None.**

Janus Afo:

- A. Original Information filed: 12-7-07.
Charges: UPF1.

Co-defendants listed: Reading, Waller, Cooper.
B. First Amended Information filed 12-28-07.
Charges: UPF1; Conspiracy to Commit Rob1.
Co-defendants listed: Reading, Waller, Cooper.
C. Second Amended Information filed 3-12-08.
Charges: Conspiracy to Commit Residential
Burglary.
Co-defendants listed: *None*.

Dawn Cooper:

A. Original Information filed 12-5-07.
Charges: Conspiracy to Commit Rob1.
Co-defendants listed: Waller, Reading, Afo. (RP
436).

B. First Amended Information filed 3-6-08.
Charges: Conspiracy to Commit Rob1 and/or
Burg1.
“Jointly charged with Co-defendants: *None*.”

(RP 436) (Exhibits to Motion for Discretionary Review).

The State filed a Motion to Join Defendants on January 7, 2008.
(CP 18). That motion sought to join the four defendants listed above for
trial, and contains the following language: **“The defendant is charged
with accountability for each offense included, that the offenses
charges were part of a common scheme or plan, and were so closely
connected in respect to time, place, and occasion that it would be
difficult to separate proof of one charge from proof of the other.”**

That quoted language does not appear in *any* of the informations filed in
the above cases.

Ms. Cooper filed a Motion to Vacate Order Joining Defendants for Trial, (CP 24-25), and a Brief in Support of Separate Trial. (CP 26-36). Ms. Cooper filed another motion asking the court to dismiss her case for the same reasons; that was heard and denied on May 29th. (CP 174). Ms. Cooper asked the court for relief on many occasions; first in January, then in March, then in May, then a Motion and Memorandum For Dismissal Per CrR 8.3(b) and/or Mistrial (CP 194-197), then in her motion for discretionary review to this court.

The quoted language in the Motion belongs in a charging document, if the prosecutor intends to charge co-defendants in such a way that they are automatically joined for trial. Further, Ms. Cooper's original information was not filed until after the others', none of the original informations charged the same offenses as the other defendants' informations did, and none of the informations contained the required language.

The only indication that others were charged in the same incident was a notation underneath the right side of the caption that says "Co-Defendant" and lists the names of the other defendants along with their cause numbers. But, they are not consistent with each other in that Waller's original information only contains the names of Reading and Afo, but not Cooper; Reading's original information contains the names of

Waller and Afo but not Cooper; Afo's contains all three other defendants, as does Cooper's original information.

The second informations are still different, in that Waller's contains the names of defendants Reading, Afo, and Cooper but his third information contains none of the other names; Reading's second information lists no co-defendants; Afo's second information lists Reading, Waller and Cooper, but his third information lists none of the others; Cooper's second information lists *none* of the other defendants.

Further, there is a difference in terminology in the informations. In the original informations that list co-defendants, the term used is "co-defendants". In the subsequent informations, the terminology is found to be "Jointly Charged with Co-Defendant(s):". The latter terminology, "Jointly Charged with Co-Defendant(s):", is clearly designed to notify a defendant that her case is joined for trial with other defendants' cases. But, in *none* of the informations where this language is used any defendants listed. Thus, the clear notice to a defendant is that her case is *not* joined with any other cases.

A First Amended Information was filed in Dawn Cooper's case on March 6th. (RP 436) (Exhibits to Motion for Discretionary Review). That information contains the language, "Jointly Charged with Co-Defendant(s): N/A". If the State undertakes to charge a citizen with a

criminal offense, particularly a felony criminal offense, it bears the burden of proper notice, and any drafting ambiguities or errors must be construed in favor of the defendant, who is presumed innocent.

The court rule that discusses the joinder of defendants for trial reads as follows:

Joinder of Offenses and Defendants, CrR 4.3 (b):

Two or more defendants may be joined in the same charging document:

- (1) When each of the defendants is charged with accountability for each offense included;
- (2) When each of the defendants is charged with conspiracy and one or more of the defendants is also charged with one or more offenses alleged to be in furtherance of the conspiracy; or
- (3) When, even if conspiracy is not charged and all of the defendants are not charged in each count, it is alleged that the several offenses charged:
 - (i) were part of a common scheme or plan; or
 - (ii) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others.

These defendants were not joined by operation of the rule. First, they were not charged in the same charging document. Each was charged in a separate charging document. When defendants are charged correctly pursuant to the rule, they are all listed in the caption as defendants, for example here as “State of Washington, Plaintiff, v. Dawn Cooper, Janus Afo, David Reading, Donald Waller, Defendants. In the body of the charging document in the charging language itself, the following words

must be included: “[t]he defendant is charged with accountability for each offense included, that the offenses charges were part of a common scheme or plan, and were so closely connected in respect to time, place, and occasion that it would be difficult to separate proof of one charge from proof of the other.”

Without those words in the charging language (or in fact anywhere on the document) and without the defendants all listed as defendants on the same charging document, the rule has not been followed and the cases are not joined.

Here, section 1 of the rule does not apply because each of the defendants is not charged with accountability for each offense. Cooper was charged only with Conspiracy to Commit Rob1. Waller was charged only with UPF1. Reading was charged only with Felony Elude. Afo was charged only with UPF1. (Exhibits to Motion for Discretionary Review). There is no indication in this charging decision that these defendants were to be charged and tried jointly. It was not done.

Section 2 of the rule does not apply because it requires each of the defendants to be charged with conspiracy. Only Cooper was so charged. The State may have tried to fix that with the Amended Informations, but if the cases were not joined from the outset, then they were not properly joined and Ms. Cooper’s speedy trial period has passed due to no fault of

her own. In point of fact, she demanded her right to speedy trial on the record at the hearing where she first learned that an order of joinder had been entered without her presence, consent, or knowledge.

Section 3 of the rule does not apply, either. That section reads in full as follows:

- (3) When, even if conspiracy is not charged and all of the defendants are not charged in each count, it is alleged that the several offenses charged:
- (i) were part of a common scheme or plan; or
 - (ii) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others.

The rule states that, where each defendant is not charged with conspiracy and all of the defendants are not charged in each count, *it is alleged that* the several offenses charged were part of a common scheme or plan or were so closely connected in respect to time, place and occasion that it would be difficult to separate proof on one charge from proof of the others. *There is no such allegation in any of the informations.* The rule is clearly and unambiguously speaking to charging language. It would be an absurd interpretation to insist that such an allegation can be only in the mind of the prosecutor. It must be alleged, and it was not done here. The rule was not complied with; this Court must in fairness and justice find that these cases were not joined by operation of the rule.

That being so, Ms. Cooper is entitled to have her conviction reversed for violation of her right to speedy trial.

All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against her. Const. art. 1, § 22 (amend. 10) provides in part:

In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him, ...

U.S. Const. amend. 6 provides in part:

In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation; ...

CrR 2.1(b) provides in part that

the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991).

CrR 3.3 provides that it is the responsibility of the court to ensure that a defendant receives a speedy trial. It is also the trial court's duty to make an adequate record of the reasons for noncompliance with a speedy trial period. State v. Tidwell, 32 Wn.App. 971, 978, 651 P.2d 228 (1982); CrR 3.3(f) ("The court must state on the record or in writing the reasons for the continuance."). Because Ms. Cooper was in custody, she had the

right to be tried within 60 days of her arraignment on December 5, 2007; yet she was not. Her conviction should be reversed and her case dismissed.

II. Denial of Ms. Cooper's request to call Nathan Hoffman in her defense. Ms. Cooper informed the trial court that she had spoken to the alleged victim of her case, David Nathan Hoffman, in the county jail during the trial. The declaration of counsel, which is part of the Motion and Memorandum for Dismissal Per CrR 8.3(b) and/or Mistrial, states in full as follows:

I, Bruce Finlay, declare as follows: I am the attorney for the defendant herein. I make this declaration from my best knowledge and memory. There is not a complete record for some of the allegations contained herein. There were at least two conferences in the judge's chambers with the judge and all four lawyers involved in this case, Mr. Bruneau, Mr. Hack, Mr. Woodrow, and Mr. Finlay. At one of those conferences, I brought up a potential conflict of interest for Mr. Woodrow. I intended to call the victim of this alleged conspiracy, David Nathan Hoffman, or "Nate" as the witnesses had called him, to the stand to testify for Ms. Cooper. However, in an interview with Mr. Hoffman at the jail on Friday, June 20th, he told me and private investigator Dan Morse that he had retained Mr. Woodrow to represent him in January of this year on pending forgery charges and in his capacity as a potential witness in this case, as he said that Det. Kolb had been trying to get hold of him and he did not want to give a statement.

Mr. Hoffman stated that he told Mr. Woodrow his version of what happened in the incident that caused the present charges against Ms. Cooper and the other defendants. Mr. Woodrow withdrew from his representation about 6 weeks ago.

Mr. Hoffman stated that he owed Mr. Reading \$1500; that it was in the nature of a friendly debt; that he had not yet been asked to pay it back; that his cell phone had been lost or stolen so all he had was voice messaging but that Mr. Reading and Ms. Cooper had his number he believed, and that no one had yet asked him for the money. Thus, he felt that there would be no reason for hard feelings. He never received any kind of threats from anyone regarding the debt, and that if he had been contacted, he believes that he would have been able to pay the debt.

Mr. Woodrow stated in Chambers that he did not represent Mr. Hoffman in this matter, but that Mr. Hoffman had told him his entire story about this case. I brought this up in chambers because I believed that Mr. Woodrow had a conflict of interest, in that he would not be able to cross-examine Mr. Hoffman. It appeared that Mr. Woodrow's representation of Mr. Reading would be materially limited or compromised and could even cause a mistrial or prevent Ms. Cooper from calling Mr. Hoffman in her defense. The judge became angry with me and told me loudly that Mr. Hoffman was not a victim and then that his testimony was not relevant and that he would not be inclined to allow me to call him in Ms. Cooper's defense.

When we went back in the courtroom, I tried to make a record on several occasions of this conversation in chambers but the judge again became obviously and openly angry at me in the courtroom on the record. The judge had become angry with me at an earlier occasion on the record when I repeatedly tried to make a record of a snafu with juror #41 who was listed on defense counsels' jury panel lists as present but was later found not to be in the courtroom. I felt that this needed to be clear on the record and I believe that is why the judge became angry with me. I believe the record will show that I tried three times to place the juror #41 situation on the record, with the judge cutting me short each time.

I believe that Mr. Hoffman's testimony would be admissible and helpful. I believe that the judge's ruling excluding his testimony violates these constitutional rights: 14th Amendment due process right to present a defense, sixth amendment right to compulsory process, and sixth amendment right to counsel. I believe that Mr.

Woodrow has an actual conflict of interest and should have immediately notified the judge and counsel. In the chambers conference, both Mr. Woodrow and Mr. Bruneau stated that Mr. Woodrow had told Mr. Bruneau about the potential issue of a conflict, and that Mr. Bruneau had accordingly not put Mr. Hoffman on his subsequent amended witness lists. But, neither Mr. Finlay, Mr. Hack, nor the judge were told about the potential conflict and that prevented it from being taken up in time to prevent damage to Ms. Cooper's defense.

Therefore, I am asking that this case be dismissed for the reasons stated above.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my memory, knowledge, and belief: Dated June 25, 2008.

A criminal defendant has constitutional rights that include a 14th Amendment due process right to present a defense, a 6th Amendment right to compulsory process, and a 6th Amendment right to counsel. "Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (hearsay rule may not be applied mechanistically when to do so deprives a criminal defendant constitutional rights directly affecting the ascertainment of guilt); Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972) (where judge singled out defense witness for lengthy admonishment about dangers of testifying falsely so that witness refused to take the stand, deprived defendant of due process of law under 14th Amendment).

The United States Supreme Court in Washington v. Texas stated as follows:

The right to offer testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

In State v. Elliot, our Court of Appeals held that a trial court's refusal to allow the defendant to present reliability and validity evidence against the State's foundation for a stipulated polygraph test, and to allow him to call his own expert against the State's polygrapher, constituted constitutional error even though the defendant had signed a stipulation to admissibility of the polygraph results that included language that he would not call witnesses to challenge the results. Elliot, 121 Wn.App. 404, 88 P.3d 435 (2004).

Here, the alleged victim, Nathan Hoffman, was listed as a witness by the State on its first three of six witness lists. (CP 22, 38, 165). He was taken off the State's witness lists by an undisclosed agreement between the prosecutor and counsel for Mr. Reading, due to a conflict of interest.

Counsel for Mr. Reading admitted that Mr. Hoffman had told him his version of the events for which Ms. Cooper and Mr. Reading were on trial, and told the judge that he would have to move to sever if Hoffman were called to the stand, because he would not be able to effectively cross examine him. He stated that it would hurt Mr. Reading if he was not effectively cross-examining Mr. Hoffman, and any cross-examination of Mr. Hoffman would implicate attorney-client communication. Mr. Woodrow went on to say that he believed it would not be a potential conflict, but a very real conflict. (RP 444-45).

Mr. Woodrow was correct that he had a real conflict of interest.

RPC 1.6; RPC 1.7; In re Carpenter, 160 Wn.2d 16, 155 P.3d 937 (2007).

RPC 1.7(a) reads in relevant part as follows:

Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Here, counsel for Mr. Reading should not have accepted the representation of Mr. Reading. He knew going in that he had a conflict of interest. Also, in fairness to all, he should have notified the court and counsel for the codefendants, but did not do so until his conflict came to

light through Ms. Cooper's stated intent to call Mr. Hoffman to the stand. Moreover, the prosecutor should arguably have notified the court. RPC 8.3; RPC 3.4 (Fairness to Opposing Party and Counsel); RPC 3.8 (Special Duties of a Prosecutor), Comment: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." Further, "Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial." Cuyler v. Sullivan, 446 U.S. 335, 346, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

The court ruled that Mr. Hoffman's testimony was not relevant, even though the prosecutor displayed his name on the overhead projector during the prosecutor's opening statement and closing argument, and even though the prosecutor named him as the victim and as a witness on his first three witness lists. (RP 816). Ms. Cooper moved for a mistrial after the judge ruled that she could not call Mr. Hoffman to the stand; the court declined to hear it at that time. (RP 455).

However, Mr. Hoffman's testimony was expected to be that the debt was just a friendly debt, it was not a drug debt as the prosecutor kept trying to imply in violation of the motions and agreements in limine, and therefore, Ms. Cooper and the other defendants would have had no reason to commit a conspiracy to commit robbery 1 or burglary 1. These facts

certainly seem relevant to Ms. Cooper's defense. True, there was evidence that conflicted with that, but that does not make Mr. Hoffman's testimony irrelevant. Ms. Cooper was denied her fundamental constitutional rights to call a witness in her behalf. Ms. Cooper's constitutional rights cannot take second place to the court's desire to avoid a mistrial for expediency sake. Mr. Hoffman's testimony would make it less likely that Ms. Cooper intended to rob, burglarize, or assault him, or conspire to do so. Any reasonable juror would see the State's implication that this was a drug debt; and any reasonable juror would believe that violence is more likely when collecting a drug debt. But Mr. Hoffman said it was not a drug debt, and that was contrary to the State's theme. Relevancy is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401.

III. Appearance of Fairness Doctrine; Cumulative Error; Prosecutorial Misconduct.

Fair play is the essence of due process. Galvan v. Press, 74 S.Ct. 737, 742, 347 U.S. 522 (1954). It is a shield against unfair or deceptive treatment of an individual by the government. U.S. v. Romano, 583 F.2d 1 (1st Cir. 1978). A fair hearing is a basic requirement of due process. State

v. Moreno, 147 Wn.2d 500, 507, 58 P.3d 265 (2002). Actual fairness is not enough, however: “procedural due process requires the appearance of fairness and fairness in fact.” Westside Hilltop Survival Committee v. King County, 96 Wn.2d 171, 181, 634 P.2d 862 (1981) (ROSELLINI, Justice concurring). Accordingly, a hearing must “not only [be] fair in substance, but fair in appearance as well.” Harris v. Hornbaker, 98 Wn.2d 650, 658, 658 P.2d 1219 (1983). The rule is “stringent” and may bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. Moreno, at 507 (quoting, In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623 (1955)).

The rule grows out of the maxim that: “[T]o perform its high function in the best way ‘justice must satisfy the appearance of justice.’” In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623 (1955).

[T]he evil sought to be remedied lies not only in the elimination of actual bias, prejudice, improper influence or favoritism, but also in the curbing of conditions which, by their very existence, tend to create suspicion, generate misinterpretation, and cast a pall of partiality, impropriety, conflict of interest or prejudgment over the proceedings to which they relate.

Harris v. Hornbaker, 98 Wn.2d at 658 (quoting Chrobuck v. Snohomish Cy., 78 Wn.2d 858, 868, 480 P.2d 489 (1971)). Actions carried out by tribunals which disregard this safeguard “would more appropriately be

termed the administration of injustice, and their proceedings would be as shocking to our private sense of justice as they would be injurious to the public interest.” Westside Hilltop Survival Committee at 181 (ROSELLINI, Justice concurring and quoting, State ex rel. Barnard v. Board of Education, 19 Wn. 8, 52 P. 317 (1898)).

Known as the Appearance of Fairness Doctrine, this rule applies whenever the law requires a hearing of any sort as a condition precedent to the power to proceed. Smith v. Skagit County, 75 Wn.2d 715, 739, 453 P.2d 832 (1969). Its application under Washington law provides procedural protections beyond the minimum requirements of the federal due process clauses. Washington State Medical Disciplinary Board v. Johnston, 99 Wn.2d 466, 478, 663 P.2d 457 (1983). It dictates that proceedings before a tribunal are valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing. Johnston, 99 Wn.2d at 478. Decisions that do not satisfy the requirement of Appearance of Fairness will be reversed. Westside Hilltop Survival Committee at 181 (ROSELLINI, Justice concurring).

Here, important motions in limine were discussed and agreed upon in chambers conferences and sidebars, along with the conflict of interest of counsel for Mr. Reading and the court’s ruling that Ms. Cooper would not

be allowed to call Mr. Hoffman in her behalf. When important matters are agreed upon off the record, the court must either summarize them on the record at the next opportunity, or allow counsel to do so. State v. Hanson, 58 Wn. App. 504, 508, 793 P.2d 1001 (1990).

Here, the discussions about the motions in limine and about Mr. Hoffman occurred in chambers; the judge did not place it on the record and counsel had to do it at a later time, which led to some initial confusion, but the judge later recognized that an agreement had been reached to exclude mention of uncharged crimes.

Second, the judges who heard Ms. Cooper's pretrial motions and the trial judge were not overly courteous to Ms. Cooper's counsel. The pretrial motion demeanor of the judges is set forth in the transcripts and the motions, including the motion to disqualify Judge Hirsch and the motion for discretionary review. The trial judge, Judge Wickham, openly expressed anger toward counsel on several occasions.

One time that the judge expressed anger toward counsel was in chambers during the conversation about Mr. Hoffman. Another time was during Ms. Cooper's request to call Mr. Hoffman to the stand on the record; counsel asked for a chance to respond to the prosecutor's objection, stating that he had more he wanted to place on the record. The judge's response was as follows: "Counsel, I think we have talked about

this several times already. I have given you ample opportunity to deal with it. It is 20 after 9:00, and we need to move on.” (RP 449).

However, as noted by counsel, the prior conversations about Mr. Hoffman occurred in chambers, and counsel had to insist that he be allowed to make a record. The court stated that he would give counsel one minute; saying that he was fifteen minutes late and had used up that time. Counsel was not asked why he was late.

Then, during counsel’s record, the court interrupted, and stated, “Mr. Finlay, Mr. Hoffman has never been on a witness list,” (RP 450), even though he was on the State’s first three of six witness lists and the court was informed in chambers that he was on at least some of the State’s witness lists. The judge then told counsel that “we need to move on. I have a jury waiting. Are there other matters we need to take up before the jury comes in?” Counsel replied, “Your Honor, I wasn’t quite finished. I would like to put all of this on the record.” The Court: “All of what on the record? You have made your motion. You have made your comments about what you knew. What else do you need to put on the record?” Counsel: “I need to state that this conflict of interest cannot, which was not of my making or Ms. Cooper’s making, cannot overcome Ms. Cooper’s right to present a defense. I did not know that Mr. - -“ The Court: “I’m not finding that Mr. Woodrow has a conflict, because I’m not

permitting Mr. Hoffman to be called as a witness. End of story.” (RP 450-453).

Counsel then stated that the Court had exhibited anger towards him on several occasions, that he was just trying to represent his client, and he didn’t think he deserved the court’s anger for doing that. (RP 452).

During Ms. Cooper’s motion to dismiss per CrR 8.3(b) at the end of the case, the Court again expressed anger toward Mr. Finlay, refused to allow Mr. Finlay to question the prosecutor’s claim that Mr. Finlay had been discourteous to him (which is not supported by the record), and openly displayed bias toward the prosecutor. (RP 825-26) (Overruled. You had your chance counsel. This is Mr. Bruneau’s chance.); (RP 833-35); (RP 837) (**Judge: I know him [Mr. Bruneau] by reputation**).

Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct require disqualification of a judge who is biased against a party or whose impartiality may reasonably be questioned. A judicial proceeding is valid only if it has an appearance of impartiality, such that a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. State v. Ra, 144 Wn.App 688, 705, 175 P.3d 609 (2008) (Court ‘troubled’ by trial judge’s comments and scolding of defendant, proffer of theories for the state to use in admitting evidence, and undue concern for the victim’s war

record, reversed on other grounds, but remanded for trial in front of a different judge).

In opening instructions to the jury, the court read the so-called *Castle* instruction, which was disapproved by our state Supreme Court about a year prior to this trial. The Supreme Court declined to find that use of the instruction in the case before it was unconstitutional, but declared as follows:

We also exercise our inherent supervisory powers to maintain sound judicial practice and instruct the trial courts of this State to use the approved Washington Pattern Jury Instruction to instruct juries on the government's burden to prove each element of the crime beyond a reasonable doubt.

State v. Bennett, 161 Wn.2d 303, 306, 165 P.3d 1241 (2007).

Finally, the prosecutor committed misconduct in several particulars. The most striking was the following statements in closing argument when he openly gave his personal opinion about the credibility of witness Janus Afo, as follows: “**I would not stand here and say believe everything Mr. Afo says.**” (RP 797). “**I don't believe Afo. It doesn't matter what I believe . . .**” (RP 798).

A prosecutor may not directly or indirectly state his personal belief whether or not a witness was telling the truth. State v. Sandoval, 137 Wn. App. 532, 540, 154 P.3d 271 (2007). “It should be implicit that it is just as

reprehensible for one appearing as a public prosecutor to assert in argument his personal belief in the accused's guilt". State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956). "A statement by counsel clearly expressing a personal opinion in the credibility of the witness or guilt or innocence of the accused is forbidden . . . Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion." State v. Allen, 57 Wn. App. 134, 142, 787 P.2d 566 (1990). Prejudicial error won't be found unless it is clear and unmistakable that counsel is expressing a personal opinion. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). In determining whether prosecutorial misconduct has occurred, a reviewing court first evaluates whether the comments were improper. If so, it considers whether there was a substantial likelihood that the comments affected the jury. Allen, 57 Wn. App. at 142.

Here, the prosecutor clearly and unmistakably expressed his personal opinion – he said, "I don't believe Afo." Mr. Bruneau is a very experienced prosecutor. His intent was to enhance his own credibility with the jury by showing that he personally knew that Mr. Afo did not tell the whole truth, to show that he was not trying to pull the wool over the jury's eyes. By doing that, he placed the prestige of his office behind his case. Mr. Afo's testimony was critical to the State's case and he had been

given a deal to testify for the State. Mr. Afo was the State's only witness who was also allegedly a participant in the incident. He stated that he thought Mr. Hoffman might be beat up, but he also stated there was never any agreement to do so, or to commit either a burglary or a robbery. But Mr. Afo's testimony that he believed that there could be a beating was critical to the State's case, and clearly the State felt so as well, because they gave him a deal to testify.

A prosecutor's improper bolstering of a witness's credibility is highly prejudicial where the witness is critical to the State's case. State v. Jones, 144 Wn. App. 284, 183 P.3d 307 (2008). The prosecutor's personal opinion of Mr. Afo's credibility was prejudicial misconduct, and this Court should soundly condemn it and reverse Ms. Cooper's conviction.

Further, the prosecutor asked defense witness Tara Miller whether she had forgery and theft convictions. She did not. Mr. Bruneau: **"And have you been convicted of theft?"** Tara Miller: **"No"**. Mr. Bruneau: **"Forgery?"** Ms. Miller: **"No."** Mr. Bruneau: **"Possessing stolen property?"** Ms. Miller: **"Yes."** Mr. Bruneau: **"Twice?"** Ms. Miller: **"No."** (RP 489); (RP 507). Mr. Bruneau claimed that he had misread Ms. Miller's criminal history. Moreover, Ms. Miller had never been convicted of theft or forgery, and had just one possession of stolen

property conviction. (RP 510). At that point, Ms. Cooper told the court that she had a motion to dismiss the case. The court declined to hear it then, deferring it to the end of the case. (RP 511).

Every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial. State v. Jones, 144 Wn. App. 284, 290, 183 P.3d 307 (2008).

In Jones, Division Two found that the misconduct by the prosecutor merited reversal. First, the prosecutor improperly bolstered the credibility of the CI and the police officer during closing argument by arguing that the CI had been working for the police for a long time, so the police knew him to be reliable, and the police would not put their reputations or livelihood on the line by trusting an untrustworthy CI. Second, the prosecutor committed reversible error by asking the officer why the CI did not testify at trial, and eliciting testimony that suggested that the CI was afraid to appear, and then speculating on the CI's motives in closing argument. The Court stated that "A prosecutor's duty is not merely to zealously advocate for the State, but also to ensure the accused receives a fair trial." Jones, at 292-97.

The Court noted that a defendant waives the right to assert prosecutorial misconduct if he fails to object, unless the remark was so flagrant and ill intentioned that it causes enduring and resulting prejudice

that a curative instruction could not remedy. The Court found such prejudice. Jones, at 299. The Court found that cumulative error warranted reversal. Jones, at 301.

In State v. Henderson, a Division Two case from Clallam County, this Court stated the following analysis guidelines for a claim of prosecutorial misconduct. To prevail on a claim of prosecutorial misconduct, the defendant must show both misconduct and prejudicial effect. Prejudice exists where there is a substantial likelihood that the misconduct affected the jury's verdict. If there is no objection, the misconduct must be so flagrant and ill-intentioned that a curative instruction could not have obviated the prejudice. Henderson, 100 Wn.App. 794, 800, 998 P.2d 997 (2000).

The Henderson court found cumulative error requiring reversal based on the prosecutor's misconduct that included a reference to the defendant's right to remain silent, repeated references to a second fight not at issue in the trial, reference to photographs that the sheriff had "on hand", the prosecutor's challenge to the defense attorney's use of the word altercation, when in the prosecutor's opinion it was a robbery. Henderson, at 804.

Here, as outlined in Ms. Cooper's Motion to Dismiss per CrR 8.3(b), there are many instances of the prosecutor's violations. There are

others as well. The prosecutor asked Mr. Reading numerous questions about his DOC warrant, arguably in violation of the motion in limine that was stipulated to. (RP 553-555). The prosecutor told Mr. Reading, “Well, perhaps you just ought to behave yourself.” (RP 555) (objection sustained).

Additionally, the prosecutor directly asked witness Tara Miller if she was hanging out with the defendants and doing drugs; objection was sustained. (RP 477). Earlier, the prosecutor elicited testimony that a scale was found in the car that the three male defendants were riding in. (RP 207) (Objection at RP 213). Judge Wickham noted that there was an agreement not mention uncharged crimes. (RP 276-77).

The prosecutor also asked witness Miller whether Afo had threatened Ms. Whitt (RP 481), and asked her to comment on the credibility of the various defendants. (RP 487). Moreover, the prosecutor directly asked the detective who interviewed defendant Dawn Cooper to comment on her credibility, as follows:

Mr. Bruneau: “So the interview is not proceeding satisfactorily, is it?”

Det. Kolb: “Right.”

Mr. Bruneau: “Now, did you confront Ms. Cooper?”

Det. Kolb: “I did.”

Mr. Bruneau: “Well, I use the term, “confront.” You said you did. What did you say to her?”

Det. Kolb: “I advised Ms. Cooper that I didn’t feel she was being honest with me about the events that unfolded that day.”

Mr. Finlay: “Your Honor, I’m going to have to object in that it’s not proper for one witness to comment about the credibility of another witness.”

Mr. Bruneau: “I’m asking the officer about here interview and the colloquy between the witness and the person who was being interviewed.”

The Court: “The objection is overruled. The witness will answer the question.”

(RP 388).

Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant. Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury. In considering whether to admit such testimony, the trial court considers the circumstances of the case, including the following factors: (1) the type of witness, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

Demery involved the admission into evidence of a recorded interview of the defendant by a police officer. During the interview, the officer accused the defendant of lying. The court held that, under the circumstances of that case, it was not reversible error to admit the recording. “However, statements made by police officers during a taped interview accusing the defendant of lying do not carry this aura or reliability because such statements are part of a police interview technique commonly used to determine whether a suspect will change her story during the course of an interview. The officers’ statements are not testimony and are admissible to provide context to the relevant responses of the defendant.” Demery, at 765.

Demery was a plurality opinion. A majority of the justices (five of nine) concluded that it was error to admit the statement. Those justices agreed that the officers’ statements constituted impermissible opinion testimony. Although the majority agreed that the statements were inadmissible, four justices believed the error was reversible, while one believed it was harmless. It was this split among the majority that led to the ultimate order affirming Demery’s conviction. Demery, 144 Wn.2d 753.

Here, however, the State did not admit a recorded interview. Rather, it had the officer testify directly that she did not feel that Ms.

Cooper was being honest with her during the interview. The Demery court believed that the special aura of reliability of a police officer would not attach where the officer did not testify to the statements at trial, but the recorded interview was admitted. Thus, this case is distinguished from Demery, and the officer's opinion about Ms. Cooper's veracity should not have been admitted. Further, as discussed above, the prosecutor here directly and unmistakably told the jury his personal opinion of the veracity of witness Afo. Mr. Afo's testimony that he thought a beating might take place, and Ms. Cooper's admission of the same to the officer during the interview were the only evidence presented that suggested that some sort of violence might take place in attempting to collect the money owed by Mr. Hoffman. Under these circumstances, the conviction should be reversed.

During trial, the court admitted as exhibits photographs of each defendant. These photos were taken from booking photos. During identification of exhibit 8, the photograph of Mr. Afo, counsel for Mr. Waller objected that the witness was turning the photograph so that the jury could see it, before it had been admitted, and again objected that the prosecutor was turning an un-admitted exhibit to the jury's view. The court instructed the witness not to show the jury the exhibit. (RP 94, 109). Counsel for Mr. Waller at one point asked the prosecutor if he could

borrow his laser pointer, and the prosecutor replied in front of the jury, “Get your own.” (RP 58).

Ms. Cooper objected to the witness showing the jury an exhibit that had not been admitted, and objected to the prosecutor’s practice of not showing exhibits to counsel before showing them to the witness. It appeared to counsel that the officer had intentionally turned one of the photos to the jury’s view, and the prosecutor was directly facing the witness at the time. (RP 117-118).

The prosecutor asked many leading questions; in fact he led every one of his witnesses, except perhaps for the fingerprint technician, who had nothing of substance to say. In essence, the prosecutor was testifying. Many were objected to, and Ms. Cooper asked the court to instruct the prosecutor not to lead the witnesses. (RP 124). Ms. Cooper also the court to direct the prosecutor not to laugh at opposing counsel during objections, as he had done earlier. (RP 125). Some examples will be found at RP 45-46 (objection sustained), 63 (objection overruled), 78, 92 (objection sustained), 93 (objection overruled, leading questions followed), 94, 95, 97, 98, 99, 100, 101, 103, 104, 105, 109, 110, 111, 126, 140 (objection sustained), 143, 146, 148, 160, 165, 168, 172 (objection sustained), 178, 179, 180, 205, 206, 207, 208, 210, 211, 225, 263, 264, 266, 287 (objection sustained), 303 (objection overruled), 311 (objection, no ruling), 319, 320

(objection sustained), followed immediately by the same leading question, 321, 322, 323, 324, 325, 326, 327, 328, 329, 331, 332, 334 (objection sustained at 335), 335 (objection overruled), 336 (objection overruled), Ms. Cooper objected at 336 (handled at sidebar, no record), Ms. Cooper objected again at 337 based upon the sidebar and asked for hearing on the record, court denied that request, ruling it could be handled at the next opportunity, record made at 339-342, 338 (objection overruled – question: “The reason for going there was to see if he had the money; is that right?”), two more objections at 338, leading and asked and answered, overruled, 358, 360 (objection sustained, question and answer stricken), Ms. Cooper objected as speculation by Mr. Afo (objection overruled), but at 368 Mr. Waller asked Mr. Afo whether it was just as likely that nothing would have happened, the prosecutor objected as speculation and the court sustained it, 370 (objections sustained, prosecutor misstating testimony and leading the witness), 371 (objection overruled), at 372 Ms. Cooper objected to speculation, court noted the objection, 373 (two objections to hearsay overruled), at 376 prosecutor asked Mr. Afo if he recalled his agreement with the prosecutor to testify truthfully (objection sustained as vouching), at 377 court admits booking photos of defendants, 386, 389 (objection sustained), 397, 398, 399 (objection sustained as to leading and prosecutor testifying).

During direct examination of Ms. Whitt, the prosecutor asked her to review her statement to the police, although she had not testified to lack of memory, as required by ER 612. (RP 288). The prosecutor also asked witness Mr. Afo to review his prior written statement, without laying the proper foundation. (RP 336).

Foundational requirements for the ‘present recollection refreshed’ rule include (1) that the witness’ memory needs refreshing, (2) opposing counsel has had an opportunity to examine the writing, (3) the trial court is satisfied that the witness is not being coached. Additionally, the witness must first be examined until her memory is exhausted and the witness indicates a need to refresh her memory from the writing; the writing must cause the witness to actually recall the occurrence or event in question, and the witness must thereafter testify from an independent recollection of the matter. If objection is made, the court must determine whether witness’ memory has actually been refreshed, or whether the witness intends to keep reading from the writing. Counsel has an obligation not to abuse the opportunity to refresh the memory of a witness. 5D Wash.Prac., Handbook Wash. Evidence ER 612 (2008-09 ed.).

Ms. Cooper did object, and the prosecutor replied in front of the jury as follows: **“Your Honor, I have been accused of leading the witness. I wish to hear from the witness so that the whole world**

knows that I was not leading the witness”. (RP 288-89). Ms. Cooper objected to the prosecutor’s improper argument, and the court after sidebar sustained the objection to the witness reviewing her statement. (RP 289).

IV. Insufficient Evidence to Sustain a Conviction for Robbery

The test for determining the sufficiency of evidence is whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the state and interpreted most strongly against the defendant. Salinas, at 201. Circumstantial evidence is not less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201.

For a conspiracy to commit robbery first degree conviction, the State must prove that Ms. Cooper intended that conduct constituting robbery first degree be performed, and she agreed with one or more persons to engage in or cause the performance of such conduct, and any

one of them took a substantial step in pursuance of the agreement. RCW 9.28.040; RCW 9A.56.200.

Robbery first degree requires a person be armed with a deadly weapon or firearm or inflict bodily injury in the commission of robbery or in immediate flight therefrom. RCW 9A.56.200.

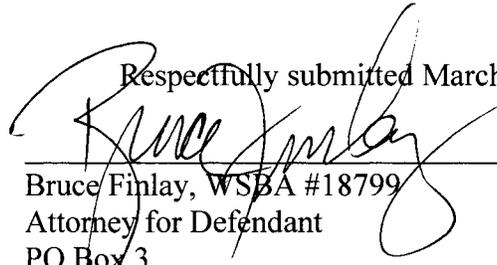
The weakness in this case is the robbery. There was no testimony that anyone intended to commit a robbery, or a robbery first degree. The only evidence presented was that there was a debt owed, and that the three male codefendants were going to try to find the debtor, Nate Hoffman, and Mr. Afo testifying for the state pursuant to plea bargain, said he thought it was 50/50 that Mr. Hoffman would get beaten up, perhaps badly. Ms. Cooper gave an off the record statement to a detective that she also thought Mr. Hoffman might get beaten up. But, there was no testimony or even circumstantial evidence that anyone was going to rob Mr. Hoffman.

E. CONCLUSION

For the foregoing reasons, this Court should reverse the conviction of Dawn Marie Cooper, and dismiss the case. Should the Court decide to reverse the conviction and remand for new trial, it should order that trial occur in front of a different judge. She was deprived of a fair trial due to cumulative error including improper joinder, denial of her right to speedy

trial, governmental mismanagement pursuant to CrR 8.3(b), instructional error by the trial court, prosecutorial misconduct, and violation of the Appearance of Fairness Doctrine, and insufficient evidence.

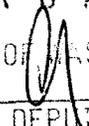
Respectfully submitted March 5, 2009.

A handwritten signature in black ink, appearing to read "Bruce Finlay", is written over a horizontal line. The signature is fluid and cursive.

Bruce Finlay, WSBA #18799
Attorney for Defendant
PO Box 3
Shelton, WA 98584
360-432-1778

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STATE OF WASHINGTON
BY  _____
DEPUTY

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

STATE OF WASHINGTON)	
Respondent,	)	No. 38008-1-II
	)	(Thurston County Superior Court
vs.	)	#07-1-02074-1)
	)	DECLARATION OF SERVICE
DAWN M. COOPER,	)	BY MAIL – BRIEF OF APPELLANT
Appellant.)	
)	

I, Pat Lewis, on March 5, 2009, mailed via the United States Postal Service, first class and postage prepaid from Shelton, Washington, the following document:

Brief of Appellant

to:

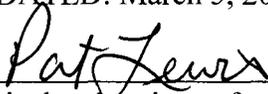
David Bruneau, Deputy Prosecuting Attorney, and to counsel for co-defendants Peter Tiller and Thomas Doyle.

DECLARATION OF SERVICE BY
MAIL-1

Bruce Finlay
Attorney at Law
PO Box 3
Shelton, WA 98584
360-432-1778

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: March 5, 2009, at Shelton, Washington.



Pat Lewis, legal assistant for
Bruce Finlay

DECLARATION OF SERVICE BY
MAIL-2

Bruce Finlay
Attorney at Law
PO Box 3
Shelton, WA 98584
360-432-1778

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DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

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

STATE OF WASHINGTON)	
Respondent,	)	No. 38008-1-II
	)	(Thurston County Superior Court
vs.	)	#07-1-02074-1)
	)	AMENDED DECLARATION OF
DAWN M. COOPER,	)	SERVICE BY MAIL – BRIEF OF
Appellant.	)	APPELLANT
)	

I. Pat Lewis, on March 5, 2009, mailed via the United States Postal Service, first class and postage prepaid from Shelton, Washington, the following document:

Brief of Appellant

to:

David Bruneau, Deputy Prosecuting Attorney, and to counsel for co-defendants Peter Tiller and Thomas Doyle, and to Appellant Dawn Cooper.

DECLARATION OF SERVICE BY
MAIL-I

Bruce Finlay
Attorney at Law
PO Box 3
Shelton, WA 98584
360-432-1778

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED: March 5, 2009, at Shelton, Washington.

Pat Lewis

Pat Lewis, legal assistant for
Bruce Finlay

DECLARATION OF SERVICE BY
MAIL-2

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COMMENTS: Declaration of Service amended to include appellant

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