

NO. 39103-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

JENNIFER HOLMES, Appellant

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson
Pierce County Superior Court Cause No. 06-1-01432-6

BRIEF OF APPELLANT
(CORRECTED)

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A. ASSIGNMENTS OF ERROR:

1. The appellant Jennifer Sarah Holmes hereby adopts and incorporates by reference the assignments of error as well as statement of the case, law and argument from codefendant James Lindsay's brief on arguments 1 and 3. Ms. Holmes has provided additional argument on assignment of error no. 1.

2. Ms. Holmes is entitled to a new trial where the prosecutor committed multiple acts of misconduct both during the evidentiary phase and closing arguments.

(a) The prosecutor's repeated comments denigrating defense counsel denied Ms. Holmes her right to counsel and due process of law.

(b) The prosecutor's closing argument repeatedly shifted the burden of proof to Ms. Holmes.

(c). The prosecutor's committed misconduct in when he repeatedly misstated and trivialized the State's burden of proof.

(d) The prosecutor committed misconduct by repeatedly arguing that the nontestifying codefendant's confession could be considered evidence against the defendant.

(e) The prosecutor committed misconduct by repeatedly arguing that the nontestifying codefendant's confession could be considered evidence against Ms. Holmes.

(f) The prosecutor committed misconduct by "sand bagging" during closing rebuttal.

(g) The prosecutor committed misconduct by arguing in closing that Ms. Holmes had committed prior unrelated bad acts and that she had a bad character.

(h) The prosecutor committed misconduct by repeatedly expressing his personal opinions regarding the credibility of witnesses and the guilt of Ms. Holmes.

(i) The trial court denied Ms. Holmes her right to trial by jury by repeatedly informing the jury that they would be finished with the entire case, including deliberations, by a specific date.

3. Ms. Holmes was denied her constitutional right to an appeal where the prosecutor purposefully whispered portions of his rebuttal argument such that Ms. Holmes, her counsel, and the court reporter could not hear that argument.

4. The trial court abuse its discretion when it failed to admit evidence that Wilkey suffered a serious cocaine addiction during the time

period relevant to these accusations and that his memory therefore was compromised.

5. Assuming arguendo that this court does not reverse Ms. Holmes' convictions, this court should order a new restitution hearing where the State failed to meet its burden of proof and the trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

1. Ms. Holmes adopts the codefendant's issues pertaining to assignments of error for issue 1, the denial of Ms. Holmes' right to a public trial and the public's access to the court.

2. Ms. Holmes adopts the codefendant's issues pertaining to assignment of error for issue 2 with a substitution of "unlawful imprisonment" for kidnapping.

3. A criminal defendant is guaranteed a fair trial, due process of law, and the right to effective assistance of counsel. A prosecutor has the obligation to ensure that the defendant is afforded all of her constitutional rights. A prosecutor denies the defendant her constitutional rights when he deliberately and repeatedly commits egregious misconduct during both the evidentiary and argument phases of the trial. When the prosecutor denigrates defense counsel, expresses his personal opinions about the credibility of witnesses and the guilt of the defendant, and

misstates the law in closing argument, the prosecutor's misconduct requires dismissal of this case.

4. When the defendant is denied a complete record upon which to base her appeal and where the prosecutor is directly responsible for the lack of the record, the defendant is entitled to dismissal of this case.

5. The defendant has the right to test the memory of a witness by adducing evidence of drug and/or alcohol use during the time period relevant to the accusations. Ms. Holmes was denied her right to cross examine witnesses when the trial court prohibited questions about the complaining witness's admitted cocaine addiction.

6. The trial court denied Ms. Holmes her right to trial by jury by repeatedly informing the jury that they would be finished with the entire case, including deliberations, by a specific date. The trial court's insistence to the jury that their deliberations would be finished by a date certain rushed and raised their concerns about what would occur if they could not finish their deliberations in the time allocated by the court.

7. The determination of restitution is a critical stage as it is part of sentencing. The State must prove the amount of restitution by a preponderance of the evidence. The State failed to meet this burden in this case and therefore the defendant is entitled to a new restitution hearing.

8. The defendant is entitled to reversal under the cumulative error doctrine where the aggregated errors denied the defendant her constitutional rights.

C. STATEMENT OF THE CASE:

b. Evidentiary Facts:

Ms. Holmes hereby incorporates the statement of the case of her codefendant James Lindsay, with the following additions:

Shortly after Ms. Holmes and Wilkey became involved, her divorce from David Creveling became final. RP 64 58-60. As part of the divorce settlement, Ms. Holmes received a cash settlement of approximately \$750,000. RP 6460.

Ms. Holmes used a portion of her money for property in Athol, Idaho. RP 1767. Ms. Holmes purchased the property in her own name for herself and her three daughters. RP 1774, 6462.

Ms. Holmes also furnished the new residence with quality items. RP 1767. She purchased, *inter alia*, 6 Tempur-Pedic bed mattresses, a bed pedestal; and headboard, a television, a 2004 Chevy Duremax truck. RP 1780, 1782 Ms. Holmes also purchased for their five horses many amount of tack. RP 1787-90. Ms. Holmes also purchased a substantial number of tools. RP 1794-98. Ms. Holmes also purchased a riding lawn mower,

John Deere tractor, two horse trailers, and some firearms. RP 1803-04. 1805. 1808.

Ms. Holmes at no time comingled her assets with Wilkey. RP 6461. She made no joint purchases with Wilkey. RP 6461.

Ms. Holmes did purchase many gifts for Wilkey, including a ruby and diamond ring, a gold men's cocktail ring with a green jade stone with a diamond in the middle. RP: 6691. She also purchased for him a gold men's wedding ring with a large diamond in the center. RP 6692. Wilkey wore the rings to trial. RP 6691-92.

While living in Idaho, Ms. Holmes started a massage business. RP 6/25/08 1813. Ms. Holmes met the Lindsay when he became a client. RP 1815. Over time they developed a romantic relationship. RP 6458.

Ms. Holmes subsequently told Wilkey that she no longer loved him and that she intended to marry someone else. RP 08 1818. She and that they had already purchased their rings. RP 1818.

Wilkey decided to move out of the residence on October 22, 2005. RP 1862. Wilkey knew that Ms. Holmes and her daughters would be away from the house all that day. RP 1863.

When he left, Wilkey took much of Holmes' property with him. RP 1871, 2218-2220, 2230, 233-34.

In March 2006, Ms. Holmes and the co-defendant travelled to Pierce County to retrieve her property. RP 6787.

On March 27, 2006, Wilkey returned from grocery shopping and saw Holmes and Lindsay at his door.. RP 1897. Wilkey attempted to call Vasquez as planned. Id.

Sometime after Ms. Holmes and the co-defendant left. Wilkey and his neighbors called 911. Battalion Chief for the Peninsula Fire Department Reigle responded to the 911 call. RP 1022. The man later was identified to be Wilkey RP 1031. When they arrived, they saw Wilkey sitting on the porch and smoking a cigarette. RP 1029, 1046.

Wilkey was taken to St. Joseph Hospital. RP 5104. He was treated for diabetes issues. RP 5111. Wilkey reported the alleged assault. However, doctors examined him and did not find evidence of the reported assault. RP 5113, 5115, 5166.

After release from the hospital and at the request of police, Wilkey provided a list of items missing from his residence. RP 3070. Police asked Wilkey to up-date the list if he discovered other items that were missing. RP 3070. Wilkey never provided any records to document when, where, and who paid for the items on the list. RP 3112. Likewise he never supplemented for police his list of missing property. Passim.

Members of the Pierce County Sheriff's Department travelled to Sand Point Idaho to retrieve items of property that the Bonner County Sheriff's Department had stored. RP 1710. Detective Rayner check off items as they were taken. RP 1715. Rayner and other Pierce County Sheriff's Department officers seized only items on their list. RP 6/25/08 1717. They did not conduct a thorough inventory of all items contained in both horse trailers.

a. Procedural Facts:

The State of Washington charged JENNIFER SARAH HOLMES in an amended information with the crimes of burglary in the first degree (count 1); robbery in the first degree (count 2); kidnapping in the first degree (count 3); assault in the first degree (count 4); theft of a firearm (counts 5). CP 53-58.

Trial commenced on March 19, 2008, before the Honorable Brian Tollefson. RP 1

Throughout the trial there were discovery issues. Wilkey made numerous lists regarding missing property, Jennifer's finances, purchasing records, family vacations, where and how money was spent, etc. RP 2242-2246. The court ordered production of those lists. RP 2250-51.

On October 8, 2008 (the day after Wilkey's lists were made known and produced), Wilkey brought to court some physical evidence including

bleached clothing, twisted glasses. RP 2258-59. The court also ordered production of these items. RP 2262-63. On October 8, 2008, Wilkey brought photographs to court. These photographs were of Wilkey's bruises and also of his residence after the alleged event. RP 10/8/08 The court ordered production of these photos. RP 2286-2295.

The trial was interrupted and marred by repeated impermissible comments by the prosecutor. These comments were made both in front of the jury and, when making legal arguments, before the bench only.

The following portions of the transcript provide a glimpse of the prosecutor's misconduct:

OUTSIDE THE PRESENCE OF THE JURY

- Early on in the trial, the prosecutor began to denigrate defense counsel's motions. In response to a discovery issue raised by the defendant, the prosecutor stated: "There's nothing else. There is nothing else. If counsel pays attention to these, there are so flipping obvious from the testimony, it is painful . . . RP 6/26/08 1828.
- Mr. Sheeran: ". . . But she wants to inject that into the jury's mind because, you know, it's more fun that way. It has nothing to do with the truth. RP 1242.
- Defense counsel: "I don't care to be yelled at Mr. Sheeran. I would expect that he would have a little more self-control. I don't like being screamed at and berated. Maybe we can take a break so he can compose himself."

- When defense counsel raised a discovery issue under CrR. 4.7. The prosecutor responded: “I’ve heard that somewhere before. Are we done?” RP 6/26/08 1933-34.
- When defense counsel proposed a solution to move the trial along by interrupting her cross-examination of the complaining witness until medical records were received, the deputy prosecutor’s response was: “This is a joke . . . It’s a joke either way. . . . Jerk him (the complaining witness) around some more. He’s been in here every day last week, this week.” RP 2550. As the parties continued to discuss this matter with the court, the deputy prosecutor characterized the plan to interrupt cross examination of the complaining witness : “ . . . This is ridiculous.” RP 2556-57. The prosecutor continued to sarcastically denigrate defense counsel. When the court asked the prosecutor if he wanted the court to inquire whether the defendants wanted a mistrial, the prosecutor responded: “No, I know they’re not asking for a mistrial. What they’re asking for is the Burger King trial.” When the court asked the prosecutor to explain, the prosecutor replied: “Have it my way.” RP 2557.
- During the prosecutor’s voir dire of Wilkey regarding the admissibility of photos taken by a defense investigation, the prosecutor asked Wilkey “whether or not whoever took the pictures [of Wilkey’s residence] were taken by someone who had trespassed on Mr. Wilkey’s property.” RP ___, 2635. Defense counsel argued for a curative instruction for this prosecutorial misconduct. Defendant noted that the prosecutor’s question was asked in bad faith: “Now, there’s no purpose in asking that question without a good faith belief except to suggest to the jury that defense counsel and its investigators are acting unethically and improperly.” RP 2635. During argument on this issue, the prosecutor interrupted defense counsel and interposed: “You’ve made your point, now you’re just repeating yourself.” RP 2637. The court then reminded the prosecutor: “I asked her a question so she’s answering the question.” RP 2637.
- When the defendant attempted to answer a question from the court, the following exchange occurred:
The Court: Now was there a --- my understanding was there was a police report that talked about Ms. Holmes

being told this was a civil matter. Isn't that the phraseology that I heard?

Defense counsel: The police told her that it was a civil matter. That's all in the report.

The Court: Nothing about the insurance?

Defense counsel: No, No.

Prosecutor: Really? Really?

Defense counsel: I don't think so.

Prosecutor: Then what about the 500 – or 120 pages of insurance stuff sitting here as well.

Defense counsel: That's ----

Prosecutor: ---- as well as in the police report saying it was a civil matter.

Defense counsel: Okay. The police report said it was a civil matter. We don't know –

Prosecutor: That's an –

Defense counsel: --- would you let me finish, Mr. Sheeran?

Prosecutor: No.

The Court: Hold on, just a minute Mr. Sheeran.

Defense counsel: Okay, Don't let me finish, Mr. Sheeran.

The Court: Mr. Sheeran - -

Prosecutor: -- and you interrupted, now you want me to be quiet for you.

Defense counsel: Not that you're likely to do that but ---

The Court: Well, Ms Corey, I think, was answering my question. RP 3561-62.

- Defense counsel raised the issue of the prosecutor's conduct outside the presence of the jury: “. . . you know, Mr. Sheeran's nonverbal conduct is likely to have an impression on the jury... And frankly, you know, it's prosecutorial misconduct for him to stand there and roll his eyes, and, you know, be snide and make objections that are, you know, sarcastic and rude. He's - - - I guess he left his hat that makes him a minister of justice somewhere else. RP 3563.

As the argument continued, the prosecutor continued to act out.

Defense counsel: “Once again he's laughing at us.”

Prosecutor: I've laughed at you for weeks ---

The Court: Hold on just a minute --- just a minute, Mr. Sheeran. RP 3566-67.

Defense counsel: . . .I would ask the Court to admonish Mr. Sheeran not to roll his eyes during objections. I mean, I mean, he's standing right next to the jury, he obviously thinks it's hilarious because he's cracking up, but it's very rude. I mean, those types of nonverbal comments also deny my client her right to a fair trial and Mr. Sheeran should know better.

The Court: Isn't that just part of his argument in this case, Ms. Corey?

Defense counsel: What? That he's rolling his --

The Court: Haven't I already instructed this jury about the arguments of counsel?

Defense counsel: You know, it's the nonverbal things that can be just as effective and Mr. Sheeran knows that. And I'm going to put every single one of them on the record so that an appellate court can become aware of that.

Prosecutor: I welcome it. And I will fully explain why I'm laughing at counsel when I do.

The Court: Okay. Levity is one thing; rolling eyes is another. RP 3570-71.

- The court admonished the prosecutor to act professionally:
The Court: . . .And by the way, Mr. Sheeran, I am in complete control of this courtroom.
Prosecutor: I apologize, Your Honor. I will tell you right now - - -
The Court: Can I finish?
Prosecutor: I'm sorry.
The Court: Can I finish for once?
Prosecutor: Yes.
The Court: (to the prosecutor): And trying to represent your client zealously that's fine, but you need to make sure you do it in an effective manner. Interrupting, losing your temper, things like that, not effective. And not in my opinion good lawyering. RP 3569-70.
- When defendant Holmes again objected to the admission of hearsay statements from the nontestifying codefendant and requested a limiting instruction, the following exchange occurred:
Prosecutor: This is ridiculous.

The Court: Okay.

Prosecutor: This is --- I mean, what she does is say you're an idiot, you-re an idiot, you're an idiot.

Defense Counsel: I didn't say that once.

Prosecutor: You didn't do this, this, this, this, this, this, this, this, this, this. You didn't do this, this, this, and this. . . .

The Court: I'm going to give WPIC 4.2. RP 4081-82.

- During the defendant's cross examination of Wilkey, the defendant asked for a mistrial. This motion was made after defense counsel observed that the prosecutor was "tapping his pen and rolling his eyes" during that cross examination. RP 4305. Defendant argued that the prosecutor's behavior suggested to the jury that defense counsel was incompetent. RP 4305-06.

The codefendant also noted that he heard the prosecutor loudly playing with his pen during the cross examination. RP 3206.

- The prosecutor admitted his conduct and attempted to justify it. In response, the prosecutor admitted that he engaged in such actions. He responded to the objection: "I'm ready for the jury. Let's bring them back. This is silly. *You want to ask stupid questions for four flippin' weeks, you're going to get a reaction from me*, I'll grant you that. I mean this is the most ridiculous, pathetic, long-ranging cross-examination of a witness in history. *And if --- at some point I'm going to sit here and turn and go, I probably am*. I mean, but at the same time, you know what, you don't get to sit here and ask the same question over and over and over again for 400 hours and not expect some --- they're doing the same thing. You might want to look at them while you're asking these questions, too. *This is ridiculous*. (Italics added).

The Court: So that's your total response?

Prosecutor: My total response is -- yes. Yes.

The Court (to defense counsel): Thank you, You get the last word because it's your motion.

Defense Counsel: Well, Mr. Sheeran has an obligation to conduct himself in a professional way to ensure that my client receives a fair trial. . . . I have a duty to cross examine and his duty is to sit there and act like a professional person who cares not only about the State's case but who cares about my client. And I'm frankly damn sick of Mr. Sheeran showing nonverbal reactions to my attempt to put on a case and to cross-examine this witness.

If this were the first time that had happened, I would not be making this motion, but this is at least the fifth or sixth time that we've had to interrupt the proceedings to talk about Mr. Sheeran's inability to refrain from disparaging defense counsel. And he can't do it or he won't do it and he thinks he shouldn't do it and all he says is this is silly. . . . And when we have Mr. Sheeran sitting there completely ignoring his obligations as a prosecutor and, you know, just doing whatever he thinks he can, and if we object, saying it's silly – and I believe he's trying to interrupt my argument now – it's improper –
Prosecutor: Because you're repeating the same thing you've said 16 times in this courtroom.

The Court: Okay, Mr. Sheeran.

The Court: I would like to move on.

Defense Counsel: I would, too, but I'd also like the Court to admonish Mr. Sheeran that if, you know, engages in these precious little antics one more time, that you're going to find him in contempt or you're going to sanction him, I'm frankly sick of turning around and seeing the prosecutor –

Mr. Sheeran: *The number of things I'm sick of in this courtroom with her behavior is impalpable.* But you know what, we're going to move forward, so let's just do it. RP 4310-11. (Italics added.)

- When defense counsel presented legal argument to the court, the deputy prosecutor was banging his head on the table. RP 3243.
- The prosecutor continued to act out.
Prosecutor: (arguing a legal objection): . . . I have never seen anybody do something so immature, stupid, and absolutely unprofessional.
Defense Counsel: If I have misconstrued the order, I don't think it's because I'm immature or stupid or unprofessional. In the heat of trial, people make mistakes. . . I take great issue with Mr. Sheeran, you know, screaming and shouting and, you know, having another temper tantrum in front of the jury. I'm frankly damn sick of it
And then Mr. Sheeran had a --- like a major temper tantrum in front of the jury. This is completely inappropriate. It's designed to denigrate defense counsel yet again I am moving for a mistrial. I frankly have had it with Mr. Sheeran and his little, you know, shouting matches in front of the jury where he accuses me of misconduct. He knows how to make an objection. He can ask to

have matters heard outside the presence of the jury. He doesn't have to stand there, you know, and stamp his foot and yell like Rumpelstiltskin and, you know, show the jury how agitated he is. I didn't intentionally violate anything. My understanding of the court order was exactly as I have just expressed. RP 4556 – 60.

Defense counsel moved for a mistrial based on prosecutorial misconduct: (1) The prosecutor had informed the jury that defense counsel had seen Wilkey write notes during his testimony when in fact defense counsel had seen no such thing; (2) the prosecutor called defense counsel “a sixth grader” for making a meritorious objection. RP 4358-60.

Defense counsel emphasized her frustration with the prosecutor who made comments denigrating defense counsel “multiple times a day or even between recesses . . .at some point, you know, his personal attacks on me, his attacks on my ethics, my integrity, even my ability to see what goes on in the courtroom reaches a point where my client is denied a fair trial. And frankly we've reached that point. . . And the cumulative misconduct by the prosecutor requires a mistrial at this point.” RP 4360

The Prosecutor: This has turned into – and I have never said this outside this courtroom. I have sustained more personal attacks by counsel in this trial than I have in my entire career. It goes on day after day . . . *And she objects, not for the sake of objecting, but for the sake of a legal argument, let me put it that way, but for the sole sake of objecting, for interrupting, for breaking it down, for making it complains so much about me it's comical, because she just did it.* (Italics added.)

(for the first time ever) the Prosecutor also complained: She sits in front of your Honor, in front of the bar, and if there's a point she thinks has been made, she literally turns to me and smirks. I stood here not 15 minutes ago pointing things out and she would sit there and scoff as went through this. And my point is that we've gotten to this ---- this doesn't happen to me anywhere else. This doesn't happen to me with anybody else, is my point, your Honor, not anywhere. It's the “who” it's with. The level of behavior is that of a six year old, much less a sixth grader.”

Defense counsel: . . . Well, your Honor, I resent the personal attacks by Mr. Sheeran. He talks about how it always happens with me. I want the record to be abundantly clear that I had one trial with Mr. Sheeran as a defense attorney and we got a mistrial so it was a failure of discovery.

The fact of the matter is, Your Honor, Mr. Sheeran doesn't know what I've seen or what I've not seen, and I didn't see Mr. Wilkey write that out. I don't think there's any basis in fact that my objections have been anything but consistent with my duty as a defense attorney to defend Ms. Holmes. That's what I've tried to do and I've done my best to do that. And, frankly, I haven't scoffed, I haven't, you know, done any of the nonverbal actions that Mr. Sheeran, now belated months into this, accuses my of doing, because I don't try cases like that. I just don't.

I mean, the fact of the matter is, you know, Mr. Sheeran called me a sixth grader in front of the jury. I could hear it where I was and I'm sure the jury could hear it, too.

At some point, you know, one or two comments are perhaps harmless, but when it happens on a daily basis time after time after time, then it has an effect on my client and it denies her right to effective assistance of counsel and it frankly denies her the right to have a jury --- to have a jury that basically has heard proper evidence as opposed to the prosecutor's improper, unprofessional and snide comments. RP 4367-68.

- When the defendant made a motion to reconsider the court's ruling on the admissibility of ER 404(b) evidence, the court and defendant were discussing the Alexander¹ case.

During this discussion the prosecutor interrupted defendant's argument and stated: I'm sorry, are we still talking about Alexander or is this a motion to reconsider the motion to reconsider?

Defense Counsel: I'm not done.

Prosecutor: I know, that's my point. You're not talking about Alexander anymore . . .

The Court: I think we are. . . RP 5326.

¹ State v. Alexander, 52 Wn.App. 897, 765 P.2d 321 (1988)

Defense Counsel: . . . again we have Mr. Sheeran not making legal objections; again, we have Mr. Sheeran denigrating defense counsel in the presence of the jury saying it's silly. . .

Prosecutor: Could we get to the point? Can we make the motion? Because I'm losing my patience here, Your Honor. . . RP 5429.

- While the court and counsel discussed jury instructions, the prosecutor again responded to a defense objection with name-calling:

Prosecutor: I would just like a couple of things, Your Honor, because the accusations that flew were just mildly entertaining if not somewhat disgusting . . . RP 8645.

IN THE PRESENCE OF THE JURY

- During the trial, the prosecutor made improper statements before the jury and also before the court. These statements repeatedly denigrated defense counsel:

Mr. Sheeran: “. . . Knowing she could have asked that question outside the presence of the jury, she waits until then. You know, it's because she didn't want to do it when they weren't here. Because she wants to just throw it up there and see what sticks. RP 1240.

- During defendant Holmes' recross of the lead detective (Loeffelholz), the following exchange occurred:

Defense counsel: If you were to do a test on the clothes and determine that they in fact had alcohol on them, then that would be corroborative of information that you had received - - -

Prosecutor: Same objection.

Defense counsel: He said that he does –

The Court: Can I hear the question?

Prosecutor: *She's making argument as we go and she doesn't care if the objection is sustained or not.*

Defense counsel: Your Honor, once again we have Mr. Sheeran reporting (sic) to read my mind. Can we take this up outside the presence of the jury, please. . . .

Court: The objection is overruled. RP 4118-19. (Italics added.)

- When the prosecutor examined Wilkey about notes that he had written while on the witness stand, defense counsel moved for a copy of the notes. . . .
Prosecutor: What?
The Court: I'm sorry.
Prosecutor: *I can't respond politely.* RP 4341. (Italics added)

- In response to the defendant's meritorious objection regarding hearsay evidence, the prosecutor called defense counsel "a sixth grader." The court sustained the defendant's objection. RP 4356-57.

- (in response to defense counsel's questions to witness Vasquez about reason for Wilkey leaving his father's residence)

Prosecutor: Objection, your Honor and motion outside the presence. And counsel walked into this after freaking six weeks –

The Court: Hold on just a minute.

Defense Counsel: Mr. Sheeran is having a tantrum.

The Court: If I could have the jury go into the jury room. RP 4554.

Prosecutor: Tantrum because you –

- After defense counsel made a legal argument, the prosecutor responded "I didn't object because I was laughing so hard it was stupid." RP 4573.
- When the defense counsel was engaged in re-cross of Deputy Deal, she asked: And there's nothing in this that says that I contacted them in October of 2005 and many, many months later learned that it was going to be a civil matter. Correct?

Witness: There's - - -

Prosecutor: Objection, relevance. We're well beyond ---- it seems like impeachment on a collateral matter and we're into silly.

The Court: Well, the objection's overruled. Go ahead and answer the question. RP 5423.

PROSECUTOR'S IMPERMISSIBLE QUESTIONS VOUCHING FOR CREDIBILITY OF STATE'S WITNESSES

- During cross-examination of the complaining witness Wilkey, the prosecutor interjected his personal opinion that Wilkey was “doing the best that he can” to answer defense counsel’s questions. RP 2473.
Defense counsel asked for a curative instruction which the court gave:
You are instructed that the prosecutor may not state personal opinions regarding the credibility of any witness. Therefore you must disregard any such statements, comments, or opinions. RP 2558.

PROSECUTOR'S IMPERMISSIBLE NONVERBAL CONDUCT

- When the defendant interposed an objection to the admission of certain photos, the prosecutor rolled his eyes. RP 3557
- During direct examination of Ms. Holmes:
Defense counsel: (asking about abuse by Wilkey): So it was an emotional, psychological and physical hurt?
Defendant: Yeah.
Defense Counsel: Anything else that upset you?
Defendant: Yeah.
Defense Counsel: What?
Defendant: *The fact that I'm sitting here looking at the prosecutor and he's just laughing at it.* RP 6679. (Italics added.)
- During the Ms. Holmes argument for motion for new trial, Mr. Sheeran was laughing. RP 8949.
When he did respond to the Ms. Holmes defendant’s argument, he once again lapsed into name-calling and impermissible behavior: “Yeah, I did want to say something, because for the last hour and a half it has been exactly like it was for 10 months. Besides the obvious name-calling, the absolute disregard for the truth has been unmitigated and unstoppable. And the only time --- I just interrupted to yes, I was laughing, because it was the only time Ms. Corey said something truthful about what has

happened in the last 10 months for the last hour and a half. RP 899-91.

- During Ms. Holmes' cross examination of Wilkey, the defendant asked for a mistrial. This motion was made after defense counsel observed that the prosecutor was "tapping his pen and rolling his eyes" during that cross examination. RP 4305. Ms. Holmes argued that the prosecutor's behavior suggested to the jury that defense counsel was incompetent. RP 4305-06.
The codefendant also noted that he heard the prosecutor loudly playing with his pen during the cross examination. RP 3206.
In response, the prosecutor admitted that he engaged in such actions RP 4310-11.

PROSECUTORIAL MISCONDUCT DURING CLOSING
ARGUMENT:

During the State's closing argument, Ms. Holmes objected to a misstatement of the evidence. RP 8693. The prosecutor responded: "Maybe counsel doesn't remember her client sitting here saying of, yeah, this is yellowish --" RP 8693. Ms. Holmes objected to the personal disparagement of defense counsel. RP 8693.

In a similar vein, the prosecutor made commented on an objection made by defense counsel: "I'm not really sure how me not knowing where it came from misstates the evidence, but *we'll let that one go. . .*" Defense counsel interposed a proper objection which the court denied. RP 8718.
(Italics added)

During the State's closing argument, the prosecutor offered his personal opinion on Ms. Holmes' credibility: "This (the defendant's statement that was not made at Wilkey) *may be part of my favorite though, I wasn't made at him. Why is it my personal favorite? Come on. It may be the most ridiculous thing I've ever heard. Probably the most ridiculous thing you've ever heard.* (Italics added.)

The defendant objected that the prosecutor was impermissibly giving his opinion of the credibility of the defendant. The court overruled the objection. RP 8708.

When the prosecutor argued that Ms. Holmes explanation of the advice she received regarding the return of her property, the prosecutor again argued his personal opinion: "*Okay, Now that's a little ridiculous...*" (Italics added.)

Ms. Holmes objected that the prosecutor was impermissibly giving his opinion of the credibility of the defendant. The court overruled the objection. RP 8711.

During the State's closing argument, the prosecutor repeatedly expressed his personal opinions regarding the defendant's credibility:

"I mean it would be funny if it weren't so disgusting. I mean, it would be comical, this story, if the truth weren't so horrific." RP 8717.

-“Like I said, but for it being as disgusting as it is, it would be comical.” RP 8722. (Italics added.)

Further the prosecutor made “burden shifting” arguments when he tried to explain “reasonable doubt” to the jury:

“You’ve been going up and down this hill. A lot of you have, parking your car up the hill, and there’s a light a half a block up the hill. And you stand at that light, you push the button --- you stand at the light and you wait for the walk sign and the walk sign comes and you see a car coming to your left and it’s slowing down. He has the red light, you’ve got a walk sign, you look at him, he sees you, he’s slowing down, he nods and you start walking. You’re walking because beyond a reasonable doubt you’re confident you can walk across that crosswalk without getting run over.

Now maybe he’s even stopped. He’s come to a complete stop and you have beyond a reasonable doubt you can cross that street. It is possible that you’ve met the biggest jerk in the world and he’s going to run you down? Yeah, it’s possible. Is it possible that he’s going to have a heart attack, foot fall off the brake and roll into you? Sure, it’s possible. Is it possible that another car comes up from behind him and hits him and he hits you? Sure, that’s all possible, but it’s not reasonable. We don’t live our life in fear. Our decision making is not crippled by fear. We make our decisions with the information we have. Your decisions are based on the information – in this case the instructions – and then you have a conclusion to come to.” RP 8728-29.

Defense counsel repeatedly reminded the jury that they could not use the nontestimonial codefendant’s (Lindsay) statement against her. RP 8739, 8740, 8769, 8773, 8795, 8797, 8805, 8830, 8837.

In response to the State’s improper reasonable doubt argument, defense counsel stated: “Life is very complex sometimes and this is one of

those places where it is. We're not going to be crossing the street because the light says we're going to be deciding weighty issues that affect the future of my client and those require more time than the nanosecond of thought that it takes you to see that the light is green." RP 8760.

Defense counsel also argued: "Although the prosecutor tried to trivialize it (burden of proof beyond a reasonable doubt) by saying it's like crossing the street, it's not. It's an extraordinarily high standard. It's a high level of proof. . . RP 8832.

During the State's rebuttal, the prosecutor started by calling the defense closing arguments "*a crock. What you've been pitched for the last four hours is a crock.*" RP 8877. (Italics added.)

When the defense interposed objections during the State's rebuttal, the prosecutor stated: "*Why? Why? Why the distraction? Why the distraction?*" (Italics added.)

The prosecutor also repeatedly shifted the burden of proof to the defendant by telling the jury that the defendant needed "to own" her conduct. RP 8882, 8883.

The prosecutor then told the jury that they needed to "compare which Mr. Wilkey said with all the evidence when you're looking at his credibility, and then you compare what Jennifer Holmes said to you for three months." RP 8884.

The defense objected to the prosecutor's argument that the jury should compare Wilkey's testimony with ALL the evidence, which would necessarily include the nontestifying codefendant's statement to police, with the defendant's testimony. RP 8884.

Near the conclusion of the State's rebuttal, the prosecutor stood close to the jury and whispered his comments. CP 733-780; 795-822; RP 8884. The court reporter noted that the prosecutor's argument was "sotto voce." RP 8884.

When defense counsel informed the court that she could not hear the prosecutor and asked that he raise his voice, the prosecutor agreed to do so. RP 8885.

The defendant asked for the court reporter to read back the prosecutor's previous statements and the court responded, "I said I couldn't hear it." RP 8885.

Because the prosecutor then urged the jury to convict the defendant on an improper basis, the defendant interposed an objection. RP 8885-86. The prosecutor's bizarre response: "*Somebody had their sandwich . . . I said somebody had their sandwich at lunch.*" RP 8886. (Italics added.)

The prosecutor again dropped his voice just as he was discussing the credibility of the defendant's testimony. Defense counsel again stated that she could not hear the prosecutor. The court instructed the court

reporter to read the argument back to counsel. The court reporter noted that he had not been able to hear the prosecutor's argument either. RP 8886.

The prosecutor then stated, "Maybe if counsel and her client could just be quiet for a few minutes they might be able to hear something --" RP 8887.

Ms. Holmes again objected to the prosecutor's improper denigration of defense counsel. RP 8887.

At that point, the prosecutor began to yell as loud as he could. After a few minutes of extreme volume, the prosecutor then dropped to his "*sotto voce*" style. The prosecutor did so as he apparently began to ask the jury to "ask yourself who wants to find the truth ---" The court reporter then asked the prosecutor to repeat the last couple of words, which the prosecutor might have done. RP 8888.

After the closing arguments, Ms. Holmes moved for a mistrial. She noted that the prosecutor's argument that the jury could consider all of the evidence that corroborated Wilkey's testimony constituted an improper statement of law. This is so because the prosecutor was telling the jury that it could consider the Lindsay statement against the defendant. RviP 8889-91. This argument violated the defendant's constitutional rights to cross examine witnesses against her. RP 8892. During Ms. Holmes closing the

prosecutor was spinning his hands in an obvious effort to make fun of the defendant's argument. RP 8890. Ms. Holmes also urged the court to grant the mistrial motion based on the prosecutor's repeated and apparently uncontrollable statements denigrating defense counsel. RP 8890. She also requested a mistrial based on the prosecutor's numerous statements of his personal opinion throughout the State's closing. RP 8890.

When the court asked the prosecutor to reply, the prosecutor continued to denigrate defense counsel" "Well, Your Honor, I've never been treated so rudely and poorly for a better part of 10 months in my entire career. *I think this has been a joke from day one to Ms. Corey. I think she's treated the vast majority of the people in this courtroom with a disrespect like no other attorney I've ever come across. It continued right up until the absolute bitter end.* . . RP 8893. (Italics added.)

During closing argument, the prosecutor purposely whispered portions of his argument to the jury. RP 8953-8953. The defendant to this day has no idea what the prosecutor's arguments were, except that some of those arguments were made after the prosecutor mentioned the defendant. After several objections were made regarding the inability of the defendants to hear the State's closing, the prosecutor walked behind the jury and bellowed as loud as he could. RP 8955. The prosecutor's

impermissible and intentional actions here elicited laughter from the jury.
RP 8955-56.

Ms. Holmes argued that she was denied her right to appeal by the prosecutor's deliberate attempt to conceal from the record certain comments that he made before the jury that were inaudible to defense counsel and the court reporter. RP 8964.

JURY DELIBERTIONS:

After closing arguments, the court opined that the jury likely would not reach a verdict that night. RP 8900. The court stated that the jury could deliberate until 6 p.m. RP 8900.

At 6 p.m. the jury requested permission to deliberate longer. RP 8908. After input from counsel, the court decided to permit the jury to deliberate until 9 p.m. RP 8909. The jury then decided to leave for the day at 7 p.m. RP 8910.

On Thursday, March 5 (the day after closing arguments), the jury sent a note to the court: "If we can't come to a verdict by Thursday night, what will be the court's direction?" RP 8917. After hearing arguments of counsel, the court decided not to reply to this question. RP 8920.

At the end of Thursday deliberations, the court was informed that the jurors wanted to go home. The court decided to bring the jurors back in the courtroom to "find out if they're all coming back tomorrow, and if

they all say yes, then I guess we can let them deliberate another day. If they say no, then I suppose we could go into the standard WPIC 4.70, probability of a verdict with the presiding juror . . . I haven't head that they're not all going to come back tomorrow yet . . .” RP 8928.

When the court asked the jurors if they planned to return the following day, Juror Bowerman stated that she could return “but I really don't want to.” RP 8930. Juror Bauman stated that she would be late because of a medical appointment. RP 8910.

Near the conclusion of the trial, the court repeatedly informed the jury that they would be totally finished with the case by Thursday March 6, 2009. Specifically, the court told the jury that they would be done with the case by the end of the week (closing arguments were made on Wednesday). RP 8660.

The defendant objected to the court informing the jury that the trial and deliberations would conclude by that date. RP 8630, 8540-41, 8683. The defendant additionally objected because the court's instruction coerced the jury to reach a verdict during a limited period of time. RP 8654. Defense counsel reminded the court that the trial had lasted several months and about 590 exhibits had been admitted. RP 8655. Ms. Holmes also objected the court's instruction violated the defendant's constitutional

rights to trial by jury because the court de facto placed a time limit on deliberations. RP 8655-8658, 8683, 8919.

In fact, during deliberations, the jury asked what the procedure would be if they were unable to conclude deliberations by the court's end date. RP 8917. The jury asked if they would return for further deliberations. The court gave no instruction to the jury. RP 8920.

The court dismissed the jury at 7 p.m. on March 5, 2009. RP 8931-8933.

VERDICT:

On Friday, March 7, 2009, after the courthouse had closed, the court informed the parties that the jury had reached a verdict. RP 3/7/0927-28.

The prosecutor Ms. Robnett asked to make a record regarding access to the court after it had closed. RP 3/7/09 28. She stated that she had asked the judicial assistant to check the first floor to determine whether anyone was trying to gain access to the building. RP 3/7/09 28. Ms. Holmes argued that the court could not take the verdict at that hour because to do so would violate her constitutional right to an open courtroom. RP 3/7/09 29. Defense counsel asserted that the courtroom was not open when individuals seeking access could not enter without being admitted by the judicial assistant or the prosecutor. RP 3/7/09 28-29.

The prosecutor did not respond to the constitutional argument and merely stated that the court should admit anyone who was outside the courthouse and who wanted in. RP 3/7/09 30.

The court acknowledged that it could seal the verdicts and have the jury return on Monday to give their verdicts. RP 3/7/09 30. Ms. Holmes urged the court to follow that plan. RP 3/7/09 11-12. The prosecutor subsequently informed the court that the State did not object to the proposal to seal the verdicts until the jury returned on Monday. RP 34.

The court nevertheless decided to take the verdict at that time. RP 3/7/09 34.

The jury convicted Ms. Holmes of first degree burglary, first degree robbery, unlawful imprisonment, second degree assault, theft of a firearm. RP 3/7/09 39-44; CP 708-727 .

After the verdict was accepted the parties made further argument about the legality of taking the verdict after the court closed.

The prosecutor contended that the constitutional requirement of an open courtroom was met if any interested parties outside the courthouse were admitted to hear the verdict. RP 3/7/09 32.

In a transparent attempt to make a record that the courtroom was open. Robnett noted, that “about a dozen people filed into the courtroom.” RP 3/7/09 28. The people who were present were individuals from the

prosecuting attorney's office who had gained access to the building with their access cards. These individuals were Jesse Williams, Maureen Goodman, Angelica McGaha, Mike Sommerfeld, Christa Sommerfeld, Kevin McCann, Trina Hall, and one other deputy prosecutor. RP 3/7/09 55-56.

Deputy prosecutor Michael Sommerfeld stated that he had been at a social event when he heard that a verdict had come in. RP 3/7/09 81. He then appeared at the courtroom with his wife Christa Sommerfeld and Trina Hall, an advocate. RP 3/7/09.

All of the people that entered the courthouse were either employees of the prosecutor's office, spouses of prosecutors, and individuals who had personal relationships with prosecutors. RP 82. Sommerfeld would not have known that the jury had reached a verdict had not someone conveyed that information to someone in the prosecutor's office. RP 3/7/09 83.

Sommerfeld gained access to the building when someone else in his group used an access card. RP 3/7/09 84

NEW TRIAL MOTION:

On March 27, 2009, the parties appeared before the court for new trial motions and sentencing. As the defendant made her new trial motion, the prosecutor was laughing.

Defendant's motion for new trial was based upon (1) the taking of the verdict when the courthouse was closed; (2) during prosecutorial misconduct during the examination of witnesses and the defendant's objections, making of objections at an appropriate volume when the jury was in the jury room, as well as during closing argument;; and (3) the trial court's failure to admit for impeachment evidence of Wilkey's cocaine addition during relevant times of the alleged crimes. RP 8966-67.

The court denied the defendant's motions for new trial. First, the court steadfastly held to its earlier position that the courthouse was open during the taking of the verdict. RP 8991. Next the court held that the prosecutor's repeated denigration of counsel was forgivable given the natural excitement of a trial. RP 8992-93.

The court also held that admission of Wilkey's cocaine was inadmissible because it would have extended the length of the trial. RP 8983.

The trial court also denied the defendant's motion for new trial based on prosecutorial misconduct. RP 8993. The court held that the prosecutor's whispered closing argument did not prejudice the defendant because it occurred during rebuttal and therefore the defendant did not have any basis for responding to it. RP 8788, 8993.

Because the court found that no error occurred during the trial, the court also denied the defendant's motion based on cumulative error. RP 8984.

The State did not propose nor did the trial court enter any written findings of fact and conclusions of law regarding the denial of the defendant's motion for new trial. *Passim*.

SENTENCING:

After denying the defendant's motion for new trial, the court proceeded to sentencing.. RP 8938; CP 795-822.

The court sentenced the defendant within the standard range and the usual legal financial conditions. CP 828-841. The court ordered a restitution for a later date. *CP Id.*

At the conclusion of Ms. Holmes' sentencing, the court, although having earlier asserted that the court never closed, informed the codefendant that his sentencing would have to be continued "because we have run out of time today." RP 9028. The court apparently had another matter in which he had to inform the parties that they would need to return at a later date. RP 9031. The court did not acknowledge that the court was always open prior to adjourning for the day. *Passim*.

RESTITUTION AMOUNTS:

On November 25, 2009, the court entered a restitution order in the amount of \$39,133.25 RP 11/13/09 1-6, see Appendix A.

The court determined the restitution amount based upon an unsworn list provided by Wilkey and without affording the defendants the opportunity to cross-examine him. RP *Id.* The defendants objected to nearly all of the items for which Wilkey requested restitution. See Appendix B. The court ordered restitution despite the lack of Wilkey's testimony, the failure of police to inventory the contents of one trailer prior to returning it to Wilkey, the prosecutor's pretrial actions of returning some property to Wilkey, the absence of any documentation that Wilkey had ever even possessed some of the items for which he requested restitution.

APPEAL:

Ms. Holmes thereafter timely filed this appeal. CP 842-843; 847.

D. LAW AND ARGUMENT:

1. DEFENDANT HOLMES ADOPTS AND INCORPORATES ARGUMENT 1 FROM CODEFENDANT LINDSAY'S BRIEF.

Defendant Holmes was the party who initially objected to the court's receipt of the verdicts after the courthouse was closed.

Defendant Holmes likewise briefed this issue as part of her new trial motion on March 27, 2009. CP 795-822.

Because the issue is identical for both defendants and has been well briefed by codefendant Lindsay, this defendant hereby adopts that factual statement and law and argument from the Lindsay brief, with the following additional argument:

Washington Const. art. 1, sec. 10 provides: “Justice in all cases shall be administered openly and without unnecessary delay.” This latter provision gives the public and the press a right to open and accessibly court proceedings. Seattle Times v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

Neither the constitution nor the case law permits any portion of a criminal trial to be closed absent an analysis of the factors enumerated in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). The factors are set forth in Mr. Lindsay’s brief (page 13) and will be repeated herein. However, it is significant that consideration of the Bone-Club factors is mandatory. The court must make detailed findings if it orders courtroom closure. Waller v. Georgia, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

In the instant case, the trial court took Mr. Holmes’ verdict in a closed courthouse. Because the courthouse was closed, the courtrooms

inside were de facto closed. Based on the erroneous notion that an open courtroom inside a closed courthouse satisfied constitutional requirements for open and public judicial proceedings, the trial court failed to undertake any Bone-Club analysis.

Moreover, the denial of a public trial is a constitutional right that is *never* subject to harmless error analysis. *State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2006).

In this case, the trial court placed juror convenience above the constitutional rights to an open trial. Further, the trial court flatly denied that the courthouse was closed because the courtroom was open. Further, the trial court seemed to say that unless the defendants could provide names for persons who wished to attend the verdict and presumably could not enter the courthouse, the defendants suffered no prejudice.

In this case, Ms. Holmes timely objected to the closure of the courtroom for the verdict. The State's concern that Ms. Holmes' constitutional right was being violated is established by the deputy prosecutor's action of posting another prosecutor to admit any member of the public who happened by on a late Friday evening and wanted to enter the courthouse the door of which posted other hours for business. The trial court was non-plussed by Ms. Holmes' argument and violated her

constitutional rights as well as the rights of the public and the press, to an open courthouse.

This court must reverse Ms. Holmes' case for this non-harmless constitutional violation.

2. DEFENDANT HOLMES ADOPTS AND INCORPORATES ARGUMENT 3 FROM CODEFENDANT LINDSAY'S BRIEF.

Ms. Holmes was convicted, *inter alia*, of robbery, kidnapping and assault. Although she was not convicted of kidnapping but rather of a lesser degree (unlawful imprisonment, she nevertheless is entitled to relief. This is so because the multiple convictions for the same acts violate the *Double Jeopardy Clauses* of the United States Const. Amend. V² and also Wash, Const. Art. 1, sec. 9³.

For the reasons set forth in codefendant Lindsay's brief, defendant Holmes adopts as her own argument the facts and law pertaining to the double jeopardy issues of her multiple convictions.

All of the facts and law are identical for the defendant and the issue have been well briefed by codefendant Lindsay and therefore are adopted by Ms .Holmes, who provides additional authority:

² The U.S. Const, Amend. V provides that "no person shall . . . be subject for the same offence to be twice put in jeopardy or life or limb."

³ Wash. Const. Article 1, sec. 9 provides that "no person shall . . . be twice put in jeopardy for the same offense."

Washington's double jeopardy clause is coextensive with the federal double jeopardy clause and "is given the same interpretation the Supreme Court gives to the Fifth Amendment. State v. Eggleston, 164 Wn.2d 61, 70, 187 P.3d 233 (2008) (quoting State v. Glocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)). Consequently, both clauses have been interpreted so as to protect against the same triumvirate of constitutional evils: "being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) punished multiple times for the same offense." State v. Linton, 156 Wn.2d 777, 783, 132 P.3d 127 (2006) (citing State v. Graham, 153 Wn.2d 400, 403, 103 P.3d 1238 (2005); Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed/2d 187 (1977)). The last of these three protections, the prohibition against imposing multiple punishments for the same criminal conduct, is implicated here.

Based on Mr. Lindsay's argument, Ms. Holmes also asks this court to strike Ms. Holmes' convictions for assault and unlawful imprisonment and remand for resentencing.

3. THIS COURT SHOULD REVERSE THE DEFENDANT'S CONVICTIONS BASED ON REPEATED ACTS OF PROSECUTORIAL MISCONDUCT BOTH DURING THE TRIAL AND CLOSING ARGUMENTS.⁴

A criminal defendant is guaranteed due process of law under the United States Constitution, Amen. 14, sec 1⁵, and Wash. Const. Art.1, sec. 3.⁶

Due Process requires dismissal where there has been "outrageous government conduct." *United States v. Williams*, 547 F.2d 1187, 1199 (9th Cir. 2008). Dismissals are reserved for "only the most intolerable government conduct." *United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir. 11991) quoting *United States v. Bogart*, 783 F.2d 1428, 1435 (9th Cir. 1986). The extraordinary remedy of dismissal applies only when the defendant's rights were so prejudiced that a new trial cannot resolve the errors. *State v. Laureano*, 101 Wn.2d 745, 762-63 (1984), overruled on other grounds by *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988).

⁵ All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

⁶ No person shall be deprived of life, liberty, or property, without due process of law.

The Washington courts have characterized the prosecutor's conduct in *State v. Belgarde*, 110 Wn.2d 504, 516-20, 755 P.2d 174 (1989) and *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1989) as class cases of prosecutors run amuck. The prosecutor's misconduct in this case descends to a new low.

In this case the trial court's instructed the jury that it must disregard arguments, objections, and rejoinders in its consideration of the case. However, the sheer number of impermissible statements as well as the derogatory and sarcastic nature thereof and the bizarre nonverbal conduct deprived Ms Holmes of her constitutional rights to counsel, cross-examination of witnesses, trial by jury, and due process.

As set forth in detail in the statement of the case, the prosecutor's trial tactics consisted of belittling Ms. Holmes and her counsel outside the presence of the jury, inside the presence of the jury, by nonverbal communication, and also by numerous impermissible statements in closing argument and rebuttal.

Given the sheer number of patently impermissible prosecutorial actions, this court should find that the prosecutor's conduct warrants dismissal. This is so because the prosecutor's actions evince a complete disregard for Ms. Holmes fundamental constitutional rights and an

appalling willingness to win at all costs. The courts and the citizens demand more from the public prosecutor.

In this case and for the reasons set forth herein, the deputy prosecutor's conduct through out the trial easily satisfied any definition of "the most intolerable government conduct." *Williams*, id.

a. The prosecutor's repeated comments denigrating defense counsel constituted egregious misconduct and denied counsel the defendant's right to a fair trial.

The prosecuting attorney represents the people and is presumed to act with impartiality "in the interest only of justice." *State v. Reed*, 102 Wn.2d at 147 (quoting *State v. Case*, 49 Wn.2d 66, 70-71. 298 P.2d 500 (1986) (quoting *People v. Fielding*, 158 N.Y. 542, 547. 497 (1899).

Prosecuting attorneys are quasi-judicial officers who have a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant. *State v. Davenport*, 100 Wn.2d 757, 763, 674 P.2d 1213 (1984).

The burden rests on the defendant to show the prosecuting attorney's conduct was both improper and prejudicial. *State v. Gregory*, 158 Wn.2d 759, 858, 147 P.3d 1201 (2006). Once proved, prosecutorial misconduct is grounds for reversal where there is a substantial likelihood the improper conduct affected the jury. *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

A defendant's constitutional right to the effective assistance of counsel may be infringed by a prosecutor's comments that denigrate defense counsel. Such prosecutorial misconduct is found where, *inter alia*, the prosecutor makes remarks about counsel's reasons for interposing objections as well as when the prosecutor impugns defense counsel's ethics and integrity. Since these remarks offend a specific constitutional guarantee, some courts invoke a more stringent standard of review to determine whether the conduct was harmless. *State v. Johnson*, 80 Wn.App. 337, 908 P.2d 900 (1996); *State v. Hemingway*, 148 Vt. 90, 528 A.2d 746 (1987); *Sizemore v. Fletcher*, 921 F.2d 667 (6th Cir.1983).

Because the prosecutor's comments/objections were so venomous the court gave an oral instruction: "Members of the jury the defendants have the constitutional right to effective assistance of counsel. You may hear objections made by the lawyers during trial. Each party has the right to object to questions by another lawyer and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections. RP 3896.

In this case, the prosecutor failed to argue law in response to Ms. Holmes' objections and habitually resorted to name-calling and belittling.

Further, the prosecutor expressed his ill-will toward Ms. Holmes in non-verbal ways as well. In the presence of the jury the prosecutor rolled

his eyes and made sarcastic objections (RP 3563), the prosecutor's eye-rolling occurred more than once and also laughed at defense counsel's examination of witnesses in the presence of the jury (RP 357071); during defense counsel's cross-examination of Wilkey, the prosecutor was tapping his pen and rolling his eyes (RP 430506). Further examples of the prosecutor's impermissible nonverbal conduct occurred when he rolled his eyes in response to a defense objection regarding the admissibility of certain evidence.

At one point the prosecutor stood by the jury box and either hit something or stomped his boot...RP 4567. The prosecutor's repeated tirades and tantrums were discussed in court. RP 4567, 4569.

In the instant case, the prosecutor suggested through his examination of Wilkey that the defense had done something impermissible and sneaky when it photographed the defendant's property.

The prosecutor also repeatedly commented not only on the merits of defense counsel's objections but also on counsel's motive for making such objection.

The prosecutor made snide and unprofessional comments on the merits of the defendant's objections throughout the trial and during closing argument. Of note, during closing argument the prosecutor questioned the defendant's objections as "distractions." Further the prosecutor's comment

“*someone had their sandwich at lunchtime*” was an inexcusable statement directed at defense counsel. (Italics added)

Where the prosecutor repeatedly denigrated defense counsel both before the jury and in front of the bench, the prosecutor’s egregious misconduct requires this court’s condemnation by reversing this case. Further, given an increasing penchant by prosecutors to engage in such antics, this court should publish at least this portion of its opinion.

It is significant to emphasize that the prosecutor never denied committing any of the actions documented in the statement of the case and/or referenced in the arguments herein.

b. The prosecutor’s repeated acts of misconduct far exceeded the conduct expected from a quasi-judicial officer and exhibited unrestrained contempt for defense counsel, thereby denying the defendant a fair trial.

In *State v. Fisher*, 165 Wn.2d 727, 756, 202 P.3d 937 (2009), the Court held the prosecutor committed misconduct when he gesticulated during the defendant’s examination of witnesses and defense counsel’s closing argument, rolled his eyes, winced, shook his head, rubbed his head, and thrust his hands in disbelief at various points in the trial where his improper and unprofessional actions prejudiced the defendant’s right to a fair trial.

In this case, the prosecutor engaged in all of the actions condemned by the Fisher court and then some. As noted in the statement of the case, the prosecutor repeatedly called defense counsel derogatory names, engaged in physical conduct expressing his personal opinion of the defense counsel's questions and actions in the case, made gratuitous and extremely negative comments about counsel throughout the case.

c. This court should reverse Ms. Holmes' convictions where the prosecutor placed before the jury his opinion that defense counsel was unethical in its investigation and conduct of the case.

A prosecutor's personal attacks on defense counsel's ethics and integrity distorts the trial process and denies the defendant a fair trial. e.g. U.S. v. Rodrigues, 1590 F.3d 439 (9th Cir. 1999).

In the instant case the prosecutor purposefully suggested to the jury that the defense had been unlawfully trespassing on Wilkey's property when they took photos. The sole purpose in adducing the testimony was to cause the jury to conclude that defense counsel was dishonest and conniving.

d. This court reverse should reverse Ms. Holmes' convictions where the prosecutor repeatedly committed misconduct during closing argument.

In the context of closing arguments, the prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." State v.

Gentry, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995). The appellate court reviews allegedly improper comments in the context of the entire argument. References to evidence outside of the record and bald appeals to passion and prejudice constitute misconduct. Belgarde, 110 Wn.2d at 507-08.

(i) The deputy committed reversible error when he misstated and trivialized the State's burden of proof.

In State v. Anderson, 153 Wn. App. 417, 43; 220 P.3d 1273 (2009), the deputy prosecutor likened the reasonable standard to decisions made in the course of every day life. This court held that such comments were improper because they minimized the importance of the reasonable doubt standard and of the jury's role in determining whether the state had met its burden. This court explained that by comparing the certainty required to convict with the certainty people often require when they make everyday decisions—both important decisions and relatively minor ones—the prosecutor trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case against Anderson. This was improper. The Anderson opinion informed prosecutors that arguments that diminished the state's burden of proof constituted reversible error.

In this case, the prosecutor argued to the jury that their comfort level while making a lane change on the free way was akin to proof beyond a reasonable doubt. The prosecutor not only trivialized the burden of proof but also then attempted to further minimize it by telling the jury that people make decisions even when there are potential pitfalls/dangers accompanying those decisions.

Further, the prosecutor misstated the burden of proof by telling the jury that they were convinced beyond a reasonable doubt if they had an abiding belief in the truth of the charge ---- the prosecutor told the jury that they would be would have an abiding belief in the truth of the charge if they were convinced of the defendant's guilt the day after their verdict, a couple of days after their verdict, and also far into the future.

This latter argument is misleading and fails to provide any guidance to the jury. Rather, it encourages the jury to convict not on the basis of the evidence but on a belief that they will be content with their verdict in the future.

Further, the prosecutor informed the jury that it needed to find "the truth." Of course, the jury's function is to determine whether the state has proved its case beyond a reasonable doubt.

Because the prosecutor purposefully misled the jury regarding the burden of proof, the defendant is entitled to a new trial.

The prosecutor also shifted the burden of proof by repeatedly arguing to the jury that Ms. Holmes needed “to own” her conduct. RP 8715, 8883. Ms. Holmes’ sense of personal responsibility was completely irrelevant to the State’s burden of proof beyond a reasonable doubt. By making the “own it” arguments, the State urged the jury to convict Ms. Holmes on a basis other than proof beyond a reasonable doubt.

e. The prosecutor committed misconduct by repeatedly expressing his personal opinions about the credibility of witnesses and the guilt of the accused.

A prosecutor may **not** express his personal opinion about the credibility of a witness and the guilt or innocence of the accused. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).. Prejudicial error occurs when “it is clear that the prosecutor is not arguing an inference from the evidence, but is expressing a personal opinion.” *State v. Copeland*, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996) (quoting *State v. Swan*, 114 Wn.2d 613, 664, 790 P.2d 610 (1990)).

The prosecutor committed misconduct when he repeatedly commented on the credibility of witnesses.

It is axiomatic that the prosecutor may not express any personal opinions regarding the credibility of witnesses. *State v. Papadopoulos*, 34 Wn.App. 397, 400, 662 P.2d 59, *rev. denied*, 100 Wn.2d 1003 (1983); 40

Wn.App. 3450, 343-46, 698 P.2d 598 (1985) *reversed on other grounds*, 111 Wn.2d 641 (1988).

In this case, the prosecutor argued that Wilkey was credible because he was doing his best to answer counsel's questions. 2473. The court gave a curative instruction to this egregious statement. *Id.*

In this case, the prosecutor repeatedly informed the jury that he considered Ms. Holmes' testimony to be "ridiculous." RP 8708, 8711, 8717, 8722.

A . The prosecutor's committed misconduct in closing argument when he made "burden shifting" arguments.

Washington has long recognized the "in order to find the defendant not guilty" argument as flagrant and ill-intentioned. 4 Report of Proceedings (RP) at 327; *see State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998); *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), *review denied*, 131 Wn.2d 1018 (1997).

In 1996, Division One of this court disapproved of the prosecutor's remarks to the jury when the prosecutor stated in closing argument, "for you to find the defendants ... not guilty of the crime ... , you would have to find either that [the victim] has lied about what occurred ... or that she was confused." *Fleming*, 83 Wn. App. at 213 (emphasis omitted). The

court held that the prosecutor “misstated the law and misrepresented both the role of the jury and the burden of proof.” *Fleming*, 83 Wn. App. at 213. Division One made clear that under the presumption of innocence, a jury need not find that the victim or witness was mistaken or lying in order to acquit; instead, it is *required* to acquit *unless* it is convinced beyond a reasonable doubt of the defendant's guilt. *Fleming*, 83 Wn. App. at 213.

In this case, the prosecutor shifted the burden of proof when he repeatedly argued that the defendant needed “to own” her conduct. This prosecutorial refrain urged the jury to convict the defendant because she had not confessed or admitted her misconduct while on the stand.

This argument shifted the burden of proof because it informed the jury that Ms. Holmes needed to prove her innocence. The phrase “own it” could mean nothing else.

These arguments not only shifted the burden to the defense but also suggested to the jury that they could and should convict the defendant based on her failure to testify according to the prosecutorial wishes.

f. The prosecutor committed misconduct in closing argument by informing the jury that the nontestifying codefendant’s confession could be used as evidence against Ms. Holmes.

The confrontation clause guarantees a criminal defendant the right “to be confronted with the witnesses against him.” U.S. Const. amend VI..

’ As a consequence, hearsay evidence of a testimonial statement is

inadmissible in a criminal trial, unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

In this case, where codefendant Lindsay did not testify, his statement could not be used against defendant Holmes. Nevertheless, the prosecutor impermissibly informed the jury that they could consider it as part of the evidence against defendant Holmes

The prosecutor so informed the jury that it should evaluate the credibility of Wilkey in the context of the all of the evidence including the codefendant's statement to police. In the next breath, the prosecutor urged the jury to apply the same evidence to its case against the defendant.

This argument was error and should be the basis for reversal of the defendant's convictions.

g. Further, the prosecutor impermissibly argued "prior bad acts" evidence when such evidence had not been admitted by the court.

Prior to referring to or introducing evidence of an individual's prior bad acts, the proponent must inform the other party of its intention and also must obtain the court's ruling. State v. Jackson, 102 Wn.2d 689, 689 P.2d 76 (1984). Further, the State may not admit character evidence during closing argument.

In this case, the prosecutor “sand bagged” in rebuttal when he purposefully made whispered comments to the jury. The court declined to penalize the prosecutor, noting that the defendant did not have the remedy of surrebuttal and the trial court refused to provide any relief, noting that the defendants had no recourse to the prosecutor’s conduct. The prosecutor argued in rebuttal that the jury’s obligation was to t” . . .tell me what the truth is. You tell me who sat there, who stood here and tried to give it to you.” RP 8878.

In this case, the State argued that the defendant was a bad person. For example, the State argued that the defendant “always paid her bills except when she did not.” . . . RP 8882.

h. The prosecutor committed misconduct during closing argument and rebuttal when he repeatedly stated his personal opinions about defense counsel and the merits of their closing argument.

Throughout his closing argument and rebuttal, the prosecutor personally attacked the defense for interposing objections. RP 8718.

Instead of responding to the merits of the defense closing arguments, the prosecutor informed the jury “This is a crock. What you’ve been pitched for the last four hours is a crock.” RP 8877.

The prosecutor “sand bagged” the defendant in closing argument.

In Washington criminal trials, the prosecutor is permitted to make closing argument and then give a rebuttal to the defense closing. Some

jurisdictions have recognized a prosecutorial tactic called “sandbagging”. Sandbagging occurs when the prosecutor argues new theories or makes new arguments not previously made. e.g., *Bradshaw v. Stumpf*, 645 U.S. 175, 125 S.Ct. 2398, 162 L.Ed 143 (2005). The harm inherent in sand bagging is that it takes the defendant by surprise and affords counsel no opportunity to contest or clarify what the prosecutor said.

4. THIS COURT SHOULD REVERSE THE DEFENDANT’S CONVICTIONS WHERE THE PROSECUTOR’S CONDUCT DEPRIVED THE DEFENDANT OF HER CONSTITUTIONAL RIGHT TO APPEAL BY DELIBERATELY REFUSING TO MADE A RECORD OF CERTAIN COMMENTS DURING REBUTTAL.

Wash. Const. Art. 1, sec. 22 guarantees to the defendant in a criminal case the right to appeal in all cases. A criminal defendant is "constitutionally entitled to a 'record of sufficient completeness' to permit effective appellate review of his or her claims." *State v. Thomas*, 70 Wn. App. 296, 298, 852 P.2d 1130 (1993) (quoting *Coppedge v. United States*, 369 U.S. 438, 446, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962)).

In the instant case, the prosecutor purposefully and repeatedly denied Ms. Holmes her right to a record of sufficient completeness to make her appeal. As noted in the statement of the case, the prosecutor whispered portions of his closing argument to the jury. At that time, the prosecutor appeared to have been arguing about Ms. Holmes. The

prosecutor's tone of voice was so low that the court reporter was unable to record the argument.

Ms. Holmes has assigned error to the prosecutor's closing arguments. It is highly likely that the prosecutor's whispered comments also were error. There is no way to determine the content of the *sotto voce* arguments except by relying on the very party that deliberately made the whispered arguments.

The prosecutor's claim that he had lost his voice during those moments is belied by the prosecutor's conduct whereby he seconds later bellowed his arguments to the jury. The prosecutor's remarkably increased volume at that time and in response to the defendant's objection caused levity and laughter by the jury. It is readily apparent from this conduct that the prosecutor not only made impermissible whispered arguments but also then deflected attention from his misconduct by making a joke before the jury.

Because the prosecutor's conduct deprived the defendant of a complete record in a highly objectionable argument, the defendant cannot appeal the prosecutor's assuredly egregious misconduct during closing.

5. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO ADMIT EVIDENCE THAT WILKEY SUFFERED A SERIOUS COCAINE ADDICTION DURING THE TIME PERIOD RELEVANT TO THESE ACCUSATIONS AND THAT HIS MEMORY THEREFORE WAS COMPROMISED.

A witness's sensory or mental deficiencies may be brought out for purposes of impeachment if the deficiency is such that it affects the witness's memory or powers of observation. This is so because a witness's use of alcohol or drugs at the time of the events is generally admissible to show that the witness may not remember the events accurately. *State v. Clark*, 48 Wn.App. 850, 748 P.2d 822 (1987); *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) (cocaine and alcohol).

In this case, the prosecutor on direct examination elicited testimony from Wilkey regarding the beginning days of his relationship with Ms. Holmes. Vasquez also testified in direct examination that Wilkey moved out of his father's house because of a disagreement. RP 4505. When the defendant cross-examined about the same falling out between Wilkey and his father, the prosecutor objected on relevance grounds. RP 4551. Mr. Wilkey's father kicked Wilkey out of the residence because of Wilkey's drug use. RP 4554; CP 128-134. During a pretrial deposition Wilkey had acknowledged that he had a crack cocaine addiction during the early days of his relationship with Ms. Holmes. RP 4557-58, 4570. Although the court agreed with Ms. Holmes that the jury

was entitled to know whether a witness was under the influence of drugs when the actual incident occurred, the court refused to admit the evidence. RP 4583, 4606. After Mr. Sheeran's temper tantrum and unprofessional conduct while arguing the drug issue, the court instructed the jury "Members of the jury. I've already instructed you on a criminal defendant's constitutional right to effective assistance of counsel. Further you must disregard any conduct by an attorney that you consider unprofessional. You are instructed that you must not hold the conduct of any attorney against their party in this case." RP 4605-06.

Wilkey testified about, *inter alia*, the defendant's lack of financial resources, and his assistance to her. RP __. N Wilkey also acknowledged during a pretrial deposition that he had a raging cocaine addiction during the early years of their relationship. RP 5274. Given the prosecutor's repeated assertions that Wilkey's testimony was accurate and reliable, the defendant should have been allowed to impeach him with his admissions of cocaine usage during the relevant periods.

6. THE DEFENDANT IS ENTITLED TO A NEW RESTITUTION HEARING WHERE THE TRIAL COURT FAILED TO AFFORD THE DEFENDANT DUE PROCESS.

Although the setting of restitution is an integral part of sentencing, the Rules of Evidence do not apply at restitution hearings. *State v. Pollard*, 66 Wn.App. 779, 784, 834 P.2d 51 (1992).

Evidence presented at restitution hearings, however, must meet due process requirements, such as providing the defendant with an opportunity to refute the evidence presented, and being reasonably reliable. *Pollard*, 66 Wn.App. 784-85 (citing *State v. Strauss*, 119 Wn.2d 401, 418, 832 P.2D 78 (1992)). In other words, the amount of restitution must be established with “substantial credible evidence” which “does not subject the trier of fact to mere speculation or conjecture.” (Citations omitted.) *State v. Fambrough*, 66 Wn.App. 223, 225, 831 P.2d 789 (1992). When the evidence is comprised of hearsay statements, the degree of corroboration required by due process is not proof of the truth of hearsay statements “beyond a reasonable doubt”, but rather, proof which gives the defendant a sufficient basis for rebuttal. *State v. S.S.*, 67 Wn.App. 800, 807-08, 840 P.2d 891 (1992).

Here, the restitution award was not based upon the State’s affidavit, which contained the hearsay. Due process thus was offended by the trial court’s reliance upon Wilkey’s unsworn list of items missing or the cost thereof. The court must reverse the restitution order and remand for a new restitution hearing.

State v. Dedonado, 99 Wn.App. 251, 991 P.2d 1216 (2000). When a defendant disputes material facts for purposes of restitution, the sentencing court must either not consider those facts or grant an

evidentiary hearing when the State must prove the restitution amount by a preponderance of the evidence. State v. Kinneman, 155 Wn.2d 272, 119 P.3d 350 (2005); State v. Woods, 90 Wn.App. 904, 907, 953 P.835, review denied, 136 Wn.2d 1021, 969 P.2d 1064 (1998).

The amount of restitution must be based “on easily ascertainable damages.” RCW 9.94A.753(3). Evidence of damage is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture. State v. Pollard, 66 Wn. App. 779, 785, 834 P.2d 51, [*5] review denied, 120 Wn.2d 1015, 844 P.2d 436 (1992)

While the claimed loss “need not be established with specific accuracy,” it must be supported by “substantial credible evidence.” State v. Fleming, 75 Wn.App. 270, 274-75, 877 P.2d 243 (1994), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d (2006).

If a defendant disputes the restitution amount then the State must prove the damages by a preponderance of the evidence. The amount of the restitution may be determined by affidavit. State v. Kisor, 68 Wn.App. 610, 619, 844 P.2d 1038, review denied, 121 Wn.2d 1023, 854 P.2d 1084 (1993). Nonetheless the award of restitution must be supported by credible evidence which “does not subject the trier of fact to mere speculation or

conjecture.” Kisor, 68 Wn.App. at 620 (quoting *State v. Fambrough*, 66 Wn.App. 223, 225, 831 P.2d 789 (1992)..

The State does not have to prove the amount of restitution with "specific accuracy," provided there is evidence sufficient to provide a reasonable foundation

“The size of [a restitution] award is within the court's discretion and will not be disturbed on appeal absent a showing of abuse.” *State v. Mead*, 67 Wn.App. 486, 490, 836 P.2d 257 (1992) citing *Davison*, 116 Wn.2d at 917. However, application of an incorrect legal analysis or other error of law can constitute abuse of discretion. See *State v. Kinneman*, 155 Wn.2d 272, 289, 119 P.3d 350 (2005). The appellate court reviews the trial court’s factual findings for substantial evidence. *Ingram v. Dep’t of Licensing*, 162 Wn.2d 514, 522, 173 P.3d 259 (2007).

In the instant case, the trial court erred when it imposed restitution in this case. This is so because the trial court, upon motion of the State, terminated the evidentiary hearing and decided the restitution amount based on Wilkey’s list of missing items.

In the instant case, the losses and expenses claimed by Wilkey were unsupported by affidavit and also were contrary to the evidence at trial. The trial court’s restitution award was neither based on “substantial credible evidence” nor “easily ascertainable damages.”

6. THE DEFENDANT IS ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE.

The cumulative error doctrine applies when several errors occurred at the trial court level, none of which alone warrants reversal, but the combined errors effectively denied the defendant a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031 (2004); *see also State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The defendant bears the burden of proving an accumulation of errors of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994).

In this case, Ms. Holmes submits that there are numerous errors which taken by themselves require reversal and even dismissal of this case. However, should this court somehow disagree with her, Mr. Holmes contends that the aggregate of the arguments and facts set forth herein mandate dismissal and/or reversal of her convictions. In the event that this court affirms Ms. Holmes' convictions, this court should remand the matter for resentencing.

E. CONCLUSION:

For the foregoing reasons Ms. Holmes respectfully asks this court

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STATE OF WASHINGTON

to grant the relief requested.

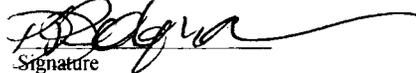
RESPECTFULLY SUBMITTED this 8th day of September, 2010.


BARBARA COREY, WSBA#17788
902 South 10th Street
Tacoma, WA 98405
253-779-0844

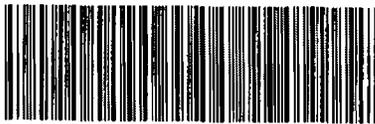
CERTIFICATE OF SERVICE:

I declare under penalty of perjury under the laws
Of the State of Washington that the following is a true
and correct: That on this date, I delivered via ABC- Legal
Messenger/U.S. Mail-postage pre-paid, a copy of this
Document to: Kathleen Proctor, Pierce County
Prosecutor's Office, 930 Tacoma Ave So, Room 946
Tacoma, Washington 98402 and to Appellant, Jennifer Holmes,
32809 14th Ave. So., Roy, WA 98580.

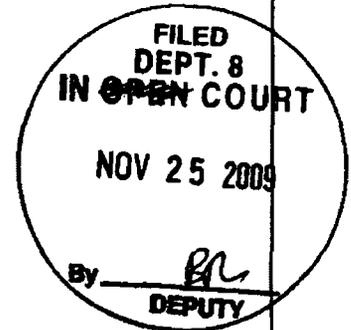
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Date


Signature

APPENDIX A



06-1-01432-6 33271642 ORSR 11-30-09



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 06-1-01432-6

vs.

JENNIFER SARAH HOLMES,

Defendant.

ORDER SETTING RESTITUTION AND DISBURSEMENT

THIS MATTER having come on before the undersigned judge of the above entitled court and restitution having been ordered pursuant to a criminal conviction and RCW 9.94A.753 which provides in part that restitution be ordered for easily ascertainable damage for injury or loss of property and actual expenses incurred for treatment for injury to persons and lost wages resulting from injury, but that the amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime; further, the Court having heard the testimony of the witnesses at trial and during the restitution hearing, and judged the credibility of those witnesses regarding the appropriate amount of restitution; and reviewed the documents admitted during trial and during the restitution hearing; and considered the argument and briefing of counsel, the files of the Prosecuting Attorney having reflected that the following persons or entities should receive restitution; Now, Therefore, IT IS HEREBY

ORDERED that restitution in the above entitled matter be, and the same is hereby set in the sum of \$39,133.25. This amount was determined by the Court after careful consideration of the

ORIGINAL

1 testimony, argument, and review of the documents submitted. This amount is based on the
2 itemized list attached to this order. Exhibit A.

3 The Clerk of the above entitled Court is hereby directed to disburse said funds as they are
4 received in the manner following:

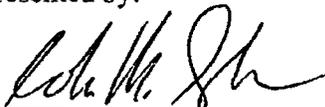
5 Lawrence Wilkey \$39,133.25

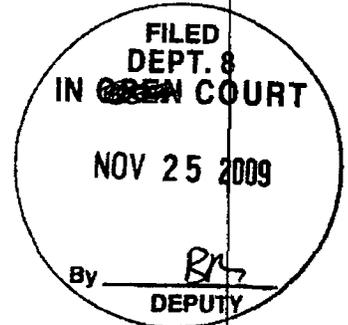
6 This legal financial liability is joint and several with defendant James L. Lindsay, Sr., Pierce
7 County Superior Court Cause No. 06-1-01433-4.

8 DONE ~~IN OPEN COURT~~ this 25th day of November, 2009.

9
10 
11 _____
12 JUDGE

13 Presented by:

14 
15 _____
16 JOHN M. SHEERAN
17 Deputy Prosecuting Attorney
18 WSB # 26050



19 *copy received; objections noted in record*
20 *BARBARA L. COREY* *at time of restitution*
21 *WSB #11778* *hearing*
22 *Blaney*

23 *jms* *Defendant Holmes did not waive*
24 *her presence at this presentation.*
25

EXHIBIT A

CAUSE NO. 061014326 HOLMS 061014334 LINDSAY

- \$ 615.00 55 GAL DRUM FULL OF YARD TOOLS 3-PICKS, 6 FIBER GLASS SHOVELS, 3 CROW BARS, 2 HOES, 2 METAL RACKS, TWO LAWN RACKS, 1, 5 FT AND 2 6FT PRY AND TAMPING BARS.
- \$ 195.00 3 5GAL METAL SAFTY GAS CANS
- \$ 180.00 2 14FT BRAND NEW GATES
- \$ 250.00 PULL AROUND FERTILIZER
- \$ 35.00 NEW HAND TRUCK
- \$ 150.00 8FT FIBER GLASS LADDER
- \$ 180.00 10FT FIFER GLASS LADDER
- \$ 80.00 15 GAL PROPANE TANK
- \$ 45.00 PROPANE TORCH
- \$ 100.00 4 50FT GARDEN HOSES 3/4 INCH
- \$ 175.00 5 10FT GARDEN HOSES 3/4 INCH
- \$ 75.00 COMMERCIAL RUBBERMAID GARBAGE CAN

- \$ 100.00 1 2FT BY 1FT METAL FIRST AID STATION

- \$ 1,200.00 2 RED GARAGE ROLL AROUND TOOL BOXES (2 SETS) BOTTOM AND TOP

- \$ 400.00 CRAFTMAN STAND UP AIR COMPRESSOR WITH HOSE
- \$ 150.00 SHOP VAC WITH ATTACHMENTS

PAGE

TOTAL: \$ 3930⁰⁰

CAUSE NO. 061014326 HOLMES 061014334 LINDSAY

- \$ 200.00 MCULLAH CHAIN SAW WITH BOX
 \$ 650.00 HUSQVARNA CHAIN SAW WITH BOX

 \$ 100.00 ELECTRIC RECIPROCATING SAW MILWALKI
 \$ 556.00 3 ELECTRIC CUTTING CIRCULER SAWS,BOSCH CRAFTSMAN,ECT.
 \$ 529.99 BOXES OF FENCING SUPPLIES,FENCE STRETCHER, WIRE STRETCHER
 \$ 918.99 DEWALT 18 VOLT CORDLESS TOOLS,RECIPROCATING SAW,CIRCULAR SAW, 2 DRILLS, BATTERY OPERATED LIGHT,ELECTRIC IMPACT DRIVER

 \$ 500.00 4 MAKITA 9.6 CORDLESS DRILLS 6 BATTERY S 2 CHARGERS
 \$ 90.00 1FT, 2FT, 3FT BOLT CUTTERS
 \$ 1,000.00 6 , 16 INCH WITH RIMS TRUCK TIRES
 \$ 320.00 4 , 15 INCH STUDED SNOW TIRES ON RIMS
 \$ 600.00 CRAFTMAN ROTOTILLER
 \$ 1,200.00 PORTABLE ELECTRIC WINCH WITH HOLDER
 \$ 74.00 METAL CAR RAMPS LOAD/UNLOAD TRAILERS
 \$ 180.00 ALUMANUM RAMP LOAD/UNLOAD TRAILERS

 \$ 535.00 FAKE DEAR ANTLER LAMP

 \$ 250.00 3 SETS BINOCULARS
 \$ ~~600~~ ⁶⁰⁰ 1 PIECE ENTERTAINMENT CENTER W/GLASS FRONT.APROX 10FT BY 7FT BOTTOM TOP TWO SIDE COLLUMS.NICE I RFINISHED IT.

PAGE

TOTAL: \$ 7,803.98

CAUSE NO. 061014326 HOLMES 061014334 LINDSAY

\$ 400.00 SET OF 4 SPEAKERS

\$ 150.00 5, 3 BATTERY MAG FLASHLIGHTS , 3, DOUBLE A FLASHLIGHTS.

\$ 350.00 MASSAGE THUMPER

\$ 150.00 CHIROPRACTIC NECK STRETCHER DEVICE

\$ 275.00 CELL PHONE, AND 2 CARORDS

KITCHEN

\$ 600.00 COMPLETELY CLEANED OUT CUPBOARDS OF FOOD AND FOOD ON 2CND STORAGE BEDROOM.

\$ ~~200.00~~¹⁰⁰ ALL KEYS STOLEN, REPLACED DOOR LOCKS , KEY FOBS , PO BOX

\$ 70.00 BRAND NEW 40LB BAGS DOG FOOD

\$ 32.00 2 CASES CANNED DOG FOOD

\$ 28.00 2 BRAND NEW COOKIE SHEETS AND PIZZA SHEETS SMALL/LARGE

\$ 250.00 RED KITCHEN AID MIXER

\$ 80.00 1 GIDDLE , 1 BLENDER

\$ 350.00 WOODEN BOX WITH COMPLETE SET OF SILVERWARE

\$ 50.00 2 , QUART SIZE THERMOS

\$ 35.00 1 SMALL , 1 LARGE ROASTING PANS

LAUNDRY ROOM

\$ 24.00 2 BAGS COSTCO SHOP TOWELS

\$ 250.00 ALL LAUNDRY SOAPS,CLEANING SUPPLIES,BUCKETS,TRASH BAGS ,ECT.

PAGE Total:
\$ 2794⁰⁰

CAUSE NO. 061014326 HOLMES 061014334 LINDSAY

\$ 200.00 10 SETS BATHROOM TOWLES, WASH CLOTHES , HAND TOWELS
\$ 135.00 SONICARE TOOTH BRUSH
\$ 50.00 COSTCO ,TOILET PAPER,NAPKINS,PAPER TOWELS
\$ 350.00 MEDICAL SUPPLIES,SHAPOO'S SOAPS , ECT

\$ 340.00 COINS CHANGE

\$ 45.00 GREEN SPORTSMAN ICE CHEST
\$ 45.00 BLUE ICE CHEST (GIFT FROM MOTHER)

\$ 150.00 5 IGLOO COOLERS
\$ 225.00 GRINDER ,CUT OFF TOOL ELECTRIC DRUMEL
\$ 249.00 1-50PC SOCKET SET 1-100 PIECE SOCKET SET
\$ 250.00 PORTABLE STERJO NEW IN BOX
\$ 450.00 PANASONIC VACUM CLEANER SUPPIES AND ATCHMENTS
\$ 325.00 HOOVER STEAM VAC RUG CLEANER , ATACHMENTS/SUPPLIES

PAGE Total: \$2814⁰⁰

CAUSE NO. 061014326 HOLMES 061014334 LINDSAY

\$ 20.00 2 PORTABLE FILE CABINETS
 \$ 1,835.00 Y BAR L ,SADDLE WITH STAND

 \$ 100.00 GRAY HAD BRIEFCASE WITH INK ,TRAVEL STAPLER, PULLER
 \$ 350.00 HARDWOOD 4 DRAW FILE CABINET WITH FILE'S,OFFICE SUPPLY
 CIROPRACTIC BLOCKS,DOG TOY'S.

 \$ 325.00 SADDLE BAGS FULL CANTTEN HORSE EQ ECT.
 \$ 80.00 RIFLE SCALBERT

 \$ 85.00 2 SLEEPING BAGS LARGE SIZE 5 POUND
 \$ 870.00 MANS DIAMOND RING
 \$ 100.00 KING SIZE SHEETS
 \$ 15.00 4 BACK SCRATCHERS
 \$ 20.00 STEAM IRON
 \$ 25.00 IRONING BOARD
 \$ 1,000.00 MANS MOVAR WATCH
 \$ 40.00 40 OLD SILVER DOLLARS
 \$ 150.00 KING SIZE COMFORTER
 \$ 100.00 KING SIZE QUILT
 \$ 100.00 2 DOUBLE SIZE QUILT'S
 \$ 1,600.00 CD MUSIC COLLECTION
 \$ 60.00 2 PAIR SLIPPERS

PAGE Total: \$6875⁰⁰

CAUSE NO. 061014326 HOLMES 061014334 LINDSAY

\$ 175.00 3PC-SET EDDIE BAUER LUGGAGE
 \$ 125.00 EDDIE BAUER RAINCOAT
 \$ 220.00 3 CARHART JACKETS
 \$ 325.00 INSULATED SNOW MOBLE SUIT
 \$ 100.00 INSULATED CARHART OVERALLS
 \$ 115.00 INSULATED WINTER FLIGHT JACKETS
 \$ 65.00 2 FORM FITTING BASEBALL CAPS
 \$ 80.00 LEG AND BACK/NECK PILLOWS
 \$ 45.00 2 PAIR THONGS
 \$ 250.00 BULL HORN FOOT STOOL
 \$ 30.00 4 PIECE SET PYREX MIXING BOWLS
 \$ 25.00 3 PIECE SET PYREX BACKING BOWLS WITH LIDS
 \$ 30.00 2 PYREX CAKE BAKING PANS
 \$ 200.00 ALL MY TUPERWARE
 \$ 30.00 ROUND MARBLE PAD
 \$ 130.00 6 STONE HOT/COLD PADS
 \$ 150.00 4 MEDICAL COLD PACKS HEAVY RUBBER
 \$ 32.00 HEATING PAD
 \$ 30.00 REVEREWARE FRYING PAN
 \$ 200.00 5 PIECE SET REVEREWARE COPPER BOTTOM WITH LIDS
 \$ 130.00 4 COOLERS APROX 30 QUART SIZE, 1 FILLED WITH MEDICAL SUPPLIES
 BANDAGES ECT. 1 FILLED WITH PICNIC SUPPLIES.1 FILLED WITH DOG
 TRAVEL SUPPLIES ,1 EMPTY.
 \$ 48.00 FOUR GREEN AMO BOX "S

 \$ 108.00 1 CASE 12 GAUGE

PAGE Total:
 \$2,643⁰⁰

CAUSE NO. 061014326 HOLMES 061014334 LINDSAY

- \$ 45.00 3 LARGE GOLF UMBRELLA'S
- \$ 115.00 6 POWER STRIPS
- \$ 500.00 4 BLUE TACOMA SCREW BOXES FILLED WITH ALL SORTS OF SCREWS
WASHERS ECT
- \$ 25.00 100 FT ROLL SPEAKER WIRE
- \$ 20.00 4 BREAD BAKING PANS
- \$ 250.00 AIR TOOLS ,IMPACT WRENCH,DRILL,CHISEL GUN,DISC GINDER,
SANDER, CUT-OFF TOOL
- \$ 120.00 4 HEAVY DUTY PLASTIC SAW HORSES ADJUSTABLE
- \$ 120.00 4, 27 FOOT TIE STRAPS
- \$ 45.00 3 BINDERS
- \$ 60.00 8 SMALL TIE STRAPS
- \$ 70.00 2 COMALONGS

- \$ 340.00 2 COWBOY COATS COATED AUSY STYLE 1 LONG TO ANKLE'S AND 1
SHORT.
- \$ 132.00 2 SETS COWBOY SPURS

Page TOTAL:
\$ 1,842⁰⁰

CAUSE NO. 061014326 HOLMES 061014334 LINDSAY

- S 600.00 PANASONIC TELEPHONE SYSTEM WITH 4 ADDITIONAL REMOTE HAND SETS

- S 99.00 BROKEN WATER FAWCET, FLATTENED TO GROUND DRIVEN OVER FAWCET \$39.00 REPAIR LABOR \$ 60.00

- S 850.00 MY BROWN LEATHER COUCH WAS RIPPED AND TORN (REPLACED)

- S 780.00 RELAX BACK STORE ZERO GRAVITY CHAIR BROKEN (COULD NOT BE FIXED)

- S 44.00 FENCING CUT (WAS REPLACED)

- S 300.00 CARPET CLEANING

- S 500.00 DVD/RECEAVER WAS TRASHED,DESTROYED

Page Total: \$3173⁰⁰

CAUSE NO. 061014326 HOLMES 061014334 LINDSAY

- S 1,912.38 COST TO FLY TO IDAHO TO PICK UP IMPOUNDED TRUCK, REPAIR, REPLACEMENT OF STOLEN ITEMS IN TRUCK, FOOD ECT, ECT, ECT, SEE RECEIPTS.
- (REPAIR DAMAGES)
- S 2,150.00 PAINT DAMAGE TO ROOF, HEATER CORE ROTTED OUT BECAUSE TRUCK SAT 1 YEAR, SAME WITH AC PUMP, MUD FLAP TORN OFF, RAIN GAURDS BUSTED, ECT.

PAGE Total:
\$4062.³⁸

CAUSE NO. 061014326 HOLMES 061014334 LINDSAY

MEDICAL

ST JOSPH HOSPITAL (SEE MEDICAL RECORDS/RECEIPTS) CO-PAY \$952.00

EMERGENCY DEPT VISIT CO-PAY \$ 29.96

INPATIENT SERVICES

MEDICAL IMAGING

Hospital ADMIN

CARDIAC STUDY (REFER BY PCP) CHEST HURT CO-PAY \$ 45.23

MEDICATION AFTER RELEASE FROM HOSPITAL

EYE EXAM (REFER BY PCP) ALL EYEWARE DESTROYED CO-PAY \$67.00

DR GEORGE GLVA M.D INPATIENT TEAM CO-PAY \$26.44

DR KIRKEGAARD M.D. DISCHARGE DAY CO-PAY \$14.02

TACOMA RADIOLOGICAL CO-PAY \$19.57

LOWELL C FINKLEMAN (PCP) CO-PAY \$154.82

S 1,383.10 ATLAS FAMILY CHIROPRACTIC (REFER BY PCP)

S 503.75 MASSAGE THERAPY (REFER BY PCP AND CHIROPRACTOR)

Page Total:
3,195.89

APPENDIX B

October 16 2009 8:59 AM

KEVIN STOCK
COUNTY CLERK
NO: 06-1-01432-6

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN PIERCE COUNTY**

STATE OF WASHINGTON,

Plaintiff,

vs

JENNIFER HOLMES,

Defendant.

NO. 06-1-01432-6

DEFENDANT HOLMES' RESPONSE
TO STATE'S RESTITUTION
REQUEST

JENNIFER SARAH HOLMES, represented by her attorney Barbara Corey, now makes the response to the State's restitution claim. This court heard extensive testimony at trial regarding (1) items that Ms. Holmes reported stolen from her residence in Idaho in October 2005; (2) Idaho police did not act on her report because it was a "domestic" case; (3) many of the same items that Ms. Holmes reported stolen were later reported stolen by Mr. Wilkey.

Mr. Wilkey makes a substantial restitution claim. However, he fails to provide any documentation in support of his many claims. His cost estimates appear grossly inflated.

At a prior proceeding, this court stated that it would limit restitution to out of pocket costs. Mr. Wilkey has failed entirely to show out of pocket costs.

This restitution hearing is not an opportunity for Mr. Wilkey to extract money that is not owed him.

Ms. Holmes incorporates by reference the response of Mr. Lindsay.

HOLMES – RESPONSE
TO STATE'S
RESTITUTION CLAIM

BARBARA COREY, ATTORNEY PLLC
901 South "I" St, #201
Tacoma, WA 98405
253.779.0844

1 Further, it appears likely that DPA Sheeran has returned certain property to Mr. Wilkey.
2 Those items appear to include the television, the portion of the entertainment center that was
3 admitted at trial, firearms, etc. The ownership of those items always has been disputed. This
4 court should decline to reach a restitution amount until it determines the amount by which the
5 State of Washington already has unjustly enriched Mr. Wilkey by giving his property that he
6 does not own.

7 1. Defendant Holmes agrees to pay for the medical expenses which are documented on
8 page 12 of the amended proposed restitution request *with the following exceptions*: Defendant
9 Holmes contends that she should not have to pay the cost of cardiac study since it was unrelated to
10 the March 2005 events. Likewise, the eye exam should not be covered. It must be noted that the
11 victim had had lazer eye surgery which had corrected his vision. The defendant also objects to
12 payments to Dr. Finkleman absent documentation that the treatment was necessary and related to
13 this incident. The defendant also objects to payments to Atlas Chiropractic and Massage Therapy
14 (an identified provider) absent proof that these expenses were incurred as a direct consequence of
15 the crimes for which the defendant was convicted. Further, the defendant anticipates that the State
16 will provide receipts for the aforementioned claims.

17 2. Page 3: As the court previously observed, restitution shall be based on out of pocket
18 expenses.

19 a. It is undisputed that Jennifer Holmes paid for the Yamaha 600 Grizzly 4
20 Wheeler. Further, there was no credible evidence that she gave this expensive item to the
21 defendant. It is significant that Mr. Wilkey presented a bill of sale which he claimed was signed
22 by Jennifer Holmes in January 2006 --- at a time when there was absolutely no contact with the
23 victim.

24 b. The items included on the list from the \$615 claim through the commercial
25 Rubbermaid garbage cans should not be included in the restitution order. Per the trial testimony,

1 neither Bonner County Sheriff's detectives nor Pierce County Police inventoried the second trailer
2 in Idaho. That trailer and its contents were returned to Mr. Wilkey.

3 c. The 2 outdoor dog houses were shown by photographs to have been in Idaho
4 the entire time. The outdoor dog houses never left Idaho.

5 d. The parties owned at least 2 metal first aid kits.

6 e. Mr. Wilkey received this vehicle prior to the conclusion of the case when DPA
7 Sheeran released it to him. The defendant had no opportunity to inventory the truck. The
8 defendant therefore should not held responsible for the alleged contents which Mr. Wilkey claims
9 were missing. As for the length of time when he was deprived of use of the vehicle, Mr. Wilkey
10 perhaps should have persuaded Mr. Sheeran to give him the vehicle at an earlier date. Anyway,
11 once police seized the vehicle and put it into evidence, the police and prosecutor (not the
12 defendant) were responsible for the item and any decisions related to its release.

13 f. The remaining items on page 3 relate to the horse trailer (which Mr. Wilkey
14 received back) and items that he claimed were inside the horse trailer. Again, neither Idaho nor
15 Pierce County law enforcement agencies inventoried the horse trailer. Defendant Holmes should
16 not have to compensate Mr. Wilkey for items that the State cannot establish were even taken.

17 3. Page 4. There was testimony at trial regarding ownership of the chain saws. The
18 defendant submits that her testimony that she had received one of the chain saws after her father's
19 death and that she had purchased the Husqvarna saw was credible. There is no doubt that the
20 defendant was in a financially superior position to Mr. Wilkey for most of their relationship.

21 a. Again, for the items from the electric reciprocating saw through the Dewalt 18
22 volt cordless tools, etc, Mr. Wilkey has failed to provide evidence that he had any out of pocket
23 loss for these items. In many ways, because Mr. Wilkey simply lacks any evidence that he had
24 out of pocket losses. Mr. Wilkey's restitution claim reads like a Christmas list.

25 b. The same answer is made for the remainder of the tools itemized on this page.

1 c. Regarding the living room items, the defendant submits that the "fake deer
2 antler lamp" appears in police photos of the defendant's residence. Mr. Wilkey lacks any
3 verification that 5 pairs of prescription eyeglasses were destroyed. Mr. Wilkey fails to document
4 any out of pocket expenses for his undocumented claim. Mr. Wilkey's claim that \$5221.00 of
5 prescription medicine was taken (by being flushed down the toilet) is patently ridiculous. At trial,
6 there was considerable testimony about the pill bottles which Mr. Wilkey belatedly brought into
7 trial after it commenced and which were not seen by police after the reported event. As the court
8 will recall, all of the prescription drugs were past their expiration dates. It is suspicious, to say the
9 least, that these items were not produced as evidence until many years after the alleged crime. Mr.
10 Wilkey has no documentation for the alleged loss of three pairs of binoculars. The entertainment
11 center was displayed in court. Jennifer Holmes purchased the item and Mr. Wilkey did some
12 modest refinishing on this piece of furniture. This item should be given to Ms. Holmes.

13 4 Defendant.Holmes interposes the following objections to the items enumerated on page
14 5.

15 a. Assuming arguendo that this court finds that a set of 4 speakers was taken, Mr.
16 Wilkey has failed to provide any documentation of his out-of-pocket expenses.

17 b. Again, Mr. Wilkey has nothing other than his mere assertion to establish
18 numerous flashlights were taken. Ms. Holmes purchased the massage thumper, chiropractic neck
19 stretcher device for her massage business. Likewise, Mr. Wilkey has failed to establish any
20 documentation the alleged loss of his "cell phone and 3 carods."

21 c. Ms. Holmes established by competent evidence at trial that she purchased the
22 Kitchen Aid mixer. Her receipt stands in marked contrast to the Mr. Wilkey's claim that the mixer
23 was purchased at a garage sale.

24 d. Regarding Mr. Wilkey's claims that the defendant completely cleaned out
25 cupboards of food,etc., the defendant denies the same. Photographs of the Wilkey residence

1 affirm that is not true. Likewise, there is no documentation that any of the other items on page 5
2 were removed from his residence.

3 5. Page 6.

4 a. Regarding bathroom supplies, Mr. Wilkey has failed to provide any
5 documentation that he possessed, much less paid for, these items. Further, the Sonicare tooth
6 brush is visible in photographs of the residence.

7 b. Regarding the existence of the tiger eye bracelet, Mr. Wilkey not only has failed
8 to provide any evidence even of its existence but also has failed to provide any documentation of
9 either value or out of pocket loss. Ms. Holmes adamantly denies that any coins or change were
10 removed from Mr. Wilkey's residence.

11 c. Regarding the remaining items on page 6, Ms. Holmes denies that they were
12 taken. Further, Mr. Wilkey has failed to establish the existence of and out of pocket costs for these
13 items.

14 6. Page 7.

15 a. Ms. Holmes denies that the wooden file cabinets that she retrieved belonged to
16 her and were used for business records. Ms. Holmes paid for them and Mr. Wilkey has no
17 documentation to prove otherwise. The saddle in question was purchased by Ms. Holmes at the
18 saddlery here in Pierce County. Ms. Holmes provided receipts for the purchase of all of the
19 saddles.

20 b. Ms. Holmes provided proof of the purchase of the Dell computer and related
21 equipment. Mr. Wilkey not only knew that Ms. Holmes had purchased the computer and related
22 items but also that she had purchased them for her daughters' use on school work.

23 c. Regarding the brief case and other hardwood four draw file cabinet, the
24 defendant is unaware of any 3rd such file cabinet. Mr. Wilkey has provided no documentation of
25 any out of pocket expenses for such items, assuming that they exist.

1 d. The list of additional items faxed to Det. Loffelholz in May 2006 contains many
2 items whose existence is dubious at most. In addition, the list contains items that Mr. Wilkey still
3 owns – such as the man’s diamond ring that he wore to court. Mr. Wilkey has never provided any
4 documentation that he owned any \$1000.00 watch, much less a “Movar” watch. Although Mr.
5 Wilkey reported that numerous quilts were stolen, those quilts and blankets were identified by Ms.
6 Holmes at trial as items that she had purchased and which Mr. Wilkey had stolen from her. Mr.
7 Wilkey also seeks restitution for a “cd music collection”. The only testimony about his musical
8 collection at trial concerned cassette tapes. There is a vast difference in value between cassette
9 tapes and CD’s. Further, Mr. Wilkey has failed to provide any documentation whatsoever for this
10 extensive music collection.

11 7. Page 8. Again, Mr. Wilkey fails to provide any documentation that he suffered any out
12 of pocket losses for any of the enumerated items.

13 8. Page 9. Ms. Holmes incorporates the previous answer.

14 9. Page 10. Mr. Wilkey asserts that “80%” of his kitchen was destroyed and that various
15 items of kitchenware were taken. Mr. Wilkey in the previous pages already has claimed these
16 items.

17 a. Regarding the Panasonic phone system, Ms. Holmes testified that she purchased
18 this system and that she never gave it to Mr. Wilkey. His testimony predictability asserts that he
19 received it as a gift from Ms. Holmes.

20 b. The leather couch was torn and ripped by the puppies before it ever left Idaho.
21 As for Wilkey’s testimony that Ms. Holmes or Mr. Lindsey cut the top of the couch with a knife,
22 no one ever noticed this damage. Mr. Wilkey never reported this to law enforcement.

23 c. Mr. Wilkey’s claim for \$2000.00 for destroyed clothing and items destroyed by
24 bleach is grossly inflated. As this court will recall, the items “destroyed” were not destroyed at all.
25 There were some bleach marks on blue jeans, an old sweatshirt and a pair of men’s underpants.

1 d. The zero gravity chair was purchased by Ms. Holmes. Once again, Mr. Wilkey
2 claimed that it was a gift.

3 e. No dvd/receiver was trashed or destroyed.

4 10. Page 11.

5 a. Mr. Wilkey's story about damage to the blue car is not credible. He claimed
6 that Ms. Holmes and Mr. Wilkey had set fire to the car a day or so before. It was never reported to
7 police. Further, none of the police officer's who responded to the incident at issue here notice any
8 thing wrong with the car.

9 b. Wilkey recovered a truck and horse trailer (although Mr. Holmes has never
10 conceded that he owned either).

11 c. Any damage that occurred to the truck while it was in the custody of police is
12 not a proper restitution expense.

13 DATED: October 15, 2009.

14 /s/BARBARA COREY, WSBA# 11778
15 Attorney for Defendant
16 barbara@bcoreylaw.com
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10/27/2010
STATE OF WASHINGTON
SY

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

STATE OF WASHINGTON,

Respondent,

and

JENNIFER HOLMES,

Appellant.

CASE NO. 39103-1-II

CERTIFICATE OF SERVICE
(Corrected Brief of Appellant)

I declare under penalty of perjury under the laws of the State of Washington that the following is a true and correct: That on the 20th day of September, I delivered via ABC- Legal Messenger, a copy of the *Corrected* Brief of Appellant to: KATHLEEN PROCTOR, Pierce County Prosecutor's Office, 930 Tacoma Ave So, Room 946 Tacoma, Washington 98402 and to Appellant, Jennifer Holmes, via U.S. Mail 32809 - 14th Ave. So., Roy, WA 98580.

DATED this 21st day of September, 2010.



Kim Redford