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GROUND 1

PROSECUTORIAL MISCONDUCT

Standard of Review

Gore bears the burden of (1) establishing prosecutorial misconduct and (2) demonstrating that the conduct prejudiced his defense in that there is a substantial likelihood that the improper argument affected the verdict. State v. Cheatam, 150 Wn. 2d 626, 652, 81 P. 3d 830 (2003)(citing State v. Finch, 137 Wn. 2d 792, 839, 975 P. 2d 967 (1999)). In deciding whether misconduct warrants reversal, consideration is given to its prejudicial nature and cumulative effect. State v. Boehning, 127 Wn. App. 511, 518, 111 P. 3d 899 (2005).

A defendant's failure to object to an improper remark at trial generally waives his right to argue prosecutorial misconduct on appeal unless the remark was so "flagrant and ill-intentioned" that it caused enduring and resulting prejudice that a curative instruction could not have remedied. *Id.*

The prosecutor in Gore's case committed misconduct by asking defense witness Casey Jones whether Gore was "lying" during his testimony.

During cross-examination of Casey Jones the prosecutor engaged in the following line of questioning:

Prosecutor: You said you heard lots of sounds coming from that room; is that right?

Casey Jones: Yes, ma'am.

Prosecutor: Any of them include ow, that hurts?

Casey Jones: I didn't hear it.

Prosecutor: So if the defendant himself testified that she told him that ow, it hurt, would he be lying?

Casey Jones: Probably not.

Mr. Dixon: Objection. Objection.

The Court: Hang on.
Sustained.

[RP 878]

Generally, it is misconduct for a prosecutor to seek a witness's opinion as to whether another witness is telling the truth. State v. Jerrels, 83 Wn. App. 503,507, 925 P.2d 209 (1996); State v. Casteneda-Perez, 61 Wn. App. 354, 362, 810 P. 2d 74 (improper to ask witness's opinion whether another witness was "lying"), review denied, 118 Wn. 2d 1007 (1991).

Where prosecutor asked defendants opinion on witness's credibility, The Court of Appeals labeled the prosecutor's question "flagrant misconduct." See State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005).

In State v. Wright, 76 Wn. App. 811, 821-22,888 P. 2d 1214, review denied, 127 Wn. 2d 1010 (1995), the court explained that (1) questioning one witness about another witness's "lying" is impermissible because it "places irrelevant information before the jury and potentially prejudices the defendant;" but (2) questions about whether a witness is "mistaken" which "do not have the same potential to prejudice the defendant or show him or her in a bad light," are merely objectionable to the extent that they are irrelevant and not helpful to the jury.

The caselaw speaks clearly. The prosecutor's questioning was improper.

Jones was the only witness that could testify to seeing J.L.C. and Gore have sex and to J.L.C.'s demeanor during sex. The prosecutor had already attempted to impeach Gore with his prior theft conviction; therefore Jones' credibility and testimony were critical to the defense.

Jones already stated to the prosecutor that he didn't hear J.L.C. say "ow" or "it hurts," [RP 878]. When the prosecutor asked "so if the defendant himself testified that she told him that ow, it hurts, would he be lying?"; it called for Jones' opinion as to the defendant's credibility based solely on speculation about whether Gore had in fact said it.

By Jones stating his opinion that the defendant was "probably not" lying, there is a substantial likelihood it prejudiced the

defense. Asking a witness to express an opinion about whether another witness is lying invades the province of the jury.

State v. Casteneda-Perez, 61 Wn. App at 362.

It is

likely that a reasonable jury could infer from Jones' speculation about the defendant's credibility and prior testimony, that Jones, who's opinion was clearly in favor of the defendant, was thus biased and uncredible.

The prosecutor's question was a deliberate attempt to influence the jury's perception of Jones' testimony and unfairly cast a bias between Jones and the defendant.

The improper questioning was an invasion of the jury's province that prejudiced the defense.

Jones' testimony described a consensual encounter between Gore and J.L.C. where J.L.C. was "coherent" and speaking to Gore in a "seductive" tone of voice. [RP 874-877]. This was extremely important to the defense and Jones' credibility thus became one of the core issues of the case.

Thus, there is a substantial likelihood the prosecutor's improper conduct affected the verdict and Gore's right to a fair trial.

Prosecutorial misconduct warrants reversal of Gore's convictions.

GROUND 2

Ineffective Assistance of Counsel

Standard of Review

To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. Strickland v. Washington, 460 U.S. 668, 687, 104 S. Ct. 2052 80 L. Ed. 2d. 674 (1984). Counsel's performance is deficient when it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn. 2d. 668, 705, 940, P. 2d 1239 (1997). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. State v. Powell, 150 Wn. App. 139, 153, 206, P. 3d 703 (2009). There is a strong presumption that counsel is competent and provided proper, professional assistance. State v. Lord, 117 Wn. 2d. 829, 822, 882 P. 2d 177 (1991). Deficient performance is not shown by matters that go to trial strategy or tactics. State v. Cienfuegos, 144 Wn. 2d. 222, 227, 25 P. 3d 1011 (2001).

A. Presumption of innocence

Defense counsel violated Gore's presumption of innocence during closing arguments by directly and unconstitutionally stating to the jury that Gore was "not innocent."

I. Deficient Performance

At the end of defense counsel's closing argument he provided the jury this statement:

"So don't find him innocent because he's not. He might be a good guy, might be a bad guy, might be somewhere inbetween, not innocent. You are, I am, Ms. Jinhong is, everyone in this room is. It's up to you. The proper verdict in a court of law, the proper verdict for you to return based on the evidence and lack of evidence is a verdict of not guilty."

[RP 960]

The sole purpose of closing argument is to assist the jury in analyzing, evaluating, and applying evidence. United States v. Dorr, 636 F.2d 117, 120 (5th cir. 1981)

The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary and it's enforcement lies at the foundation of the administration of our criminal law. Coffin v. United States, 156 U.S. 432, 453 15 S. Ct. 394, 39 L. Ed. 481 (1895); see also Taylor v. Kentucky, 436 U.S. 478, 483, 98 S. Ct. 1930, 56 L.Ed. 2d 468 (1978).

Gore's counsel violated RCW 10.58.020, providing, "every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt..."

Counsel's statement to the jury violated Gore's due process by eroding the presumption of innocence.

This couldn't be further from a trial strategy or tactic to further Gore's interests. And although counsel stated "the proper verdict is...not guilty" [RP 960], telling the trier of the fact that a criminal defendant is "not innocent" is clearly not a reasonable trial strategy any competent attorney would consider.

Defense counsel's comments were improper and consequently violated Gore's presumption of innocence; and therefore fell below an objective standard of reasonableness.

II. Prejudice

Counsel's damaging comments invaded the province of the jury and destroyed the presumption that Gore was innocent until proven guilty, the bedrock of our criminal justice system.

Counsel's argument unfairly persuaded the jury that Gore was in fact "not innocent."

Any reasonable juror could infer from defense counsel stating Gore was not innocent that Gore was culpable in some way even if defense counsel disputed the evidence against him.

Because Gore's counsel violated his presumption of innocence and denied him a fair trial, it is likely that absent counsel's improper comments the results of the trial would have differed.

Thus Gore's convictions must be reversed.

B. Failure to Request Curative Instruction

As a result of the prosecutor's improper questioning of Casey Jones (Additional Ground 1), Gore's defense counsel should have requested a curative instruction to remedy the resulting prejudice.

I. Deficient Performance

After a sustained objection to the prosecutor's questioning about Gore "lying", [RP 878] defense counsel should have requested a curative instruction to dispell any prejudicial implications against the defendant.

Counsel's failure to move for a mistrial or request a curative instruction "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn. 2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991).

In the instant case, defense counsel made a timely and sustained objection to the prosecutor's question, obviously counsel understood it was improper and preserved the record accordingly. However, any competent attorney would have identified the prejudicial implications the questioning served against the defendant and Jones and requested a curative instruction.

Counsel's decision cannot be considered a strategy or trial tactic. Requesting the instruction would have been at no cost to Gore and would alleviate an prejudice associated with the prosecutor's questioning. To not request the instruction would place the defense in substancial jeopardy and would be wholly detrimental to Gore's position at trial.

Therefore, defense counsel's performance was objectively unreasonable and thus deficient.

II. Prejudice

The prejudice here is clear, without a curative instruction the jury could have drawn a prejudicial inference from the prosecutor's questioning and attributed it to Gore or Jones; two critical witnesses for the defense. There is a substantial likelihood that had counsel requested a curative instruction in regards to the prosecutor questioning Jones about Gore "lying" [RP 878], the results of the trial would have differed.

Because defense counsel was ineffective to the extent that Gore was prejudiced and denied his right to a fair trial, Gore's convictions must be reversed.

GROUND 3

PRESUMPTION OF PREJUDICE

The juror misconduct in the present case triggered a presumption of prejudice and the trial court abused its discretion by claiming the misconduct was harmless, consequently alleviating the state of any burden to show the juror's claims were not prejudicial.

The sixth amendment of the United States Constitution provides that an individual accused of a crime has a right to trial by an impartial jury.

Any unapproved communication, contact or tampering with a juror during a criminal trial is presumtively prejudicial. Remmer v. United States, 347 U.S. 227, 229 (1954). The constitution however, does not mandate a new trial "every time a juror has been placed in a potentially compromising situation." Smith v. Phillips, 455 U.S. 209, 217 (1982). Instead, trial courts should investigate jurors exposed to extraneous influences to determine whether there has been prejudicial impact. Remmer, 347 U.S. at 230.

Communications by or with jurors constitute misconduct. Once established, it gives rise to a presumption of prejudice which the state has the burden of disproving beyond a reasonable doubt.

However, the presumption is not conclusive and may be overcome if the trial court determines such misconduct was harmless to the defendant. State v. Murphy, 44 Wn. App. 290, 296, 721 P. 2d 30 (citation omitted), review denied, 107 Wn. 2d 1002 (1986).

In the present case the record shows that the juror's actions and comments described in the bailiffs testimony constituted misconduct and were presumptively prejudicial.

The bailiff provided that:

"As your honor has noted, four jurors independently and privately had brought to my attention that [Gore] had to be passed at very close proximity almost every time that they entered the courthouse. One of them used the term tactic, felt that it was a conscious tactic. Another one of the jurors used the term staging."

[RP 350]

The bailiff also stated that other jurors were aware of the issue, and he could "see in their faces" they were familiar with it when when the third juror voiced her concerns in front of the entire jury, [RP 353]

Although the state contended in trial that "there was just a misunderstanding that it turned to strategic or intentional behavior on the defendants part as opposed to unintentional." [RP 355]. And the state contends now on appeal that "given the record in the present case, there was nothing put forward by the bailiff's testimony to indicate an abuse of discretion, nor to indicate or suggest any misconduct or prejudice;" (Respondants brief at 39), both of these positions overlook the clear and inescapable prejudice inherent in the bailiff's testimony.

It is clear the jurors, at least one of them, felt that Gore's actions were intentional. A "conscious tactic" is clearly intentional and direct. What is of the most concern is that it is unknown what the jurors thought Gore was attempting to do when they claimed he was staging or acting tactical. But by the jurors stating they felt "uncomfortable" because of Gore's "staging" or "conscious tactics", it lends the notion they felt he was attempting to influence them or intimidate them in some manner. The fact that the jury attributed it's discomfort to what they perceived to be the defendant's deliberate actions or tactics constituted not only misconduct but a possibility of jury tampering or extraneous influence. This gave rise to a presumption of prejudice, that the state then had the burden of disproving beyond a reasonable doubt. *Murphy* 44. Wn. App at 296.

But rather than the state being required to disprove the prejudice, the trial court overcame the presumption by stating "I don't think there has been anything close to a showing of any kind of misconduct or any basis the jury is tainted in any way." [RP357].

A trial court's exercise of discretion must be based on tenable reasons and must then fall within a range of acceptable choices given the facts and the law. *State v. Rundquist*, 79 Wn. App. 786 793, 905 P. 2d 922 (1995).

To deny inquiry into the possible prejudicial impact of the jury's discomfort due to Gore's tactics and staging, [RP 356-59] and consequently relieve the state of its burden to disprove any prejudice, was an abuse of discretion by the trial court that denied Gore his right to a fair trial by an impartial jury.

Because the jury was likely prejudiced and the trial court abused its discretion to the extent Gore was denied a fair trial, Gore's convictions must be reversed.

GROUND 4

PERSUASIVE AUTHORITY

It is the essence of the common-law method that courts consider and often rely on the decisions from other courts, even when those decisions are not binding on them. In State v. Horton, 116 Wn. App 909, 68 P. 3d 1145 (2003), our Court of Appeals, Division Two, was in no way bound by the Indiana Court of Appeals decision in Wright. Horton at 922, 923. But in the absence of similar cases they were entitled to give that decision persuasive effect, as they did. Indeed in the commonlaw tradition, decisions of other courts vary in the respect they are given. They "should be accorded such a measure of weight and influence as they may be intrinsically entitled to receive." H.C. Black, The Law of Judicial Precedents 11 (1928)(quoted in R. Aldisert, the Judicial Process 778-779 (1976))

In addition to assignment of error No. 3 (jury interrogation issue) in the opening brief of Appellant, Gore requests that this court consider the case attached as appendix 1 to this SAG as a persuasive authority. (Caruthers vs. State, 2009)

Caruthers' raised an issue similar to Gore; "whether the trial court erred by failing to interrogate the jury after learning that

one or more jurors felt intimidated by actions attributed to multiple parties connected with the trial."

In Caruthers, counsel made the following statement in regards to a situation with the jury:

"There apparently is some information afloat which I would characterize as somewhat a thinly veiled allegation of jury tampering, and that concerns me greatly. Apparently, someone somewhere has received information from a juror or jurors that one or more of them, the jurors, are feeling intimidated by actions that such juror or jurors attribute to my client. I want to make a record on that, Your Honor, because I think it's a very serious allegation and I just-I am thankful that the Court has given me an opportunity to do so."
(Appendix 1 at 7)

Caruthers' defense counsel did not ask the court to interrogate the jury regarding the possible threats or otherwise provide a factual basis for the allegation and did not ask for a mistrial, (Appendix 1 at 7). In Gore's case counsel asked for both an interrogation of the jury and a mistrial, because of similar circumstances surrounding the jury, but received neither.

On appeal, the reviewing court in Caruthers stated the following:

"the trial court did not take reasonably available steps to investigate an allegation of threats which the trial court found credible enough to prompt extra security measures. The jurors themselves expressed that they felt intimidated, demonstrating that some of them had been exposed to possible threats. Upon learning of the possibility that some of the jurors felt intimidated by actions

they attributed to Caruthers, Caruthers' family, or Turner's family, the trial court did not interrogate the jury either to determine the content of the possible threatening actions or statements or to determine how many of the jurors felt intimidated. Nor did the trial court query whether the affected jurors believed they could remain impartial or ask whether any out-of-court statements were made to them about the case." (Appendix 1 at 12)

"We recognize that the trial court is in the best position to assess a jury's impartiality, but here the trial court did not investigate the extent or nature of the threats or the jury's impartiality once it became apparent to the trial court that the jury felt intimidated. Under these circumstances we conclude that the trial court abused its discretion by failing to investigate and this failure constituted fundamental error." (Appendix 1 at 13)

"As discussed further below, there was abundant evidence produced at trial to support Caruthers' conviction for murder. But we conclude that the failure to ensure during trial that the defendant was tried by an impartial jury after some of the jurors reported feeling intimidated constituted fundamental error that warrants a new trial." (Appendix 1 at 14)

Gore's issue bears striking similarity to Caruthers', and like the court in Caruthers', the trial court in Gore's case failed to investigate the jury as to ensure that they remained impartial. Here, as in Caruthers, the trial court's failure to investigate the jury constituted fundamental error that warrants a new trial.

GROUND 5

REBUTTAL TO STATE'S ARGUMENT ON ISSUE 2

The state contends on appeal that it was clearly a reasonable trial tactic for counsel to not request the inferior degree crime instruction of rape in the third degree; arguing primarily that to request such an instruction would be "antithetical" to the defense's position and Gore's testimony.

First, The State claims not requesting the instruction was reasonable given their caselaw, when infact it wasn't.

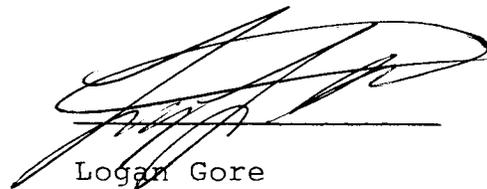
The State directs the court's attention to *State v. Pittman* (respondants brief at 32), and overlooks that the Pittman court and this court in the past considered three factors to gauge whether a tactical decision not to request a lesser included offense instruction is sound or legitimate: 1) The difference in maximum penalties between the greater and the lesser offenses; 2) Whether the defense's theory of the case is the same for the greater and lesser offenses, i.e. could the defendant reach acquittal on both charges given his defense theory of the case; and 3) the overall risk to the defendant given the totality of the developments at trial. *State v. Pittman*, 134 Wn. App. 376, 387-88, 160 P.3d 720 (2006); see also *State v. Ward*, 125 Wn. App 243, 249-51, 104 p. 3d 670 (2004).

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)	
)	
Respondent,)	No. 40047-2-II
)	
v.)	
)	
LOGAN GORE)	AFFIDAVIT IN SUPPORT OF
)	STATEMENT OF ADDITIONAL
)	GROUND FOR REVIEW
Appellant.)	
)	

I, Logan Gore, declare under the penalty of perjury under the laws of The State of Washington that the statements within this statement of additional grounds are true and correct to the best of my knowledge and have been sworn below on this 16 day of September 2010.

Subscribed and Sworn



Logan Gore

Appellant

APPENDIX 1

Case Summary

Chawknee Caruthers was convicted of murder and found to be a habitual offender. In this direct appeal, he contends that his trial counsel was ineffective. He also contends that the trial court abused its discretion by failing to *sua sponte* conduct an interrogation of the jury after defense counsel brought to the court's attention during trial that some of the jurors felt intimidated by actions attributed to the defendant, the defendant's family, and the victim's family. He also contends that the evidence is insufficient to support his conviction because the testimony of two witnesses is incredibly dubious. We reverse Caruthers' conviction because we conclude that the trial court abused its discretion by failing to investigate the content, extent, and possible prejudicial impact of the threats against the jury. However, because we also conclude that the incredible dubiousity rule does not apply and there is sufficient evidence to support his conviction, the State is free to retry him.

Facts and Procedural History

On September 15, 2007, Caruthers was visiting with a friend, Krista Anderson, at her LaPorte County home. While the pair was smoking marijuana, Santana Miller and a few other individuals entered the home. Miller was searching for some guns that he believed belonged to him as payment for cocaine he had given to Anderson for her to sell. When Caruthers lifted his shirt to show Miller that he did not have the guns on him, Miller punched him in the mouth and started choking him. Anderson told Miller that he and the other individuals needed to leave, and they did.

Caruthers then called another friend, Richard Smith, who came and picked up Caruthers. Caruthers called Anderson to ask where Miller lived, and she told him that Miller lived on Pleasant Street and described his residence. Caruthers and Richard then drove to the home of Richard's brother, Corey Smith. At the home, Richard was showing Caruthers a nine millimeter Ruger that belonged to Corey. Corey walked away from the room, and a short time later, Richard also walked away, leaving Caruthers alone with the handgun. When Richard returned, the gun was no longer on the table, and Richard assumed that Corey had put it away.

Richard, Corey, and Caruthers then left in a green Escort. Richard drove, Caruthers rode in the front passenger seat, and Corey sat in the back. Eventually, the trio traveled to Pleasant Street at Caruthers' request. The trio circled the block a few times, until Caruthers spotted a man who was standing with a group of people in front of a home examining a lawnmower on a truck trailer and said, "That looked like the guy." Tr. p. 523. Ultimately, Caruthers directed Richard to drive into an alley. From the alley, Caruthers spotted the man they had been following.

Caruthers eased out of the passenger side window, sat on the window ledge of the Escort, and pulled a handgun from his pants. Richard and Corey heard several gunshots. Caruthers then came back into the car and told Richard to drive. The group returned to Corey's home, and Caruthers said, "Man, I think I got him." *Id.* at 533. Corey asked his wife to put the gun away, and after Richard told his girlfriend that Caruthers had shot someone, Richard's girlfriend advised Corey's wife to wipe the gun to remove fingerprints.

However, Caruthers did not shoot Miller. Miller was not present at the scene. Instead, one of the rounds Caruthers fired struck the chest of Karim Turner, who was wearing a shirt similar to one that Miller had been wearing, and Turner fell to the ground. The individuals who had been standing with Turner—Jessica Stalling, Fahim Pasha, Kersee Anderson (no relation to Krista Anderson), and Tom Buford—had seen a green Escort circling the block, drive into the nearby alley, and stop. These individuals saw that the passenger riding in front was wearing a dark hoodie and heard gunshots coming from the vehicle. Stalling saw flames coming from the passenger's gun as it was fired. One of the bystanders called 911 when she saw Turner lying on the ground. Turner died soon after as a result of the gunshot wound to his chest.

Meanwhile, Corey told Caruthers to leave his home, so Richard and his girlfriend gave Caruthers a ride in the green Escort. En route, a Michigan City police officer stopped the car for a license plate violation. The officer noticed that Caruthers was wearing a dark hoodie. Pasha, who had traveled to the police station to give a statement, was walking back from the police station and observed that the police had pulled over a green Escort. Pasha ran up to the officer to identify the car as the one involved in the shooting. When Pasha saw Richard and his girlfriend in the car, Pasha became unsure about whether it was the same car. Pasha did not see the third individual's face. Because the officer found marijuana residue, all three vehicle occupants were patted down and the vehicle was searched, but no weapons were found inside the car. The officer then released the group.

Caruthers returned to Anderson's home, and he confessed to her that he had shot Turner by mistake, thinking that he was Miller because Turner and Miller had been wearing similar shirts. *Id.* at 147-48. He also confessed to Anderson's mother. *Id.* at 587-88. After reading an article in the newspaper about the shooting, Corey gave the gun to another person, who then gave the gun to the police. It was later determined that the shell casings found in the alley were fired from Corey's gun.

The State charged both Richard and Caruthers with murder.¹ The State later dismissed the charges against Richard but filed a habitual offender allegation² against Caruthers. Caruthers' jury trial began on July 28, 2008. In the middle of the State's case-in-chief during a break between two witnesses, Caruthers' counsel informed the trial court that it had come to his attention that at least one of the jurors was feeling intimidated by actions they attributed to Caruthers. Counsel stated that he thought this was a very serious allegation. Without a request to question the jurors, the trial court continued with the State's testimony. At the conclusion of his bifurcated trial, the jury found Caruthers guilty of murder and found him to be a habitual offender. At the beginning of the sentencing hearing, the trial court stated that during trial the defense had raised an issue "concerning what was loosely referred to as jury tampering." Sent. Tr. p. 1. The trial court stated that members of the jury had expressed concerns about their security to the bailiff on more than one occasion as a result of actions taken by the victim's family, Caruthers' family, and Caruthers himself. In response to these concerns, the trial court ordered extra security and alternate parking for the jurors. The court said

¹ Ind. Code § 35-42-1-1.

² Ind. Code § 35-50-2-8.

that it had informed the jurors that these additional security precautions had been taken and that at no point afterward had a juror expressed that they had been approached or threatened. The trial court sentenced Caruthers to sixty-five years for murder with an additional thirty years for the habitual offender enhancement. Caruthers now appeals.

Discussion and Decision

In this direct appeal, Caruthers raises several issues. Caruthers contends that his trial counsel³ was ineffective for waiving his request for a speedy trial without his consent, for failing to request an interrogation of the jury after an allegation of jury tampering, and for failing to actively participate in the habitual offender proceedings. Caruthers also contends that the trial court erred by failing to interrogate the jury *sua sponte* after the allegation of jury tampering was raised. Finally, Caruthers argues that the evidence was insufficient to support his conviction for murder because the testimony of two eyewitnesses was incredibly dubious.

One issue raised by Caruthers is dispositive: whether the trial court erred by failing to interrogate the jury after learning that one or more jurors felt intimidated by actions they attributed to multiple parties connected with the trial.

I. Threats Against the Jury

³ It appears from the CCS that Caruthers was represented by a series of several attorneys before this appeal. See Appellant's App. p. 2 ("9/26/07 MINUTE ENTRY Pamela S. Krause files entry of appearance as public defender on behalf of deft, enters preliminary plea of not guilty and requests discovery."); 6 ("7/28/08 DEFENDANT AND ATTORNEY APPEAR Deft in court in person and w/ counsel, J. Cupp.").

Although it is not clear which attorney waived the request for a speedy trial, James Cupp, Caruthers' attorney on appeal, represented him during both the guilt phase and the habitual offender phase of trial and is now arguing that his trial representation was ineffective. Our Supreme Court has stated that arguing one's own ineffectiveness is not permissible under the Rules of Professional Conduct. *Etieme v. State*, 716 N.E.2d 457, 463 (Ind. 1999).

During the State's case-in-chief, during a break between witnesses, Caruthers' counsel made the following statement:

There apparently is some information afloat which I would characterize as somewhat a thinly veiled allegation of jury tampering, and that concerns me greatly. Apparently, someone somewhere has received information from a juror or jurors that one or more of them, the jurors, are feeling intimidated by actions that such juror or jurors attribute to my client. I wanted to make a record on that, Your Honor, because I think it's a very serious allegation and I just – I am thankful that the Court has given me an opportunity to do so.

Tr. p. 499-500. Defense counsel did not ask the court to interrogate the jury regarding the possible threats or otherwise provide a factual basis for the allegation and did not ask for a mistrial. Nor did the trial court take any action *sua sponte* at that time to address the issue. The topic did not arise again until sentencing, when the trial court stated the following:

Before we proceed to sentencing, I want to make a record on something. During the trial, an issue was raised by the defense that there was information concerning what was loosely referred to as jury tampering. Members of the jury did express security concerns on more than one occasion to the bailiff as a result of various family members of the victim, of the defendant, as well as the defendant himself. In response, the Court arranged for extra security and alternate parking in front of exit and entrance for the jurors. To allay the jurors [sic] concerns, the Court did personally inform the jurors of the additional security precautions that were in place and instructed them on the ministerial aspects of the precautions. At no time did any juror express to the Court that they had been personally approached or threatened after the security precautions were put in place and the concerns regarding personal safety were expressed to the bailiff or made known to the Court.

Sent. Tr. p. 1.

Caruthers failed to either ask the trial court to interrogate the jury or otherwise object to the ameliorative actions taken by the trial court to allay the jury's concerns

about security. Nevertheless, Caruthers argues that the trial court's failure to *sua sponte* initiate an investigation into the possible threats constituted fundamental error that violated his right to an impartial jury. "The fundamental error doctrine is an exception to the general rule that the failure to object at trial constitutes a procedural default precluding consideration of an issue on appeal." *Jewell v. State*, 887 N.E.2d 939, 940 n.1 (Ind. 2008). The fundamental error exception is extremely narrow. *McQueen v. State*, 862 N.E.2d 1237, 1241 (Ind. Ct. App. 2007). To qualify as fundamental error, the error must be "so prejudicial to the rights of the defendant as to make a fair trial impossible." *Carden v. State*, 873 N.E.2d 160, 164 (Ind. Ct. App. 2007). The fundamental error exception "applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Hayworth v. State*, 904 N.E.2d 684, 694 (Ind. Ct. App. 2009) (quoting *McQueen*, 862 N.E.2d at 1241).

The right to trial before an impartial fact-finder is the cornerstone of our justice system. Article 1, § 13 of the Indiana Constitution guarantees criminal defendants the right to trial by an impartial jury. This right is an essential element of due process. *Black v. State*, 829 N.E.2d 607, 610 (Ind. Ct. App. 2005), *trans. denied*. "It is of course fundamental to our system of jurisprudence and guaranteed by our federal and state constitutions that an accused in a criminal case is entitled to a trial by jury. This necessarily contemplates a fair and impartial trial before a panel of competent jurors." *Hatfield v. State*, 243 Ind. 279, 183 N.E.2d 198, 199 (1962).

A juror can potentially become biased or prejudiced as a result of threats or intimidation. A biased juror must be dismissed. *Joyner v. State*, 736 N.E.2d 232, 239 (Ind. 2000), *reh'g denied*. To address the possibility that a juror has been exposed to extrajudicial comments, including threats, our Supreme Court adopted the *Lindsey* procedure⁴ in *Daniels v. State*, 264 Ind. 490, 346 N.E.2d 566 (1976). See *Joyner*, 736 N.E.2d at 239. In *Daniels*, the mother of the victim made threatening comments to the wife of one of the jurors at some point during the trial proceedings. Upon learning of the threat made to the juror's wife, the trial court interrogated each juror to determine whether anyone had heard anything about the trial or discussed the trial with anyone else, and each juror answered that he had not. The juror's wife testified regarding the threat, but it was not clear from her testimony how much she had told her husband about it. The Supreme Court decided that the *Lindsey* procedure was applicable under these facts and quoted the procedure:

Upon a suggestion of improper and prejudicial publicity, the trial court should make a determination as to the likelihood of resulting prejudice, both upon the basis of the content of the publication and the likelihood of its having come to the attention of any juror. If the risk of prejudice appears substantial, as opposed to imaginary or remote only, the court should interrogate the jury collectively to determine who, if any, has been exposed. If there has been no exposure, the court should instruct upon the hazards of such exposure and the necessity for avoiding exposure to out-of-court comment concerning the case. If any of the jurors have been exposed, he must be individually interrogated by the court outside the presence of the other jurors, to determine the degree of exposure and the likely effect thereof. After each juror is so interrogated, he should be individually admonished. After all exposed jurors have been interrogated and admonished, the jury should be assembled and collectively admonished, as in the case of a finding of 'no exposure.' If the imperiled party deems such

⁴ The *Lindsey* procedure, so-called because it was first expressed in *Lindsey v. State*, 260 Ind. 351, 295 N.E.2d 819 (1973), was initially prescribed for addressing a suggestion that the jury has been improperly exposed to prejudicial publicity.

action insufficient to remove the peril, he should move for a mistrial. Obviously, if at any stage the court believes the peril to be substantial and incurable, it should declare a mistrial sua sponte. At all stages, the trial court must have discretion to make the determination, within the context of the particular circumstances; and a denial of a motion to interrogate the jury will be reversible error, only if we can say that there has been substantial peril. If the jury has been interrogated and admonished, as set forth above, the continuance of the trial, over the imperiled party's motion for a mistrial, will be reversible error only if it can be said, after giving the decision of the trial judge the benefit of all reasonable doubt, that the peril was such as to be incurable by instruction.

Daniels, 346 N.E.2d at 568-69 (quoting *Lindsey*, 295 N.E.2d at 823). Although the Court stated that it would have been preferable for the trial court to investigate more deeply into the extent of the husband-juror's knowledge of the threat and admonish him not to discuss the matter with the other jurors, the Court held that the trial court did not abuse its discretion because the trial court had determined that none of the jurors "had suffered prejudicial exposure to extraneous influences that would warrant removing the cause from the jury." *Id.* at 569.

Since *Daniels*, our courts have addressed several cases involving threats against the jury. The Indiana Supreme Court concluded in *McDaniel v. State*, 268 Ind. 380, 375 N.E.2d 228 (1978), that the trial court did not abuse its discretion by denying the defendant's motion for a mistrial after it was revealed that one of the jurors received a threatening phone call about the case because the trial court individually interrogated the sole affected juror, discharged him, impaneled an alternate, and admonished the jury not to discuss the case with anyone and to report any attempts made to discuss the case with them. That same year, the Court held in *Owen v. State*, 269 Ind. 513, 381 N.E.2d 1235 (1978), that the trial court did not abuse its discretion by denying the defendant's motion

for a mistrial after a juror received a threatening phone call during trial because the trial court talked to the juror and ruled, based on her statements, that she could still be impartial. Nor was it established that the juror had informed anyone else about the threat she received. In a more recent case, *Joyner*, the Supreme Court found that the trial court did not abuse its discretion in refusing the defendant's request that the trial court excuse a juror who had been threatened by two of her co-workers, who were acquaintances of the defendant, and grant a mistrial. After the juror reported the threat, she assured the trial court that the threat did not affect her ability to serve on the jury and that she remained impartial to both sides. The juror also commented that others on the panel might have been approached as well. The trial court questioned each juror, who assured the trial court that he or she had not discussed the case with anyone. The Supreme Court concluded, based on the facts of the case, that there was no evidence of actual or implied bias and decided that the trial court properly refused to declare a mistrial. *Joyner*, 736 N.E.2d at 238-39.

In *McDaniel*, *Owen*, and *Joyner*, the trial court questioned the jurors as to possible bias after the defendant moved for a polling of the jury, a mistrial, or both. Here, the trial court did not conduct an investigation because the defense failed to request either interrogation of the jurors or a mistrial. Nonetheless, the trial court has an obligation to ensure that a defendant's right to an impartial jury is not violated. See *Daniels*, 346 N.E.2d at 569 ("Obviously, if at any stage the court believes the peril to be substantial and incurable, it should declare a mistrial sua sponte."). Our Supreme Court described the contours of this obligation in *Lindsey*. There, the defendant moved for a mistrial

without asking to have the jury polled to determine which jurors, if any, had been exposed to a newspaper story about the case. The Court stated that the request for a mistrial and the colloquy that followed brought the problems to the attention of the trial judge and then described the judge's resulting obligation:

The threat of prejudice being substantial, the prime consideration of the trial judge should have been to protect the integrity of the trial and not to salvage it. That obligation may be satisfied only by taking the best reasonably available steps to assure a verdict free of improper influences and not by proceeding upon the assumption that all may be well and that, if not, it will be detected and rectified later.

Lindsey, 295 N.E.2d at 824. Although the defendant in *Lindsey* did not ask to have the jury polled to determine which jurors had been exposed to the prejudicial publication, the Court concluded that the defendant was entitled to have the jury polled and that the trial court abused its discretion by failing to take reasonably available steps to ensure that the verdict was free from improper influences.

Likewise here, the trial court did not take reasonably available steps to investigate an allegation of threats which the trial court found credible enough to prompt extra security measures. The jurors themselves expressed that they felt intimidated, demonstrating that some of them had been exposed to possible threats. Upon learning of the possibility that some of the jurors felt intimidated by actions they attributed to Caruthers, Caruthers' family, or Turner's family, the trial court did not interrogate the jury either to determine the content of the possible threatening actions or statements or to determine how many of the jurors felt intimidated. Nor did the trial court query whether the affected jurors believed they could remain impartial or ask whether any out-of-court statements were made to them about the case.

Because no substantive record was made on this issue, we do not know either what occurred to cause at least some of the jurors to feel threatened or how prejudicial these occurrences might have been.⁵ But we do know that the trial court did not view the threats as imaginary or remote; indeed, the trial court recognized at sentencing that members of the jury had expressed security concerns on more than one occasion based on fears they had about the victim's family, Caruthers' family, and Caruthers himself and that it had taken action by ordering extra security and alternate parking arrangements. Although it was commendable for the trial court to take action to protect the jury's safety, the trial court's actions, without further investigation into the possible threats, could have led the jurors, including any jurors not directly exposed to threats, to believe that the judge believed that they were in danger and that they were, in fact, genuinely in danger. Nonetheless, the trial court did not address any prejudicial effects this might have had on Caruthers' right to an impartial jury. We recognize that the trial court is in the best position to assess a jury's impartiality, *Spears v. State*, 811 N.E.2d 485, 490 (Ind. Ct. App. 2004), but here the trial court did not investigate the extent or nature of the threats or the jury's impartiality once it became apparent to the trial court that the jury felt intimidated. Under these circumstances, we conclude that the trial court abused its discretion by failing to investigate and this failure constituted fundamental error.

Now we must determine the remedy for this error. The State concedes that "[e]fforts by spectators at trial to intimidate judge, jury, or witnesses violate the most

⁵ Although in this case the jury reported feeling threatened by both the victim's family and the defendant and his family, it would not necessarily affect our result if the jury perceived that it was being threatened only by the defendant's side. Although a defendant making threats should not profit by his own wrongdoing, we can imagine, for example, a scenario wherein a jury mistakenly believes it is being threatened by a defendant or a defendant's family. Such a situation could be highly prejudicial.

elementary principles of a fair trial.” Appellee’s Br. p. 14 (citing *Lambert v. State*, 743 N.E.2d 719, 733 (Ind. 2001)). However, the State, urging us to conclude that the error is harmless rather than fundamental, argues that “based on the evidence, the jury would have found Defendant guilty with or without any threat against the jurors.” *Id.* at 16. But “some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error. The right to an impartial adjudicator, be it judge or jury, is such a right.” *Riggs v. State*, 809 N.E.2d 322, 328-29 (Ind. 2004) (quoting *Gray v. Mississippi*, 481 U.S. 648, 668 (1987)). As discussed further below, there was abundant evidence produced at trial to support Caruthers’ conviction for murder. But we conclude that the failure to ensure during trial⁶ that the defendant was tried by an impartial jury after some of the jurors reported feeling intimidated constituted fundamental error that warrants a new trial. This is particularly so when the court institutes protective measures, measures known by the jurors that may substantiate their fears. *See Lindsey*, 295 N.E.2d 824 (reversing for new trial because “the accused was unconstitutionally subjected to a grave peril to which he should not have been subjected” as a result of trial court’s failure to interrogate the jury to determine the extent of its exposure to prejudicial publicity); *Stroud v. State*, 787 N.E.2d 430, 436 (Ind. Ct. App. 2003) (reversing for new trial because the trial court abused its discretion by failing to properly follow the *Lindsey* procedure after learning that a portion of the jury was exposed to potentially prejudicial media coverage), *trans. denied*.

⁶ “The *Lindsey* procedures are not appropriate and are not available for attacking a verdict.” *Fox v. State*, 457 N.E.2d 1088, 1092 (Ind. 1984). The trial court cannot wait until after the verdict to investigate whether the jury was affected but instead should take prompt action to address the issue during trial. *See Lindsey*, 295 N.E.2d at 823.

We recognize that jurors need not be absolutely insulated from all extraneous influences regarding a case. *Lindsey*, 295 N.E.2d at 822-23. Nor do we intend to suggest that trial counsel can expect to achieve delay or tactical advantage by presenting mere speculation that a jury has been exposed to extraneous influences. *See id.* Trial courts have discretion to deal with this type of problem. But in this case, where the trial court instituted protective measures known to the jury as a result of juror reports of being threatened, the trial court abused its discretion by not inquiring as to the impact of those threats on the jury's impartiality.

II. Double Jeopardy

Because we conclude that Caruthers' conviction for murder with a habitual offender enhancement must be reversed, we must determine whether double jeopardy protections bar retrial. Double jeopardy precludes retrial when there is insufficient evidence to support the conviction. *Robinette v. State*, 741 N.E.2d 1162, 1167 (Ind. 2001); *Specht v. State*, 838 N.E.2d 1081, 1094 (Ind. Ct. App. 2005), *trans. denied*. Thus, we now address the sufficiency of the evidence supporting Caruthers' conviction in the event the State seeks to retry him.

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the factfinder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. *Id.* To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider only

the evidence most favorable to the trial court's ruling. *Id.* Appellate courts affirm the conviction unless no reasonable factfinder could find the elements of the crime proven beyond a reasonable doubt. *Id.* The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. *Id.* at 147.

In order to convict Caruthers of murder, the State had to prove that he “knowingly or intentionally kill[ed]” Turner. I.C. § 35-42-1-1(1). As enumerated in the facts above, there is ample evidence from which a jury could find that Caruthers knowingly or intentionally killed Turner, even though he was under the mistaken impression that it was Miller he was shooting. Caruthers, soon after Miller had hit and choked him, asked Anderson where Miller lived and then directed his friends, Richard and Corey, to take him to that street in the green Escort. Caruthers, who was wearing a black hoodie, took Corey's handgun with him on the trip to Pleasant Street and rode in the front passenger seat. Corey testified that he saw Caruthers pull the weapon and heard the resulting shots from the car. Richard testified that he saw Caruthers ease out of the car window and face the group of people on the lawn, heard the shots ring out, and then saw Caruthers holding the gun. Members of the group on the lawn with Turner described the shooter as a man in a black or dark hoodie sitting in the front passenger seat of a green Escort. Caruthers later confessed to Anderson and her mother that he was responsible for the shooting.

Nevertheless, Caruthers argues that the evidence is insufficient to support his conviction for murder because Richard's and Corey's testimony is inherently improbable. The “incredible dubiousity rule” provides that a court may “impinge on the jury's responsibility to judge the credibility of witnesses only when confronted with inherently

improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity.” *Murray v. State*, 761 N.E.2d 406, 408 (Ind. 2002). The application of this rule is limited to where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant’s guilt. *James v. State*, 755 N.E.2d 226, 231 (Ind. Ct. App. 2001), *trans. denied*. “[A]pplication of this rule is rare and . . . the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no person could believe it.” *Stephenson v. State*, 742 N.E.2d 463, 497 (Ind. 2001) (citation omitted).

Caruthers uses the incredible dubiousity rule to challenge the testimony of two witnesses, Richard and Corey Smith. As for Corey’s testimony, Caruthers argues that the testimony regarding Caruthers being the shooter is inherently improbable because Corey admitted at trial that he was very intoxicated at the time of the shooting. As for Richard’s testimony, Caruthers argues that the testimony regarding Caruthers is inherently improbable because Richard was originally suspected of shooting Turner. Because there is more than one witness to the shooting, the incredible dubiousity rule does not apply to this conviction, nor is there a complete lack of circumstantial evidence of Caruthers’ guilt. Further, Caruthers’ argument is really a request for us to reweigh the evidence and assess Corey’s and Richard’s credibility, which we cannot do. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005).

In conclusion, there is sufficient evidence from which a jury could find that Caruthers knowingly or intentionally killed Turner. As such, the State is not barred by

double jeopardy protections from retrying Caruthers. *See Specht*, 838 N.E.2d at 1095. As a final note, on retrial, the State can also re prosecute the habitual offender enhancement, *see Jaramillo v. State*, 823 N.E.2d 1187, 1191 (Ind. 2005), and Caruthers makes no argument regarding the sufficiency of the evidence supporting the enhancement.

Reversed.

NAJAM, J., concurs.

FRIEDLANDER, J., dissents with separate opinion.

1.) In the present case the difference in maximum penalties was 118 months and a statutory maximum of life for rape in the second degree.

2.) The defense's theory of the case, consent and reasonable belief, could produce an acquittal for both charges.

3.) Gore's testimony differed greatly from J.L.C.'s and other state's witness's. The prosecutor had also called Gore a liar multiple times. Relying solely on Gore's word and his witness's, that was at odds with the testimony of J.L.C. and the state's witness's, was significantly risky given the developments at trial.

Thus, considering these three factors, counsel's choice could not have been a legitimate trial tactic.

Second, Requesting the instruction would not have been "anti-thetical" to the defense's position at trial or Gore's testimony.

Many instances in the record support an inference that Gore committed third degree rape, ALL of which were presented by the state:

T.G. testified that J.L.C. told her "she was crying out for [T.G.] the whole time while she was in the bedroom with Mr. Gore." [RP 497]. M.K. explained that J.L.C. had told her "she had been violated and against her, you know, consent, against her will..." [RP 185]. Casey Stewart, the 'S.A.N.E.' nurse who examined J.L.C. noted in her report that J.L.C. had told Gore something along the lines of "ow, stop" many times. [RP 248, 249]. J.L.C. herself

testified that "I just kept saying I'm a virgin, dont have sex with me." [RP 552], "I just kept repeating myself the whole time. Like pretty much I would say dont have sex with me, I'm a virgin. Like I was just saying that the whole time." [RP 557] (emphasis added)

This evidence shows that J.L.C. was aware of the consequences of sex, communicated unwillingness to act "the whole time", and was thus not mentally incapacitated or physically helpless. Therefore the evidence supports an inference that Gore committed third degree rape rather than second degree.

Because all of these instances came from the state's witness's, Gore's testimony would remain consistant with the defense theory of consent and reasonable belief. Therefore requesting the inferior degree instruction would not be antithetical to Gore's testimony or the defenses position.

The state may try to imply that simply because a theory of third degree rape is inconsistant with the state's theory of second degree rape that Gore should not be entitled to the instruction. But this would be contrary to Washington caselaw, State v. Fernandez-Medina goes into more detail:

"If we were to follow the Hurchalla reasoning as the state suggests, we would empower trial courts to deny a request for an instruction on the basis that the theory underlying the instruction is "inconsistant" with another theory that finds support in the evidence. This would run afoul of the well supported principle that "an essential function of the finder of the fact is the sole and exclusive judge of the evidence, the weight to be given thereto,

and the credibility of the witnesses." "...In evaluating the adequacy of the evidence [to support the proposed instruction], the court cannot weigh the evidence."

Fernandez-Medina, 141 Wn. 2d at 461, (citing State v. Williams, 93 Wn. App. 340, 348, 968 P.2d 26 (1998), review denied, 138 Wn. 2d. 1002, 984 P. 2d 1034 (1999)).

The state also implies that for Gore to be given an inferior degree instruction, defense counsel would have to argue that Gore "could or should be convicted of rape in the third degree." (respondant's brief at 35).

However, this holds no merit, indeed the jury would need consider evidence that supported a theory that Gore committed third degree rape, but all of which was produced by the state. Requesting an inferior degree instruction would substancially reduce the jeopardy Gore was in and allow Gore to maintain his innocence, counsel was in no way obligated to argue for a conviction of third degree rape when the defense strategy could acquitt Gore of second or third degree rape.

And as the court in Pittman warned, the lack of lesser included instructions where warranted by the evidence, puts in an untenable position a jury that is convinced beyond a reasonable doubt that the defendant has committed a crime: The jury wants to hold the defendant culpable and convict him of some crime, but is given only one option, here, second degree rape.

Because there was no strategic reason for Gore's attorney not to request an inferior degree instruction Gore's convictions must be reversed.

GROUND 6

CUMULATIVE ERROR

A defendant may be entitled to a new trial where errors cumulatively produced a trial that was fundamentally unfair. In re Personal Restraint of Lord, 123 Wn. 2d 296, 868 P. 2d 835 (1994). The cumulative error doctrine applies where there have been several trial errors, individually not justifying reversal that, when combined, deny a defendant a fair trial. State v. Gréiff, 141 Wn. 2d 910, 929 10 P. 3d 390 (2000).

If any of the errors raised in this statement of additional grounds are determined to be harmless or not prejudicial, Gore requests that this court consider the issues in this S.A.G. and the appellant's opening brief under the cumulative error doctrine.

B.

CONCLUSION

Based on the above argument, Gore respectfully requests that this court reverse his convictions.

DATED, September 16, 2010

A handwritten signature in black ink, appearing to read 'Logan Gore', is written over a horizontal line.

LOGAN GORE

Appellant