

NO. 40126-6-II

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

LARRY DARNELL DUNOMES,

Appellant.

FILED  
COURT APPEALS  
JUN 13 AM 11:13  
STATE OF WASHINGTON  
BY [Signature]

---

---

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

The Honorable James R. Orlando, Judge

---

---

BRIEF OF APPELLANT

---

---

CATHERINE E. GLINSKI  
Attorney for Appellant

CATHERINE E. GLINSKI  
Attorney at Law  
P.O. Box 761  
Manchester, WA 98353  
(360) 876-2736

**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... I**

**TABLE OF AUTHORITIES ..... III**

**A. ASSIGNMENTS OF ERROR ..... 1**

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

**B. STATEMENT OF THE CASE..... 4**

1. PROCEDURAL HISTORY..... 4

2. SUBSTANTIVE FACTS..... 5

**C. ARGUMENT ..... 15**

1. THE PROSECUTOR IMPERMISSIBLY COMMENTED ON  
DUNOMES’S EXERCISE OF HIS CONSTITUTIONAL RIGHT  
TO REMAIN SILENT, AND REVERSAL IS REQUIRED. .... 15

2. ADMISSION OF DR. KELLY’S OPINION THAT DUNOMES’S  
STATEMENTS WERE NOT CREDIBLE VIOLATED  
DUNOMES’S CONSTITUTIONAL RIGHT TO A JURY TRIAL  
AND REQUIRES REVERSAL. .... 20

3. THE RECORD DOES NOT ESTABLISH THAT THE JURY  
REACHED A UNANIMOUS VERDICT ON THE BRIBING A  
WITNESS CHARGE BECAUSE THE STATE FAILED TO  
PRESENT SUBSTANTIAL EVIDENCE OF EACH  
ALTERNATIVE MEANS SUBMITTED TO THE JURY..... 23

4. INEFFECTIVE ASSISTANCE OF COUNSEL DENIED  
DUNOMES A FAIR TRIAL. .... 27

a. *Trial counsel’s incomplete objection to the prosecutor’s  
misconduct in closing argument left the error unremedied. .... 29*

b. *Trial counsel’s failure to object to improper opinion testimony  
prejudiced the defense..... 32*

5.	CUMULATIVE TRIAL ERROR REQUIRES REVERSAL OF DUNOMES’S CONVICTIONS. ....	33
6.	IMPOSITION OF THE PERSISTENT OFFENDER SENTENCE DEPRIVED DUNOMES OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A JURY TRIAL. ....	35
	<i>a. Due process requires that a jury find beyond a reasonable doubt     any fact that increases the defendant’s maximum possible     sentence. ....</i>	35
	<i>b. This issue is not controlled by prior federal decisions. ....</i>	37
7.	CLASSIFICATION OF THE PERSISTENT OFFENDER FINDING AS AN “AGGRAVATOR” OR “SENTENCING FACTOR,” RATHER THAN AN “ELEMENT,” VIOLATES DUNOMES’S RIGHT TO EQUAL PROTECTION. ....	40
8.	A SCRIVENER’S ERROR IN THE JUDGMENT AND SENTENCE MUST BE CORRECTED. ....	45
<b>D.</b>	<b>CONCLUSION .....</b>	<b>46</b>

## TABLE OF AUTHORITIES

### Washington Cases

<u>In re Personal Restraint of Mayer</u> , 128 Wn. App. 694, 117 P.3d 353 (2005) .....	46
<u>State v. Aho</u> , 137 Wn.2d 736, 975 P.2d 512 (1999).....	31
<u>State v. Arndt</u> , 87 Wn.2d 374, 553 P.2d 1328 (1976).....	24
<u>State v. Aumick</u> , 126 Wn.2d 422, 894 P.2d 1325 (1995).....	31
<u>State v. Baird</u> , 83 Wn. App. 477, 922 P.2d 157 (1996), <u>review denied</u> , 131 Wn.2d 1012 (1997).....	22
<u>State v. Benn</u> , 120 Wn.2d 631, 663, 845 P.2d 289, <u>cert. denied</u> , 510 U.S. 944 (1993).....	29
<u>State v. Ciskie</u> , 110 Wn.2d 263, 751 P.2d 1165 (1988).....	22
<u>State v. Coe</u> , 101 Wn.2d 772, 685 P.2d 668 (1984).....	34
<u>State v. Demery</u> , 144 Wn.2d 753, 30 P.3d 1278 (2001).....	20
<u>State v. Dolan</u> , 118 Wn. App. 323, 73 P.3d 1011 (2003).....	20
<u>State v. Earls</u> , 116 Wn.2d 364, 805 P.2d 211 (1991).....	15
<u>State v. Easter</u> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	15, 18, 19
<u>State v. Franco</u> , 96 Wn.2d 816, 639 P.2d 1320 (1982).....	23
<u>State v. Fricks</u> , 91 Wn.2d 391, 588 P.2d 1328 (1979).....	16, 18
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	23
<u>State v. Horton</u> , 116 Wn. App. 909, 68 P.3d 1145 (2003).....	32
<u>State v. Johnson</u> , 42 Wn. App. 425, 712 P.2d 301 (1985), <u>review denied</u> , 105 Wn.2d 1016 (1986).....	18
<u>State v. Jones</u> , 117 Wn. App. 89, 68 P.3d 1153 (2003).....	20, 21

<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	20, 32, 33
<u>State v. Klok</u> , 99 Wn. App. 81, 992 P.2d 1039, <u>review denied</u> , 141 Wn.2d 1005 (2000).....	30, 31
<u>State v. Lobe</u> , 140 Wn. App. 897, 167 P.3d 627 (2007).....	23, 25, 27
<u>State v. McDonald</u> , 96 Wn. App. 311, 979 P.2d 857 (1999).....	28
<u>State v. Montgomery</u> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	20
<u>State v. Ortega-Martinez</u> , 124 Wn.2d 702, 881 P.2d 231 (1994) .....	23
<u>State v. Romero</u> , 113 Wn. App. 779, 54 P.3d 1255 (2002) .....	16, 18
<u>State v. Roswell</u> , 165 Wn.2d 186, 196 P.3d 705 (2008).....	40, 41, 44
<u>State v. Simon</u> , 64 Wn. App. 948, 831 P.2d 139 (1991).....	23
<u>State v. Smith</u> , 117 Wn.2d 263, 814 P.2d 652 (1991) .....	43
<u>State v. Smith</u> , 150 Wn.2d 135, 75 P.3d 934 (2003), <u>cert. denied</u> , <u>Smith v. Washington</u> , 124 S.Ct. 1616 (2004).....	39
<u>State v. Smith</u> , 159 Wn.2d 778, 154 P.3d 873 (2007) .....	23, 27
<u>State v. Thorne</u> , 129 Wn.2d 736, 921 P.2d 514 (1994) .....	42, 43
<u>State v. Wheeler</u> , 145 Wn.2d 116, 34 P.3d 799 (2001) .....	39
<u>State v. Whitney</u> , 108 Wn.2d 506, 739 P.2d 1150 (1987) .....	23

**Federal Cases**

<u>Adams v. United States ex rel. McCann</u> , 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435 (1942).....	28
<u>Almendarez-Torres v. United States</u> , 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).....	37
<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).....	35, 36, 38, 41

<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).....	35, 36, 37, 39
<u>Bush v. Gore</u> , 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000).....	42
<u>Doyle v. Ohio</u> , 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).....	16
<u>Evitts v. Lucey</u> , 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).....	28
<u>Griffin v. California</u> , 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965) .....	15
<u>Jones v. United States</u> , 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311(1999).....	37
<u>Powell v. Alabama</u> , 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) .....	29
<u>Ring v. Arizona</u> , 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) .....	36, 39
<u>Strickland v. Washington</u> , 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).....	28, 29
<u>United States v. Gaudin</u> , 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).....	35
<u>Washington v. Recuenco</u> , 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).....	41

**Statutes**

RCW 9.68.090 .....	42
RCW 9.94A.030.....	45
RCW 9.94A.030(34)(b)(i) .....	45
RCW 9A.28.020.....	4
RCW 9A.32.030(1)(a) .....	4
RCW 9A.36.011(1)(a) .....	4
RCW 9A.72.090.....	4, 24, 26

RCW 9A.72.120(1)..... 25

**Constitutional Provisions**

U.S. Const. amend V..... 15

U.S. Const. amend. VI ..... 27, 35

U.S. Const., amend XIV ..... 35, 42

Wash. Const. art. 1, § 21 ..... 23

Wash. Const. art. I, § 22 (amend.10) ..... 27

Wash. Const., art. I, § 12..... 42

Wash. Const., art. I, § 9..... 15

**Rules**

ER 702 ..... 22

RAP 2.5(a) ..... 18, 20

**Other Authorities**

Colleen P. Murphy, The Use of Prior Convictions After *Apprendi*, 37 U.C. Davis L. Rev. 973 (2004)..... 38

Schaefer, Federalism and State Criminal Procedure, 70 Harv. L.Rev. 1, 8 (1956)..... 28

A. ASSIGNMENTS OF ERROR

1. The prosecutor's comment on appellant's post-arrest silence violated appellant's Fifth Amendment rights.

2. Admission of improper opinion testimony denied appellant a fair trial.

3. The Court's instructions failed to ensure a unanimous verdict on the count of bribing a witness.

4. Appellant received ineffective assistance of counsel.

5. Cumulative trial error resulted in prejudice which requires reversal.

6. Imposition of a persistent offender sentence deprived appellant of his Sixth and Fourteenth Amendment rights to a jury trial and due process.

7. Classification of appellant's prior convictions as sentencing factors rather than elements deprived him of equal protection guaranteed by the state and federal constitutions.

8. A scrivener's error in the Judgment and Sentence must be corrected.

Issues pertaining to assignments of error

1. The prosecutor elicited testimony that while in police custody after his arrest, appellant refused to answer questions about how

he was injured. Then, in closing argument, the prosecutor drew the jury's attention to appellant's silence, suggesting it implied appellant knew he was guilty of the charged offense. Does this violation of appellant's rights to due process and to remain silent require reversal?

2. A psychiatrist testified about his interview with appellant, recounting appellant's statements as well as telling the jury he did not believe the statements were sufficiently corroborated. The prosecutor relied on the psychiatrist's opinion in closing when arguing that appellant's version of events was not credible. Where the defense rested on the credibility of appellant's statements to the psychiatrist, does admission of the psychiatrist's opinion on appellant's credibility require reversal?

3. Appellant was charged with bribing a witness, and the jury was instructed on three alternative means of committing that offense. Where the prosecutor argued each alternative was committed, but the State failed to produce substantial evidence as to one of the alternatives, and no unanimity instruction was given, must appellant's conviction on this count be reversed?

4. Although appellant did not testify, the prosecutor argued in closing that the jury should consider appellant's demeanor during the testimony of the complaining witnesses to determine if he was guilty.

Trial counsel objected that the argument improperly commented on appellant's right not to testify, and the court reminded the jury of that right. Counsel did not object that the argument introduced facts not in evidence, however, and did not seek a curative instruction informing the jury that appellant's demeanor was not evidence. Counsel also failed to object to the improper opinion on appellant's credibility. Where there is a reasonable probability counsel's errors affected the verdict, was appellant denied effective assistance of counsel?

5. Did cumulative error deny appellant a fair trial?

6. Were appellant's Sixth and Fourteenth Amendment rights to a jury trial and due process violated when a judge, not a jury, found by a preponderance of the evidence that he had two prior most serious offenses, elevating his punishment from the otherwise-available statutory maximum to life without the possibility of parole?

7. The Legislature has enacted statutes authorizing greater penalties for specified offenses based on recidivism. In certain instances the prior convictions are labeled "elements," requiring they be proven to a jury beyond a reasonable doubt, and in other instances they are termed "aggravators" or "sentencing factors," permitting the judge to find the prior convictions by a preponderance of the evidence. Where no rational

basis exists for treating similarly situated recidivist criminals differently, does the arbitrary classification deny appellant equal protection?

8. Boxes are checked on the Judgment and Sentence indicating appellant is a persistent offender under both the three strikes and two strikes definitions. Where appellant's convictions do not satisfy the requirements of the two strikes provision, must the error in the Judgment and Sentence be corrected?

B. STATEMENT OF THE CASE

1. Procedural History

On May 19, 2008, the Pierce County Prosecuting Attorney charged appellant Larry Darnell Dunomes with two counts of first degree assault, alleging that the offenses were committed with a deadly weapon. CP 1-2; RCW 9A.36.011(1)(a). The information was subsequently amended to add two counts of attempted first degree murder and two counts of bribing a witness. CP 129-33; RCW 9A.32.030(1)(a); RCW 9A.28.020; RCW 9A.72.090. The State then filed a second amended information dropping one charge of bribing a witness. CP 215-18.

The case proceeded to jury trial before the Honorable James R. Orlando, and the jury returned guilty verdicts on all counts, as well as affirmative special verdicts. CP 262, 264, 266, 268, 270-74. The court found Dunomes to be a persistent offender and sentenced him to life in

prison without the possibility of early release. CP 298. Dunomes filed this timely appeal. CP 281.

2. Substantive Facts

On May 15, 2008, Jarvis Bailey was stabbed one time in the abdomen. 7RP<sup>1</sup> 395, 397. His sister, Sonya Bailey, was stabbed in the abdomen and both legs and sustained cuts to her palms. 5RP 99-100; 6RP 297. Both Jarvis and Sonya told police that Sonya's husband, Larry Dunomes, had stabbed them. 6RP 295, 354; 8RP 587. Dunomes was arrested the next day and charged with first degree assault and attempted murder. 5RP 189, 192.

Dunomes was dissatisfied with his appointed counsel, and the court granted his request to represent himself. 1RP 8, 51; 2RP 13. Believing that, as a pro se defendant, he was permitted to talk to the alleged victims, Dunomes called his wife from jail. 8RP 565.

Dunomes told Sonya he was sorry, but someone had put something in his drink, and he had no memory of stabbing her. Sonya said he tried to kill her, and he denied it. Dunomes then told Sonya that he would be receiving a settlement in another case, and he offered her and Jarvis \$10,000, but Sonya said she did not want the money. Dunomes asked her

---

<sup>1</sup> The Verbatim Report of Proceedings is contained in nine volumes, designated as follows: 1RP—10/16/08, 10/23/08, 11/14/08, 11/17/08, 11/20/08; 2RP—11/4/08; 3RP—3/9/09; 4RP—11/16/09, 11/18/09; 5RP—11/19/09; 6RP—11/23/09; 7RP—11/24/09; 8RP—11/30/09; 9RP—12/1/09, 12/2/09, 12/18/09.

if she wanted to see him gone and if she was planning to go to court. Sonya responded that she had to go to trial and that she would not lie on the stand. Dunomes apologized again and said he did not mean for this to happen. Sonya responded that there was nothing she could do, even for money. Exhibit 6. The State added two charges of bribing a witness based on this telephone conversation, later dismissing the second charge. 1RP 60; 4RP 1; CP 129-33, 215-18.

At Dunomes's request, the court appointed new counsel to represent him for the remainder of the proceedings. 1RP 80-82. Dunomes was then sent to Western State Hospital for a competency evaluation, where he was found competent to stand trial. 1RP 89; 3RP 4.

At trial, the State presented evidence that Sonya and Jarvis spent the evening of May 14, 2008, drinking and smoking crack. 6RP 304-06; 7RP 404. In the early morning hours of May 15, they were hanging out on a street corner with a few other people, trying to find more crack. 6RP 309-10; 7RP 409. While there, Sonya became angry after talking to an acquaintance and called to Dunomes to confront him. 6RP 313. Sonya's call upset Dunomes, and he told her to stop calling him. 6RP 316.

Some time later, witnesses in a nearby apartment building heard a car driving erratically. 5RP 156, 170; 7RP 448-49. Sonya and Jarvis testified that they saw Dunomes's car approach them "doing doughnuts."

6RP 318; 7RP 417. Jarvis thought Dunomes's driving was highly unusual, testifying that "no one does that," and another witness described it as "crazy." 7RP 442; 8RP 497. The car came to stop at a 45 degree angle to the street, with the front of the car partially up on the curb. 5RP 171.

Jarvis testified that Dunomes stopped the car on the curb, got out, asked what was happening, then said "Die mother fucker, die" and stabbed him in the stomach. 7RP 419-20. According to Jarvis, he had no problems with Dunomes before the incident. 7RP 441.

Sonya testified that she thought Dunomes was going to run her over with the car, and she jumped down a window well to avoid being hit. 6RP 321. She then ran into an alley. 6RP 324. As she was hiding in the alley, she called 911. 6RP 326. Dunomes drove into the alley, got out of the car, and approached Sonya, and she ran away through an adjacent parking lot. 6RP 327, 331. Dunomes drove into the lot and up onto the curb, then got out of the car and followed Sonya. 6RP 332. Sonya testified that when she tripped and fell, Dunomes began stabbing her legs. She asked if he was trying to kill her, and he said "Die, bitch," and then stabbed her in the stomach. 6RP 334. Dunomes drove away before the paramedics arrived. 6RP 339.

The State called several witnesses who had varying recollections of the events. A witness in a nearby apartment testified she looked out her window when she heard what she thought was a car doing doughnuts, and she saw the car drive up on the curb. 5RP 151. She did not see anyone get out of the car, but she heard yelling for about 40 seconds before the car drove away. 5RP 157-59.

Another witness testified that he heard tires or an engine, and when he looked outside he saw a car parked on the corner at a 45 degree angle, partially on the curb. 5RP 170-71. There was a group of four people standing near the car. He heard loud yelling, then he saw the driver of the car punch someone in the side. 5RP 172. There was more yelling, and a woman ran from the group into an alley. 5RP 173. The driver then got back into the car and drove in the same direction. 5RP 175.

From a different window, the witness saw the woman run into a parking lot adjacent to the alley. 5RP 180. He saw the car cut across traffic and pull up onto the grass in front of the woman. 5RP 181-82. The driver got out of the car and started hitting the woman, and the witness called 911. 5RP 184.

A third witness testified that she heard tires squeaking and a car doing circles around the block, and she looked outside. 7RP 448-49. She saw three people standing on the street when the car drove up on the curb.

7RP 449-50. The driver of the car exited the vehicle and walked up to a man and woman who were arguing. 7RP 451. The man pushed the driver away, and they began to fight. 7RP 453. When the woman ran down the hill, the driver got back in the car and followed her. 7RP 454.

A final witness testified that he had been outside talking to Jarvis when he saw a car drive down the street, do three circles, and drive up onto the curb, almost hitting Jarvis. 8RP 488-89. The driver got out of the car, said something loud, lunged toward Jarvis, then got back into the car and drove away. 8RP 498. Although Sonya had been with them at one point, the witness did not know when she left and did not remember seeing her when the car drove up. 8RP 495, 506.

Sonya told paramedics she had been stabbed with a hunting knife with an eight to ten inch blade. 5RP 106. She was taken to the hospital where she underwent surgery and remained hospitalized for three weeks. 8RP 532. Jarvis was hospitalized for five days following surgery. 9RP 600, 609.

When Dunomes was arrested the next day, he had a cut on his leg. 8RP 578. He was brought to the emergency room, where he told Barbara Bond, a nurse practitioner, that he had been cut the day before with a six-inch steak knife. 7RP 471. Dunomes was in custody, with law enforcement present, the entire time he was being treated in the emergency

room. 7RP 475. In response to the prosecutor's questions, Bond testified that she had asked Dunomes how the injury happened, but he did not answer her question or provide any further information. 7RP 472. Defense counsel did not object to this testimony.

The State also presented testimony from Dr. Edward Kelly, the psychiatrist who interviewed Dunomes at Western State Hospital. 8RP 554. Dunomes told Kelly that before the incident he had been out drinking, first with a friend and then at a lounge, and he was wasted. 8RP 556. Dunomes suspected that one of the women he was with slipped something in his drink while he was in the restroom, because the drink had an oily taste. 8RP 556. Dunomes thought the woman wanted him to pass out so she could rob him, although he was not robbed. 8RP 556.

Kelly testified that Dunomes said he drove over to where Sonya was after she called him. He was upset that everyone was smoking crack, so he did a few doughnuts in the street and parked on the sidewalk. Dunomes said there was a "ruckus," he lost it, and he did not remember what happened. 8RP 558. He remembered getting in his car and driving off. 8RP 558-59.

Dunomes told Kelly he did not have a knife, but he had a pointed object that he had broken off the car. 8RP 560. He remembered an argument with Sonya, Jarvis, and another guy who was smoking crack

with them, and he was swinging the object at them. 8RP 560. Dunomes told Kelly that he did not know where or how he hit them, because he was surrounded. 8RP 561. Dunomes said he had broken the piece off the car to protect himself when going into the high crime area to meet Sonya, and he said he had used it on Sonya and Jarvis. 8RP 564. He said he was confused and depressed when he used it on Sonya. 8RP 564.

Kelly also talked to Dunomes about his call to Sonya from jail. Dunomes said he called to ask her what had happened and to offer her money to cover her medical expenses and take care of the children. 8RP 559. In a later interview, Dunomes said he called to talk to Sonya about what happened and about the kids, and he offered her money not to testify. 8RP 565.

In addition to relating Dunomes's statements about the alleged assaults, Kelly gave his analysis of the credibility of those statements. He told the jury that although Dunomes said he thought someone put something in his drink, he could provide no evidence that he had been drugged or that anyone planned to rob him. 8RP 556. Defense counsel did not object to this testimony, despite the fact that Dunomes did not testify and his defense as to the murder and assault charges rested on the credibility of his statements to Dr. Kelly. 9RP 678.

The prosecutor relied on both Bond's testimony and Kelly's testimony when arguing to the jury that Dunomes's version of events did not make sense:

But then Doctor Kelly's talking about everything that he did and it becomes apparent to Doctor Kelly, well, you still drank it even after you say it tasted funny? And you are saying that nobody actually robbed you and you talked to these women and then you remember being with the women at the bar, you remember leaving the bar early, you remember talking to friends outside, and then you remember leaving after that. You remember the route that you drove back to the crime scene, you remember stopping for gas, which he clearly would have paid for. He recalled committing the crimes but came up with the car part story, but wouldn't tell Nurse Bond how he got stabbed.

9RP 668. Defense counsel did not object to this argument.

The prosecutor also argued that Dunomes showed a lack of remorse for the injuries he caused, and therefore the jury could assume he intended to cause them. As an example, the prosecutor told the jury to consider how Dunomes acted in court when Sonya and Jarvis testified, telling the jury to judge from Dunomes's demeanor whether he had any regard for them. 9RP 645.

When the jury left the courtroom, defense counsel objected that the prosecutor's argument regarding Dunomes's demeanor in court violated his right not to testify. 9RP 675. The court agreed and reminded the jury that Dunomes was not compelled to testify and the fact that he did not testify could not be used to prejudice him. 9RP 676. Although counsel

did not object to the prosecutor's argument on the ground that it introduced facts not in evidence, and did not request a curative instruction on that basis, defense counsel argued that Dunomes's demeanor in court was not evidence. 9RP 678.

In addressing the bribing a witness charge, defense counsel pointed out that at no time in the telephone conversation with Sonya did Dunomes ask her not to testify. Counsel argued that, although Sonya seemed to believe that was what Dunomes wanted, the State did not prove that was his intent. 9RP 681-83. Counsel also pointed out that the State had presented no evidence that Sonya had been summoned to testify at the time of the call. 9RP 683.

In response to this argument, the prosecutor reminded the jury that there were three alternative means by which it could convict Dunomes of bribing a witness. 9RP 692. He conceded that the State had not presented evidence that Sonya had been legally summoned to testify, but he argued that only the third alternative required proof of that fact. 9RP 694-95. The prosecutor also told the jury it did not have to unanimously agree as to which alternative means Dunomes committed:

First of all, I want to again come back to "or" because there's two "or's" in there. And again,<sup>2</sup> you don't have to be unanimous as a

---

<sup>2</sup> The prosecutor had made a similar argument regarding first degree assault:  
There's something I want to say to you about that word "or" as well. You don't have to be unanimous when you get a word like that in that element, "or." For

group as to which one of those phrases you decide that he committed. If 12 of you agree he committed one of those three different definitions in that second element, and you are convinced beyond a reasonable doubt, then he is guilty, no matter which one you split on.”

9RP 692. Defense counsel did not object to this argument, and no unanimity instruction was given.

The jury entered guilty verdicts on all counts, but the Court found that the assault convictions merged with the attempted murder convictions. CP 262-70; 9RP 728. After finding that a 1988 Louisiana conviction for aggravated battery was comparable to second degree assault in Washington, the court calculated Dunomes’s offender score as a 9. 9RP 720, 722. The State alleged that Dunomes was a persistent offender based on a Washington first degree arson conviction from 1994 and the Louisiana aggravated battery conviction. 9RP 726. The court agreed and sentenced Dunomes to life without the possibility of early release. CP 298; 9RP 728.

---

example, six of you could decide the assault was committed with a deadly weapon and six of you could decide it was committed by force or means likely to produce great bodily harm or death.... [W]hen you get to an element like that, where you see an “or” within it, you don’t all have to exactly agree together on which one. You could split three to nine, five to seven, et cetera.

9RP 634.

C. ARGUMENT

1. THE PROSECUTOR IMPERMISSIBLY COMMENTED ON DUNOMES'S EXERCISE OF HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT, AND REVERSAL IS REQUIRED.

The Fifth Amendment to the United States Constitution guarantees that a criminal defendant shall not be compelled to be a witness against himself. U.S. Const. amend V. Nor may the State comment on a defendant's exercise of that right. Griffin v. California, 380 U.S. 609, 613-15, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965). The Washington Constitution guarantees the same protections. Wash. Const., art. I, § 9; State v. Earls, 116 Wn.2d 364, 374-74, 805 P.2d 211 (1991) (federal and state protections coextensive).

“The right against self-incrimination is liberally construed. It is intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt.” State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996) (citations omitted). Thus, it is constitutional error for the State to elicit testimony or make closing argument as to the defendant's silence to infer guilt. Easter, 130 Wn.2d at 236. Further, it is well settled that comments on the defendant's post-arrest silence violate due process, because the Miranda warnings constitute an assurance that the defendant's silence will carry no

penalty. Easter, 130 Wn.2d at 236; State v. Romero, 113 Wn. App. 779, 786-87, 54 P.3d 1255 (2002) (citing Doyle v. Ohio, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)); State v. Fricks, 91 Wn.2d 391, 395-96, 588 P.2d 1328 (1979).

In Fricks, the prosecutor elicited testimony from two officers that the defendant had made no statement after being advised of his Miranda rights, drawing the jury's attention to the fact that he remained silent. Fricks, 91 Wn.2d at 395. In closing argument the prosecutor again emphasized the defendant's silence, remarking that the defendant had offered no statement when he was arrested. The Supreme Court held that the comments on the defendant's silence, implying that his silence was consistent with guilt and inconsistent with his exculpatory story, unfairly penalized the defendant's exercise of his right and violated due process. Fricks, 91 Wn.2d at 395.

In this case, as in Fricks, the prosecutor elicited testimony that, while in police custody after his arrest, Dunomes refused to answer questions about an injury to his leg. After Dunomes was booked following his arrest, he was taken to the hospital to have an injury to his leg treated. 8RP 578-79. He remained in custody while he was treated, with a law enforcement officer present the entire time he was at the hospital. 7RP 475. In response to the prosecutor's questions, the nurse

practitioner who treated Dunomes testified that Dunomes refused to answer when she asked how he was injured:

Q Did you ask him how it happened?

A Yes.

Q Did he give you any information when you asked him how it happened?

A No, he did not.

Q He didn't answer you?

A He didn't answer.

7RP 472.

The prosecutor then drew the jury's attention to Dunomes's silence in closing argument, implying that he was guilty and that his exculpatory statements did not make sense. It was the State's theory that Dunomes injured himself when he struggled with Sonya. In support of this theory, the prosecutor commented that Dunomes's refusal to answer the nurse when she asked how he was injured implied he was injured by the same knife he had used on Sonya. 9RP 637.

The prosecutor again commented on Dunomes's silence in attacking the credibility of his statements to Kelly and Sonya that he did not remember what happened because he had been drugged. 9RP 666-67. Implying that Dunomes made up the story about being drugged to hide the fact that he attempted to murder Sonya and Jarvis, the prosecutor argued that Dunomes's refusal to answer the nurse's questions showed he knew what he had done: "He recalled committing the crimes but came up with

the car part story, but wouldn't tell Nurse Bond how he got stabbed." 9RP 668.

The nurse's testimony and the prosecutor's argument that an unfavorable inference could be drawn from Dunomes's post-arrest silence constitute an impermissible comment on Dunomes's exercise of his constitutional right, in violation of due process. See Fricks, 91 Wn.2d at 395. Dunomes may raise this manifest constitutional error for the first time on appeal. See RAP 2.5(a); Romero, 113 Wn. App. at 786; cf. State v. Johnson, 42 Wn. App. 425, 431-32, 712 P.2d 301 (1985) (witness's reference to defendant's refusal to discuss the case after receiving *Miranda* warnings not constitutional error where testimony did not highlight post-arrest silence and prosecutor did not comment on silence in closing argument), review denied, 105 Wn.2d 1016 (1986).

The State bears the burden of showing that constitutional error is harmless beyond a reasonable doubt. The error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error, and the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. Where the error was not harmless, the defendant must have a new trial. Easter, 130 Wn.2d at 242.

In Easter, the defendant's right to silence was violated by testimony that he did not answer questions at an accident scene and by characterizations of him as "evasive" and a "smart drunk." Easter, 130 Wn.2d at 241. The testimony that Easter was evasive in response to questioning was elicited to insinuate guilt, and the prosecutor compounded the error by emphasizing Easter's silence in closing argument. Because the evidence did not overwhelmingly establish the State's theory as to how the accident occurred, the Supreme Court found that the prosecutor's emphasis on Easter's silence may have swayed the jury and held that Easter was entitled to a new trial. Easter, 130 Wn.2d at 242-43.

Similarly, here, Dunomes's rights to remain silent and to due process were violated by testimony that he refused to answer questions after his arrest and argument that his silence suggested he was guilty. Although there was evidence that Dunomes inflicted the injuries to Sonya and Jarvis, as defense counsel argued at trial, the State had to prove the necessary mental element as well as the act. 9RP 688. The jury heard Dunomes's statements to Sonya and Kelly that he did not remember what had happened, that he was wasted, and that he thought he had been drugged. The prosecutor's insinuation that Dunomes's silence was inconsistent with his statements and consistent with guilt may have swayed the jury, and this Court cannot find the constitutional violation

harmless beyond a reasonable doubt. Dunomes is therefore entitled to a new trial.

2. ADMISSION OF DR. KELLY'S OPINION THAT DUNOMES'S STATEMENTS WERE NOT CREDIBLE VIOLATED DUNOMES'S CONSTITUTIONAL RIGHT TO A JURY TRIAL AND REQUIRES REVERSAL.

“Generally, no witness may offer testimony in the form of an opinion regarding the veracity of the defendant. Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury.” State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). Improper opinion testimony violates the defendant's constitutional right to a jury trial. State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008); State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003). Thus, an explicit or nearly explicit opinion on the defendant's guilt or credibility can constitute a manifest constitutional error, which may be challenged for the first time on appeal. Kirkman, 159 Wn.2d at 936; RAP 2.5(a).

It is well established that a witness may not testify about the credibility of another witness. State v. Jones, 117 Wn. App. 89, 91, 68 P.3d 1153 (2003). When the jury learns the witness's opinion of the defendant's credibility, reversal may be required. Id.

In Jones, the prosecutor questioned the arresting officer extensively about his interview with defendant Jones. The officer testified that he told Jones during the interview that he did not believe him and that there was no way events could have transpired as Jones claimed. Jones, 117 Wn. App. at 91. This Court held that the officer's testimony that he did not believe Jones's claims constituted an impermissible comment on Jones's credibility. Jones, 117 Wn. App. at 92 (holding that prosecutor's misconduct in eliciting the opinion required reversal).

Here, Dr. Edward Kelly, a psychiatrist at Western State Hospital, testified that he interviewed Dunomes regarding his memory of the events in this case. 8RP 554. Kelly told the jury that Dunomes suspected someone had slipped something into his drink, "[b]ut he could provide no evidence, other than a suggestion that it had an oily taste." 8RP 556. Kelly's testimony that Dunomes did not corroborate his statements to Kelly's satisfaction informed the jury of his opinion that Dunomes was not credible. As in Jones, Kelly's testimony that he did not believe Dunomes's claims constituted an impermissible comment on Dunomes's credibility.

It is important to note that although Kelly conducted a competency evaluation of Dunomes, he was not called to render an opinion on that subject at trial. Rather, he was called as a fact witness to recount

statements Dunomes made during the evaluation. 4RP 49; 8RP 554. Thus, the rule permitting experts to testify in the form of opinion does not apply here. See ER 702. In any event, not even an expert may give an opinion as to the defendant's credibility. See State v. Baird, 83 Wn. App. 477, 484-85, 922 P.2d 157 (1996), review denied, 131 Wn.2d 1012 (1997).

Dunomes did not testify, and defense counsel conducted little cross examination of the State's witnesses and called no witnesses on Dunomes's behalf. Thus, the defense rested on the credibility of Dunomes's statements to Kelly. Regardless of the fact that Kelly was not called as an expert, he was introduced to the jury as a psychiatrist who had interviewed Dunomes. 8RP 554. He proceeded to give his opinion that Dunomes's statements were not sufficiently corroborated, and the prosecutor argued that the jury should consider that it was apparent to Kelly that Dunomes's statements did not ring true. 8RP 556; 9RP 668. It is likely that, as a medical professional, Kelly carried an aura of reliability that influenced the jury. See State v. Ciskie, 110 Wn.2d 263, 280, 751 P.2d 1165 (1988) (psychological expert's opinion often unfairly prejudices defendant by creating aura of reliability and trustworthiness). The State cannot prove beyond a reasonable doubt that the verdict was not affected by Kelly's improper opinion, and Dunomes is entitled to a new trial.

3. THE RECORD DOES NOT ESTABLISH THAT THE JURY REACHED A UNANIMOUS VERDICT ON THE BRIBING A WITNESS CHARGE BECAUSE THE STATE FAILED TO PRESENT SUBSTANTIAL EVIDENCE OF EACH ALTERNATIVE MEANS SUBMITTED TO THE JURY.

Criminal defendants in Washington have a right to a unanimous jury verdict. Wash. Const. art. 1, § 21. In certain situations, the right to a unanimous jury also includes the right to express jury unanimity on the means by which the defendant is found to have committed the crime. State v. Lobe, 140 Wn. App. 897, 903, 167 P.3d 627 (2007) (citing State v. Green, 94 Wn.2d 216, 230-35, 616 P.2d 628 (1980); State v. Whitney, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987); State v. Franco, 96 Wn.2d 816, 823, 639 P.2d 1320 (1982); State v. Simon, 64 Wn. App. 948, 961, 831 P.2d 139 (1991)).

If the State presents sufficient evidence of each alternative means submitted to the jury, a particularized expression of unanimity as to the means used by the defendant is not necessary. State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007). In such cases, unanimity can be inferred from the evidence presented and the general unanimity instruction. Lobe, 140 Wn. App. at 904-05 (citing State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994); Whitney, 108 Wn.2d at 512, 739 P.2d 1150; Franco, 96 Wn.2d at 823, 639 P.2d 1320; State v. Arndt, 87 Wn.2d 374,

377, 553 P.2d 1328 (1976)). But, where the jury is instructed on more than one alternative means, if the State fails to present substantial evidence as to each of those alternatives, the conviction cannot be affirmed. Ortega-Martinez, 124 Wn.2d at 708; Lobe, 140 Wn. App. at 905-06.

Bribing a witness is an alternative means offense. A person can be found guilty of bribing a witness if he offers a benefit to a witness with the intent of accomplishing any of four alternative outcomes:

- (1) A person is guilty of bribing a witness if he or she offers, confers, or agrees to confer any benefit upon a witness or a person he or she has reason to believe is about to be called as a witness in any official proceeding or upon a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child, with intent to:
  - (a) Influence the testimony of that person; or
  - (b) Induce that person to avoid legal process summoning him or her to testify; or
  - (c) Induce that person to absent himself or herself from an official proceeding to which he or she has been legally summoned; or
  - (d) Induce that person to refrain from reporting information relevant to a criminal investigation or the abuse or neglect of a minor child.

RCW 9A.72.090. In this case, the jury was instructed on alternatives (a), (b), and (c). CP 254<sup>3</sup>. Because the jury was instructed as to three

---

<sup>3</sup> Instruction No. 28 states:

alternative means of committing the crime, “either (1) substantial evidence must support each alternative means on which evidence or argument was presented, or (2) evidence and argument must have only been presented on one means.” See Lobe, 140 Wn. App. at 905.

In Lobe, the defendant was charged with two counts of witness tampering under a statute defining alternative means similar to those set forth in the bribing statute. See RCW 9A.72.120(1). The jury was instructed on three alternative means, but the evidence supported only two means as to the first count and one means as to the second. As to the first count, the State presented argument only on the means for which there was evidence. Nonetheless, this Court held that it could not presume both that (1) the jury was unanimous as to the means based on substantial

---

To convict the defendant of the crime of bribing a witness, as charged in Count V, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about October 29<sup>th</sup>, 2008, the defendant offered a benefit upon a witness or a person he had reason to believe was about to be called as a witness in any official proceeding or upon a person whom he had reason to believe might have information relevant to a criminal investigation; and

(2) That the defendant acted with the intent to influence the testimony of that person or induce that person to avoid legal process summoning her to testify or induce that person to absent herself from an official proceeding to which she had been legally summoned; and

(3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

evidence and (2) the jury relied only on the means for which evidence was presented. As to the second count, because the State presented evidence as to only one means but argued two of the means, the Court could not be sure of jury unanimity without a limiting instruction. Both convictions were reversed.

Here, as in Lobe, the State failed to present substantial evidence on each of the means submitted to the jury. The prosecutor argued in closing that Dunomes was guilty under each of the alternatives, saying Dunomes's intent was to keep Sonya from testifying, induce her to avoid legal process if necessary, and prevent her from appearing at trial. 9RP 663. The prosecutor argued Dunomes did not want the jury to hear from Sonya or Jarvis, and he committed the offense to keep them away from the jury. 9RP 664. There was no evidence, however, that Sonya had been legally summoned at the time Dunomes called her, as required under RCW 9A.72.090(1)(c) ("Induce that person to absent himself or herself from an official proceeding to which he or she has been legally summoned"). Thus, the evidence was insufficient to establish that statutory alternative means.

Not only did the State argue that Dunomes was guilty under each alternative means, despite the lack of evidence as to one of the means, the prosecutor also argued in closing that the jury did not have to be

unanimous as to which of the three alternative means Dunomes used to commit the crime. 9RP 692. If there had been substantial evidence as to each alternative, jury unanimity would not be an issue. But because there was insufficient evidence as to one of the alternatives relied upon by the State, this Court cannot be assured of a unanimous verdict on the bribing count, because some jurors could have relied on an alternative for which there was insufficient evidence. See Smith, 159 Wn.2d at 783 (“in order to safeguard the defendant's constitutional right to a unanimous verdict as to the alleged crime, substantial evidence of each of the relied-on alternative means must be presented.”). Because substantial evidence did not support each alternative means submitted to the jury and argued by the State, Dunomes’s conviction must be reversed. See Lobe, 140 Wn. App. at 905-06.

4. INEFFECTIVE ASSISTANCE OF COUNSEL DENIED  
DUNOMES A FAIR TRIAL.

The Sixth Amendment to the United States Constitution guarantees “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.” U.S. Const. amend. VI. The Washington State constitution similarly provides “[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. art. I, § 22 (amend.10). This

constitutionally guaranteed right to counsel is not merely a simple right to have counsel appointed; it is a substantive right to meaningful representation. See Evitts v. Lucey, 469 U.S. 387, 395, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (“Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits.”); Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (“The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.”) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435 (1942)).

The primary importance of the right to counsel cannot be overemphasized: “[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.” State v. McDonald, 96 Wn. App. 311, 316, 979 P.2d 857 (1999) (quoting Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L.Rev. 1, 8 (1956)). Left without the aid of counsel, the defendant “may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant

to the issue or otherwise inadmissible.” McDonald, 96 Wn. App. at 316 (quoting Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct. 55, 77 L.Ed. 158 (1932)).

A defendant is denied his right to effective representation when his attorney’s conduct “(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney’s conduct.” State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland, 466 U.S. at 687-88), cert. denied, 510 U.S. 944 (1993). In this case, trial counsel’s failure to request an effective curative instruction for the prosecutor’s misconduct and failure to object to admission of improper opinion testimony constituted deficient performance which prejudiced the defense.

**a. Trial counsel’s incomplete objection to the prosecutor’s misconduct in closing argument left the error unremedied.**

The prosecutor committed misconduct in closing argument by exhorting the jury to consider Dunomes’s demeanor in the courtroom while Sonya and Jarvis testified. Dunomes did not testify, and his demeanor was never made part of the evidence at trial. The prosecutor’s argument substituted demeanor for testimony, impacting both Dunomes’s right to be convicted solely on the basis of the evidence and his right not

to testify. See State v. Klok, 99 Wn. App. 81, 83-85, 992 P.2d 1039, review denied, 141 Wn.2d 1005 (2000).

Prosecutorial argument that the jury should consider a non-testifying defendant's demeanor at trial is improper and prejudicial, but its prejudicial effect may be cured by an appropriate instruction. Klok, 99 Wn. App. at 85. In Klok, the prosecutor commented during closing argument that the defendant was "the guy who has been laughing through about half of this trial." Klok, 99 Wn. App. at 82. Klok did not object at trial but challenged the argument on appeal as affecting his right to a conviction based solely on the evidence and the exercise of his not to testify. Klok, 99 Wn. App. at 82-93. The Court of Appeals held that the prosecutor's comment on Klok's demeanor was improper, but the prejudice flowing from the comment could have been cured by an instruction that the remark about Klok's laughter was improper, it was not evidence, and it should be disregarded. Klok, 99 Wn. App. at 85.

Trial counsel failed to make an appropriate objection in this case as well. Defense counsel objected to the improper argument, but not contemporaneously, and only on the basis that it impacted Dunomes's right not to testify. 9RP 675. While the court gave a curative instruction neutralizing the impact on Dunomes's exercise of his right not to testify, the jury was never instructed by the court that Dunomes's demeanor was

not evidence. If trial counsel had objected that the reference to Dunomes's demeanor introduced facts not in evidence, however, the court could have instructed the jury that the remark was improper, was not evidence, and should be completely disregarded. See Klok, 99 Wn. App. at 85.

Rather than seeking a curative instruction from the court, counsel attempted to address the prosecutor's improper argument by telling the jury that Dunomes's demeanor was not evidence. 9RP 678. Only legitimate trial strategy or tactics constitute reasonable performance<sup>4</sup>, however, and counsel's attempt to cure the prosecutor's misconduct was not reasonable. It is well established that "[a] jury should not have to obtain its instruction on the law from the arguments of counsel." State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995). Indeed, the jury here was instructed to decide the law based on the instructions given by the court. CP 220. The "instruction" by counsel was thus wholly inadequate to remedy the prosecutor's misconduct, and there was no conceivable benefit to the defense in failing to seek an instruction from the court.

Reversal is required where defense counsel incompetently fails to object to prosecutorial misconduct and there is a reasonable probability the

---

<sup>4</sup> State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

failure affected the outcome of the case. State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (reversing where defense counsel failed to object to prosecutor's improperly expressed personal opinion about defendant's credibility). The State's case depended upon establishing Dunomes's intent in committing the charged acts. The State's evidence was not overwhelming, and the prosecutor felt the need to rely on facts outside the evidence to prove that essential element. Under these circumstances, there is a reasonable probability that counsel's failure to ensure that the jury was properly instructed affected the outcome of the case, and reversal is required.

**b. Trial counsel's failure to object to improper opinion testimony prejudiced the defense.**

As discussed above, Kelly informed the jury that he believed Dunomes's statements explaining the events in question were not sufficiently corroborated. Admission of an explicit or nearly explicit opinion on the defendant's credibility is a manifest constitutional error. Kirkman, 159 Wn.2d at 936. Even if this Court concludes that Kelly's testimony only implicitly presented his opinion to the jury, trial counsel's failure to object to the testimony constitutes ineffective assistance of counsel.

Trial counsel did not object to Kelly's testimony that he did not believe Dunomes or to the prosecutor's argument that it was apparent to Kelly that Dunomes's statements lacked credibility. In fact, the parties made a record after Kelly's testimony that they had gone through Kelly's report and agreed which portions he would testify about. 9RP 623-25.

It is well established that a witness's opinion of the defendant's credibility is unfairly prejudicial because it invades the province of the jury. Kirkman, 159 Wn.2d at 927. It was therefore unreasonable for defense counsel to agree to admission of Kelly's opinion. Moreover, this deficient performance prejudiced the defense. The jury did not hear directly from Dunomes; rather, the defense rested on Dunomes's statements to Kelly. Kelly's testimony that Dunomes's statements were not sufficiently corroborated thus went to the heart of the defense, and there is a reasonable likelihood that this opinion from a medical professional who interviewed Dunomes at length swayed jury. Dunomes received ineffective assistance of counsel, and his convictions must be reversed.

5. CUMULATIVE TRIAL ERROR REQUIRES REVERSAL OF DUNOMES'S CONVICTIONS.

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may nonetheless find

that the errors combined together denied the defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 685 P.2d 668 (1984). The doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998).

In Johnson, the trial court improperly admitted the evidence of the defendant's prior conviction and prior self defense claim, refused to allow the defense to impeach a prosecution witness with a prior inconsistent statement, and improperly admitted evidence of a defense witness's probation violation. While the Court of Appeals held that none of these errors alone mandated reversal, the cumulative effect of these errors resulted in a fundamentally unfair trial. Johnson, 90 Wn. App. at 74.

In this case, the prosecutor improperly commented on Dunomes's exercise of his right to remain silent, a medical professional gave his opinion that Dunomes's statements were not credible, the instructions failed to ensure jury unanimity, and trial counsel rendered ineffective assistance. Although Dunomes contends that each of these errors on its own engendered sufficient prejudice to merit reversal, he also argues that the errors together created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdicts. Reversal of his convictions is therefore required.

6. IMPOSITION OF THE PERSISTENT OFFENDER SENTENCE DEPRIVED DUNOMES OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A JURY TRIAL.

- a. **Due process requires that a jury find beyond a reasonable doubt any fact that increases the defendant's maximum possible sentence.**

The Fourteenth Amendment to the United States Constitution provides that no person shall be deprived of liberty without due process of law. U.S. Const., amend XIV. The Sixth Amendment also guarantees a criminal defendant the right to a jury trial. U.S. Const., amend. VI. The constitutional rights to due process and a jury trial “indisputably entitle a criminal defendant to ‘a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.’” Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (quoting United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)).

In recent cases, the Supreme Court has recognized that this principle applies not just to the essential elements of the charged offense, but also to the facts labeled “sentencing factors,” if the facts increase the maximum penalty faced by the defendant. For example, in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the Court held that an exceptional sentence imposed under Washington’s

Sentencing Reform Act was unconstitutional because it permitted the judge to impose a sentence over the standard sentence range based on facts that were not found by a jury beyond a reasonable doubt. Blakely, 542 U.S. at 304-05. Likewise, the Court found Arizona's death penalty scheme unconstitutional because a defendant could receive the death penalty based on aggravating factors found by a judge rather than a jury. Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). And in Apprendi, the Court found New Jersey's "hate crime" legislation unconstitutional because it permitted the court to impose a sentence above the statutory maximum after making a factual finding by a preponderance of the evidence. Apprendi, 530 U.S. at 492-93.

In these cases, the Supreme Court rejected arbitrary distinctions between sentencing factors and elements of the crime. The Ring Court pointed out that the dispositive question is one of substance, not form. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." Ring, 536 U.S. at 602 (citing Apprendi, 530 U.S. at 482-83). Thus, a judge may only impose punishment based on the jury verdict or guilty plea, not additional findings. Blakely, 542 U.S. at 304-05.

**b. This issue is not controlled by prior federal decisions.**

In Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), the Court held that recidivism was not an element of the substantive crime that needed to be pleaded in the information, even though the defendant's prior conviction was used to double the sentence otherwise required by federal law. Almendarez-Torres, 523 U.S. at 246. Almendarez-Torres had pleaded guilty and admitted his prior convictions, but he argued that his prior convictions should have been included in the indictment. Id. at 227-28. The Court determined that Congress intended the fact of a prior conviction to act as a sentencing factor and not an element of a separate crime. Id.

The Almendarez-Torres Court expressed no opinion, however, as to the constitutionally-required burden of proof of sentencing factors used to increase the severity of punishment or as to whether a defendant has the right to a jury determination of such factors. Id. at 246.

Since Almendarez-Torres, the Court has not addressed recidivism and has been careful to distinguish prior convictions from other facts used to enhance possible penalty. See e.g. Blakely, 542 U.S. at 301-02; Apprendi, 530 U.S. at 476; Jones v. United States, 526 U.S. 227, 243 n.6, 119 S.Ct. 1215, 143 L.Ed.2d 311(1999). Moreover, Apprendi noted "it is

arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested.” Apprendi, 530 U.S. at 489. The Court therefore treated Almendarez-Torres as a “narrow exception” to the rule that a jury must find beyond a reasonable doubt any fact that increases the statutory maximum sentence for a crime. Id.

In Blakely, Apprendi, and Jones, the Court stated that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. This statement cannot be read as holding that prior convictions are necessarily excluded from the Apprendi rule, however. Rather, it demonstrates only that the Court has not yet considered the issue of prior convictions under Apprendi. Colleen P. Murphy, The Use of Prior Convictions After Apprendi, 37 U.C. Davis L. Rev. 973, 989-90 (2004). For example, Justice Thomas, who was one of the five justices signing the majority opinion in Almendarez-Torres, wrote in a concurring opinion in Apprendi that Almendarez-Torres was wrongly decided. Apprendi, 530 U.S. at 499 (Thomas, J., concurring). Justice Thomas suggested that, rather than focusing on whether something is a sentencing factor or an element of the crime, the Court should determine if the fact, including a prior conviction, is used as a basis for

imposing or increasing punishment. Id. at 499-519; accord Ring, 536 U.S. at 610 (Scalia, J., concurring) (“I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.”).

The Washington Supreme Court has noted the United States Supreme Court’s failure to embrace the Almendarez-Torres decision. State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003) (addressing Ring), cert. denied, Smith v. Washington, 124 S.Ct. 1616 (2004); State v. Wheeler, 145 Wn.2d 116, 121-24, 34 P.3d 799 (2001) (addressing Apprendi). Nonetheless, the Washington Supreme Court has felt obligated to “follow” Almendarez-Torres. Smith, 150 Wn.2d at 143; Wheeler, 145 Wn.2d at 123-24. Since Almendarez-Torres only addressed the requirement that elements be included in the indictment, however, this Court is not bound to follow it in this case, which attacks the use of prior convictions on other grounds. Moreover, Blakely makes clear that due process protections extend to sentencing factors that increase a sentence above the statutory standard sentence range, a decision not anticipated by the Washington courts. Blakely, 542 U.S. at 305.

The judicial finding by a preponderance of the evidence of the sentencing factor used to elevate Dunomes's punishment to life without the possibility of parole violates due process and Dunomes's right to a jury trial. Dunomes's sentence must therefore be vacated.

7. CLASSIFICATION OF THE PERSISTENT OFFENDER FINDING AS AN "AGGRAVATOR" OR "SENTENCING FACTOR," RATHER THAN AN "ELEMENT," VIOLATES DUNOMES'S RIGHT TO EQUAL PROTECTION.

The Washington Supreme Court has recently held that where a prior conviction "alters the crime that may be charged," the prior conviction "is an essential element that must be proved beyond a reasonable doubt." State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). While conceding that the distinction between prior-conviction-as-aggravator and prior-conviction-as-element is the source of "much confusion," the Court concluded that because the recidivist fact in that case elevated the offense from a misdemeanor to a felony "it actually alters the crime that may be charged," and therefore the prior conviction is an element and must be proven to the jury beyond a reasonable doubt. Id. While Roswell correctly concludes the recidivist fact in that case was an element, its effort to distinguish recidivist facts in other settings, which Roswell termed "sentencing factors," is neither persuasive nor correct.

In addressing arguments that one act is an element and another merely a sentencing fact, the United States Supreme Court has said “merely using the label ‘sentence enhancement’ to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently.” Apprendi, 530 U.S. at 476. More recently the Court noted:

Apprendi makes clear that “[a]ny possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding.” 530 U.S., at 478, 120 S.Ct. 2348 (footnote omitted).

Washington v. Recuenco, 548 U.S. 212, 220, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

In Roswell, the Court considered the crime of communication with a minor for immoral purposes. Roswell, 165 Wn.2d at 191. The Court found that in the context of this and related offenses<sup>5</sup>, proof of a prior conviction functions as an “elevating element,” in that it elevates the offense from a misdemeanor to a felony, thereby altering the substantive crime. Id. at 191-92. But the elements of the substantive crime remain the same, save for the prior conviction “element.” A recidivist fact which potentially alters the maximum permissible punishment by classifying the crime as a class C felony rather than a gross misdemeanor, as in the case

---

<sup>5</sup> Another example of this type of offense is violation of a no contact order, which is a misdemeanor unless the defendant has two or more prior convictions for the same crime. Roswell, 165 Wn.2d at 196.

of CWMIP<sup>6</sup>, is not fundamentally different from a recidivist fact which actually alters the maximum punishment from 548 months to life without the possibility of parole, as in Dunomes's case. CP 65.

In fact, the Legislature has expressly provided that the purpose of the additional conviction "element" is to elevate the penalty for the substantive crime. See RCW 9.68.090 ("Communication with a minor for immoral purposes – Penalties"). There is no rational basis for classifying the punishment for recidivist criminals as an "element" in certain circumstances and an "aggravator" in others. The difference in classifications, therefore, violates equal protection.

The equal protection clauses of the state and federal constitutions require that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. U.S. Const., amend. XIV; Wash. Const., art. I, § 12; Bush v. Gore, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); State v. Thorne, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994). A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless the classification also involves a semi-suspect class. Thorne, 129 Wn.2d at 771. The Washington Supreme Court has held that "recidivist criminals are not a semi-suspect class," and therefore the rational basis test applies. Id.

---

<sup>6</sup> RCW 9.68.090 (communication with minor for immoral purposes is gross misdemeanor unless accused has prior conviction, in which case it is class C felony)

Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation. The classification must be “purely arbitrary” to overcome the strong presumption of constitutionality applicable here.

State v. Smith, 117 Wn.2d 263, 279, 814 P.2d 652 (1991).

The Washington Supreme Court has described the purpose of the Persistent Offender Accountability Act as follows:

to improve public safety by placing the most dangerous criminals in prison; reduce the number of serious, repeat offenders by tougher sentencing; set proper and simplified sentencing practices that both the victims and persistent offenders can understand; and restore public trust in our criminal justice system by directly involving the people in the process.

Thorne, 129 Wn.2d at 771-72.

The use of a prior conviction to elevate a substantive crime from a misdemeanor to a felony and the use of the same conviction to elevate a Class A felony to an offense requiring a sentence of life without the possibility of parole share the purpose of punishing the recidivist criminal more harshly. But in the former instance, the prior conviction is called an “element” and must be proven to a jury beyond a reasonable doubt. In the latter instance, the prior conviction is called an “aggravator” and need only be found by a judge by a preponderance of the evidence.

The legislative classification which permits this result is wholly arbitrary. The Roswell Court concluded that the recidivist fact was an element because it defined the very illegality, reasoning “if Roswell had had no prior felony sex offense convictions, he could not have been charged or convicted of *felony* communication with a minor for immoral purposes.” Roswell, 165 Wn.2d at 192 (emphasis in original); see also . But, as the Court recognized in the very next sentence, communicating with a minor for immoral purposes is a crime regardless of whether one has a prior sex conviction or not; the prior offense merely alters the maximum punishment to which the offender is subject. Id. (“If all other elements had been proved he could have been convicted of only a misdemeanor.”). So, too, attempted first degree murder is a crime whether one has prior convictions for a most serious offense or not.

Recently, Division One of the Court of Appeals held that “recidivists whose conduct is inherently culpable enough to incur a felony sanction are, as a group, rationally distinguishable from persons whose conduct is felonious only if preceded by a prior conviction for the same or a similar offense.” State v. Langstead, --- P.3d ----, 2010 WL 1427579 (April 12, 2010) (motion for reconsideration pending). This Court should reject the reasoning in Langstead. For both groups, using a prior conviction to elevate the classification of the crime share the purpose of

punishing the recidivist criminal more harshly. Because the recidivist fact here operates in the same fashion as in Roswell, this Court should hold there is no basis for treating the prior conviction as an “element” in one instance—with the attendant due process safeguards afforded “elements” of a crime—and as an aggravator in another. The Court should strike Dunomes’s persistent offender sentence and remand for entry of a standard range sentence.

8. A SCRIVENER’S ERROR IN THE JUDGMENT AND SENTENCE MUST BE CORRECTED.

The trial court found that Dunomes was a persistent offender under the three strikes provision of RCW 9.94A.030, based on a prior Louisiana conviction for aggravated battery and a Washington conviction for first degree arson. 9RP 726, 728. Nonetheless, in the Judgment and Sentence, the court checked boxes indicating that both the three strikes and two strikes provisions applied. CP 298.

The two strikes provision applies only when the defendant is convicted of rape in the first or second degree, rape of a child in the first or second degree, child molestation in the first degree, indecent liberties by forcible compulsion, or other offenses committed with sexual motivation. RCW 9.94A.030(34)(b)(i); CP 298. Because Dunomes was not convicted of any of the enumerated offenses, and there was no

showing the offenses for which he was convicted were done with sexual motivation, the two strikes provision does not apply, and the error in the Judgment and Sentence must be corrected. The proper remedy is remand to the trial court for correction of the scrivener's error. In re Personal Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005).

D. CONCLUSION

The prosecutor's comment on Dunomes's post-arrest silence violated his rights to due process and to remain silent; the improper admission of opinion testimony invaded the province of the jury and prejudiced the defense; the court's instructions failed to ensure jury unanimity on the conviction for bribing a witness; and trial counsel's errors denied Dunomes effective representation. These errors individually and cumulatively prejudiced the defense and require reversal. In addition, imposition of the persistent offender sentence violated Dunomes's rights to due process, a jury trial, and equal protection, and the sentence must be vacated. Finally, remand is necessary to correct an error in the Judgment and Sentence.

DATED this 12<sup>th</sup> day of May, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Catherine E. Glinski', written over a horizontal line.

CATHERINE E. GLINSKI  
WSBA No. 20260  
Attorney for Appellant

Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Designation of Exhibits and Brief of Appellant in *State v. Larry Darnell Dunomes*, Cause No. 40126-6-II, directed to:

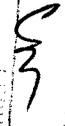
Kathleen Proctor  
Pierce County Prosecutor's Office  
Room 946  
930 Tacoma Avenue South  
Tacoma, WA 98402-2102

Larry Darnell Dunomes, DOC # 721939  
Washington State Penitentiary  
1313 N 13<sup>th</sup> Ave  
Walla Walla, WA 99362

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



Catherine E. Glinski  
Done in Port Orchard, WA  
May 12, 2010

FILED  
COURT OF APPEALS  
10 MAY 13 AM 11:13  
STATE OF WASHINGTON  
BY   
IDENTITY