

No. 41099-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER SIMMS,

Appellant.

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STATE OF WASHINGTON  
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DIVISION II

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

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The Honorable John A. McCarthy (trial), and the Honorables Vicki L. Hogan, Thomas J. Felnagle, Linda CJ Lee, Ronald E. Culpepper, (motions and other hearings) Judges

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APPELLANT'S OPENING BRIEF

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KATHRYN RUSSELL SELK  
WSBA No. 23879  
Counsel for Appellant

RUSSELL SELK LAW OFFICE  
1037 Northeast 65<sup>th</sup> Street, Box 135  
Seattle, Washington 98115  
(206) 782-3353

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A. ASSIGNMENTS OF ERROR

1. Appellant Christopher Simms was deprived of his state and federal due process rights to a fair trial when he was convicted by a jury which was not given a mandatory instruction on how to evaluate crucial evidence.
2. Simms was deprived of his Article 1, § 22 and Sixth Amendment rights to effective assistance of counsel.
3. The prosecutor's multiple acts of flagrant, prejudicial misconduct deprived Simms of a fair trial and compels reversal.
4. Simms assigns error to jury instruction 22, the special verdict instruction, under State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), and as violating his rights to the presumption of innocence and the benefit of every reasonable doubt.

The instruction provides, in relevant part:

**Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."**

CP 109 (emphasis added).

5. Simms' due process rights were violated by conditions of community custody which were insufficiently specific and failed to provide adequate notice of their terms. This further violated the doctrine of separation of powers.

The relevant conditions under section 4.2 and Appendix F of the judgment and sentence:

4.2:

The defendant shall participate in the following crime-related treatment or counseling services: Per CCO

...

The defendant shall comply with the crime-related

prohibitions: See Appendix F

CP 160-61.

Appendix F:

The offender shall participate in crime-related treatment or counseling services: Per CCO

...

The offender shall comply with any crime-related prohibitions.

CP 163-64.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is reversible error for a court to fail to caution the jury about how to evaluate the inherently unreliable testimony of an accomplice against a defendant in exchange for a plea, unless the testimony “substantially” corroborated by other evidence on the facts linking the defendant to the crime.

Simms was convicted of two counts, one of which was based solely upon testimony by an accomplice and the other on that testimony and on an unreliable, informal identification.

Were his due process rights to a fair trial violated when he was convicted by a jury which was not informed of the relevant, crucial law on how to evaluate that accomplice’s testimony because no “cautionary” instruction was given?

Further, was counsel’s unprofessional failure to request the “cautionary” instruction ineffective assistance?

2. It is misconduct for a prosecutor to vouch for the credibility or veracity of a witness. It is also improper for a prosecutor to elicit, in direct examination, that the defendant has agreed to testify truthfully in exchange for a “deal.” It is especially egregious for the prosecutor to imply that he is monitoring the witness’ testimony for truthfulness. Is reversal required where the prosecutor committed all of those acts?
3. The jury’s role is to decide whether the prosecution has proven its case beyond a reasonable doubt. To do so it

need not decide who is telling the truth or lying, nor is it required to figure out the truth or render a verdict which represents it. Did the prosecutor commit flagrant, prejudicial misconduct in repeatedly making such improper arguments?

4. Does the cumulative effect of the misconduct compel reversal where, taken together, it deprived Simms of a fair trial before an impartial jury? Further, even if the misconduct could have been cured, was counsel ineffective in failing to even attempt to do so?
5. In the alternative, must the special verdict and resulting enhancement be stricken where the jury was specifically instructed that it had to be unanimous in order to answer that special verdict “no,” contrary to Bashaw, in violation of Simms’ rights to the presumption of innocence and the benefit of any reasonable doubt?
6. Must conditions of community custody be stricken as violations of due process when they do not provide sufficient notice of what conduct was mandated or prohibited and fail to provide standards for enforcement sufficient to protect against arbitrary and capricious enforcement?

Further, did the trial court abdicate its responsibility in violation of the separation of powers doctrine by failing to set forth specific conditions of community custody, a task the Legislature has set for the court?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Christopher Simms was charged by amended information with attempted first-degree robbery with a firearm enhancement and conspiracy to commit first-degree robbery, both with “gang motivation” aggravating circumstances. CP 40-41; RCW 9.41.010, RCW 9.94A.310, RCW 9.94A.370, RCW 9.94A.510, RCW 9.94A.530, RCW 9.94A.535, RCW 9A.28.020, RCW 9A.56.190, RCW 9A.56.200. Motions and proceedings were held on November 17 and December 10,

2009, January 6, March 23, 30, May 4, 6 and 26, 2010, after which trial was held before the Honorable Judge John McCarthy on June 1-3 and 7-9, 2010.<sup>1</sup> Simms was convicted of the conspiracy and the first-degree robbery with the firearm enhancement, but the jury did not find the aggravating “gang motivator” factor. CP 112-15. Sentencing proceedings were held before Judge McCarthy on August 6, 2010, after which Simms was ordered to serve a standard-range sentences. See 8RP 1; CP 151-64. Simms appealed and this pleading follows. See CP 169-83.

2. Testimony at trial

On the night of July 30, 2009, someone came into an apartment, pointed a gun at Ashley Jones, demanded to know where the money was and if it was upstairs, then left after looking Jones in the eyes and seeing her young daughter, not taking anything as he went. RP 107-31. It was a warm night and Jones had the bedroom window open. RP 112. She heard someone outside yelling her name and went to see her next-door neighbor, Kevin McField, and a man named Adrian Broussard. RP 112-20, 163.

Jones said she did not know McField very well but knew and was close with his wife, Kendra.<sup>2</sup> RP 113-14. Although Jones never said anything about it in her testimony, Jones and Kendra were actually cousins. RP 112-31, 320.

Jones knew Broussard and admitted she had been in a sexual relationship with him at some point in the past. RP 112-20, 163. Jones

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<sup>1</sup>Citation to the verbatim report of proceedings is explained in Appendix A hereto.

<sup>2</sup>Because she shares the same last name as her husband, Kendra McField will be referred to by her first name herein for clarity. No disrespect is intended.

had not really seen Broussard since, although he had a relative who lived in the same apartment complex. RP 115, 167. The relationship between Jones and Broussard had not ended well and, during the previous summer, Jones had refused to let Broussard into her home to use the bathroom, saying he should use a bush instead. RP 115, 167. Jones maintained that she was not “angry” at him at that time but did not otherwise explain why she refused him entry. RP 167.

On July 30, however, Jones let Broussard in and made him a sandwich after speaking to him and McField for a moment, going to the front door when they knocked, and being told by Broussard that he was hungry. RP 117-19, 169. When he came into Jones’ home, Broussard sat down on her couch. RP 120, 170. Jones first said they were sort of talking while she made him a toasted sandwich. RP 121, 167. On cross-examination, however, Jones admitted that, while she was cooking, she “kind of confronted” Broussard about “his attitude.” RP 170-71. She had wanted to know if it was his girlfriend calling or texting him on his phone, which she said was “glowing up.” RP 170-71, 180. Jones had heard that he had another baby with someone and Broussard got mad when she asked him how the baby was doing, apparently because he was denying that it was his. RP 187-89. Also, Jones admitted, Broussard did not “appreciate” Jones asking her if it was his girlfriend who was trying to reach him. RP 121, 171. Jones herself did not “appreciate” Broussard coming into her apartment and having “attitude.” RP 178.

Jones said that, when Broussard was in the living room on the couch, she heard him talk on his cell phone, saying something like he

would call the person back. RP 121. That was the only time she heard him talking on the phone. RP 126-27, 183.

When Broussard asked to use the bathroom, Jones went upstairs to clean up first. RP 124. She then heard her four-year-old daughter telling Broussard, “Uncle Martin’s stuff is upstairs.” RP 124. Jones explained that her brother, Martin<sup>3</sup> Jones, had stuff there but did not sleep there. RP 125, 324.

According to Jones, although she was in the room next to the bathroom at the time, she did not hear a toilet flush when Broussard came out of the bathroom or noises “associated” with bathroom activity while he was inside. RP 126-28. Initially, when asked if she could have heard noises coming from the bathroom, Jones said “[n]o. RP 127. When asked another question about hearing what was going on in the bathroom, however, she said, “[y]ou can hear.” RP 127.

Broussard ultimately ate half of the sandwich Jones made. RP 171. At some point during the meal, he asked her if they could watch a movie together. RP 171. Jones said no, telling him that she had to go to work and her daughter to school in the morning. RP 171.

Broussard was still eating when Jones saw a “shadow” at her back door. RP 122, 129. She asked who was out there and it was McField. RP 122. He wanted to speak to Broussard and started laughing when Jones called Broussard by his real name instead of his street name. RP 123, 129.

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<sup>3</sup>Because he shares the same last name as Jones, for clarity Martin Jones will be referred to herein as “Martin,” with no disrespect intended.

Jones told McField to go to the front door to meet Broussard, saying Broussard was going to leave anyway. RP 124. According to Jones, Broussard then went out the back door, not the front. RP 124. About two minutes later, Jones said, she was walking over to lock her back door when the man with the gun came in. RP 124, 129.

The man pointed the gun at her head and asked where the money was “at.” RP 131. Jones backed up and said “[p]lease don’t shoot me sir” and “[w]hat money are you talking about?” RP 131. Jones said she was trying to calm her daughter at the time and started backing towards the living room door, to try to get out. RP 131. But then the man looked Jones “in the eyes” and ran out the door through which he had come, taking nothing with him. RP 77, 131.

At trial, Jones estimated that the man was in the apartment for five minutes. RP 132. When asked to mark time during trial for 12 seconds, Jones then could not say how long the man was there. RP 132. She admitted that she was not really focused on timing at that moment. RP 132. But a minute later, she again maintained that the incident lasted as long as five minutes, during which she said she was “pleading for my life” and the man was walking towards her across the apartment with a gun pointed “at” her head. RP 132-33.

Jones also said, however, that while the man was walking towards her, he had the gun in his hands, not pointed, and was taking the clip out of the bottom, even possibly dropping it. RP 133-34.

In talking to an officer right after the incident, Jones said the gun was in pieces when the man entered and he was holding the pistol in his

right hand and the clip in his left. RP 74-84.

Jones first answered “no” when asked if the man had ever “threaten[ed] to use the gun.” RP 134. When prompted, however, Jones remembered telling police that the man said “something to the effect of he had one in the chamber” when he entered and that this had scared her because it made her think she was “going to die.” RP 134.

As the man left, Jones said, she was out the front door right away, banging on the McFields’ door and saying “[s]omeone call 911” for a few seconds before the door opened. RP 131-39. Once inside the apartment, Jones said, she saw Broussard standing at the top of the stairs in the home. RP 139. Jones said “get him out of there,” and “[t]his is a setup.” RP 139-40. According to Jones, Broussard asked what she was talking about, then left. RP 140.

Jones first said she and Broussard were in the neighbors’ apartment for about 15 minutes together. RP 140. A moment later she said it was just “[a]bout a minute.” RP 141.

In contrast, McField said that Broussard was never inside his apartment that evening. RP 304, 315. Earlier, McField had opened his front door and seen Broussard, who said he was looking for Jones. RP 294-97. McField had then helped Broussard, knocking on the door for him, after which Broussard ended up going into Jones’ apartment with her, while McField went back to drinking at his own home. RP 298.

About ten minutes after Broussard went into Jones’ apartment, McField took out the garbage and saw a screen door lying on the back patio, so he called to Jones through her open back door and they looked at

it together, deciding it was hers. RP 302-303, 312. McField also asked to speak to Broussard and Jones said he was leaving anyway so she would tell him to stop by. RP 312.

A few minutes after McField returned to his apartment, he saw a man wearing a black hoodie and blue jeans jump over the front railing to McField's apartment and "run to the back." RP 299, 308. McField's wife, Kendra, confirmed seeing the man and said she could not see his face because it was completely obscured by a "hoodie." RP 321. In contrast to her husband, she thought the man was wearing "all black," not a black hoodie and blue jeans. RP 299, 321.

About five or ten minutes later, McField and Kendra heard Jones screaming in the hall. RP 317, 321-30. McField went out his open front door to see what was happening. RP 317, 321, 323, 330. Jones was screaming at Broussard to get out of her house. RP 314-16. McField said Jones was hysterical and was "throwing out accusations right and left." RP 314-16. In fact, Jones even accused McField and his wife of "setting her up or whatever." RP 314-16. Like Broussard, McField did not respond, focused more on trying to figure out what was going on. RP 316.

Kendra confirmed that, not only was Jones saying there was a "setup," "[y]ou pulled that gun," "[h]ow you going to sit up there and do that" and "[a]re you for real?" RP 323-38. Kendra said Jones was just accusing people, not knocking on the door saying "[h]elp." RP 328. Unlike her husband, Kendra thought Broussard came inside just for a moment, just before Jones came in screaming. RP 323-29. Kendra also thought Broussard ran out of the apartment after Jones came inside, but

McField was sure that he talked to Broussard outside the apartment for a moment after Jones made her accusations and that Broussard did not say anything in response to Jones before walking away. RP 305, 320-39.

Tacoma Police Department (TPD) Officer Toni Bartenetti responded to the call Jones ultimately made to police, and interviewed her that night. RP 66-70. Several of the details Jones gave Bartenetti were different than what she claimed at trial. To Bartenetti, Jones said that Broussard had knocked on her side door and asked if he could come in, but in her testimony she said Broussard and McField were at her front door, instead. RP 73, 118, 169. Jones told Bartenetti that Broussard “asked for a sandwich” after she invited him into her apartment, but at trial she said she offered to make him a sandwich after he said he was hungry, inviting him in so she could do so. RP 119.

Although at trial Jones said she was walking towards the side door when the man entered, to the officer Jones said she was instead cleaning up the dishes at that time. RP 74, 124-29. And she also told the officer the man was holding the two parts of the gun when he entered, with the gun in one hand and the clip in the other, not that he had taken it out as he walked towards her. RP 74, 158. Indeed, she denied telling the officer that the gun and magazine were already separate when the man came through the door. RP 158.

Bartenetti was clear that Jones said Broussard left through the front door but the gunman came in through the other door, on the side. RP 74, 86-88. At trial, Jones denied telling making this claim to the officer. RP 164-65. She reiterated that Broussard left out of the back door and then

said that she was “putting the toaster away” and “walking towards the door” when the “second intruder” - the man with the gun - came in. RP 174.

Jones conceded that she had previously given a false statement to a police officer. RP 179. She was, in fact, convicted of that crime. RP 179.

While Bartenetti was interviewing Jones, other officers arrived and decided to search for a suspect using a K-9 dog “track” but it was unsuccessful. RP 71, 81-82. The screen on the window, a railing, the open window, some doorknobs and the east side door were processed for fingerprints but no usable prints were found. RP 83, 97-98, 103, 107.

The description Jones gave to police was of a black male wearing a black, zip-up type hooded sweatshirt, black pants and a blue bandanna covering much of his face. RP 75, 139, 159. What little of his head she could still see revealed what Jones described to police as a “medium complexion” for a black male, with very tight “corn rows” in his hair. RP 75, 136, 159.

At trial, however, Jones provided additional details, like that the man was wearing “all black” Nike shoes and had gloves, too. RP 136-38. She also said he was a “[l]ight skinned,” not “medium.” RP 136-37. And she conceded that, when the man was walking toward her, all she was actually “looking at [was]. . . the black gun” in her face. RP 133-37.

During her testimony, Jones admitted that she did not “know at the time” of the incident who the gunman was. RP 143-44. She claimed, however, that she “identified” him in her own mind about a week later at a local grocery store. RP 143-44. Jones said she came around a corner in the

store, saw him and another man and “frozed up a little bit,” recognizing one of them as wearing the same type of shoes and the same type of pants as the intruder. RP 144-46. Jones also declared that she was “able to see his face clearly” when she saw him laughing, and thought the hair was the same. RP 144-46.

Jones conceded, however, that she knew the man she saw in the store was named Christopher Simms, and that Jones’ brother, Martin, had already told her that he “knew” Simms was involved. RP 145-57. Indeed, Jones had been hearing “rumors” that Simms was the perpetrator before she saw him at the store. RP 145-47, 154-55, 161. Jones already knew who Simms was from having seen him in the hallway at middle school. RP 147, 154-55.

Initially, when asked if she had gone to the police after seeing Simms at the store, Jones specifically said “[n]o.” RP 148-19. In testimony the next day, however, she was asked how long it took her to call police after seeing Simms to tell them that she thought he was the gunman, and she responded, “I went to the police department.” RP 161. She then related both going to the police to tell them Simms was the perpetrator before she saw him in the store and that she had done so “[t]he following week, the same week,” heading to a little police “substation” and being told by an officer there to call the number on the back of her police report in order to “follow-up,” something she said she later did. RP 191. No one ever called her back about her claim and it was only a month later or so that she met with a detective. RP 192-94.

When asked to describe the braids the perpetrator wore, Jones

pointed to a picture on the prosecutor's desk and said the man had braids like the man depicted in that photograph. RP 160. When shown a picture of Simms, she said it showed the hairstyle she thought he had the night of the incident. RP 194.

Simms' mom, a professional barber for 12 years, testified about the differences between dreadlocks, cornrows, braids and twists. RP 362. She was sure Simms had been wearing dreadlocks, not cornrows, at the relevant time. RP 348-49. Simms' sister confirmed that, on the night in question, Simms had "dreads," not cornrows RP 362.

Unlike the gunman, Simms is left-handed, as a photo of him doing his homework showed and his mom confirmed. RP 343-44.

The man with Simms in the grocery store that day was Anthony Smith, Broussard's brother. RP 145-47, 154-55. Smith was also the driver of a car later pulled over, from which Simms was ultimately arrested. RP 90.

Smith, who was 22 at the time of trial, had last attended Green Hill juvenile detention school and was in custody, wearing jail garb, at the time he gave his testimony for the state. RP 202-203. Smith was incarcerated as a result of what he called his "involvement in Hilltop Crips," a local division of a criminal gang. RP 204, 229. Smith claimed Broussard and Simms were also "Crips" and that Jones' brother Martin was, too. RP 206-207.

Smith's prior convictions included a juvenile conviction for third degree theft and several counts of making a false or misleading statement to authorities. RP 392-94. More recently, he had been charged with

attempted murder, unlawful possession of a firearm and conspiracy to commit robbery, for charges unrelated to the July 30 incident involving Jones. RP 230-40. And he was, Smith admitted, selling “quite a bit” of crack cocaine in Tacoma, moving an average of about 28 grams and making about \$900 profit every day. RP 234-35.

Smith testified against Simms as part of a plea “deal.” RP 230. At the same time that he pled guilty to conspiracy to commit robbery and agreed to testify against Simms and others, Smith’s charges of attempted murder and unlawful possession of a firearm were dismissed. RP 230.<sup>4</sup> Smith was also not charged with having shot at someone he thought had stolen his speakers, nor was he charged for his part in the robbery of Jones or for anything relating to his drug sales. RP 244. As a result of the “deal,” the prosecutor agreed to recommend a drug offender sentencing alternative which would have Smith out of prison in 2 ½ years, in exchange for which Smith would testify. RP 230, 244-45.

Smith’s testimony on behalf of the state was that, a few days before the incident, Smith, a man named Jamal Henry (known as “MacMaul”) and Simms had talked about Martin Jones and how much money Martin had been making selling crack. RP 107-108. Smith said there was a “problem” among Crips with Martin selling on his own but he was allowed to do it because he was from the area. RP 209. Smith denied that Martin was Smith’s “main competition,” even though he was also selling

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<sup>4</sup>The prosecution’s attempts to elicit Smith’s belief about whether this was in exchange for his testimony or because “the facts didn’t support it” were rebuffed by the court, which sustained counsel’s multiple objections. RP 230-31.

the same drug, sometimes to the same people, in the same place. RP 235. Smith admitted, however, that he had “some other problems with Martin Jones,” although Smith denied that it had anything to do with Jones’ persistence in propositioning Smith’s girlfriend for sex. RP 237-38. Instead, he said he had something to do with Martin saying something about “my brother,” presumably Broussard, about which Smith had confronted Martin. RP 238.

According to Smith, Martin did not “matter” within the hierarchy of the Crips and was seen as a “weak link” or “buster.” RP 210. That was one of the reasons why it was decided to rob him. RP 210. Smith said it was not necessarily a “bigger deal” to rob another Crip than some “random person” but instead “depends on like who the person is, how much respect” the perpetrator had for the other gang member. RP 242.

Smith nevertheless maintained that he was friends with Martin, had been to Martin’s place before and never saw where Martin kept his money. RP 247. Martin was his friend, Smith declared, so Smith “wasn’t looking to where his stuff was at.” RP 247. Indeed, Smith said, they remained just as “friendly” with each other over time, even while Smith said he helped plan to rob his “friend” because Martin was such an “easy target.” RP 211, 248. Smith backpedaled and also claimed that it was not just because Martin was so “easy” but also because Simms needed money that the robbery was planned. RP 242.

Smith admitted that there was no specific time and day set to commit this proposed crime but claimed that one day, Simms said he was “ready.” RP 211-12. They drove around looking at things like lighting

and, a couple of hours later, went to “set up spots” by the hospital where Smith was “going to post at,” i.e. wait because he was not going into the apartment. RP 212-13, 215. Smith said a couple of other people who were also “Hilltop Crips,” including Marcellus Wesley, got in the car during this time, just looking for a ride. RP 215-16. They had nothing to do with the incident and no one talked to them about the “plan” but Smith claimed they were in the car when the incident occurred. RP 216. Smith said he told them that he would drop them off wherever they wanted to go but they would have to “wait a minute.” RP 216. He then went to a particular spot and Simms made a phone call, which Smith said he thought was to Broussard and involved Simms asking Broussard to help out. RP 217. According to Smith, Simms said he was “about to make a move” and said, “if you are down there, just go over there.” RP 217. After the call was over, Smith said, Simms told Smith, “[y]our brother is going to leave the back door open.” RP 250.

That night, Smith said, Simms was wearing a black heavy coat with a hood, black pants and black shoes, and he put a “blue rag” on his face before getting out of the car. RP 218. Smith also claimed that Simms had a gun with him, which Smith said he had himself fired about a month earlier. RP 219. Smith admitted that, in fact, once he fired the gun, it jammed and he could not get it to “unjam” without taking the clip out and messing with the “top part” and “slide.” RP 220.

Smith admitted that, when he fired the gun, he was shooting at someone he thought had stolen from him. RP 243.

According to Smith, once Simms had gotten out of the car and

about ten minutes had passed, the passengers in the car got concerned, saying, “[l]et’s go. He’s taking too long.” RP 222. Smith testified that he just said “[w]hatever” and drove away. RP 222.

Smith saw Broussard about 30 minutes after he dropped off the passengers. RP 224-25. Broussard had called Smith on the phone and they arranged to meet. RP 251. Smith said Broussard was mad at Smith for getting involved and told him not to “be hanging around people that put you in certain situations,” i.e. Simms. RP 225. Broussard was also mad at Simms for involving Smith. RP 227. Even so, Broussard did not initially say anything to Smith about his own involvement. RP 226. Ultimately, Broussard said that all he was supposed to do was leave the back door open. RP 226.

According to Smith, Broussard was already at the apartment complex when Simms called for his help, because Broussard was there playing chess with McField. RP 227, 310. But McField and his wife were clear that, in fact, Broussard was not in the apartment playing chess or even hanging out earlier that day. RP 310-11, 327.

Shortly after the incident, Smith saw Martin and heard him express suspicion about Simms and another man, “Spud,” who had dropped Martin at his apartment earlier the day of the incident, which Martin thought was “weird.” RP 254. “Spud” was disputing involvement and wanted Martin to fight over it. RP 254. Smith said he did not see Simms until a couple of hours later and only spoke to Simms about what happened a few days later. RP 223. According to Smith, Simms said he got no money because left when he realized it was someone he knew who

had a child. RP 227-28.

Simms' mother, Monica Fowler, testified that, on July 30, the family had a birthday party for her niece and Simms was there from about 6 or 6:30 on, hanging out, watching movies and ultimately falling asleep on the couch along with his friend, Mercede Hall. RP 346. Also there was Simms' sister, Ciyona<sup>5</sup> Fowler. RP 357-58. Ciyona and Hall confirmed these facts. RP 347-60. Fowler recalled Hall coming over at around 8 p.m., and Fowler, Hall and Ciyona and testified about how the three ate and drank together and that Simms was on the couch all night. RP 347-55, 359-60. Hall said they were watching the movie "Terminator 2." RP 367.

In fact, Fowler said, Simms slept on the couch all the time because he was living there, with his mom. RP 348, 351.

Smith admitted telling Simms' mom and sister that he "knew for a fact" Simms "hadn't done this." RP 274. They were wanting to know why Simms had been accused and Smith told them he knew that Simms was not guilty. RP 274. Smith explained, however, that this was before Smith made his "deal." RP 274.

After making his "deal," Smith admitted, he then lied to police repeatedly, telling them that Broussard was not involved and knew nothing about the incident and lying about Smith's own role, as well. RP 255-56, 266. At the time, Smith told the officers he was being "truthful and honest." RP 255. Smith initially denied that he was lying at the time, characterizing it as just "leaving things out." RP 257. Ultimately,

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<sup>5</sup>Because she shares the same last name as her mother, Ciyona will be referred to by her first name, with no disrespect intended.

however, he admitted that he had been asked directly if Broussard was involved and had lied and said no. RP 257-58. Smith claimed that his story had changed now because he knew what was expected of him and what could be hanging over his head. RP 258.

D. ARGUMENT

1. SIMMS WAS DEPRIVED OF HIS RIGHTS TO A FAIR TRIAL AND TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE JURY WAS NOT GIVEN A CRUCIAL CAUTIONARY INSTRUCTION

Both the state and federal due process clauses guarantee the accused in a criminal case the right to a fair trial. See In re Personal Restraint of Woods, 154 Wn.2d 400, 417, 114 P.3d 607 (2005), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 549, 166 L. Ws. 1s 482 (2006); Sixth Amend.; Fourteenth Amend.; Art. I, § 3. In this case, Mr. Simms was deprived of those rights, because the jury deciding his fate was not given a crucial cautionary instruction on how to evaluate the most incriminating evidence against him - the testimony of the man claiming to be his “accomplice” and the accomplice of Broussard, Anthony Smith.

“To satisfy the constitutional demands of a fair trial,” jury instructions must, when taken as a whole, 1) properly inform the jury of the applicable law, 2) not be misleading and 3) permit each side to argue their theory of the case. See State v. O’Hara, 167 Wn.2d 91, 105, 106, 217 P.3d 756 (2009); State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). In the context of cases involving incriminating testimony from an alleged accomplice, Washington courts have set forth the applicable law.

Recognizing the inherent prejudice of such testimony and deeming the risk of conviction of the innocent based upon such testimony as high, our state's courts will not uphold a conviction based upon the uncorroborated testimony of an accomplice unless that verdict is rendered by a jury which is sufficiently cautioned:

The rule is long established in this state that the uncorroborated testimony of an accomplice is sufficient to support a conviction if the jury is instructed that they may receive such evidence only with great care and caution, must subject it to careful consideration in the light of other evidence in the case, and should not convict upon such testimony alone unless, after a careful examination of it, they are satisfied beyond all reasonable doubt of its truth.

State v. Denney, 69 Wn.2d 436, 418 P.2d 468 (1966), quoting, State v. Badda, 63 Wash.2d 176, 385 P.2d 859 (1963) (quotations omitted).

This requirement reflects “the attitude of the courts generally toward the testimony of witnesses of this type.” State v. Carothers, 84 Wn.2d 256, 268, 525 P.2d 731 (1974), overruled in part and on other grounds by, State v. Harris, 102 Wn.2d 148, 685 P.2d 584 (1984) (overruled in part and on other grounds by, State v. McKinsey, 116 Wn.2d 911, 810 P.2d 907 (1991)). That attitude, “garnered from many years of observation of the prosecutorial process” and which the ordinary juror “cannot be expected to have” without instruction, is suspicion of the testimony of one who is pointing the finger at another in order to evade prosecution or get a deal for himself. Carothers, 84 Wn.2d at 268.

Thus, an accomplice or codefendant “is a special kind of witness, required, as a matter of law, to be given a special kind of attention” when jurors evaluate the state's case. Id. The cautionary instruction, telling the jury how to evaluate the testimony of that witness, is required because it

informs jurors “about the provisions of a rule of law applicable to the class to which the witness belongs.” 84 Wn.2d at 269-70.

As a result, whenever an accomplice gives incriminating testimony against a defendant, it is always “the better practice” to give a cautionary instruction. State v. Sherwood, 71 Wn. App. 481, 485, 860 P.2d 407 (1993), review denied, 123 Wn.2d 1022 (1994); Harris, 102 Wn.2d at 152-53. The Supreme Court has “stressed the importance” of giving such instruction, based on its “repeated concern over accomplice testimony and the need to caution jurors regarding its questionable reliability.” Harris, 102 Wn.2d at 153. The Court has concluded that, where the accomplice testimony is not sufficiently, “substantially” corroborated by other evidence, the failure to give the cautionary instruction compels reversal. Id. Only where the accomplice testimony is “substantially corroborated” is it permissible to fail to give the instruction. 102 Wn.2d at 155-56.

In this case, the cautionary instruction was required, because Smith’s incriminating testimony was not “substantially corroborated” for either offense. To be sufficient, corroboration must be not of innocuous facts but rather of the link between the accused and the charged crime. State v. Calhoun, 13 Wn. App. 644, 648-49, 536 P.3d 668 (1975).

In addition, the corroboration cannot come from the testimony of the accomplice/witness but must be from other sources. See State v. Gross, 31 Wn.2d 202, 216-17, 196 P.2d 297 (1948), overruled in part and on other grounds by, Harris, 102 Wn.2d at 153. Finally, there must be a “substantial amount” of corroboration of the link between the accused and the charged crime, separate from the accomplice’s testimony. Harris, 102

Wn.2d at 154.

Thus, in Calhoun, there was insufficient corroboration of the testimony of an accomplice where the defendant was accused of three counts of armed robbery and accomplices linked him to the crimes. 13 Wn. App. at 646. Aside from the accomplices' testimony, the only other evidence was that the defendant had left a gun and holster in a paper sack in the bedroom of someone's house while the robberies were occurring. 13 Wn. App. at 648. Without the testimony of the accomplices, that evidence was insufficient to provide the required "connection between the defendant and the crime charged," so that the cautionary instruction had to be given. Id. Further, the failure to give the instruction was not deemed "harmless" even though the defendant was only convicted of one of the three charges. Id. The conviction depended in large part on the accomplice testimony, the Calhoun Court noted, so that the evidence could have affected that verdict and the failure to give the instruction compelled reversal. Id.

Similarly, here there was not "substantial" corroboration of Simms' involvement in the crimes, aside from the testimony of Smith. For the robbery, there were no fingerprints. There was no videotape. There was no confession, nor was Smith seen at the apartment complex by other witnesses, or carrying the same gun, or anything similar.

Instead, the only evidence against Simms for the robbery was 1) the testimony of the accomplice, Smith, and 2) the identification of Simms by Jones as the perpetrator. But Jones herself admitted that she knew, before making the identification, not only who Simms was but also that

her brother - allegedly a member of the same gang - “knew” Simms was involved. RP 145-61. And she also knew, before she identified Simms, that other people were also saying that the perpetrator was Simms. RP 145-57. Thus, the evidence of “identification” was simply an identification of “Christopher Simms” made by someone who knew what he looked like and believed he was involved before being shown his picture and asked to identify him.

Further, the facts do not support a finding that Jones’ “identification” of Simms was “substantial” corroboration of Smith’s claims. The gunman with the gun had a hoodie over his head and his face obscured by the bandana. RP 75, 139, 159. Jones first said he had a medium complexion but by trial it was “light.” RP 75, 136-37, 159. Although she said she saw the man for about five minutes, she was not sure. RP 132. And although she also said she looked at the man, at the same time she admitted she was focused mostly on the gun, saying that it was *all* she was looking at. RP 132-33.

Given these serious issues with the reliability of Jones’ “identification” of Simms as the perpetrator, that identification cannot serve as “substantial” corroboration that Simms was involved in the robbery, as Smith claimed. There is even less corroboration of the conspiracy count. Conspiracy requires agreement and a substantial step towards carrying it out. State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000); RCW 9A.28.040. Indeed, it is the agreement itself which is the focus of the crime, without which no conviction for conspiracy can exist. State v. Miller, 131 Wn.2d 78, 929 P.2d 372 (1997) (“[a]n agreement to

commit a crime is an essential part of a conspiracy”). But the only evidence of any “agreement” here was Smith’s testimony about the conversation he claimed that he, MacMaul and Simms had in which they decided to commit the robbery. No one else heard any such conversation. Nor was there any other evidence of such an agreement.

Because Smith’s testimony was the entire case against Simms on the conspiracy count, it was imperative that the jury receive proper instruction on the need for them to carefully evaluate that testimony, as required. The importance of Smith’s testimony cannot be overstated. Indeed, the trial court itself specifically recognized that Smith was “a significant part of the State’s case.” RP 340.

Counsel’s failure to propose the required cautionary instruction for both counts was ineffective assistance. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674; State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel’s representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a “strong presumption” that counsel’s representation was effective, that presumption is overcome where counsel’s conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

Simms can meet both of those standards here. First, counsel's failure to propose the cautionary instruction is, frankly, unfathomable. A defendant is entitled to have the jury correctly instructed on the law. State v. Thomas, 109 Wn.2d 222, 226-28, 743 P.2d 815 (1987). Where, as here, defense counsel fails to offer an instruction which is crucial to the jury's proper evaluation of the case, that failure amounts to deficient performance. Id.

Here, the missing instruction was in fact crucial to the jury's proper evaluation of Smith's claims and, by extension, the entire case. The importance and significance of Smith's testimony was clear from the moment it was thrown into the mix. While the specter of that testimony was not raised until well after the initial charges were filed in late September of 2009, counsel knew by March 23 at the latest that Smith had suddenly entered a plea and agreed to testify for the state. See CP 33-34 (continuances granted over Simms' objection because of the need to deal with the addition of Smith's testimony to the state's case). And certainly by trial in June of 2010, counsel was aware that the case against his client was primarily based upon Smith's testimony, rather than other evidence.

Yet counsel utterly failed to request the cautionary instruction that Washington courts have held is required in order to ensure that a defendant in Simms' position receives a fair trial in just such situations. Given the evidence in this case, no reasonably competent attorney would have failed to at least propose the instruction on his client's behalf. Put another way, "[a] reasonably competent attorney would have been sufficiently aware of the relevant legal principles to enable him. . . to propose an instruction

based on pertinent cases” which would support his defense. Thomas, 109 Wn.2d at 229.

Nor can there be any question that counsel’s unprofessional failure to request the instruction prejudiced Mr. Simms. Counsel’s deficient performance meets that standard if there is a reasonable probability it had an effect on the outcome of the trial. Thomas, 109 Wn.2d at 226. A “reasonable probability” is a relatively low standard, requiring only “a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694. Put another way, it is not necessary to prove that “counsel’s deficient conduct more likely than not altered the outcome of the case” but just to show a reasonable probability that it had that effect. Id.

There is more than such a probability here. Smith’s testimony was, in effect, the state’s case. It was Smith alone who placed Simms in the alleged conversation where the conspiracy was formed. And other than Jones’ incredibly weak and suspect identification of Simms, it was Smith alone who placed Simms inside the home, holding the gun on Jones and committing the robbery. But for nearly 50 years, the courts of this state have repeatedly recognized that such testimony from an accomplice is inherently suspect and must be evaluated and relied on only with great caution and care before it can be the basis for a conviction. See Denney, supra (1966); Carothers, supra (1974). And this recognition has led to such strong concern that it is automatic reversible error to fail to so caution a jury in cases such as this.

Indeed, as one court has noted, the entire reason the cautionary

instruction was crafted in the first place was the concern of the courts that testimony from an accomplice like Smith is inherently unreliable and creates a significant risk of improper convictions. Carothers, 84 Wn.2d at 269-70. The instruction is necessary in order to serve as “protection of the defendant” and his right to a fair trial. Carothers, 84 Wn.2d at 269-70.

Counsel’s failure to request the crucial cautionary instruction was deficient performance. Without that instruction, the jury was left without any guidance on how to evaluate the state’s most important evidence - the inherently suspect claims of an accomplice. And without that instruction, counsel left his client without any protection against the risks of wrongful conviction such inherently suspect testimony creates. Given the weakness of the state’s case, and the serious impact that Smith’s testimony had, counsel deficient performance was highly prejudicial to Simms and reversal and remand for a new trial with a new attorney is required.

2. THE PROSECUTOR’S REPEATED MISCONDUCT UNBECOMING A QUASI-JUDICIAL OFFICER COMPELS REVERSAL; IN THE ALTERNATIVE, COUNSEL WAS AGAIN INEFFECTIVE

Unlike other attorneys, prosecutors enjoy a “quasi-judicial” status. See Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by, Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). With this status, and the attendant respect of the people, comes responsibilities. See, State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). Among those responsibilities is the duty to seek a verdict based upon reason, not

emotion or other improper grounds. See State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993). Another is the duty to refrain from acting like a “heated partisan,” trying to win at the expense of fairness and justice. State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1989). Further, because of their role in our society, prosecutors have special influence with a jury and may, with their misconduct, deprive a defendant of a fair trial. See Suarez-Bravo, 72 Wn. App. at 367; see also, State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956) (prosecutor’s respect and influence).

In this case, reversal is required, because the prosecutor committed multiple acts of flagrant, prejudicial misconduct and the result was that Simms was deprived of his due process rights to a fair trial. In the alternative, counsel was again ineffective.

- a. Misconduct re: plea agreement and vouching
  - i. Relevant facts

On direct examination, the prosecutor asked Smith about his plea agreement and whether he got “some consideration” for testifying. RP 230. Smith responded:

I pled guilty to Robbery in the Second Degree and for five years and **to tell the truth about everything and my involvement in the Hilltop Crip gang.**

RP 230 (emphasis added). On cross-examination, counsel for Broussard asked Smith about his multiple, differing statements and Smith claimed that he was giving a different story at trial than he initially gave to police because he knew what was “expected” of him and what could be hanging

over his head. RP 255-58.

On redirect, the prosecutor then asked if Smith had read the plea agreement and elicited Smith's opinion that he had a "solid understanding" of the sentence he was facing "and the details." RP 270. Smith again said that he was looking at "five years" but then admitted that the agreement was actually for a five year "DOSA" sentence, which meant he would serve at most 2 ½ years in prison. RP 271. He said this was "**if I am truthful, and yeah, if I am truthful about everything that I have done, even my involvement in everything.**" RP 271 (emphasis added). The prosecutor also established that Smith's agreement required him to testify for the state in 20-30 more cases. RP 273.

In further recross-examination, counsel established that one of the clauses of the plea agreement provided:

A reasonable belief on the part of the deputy prosecuting attorney the defendant is not being completely truthful during his testimony will result in a violation of this agreement.

RP 275. Smith admitted that he would face 10 years in prison if he was deemed by the prosecutor not to be testifying consistent with the agreement. RP 275-79. He nevertheless denied that it was in his best interest to give testimony the prosecutor thought was truthful. RP 279.

In closing argument, the prosecutor first talked about the potential biases and interests of defense witnesses, then turned to Smith, who, the prosecutor declared, had "an interest in telling the truth, so he can get a deal." RP 412. The prosecutor said Smith had no motive to implicate Simms and that Smith was charged with "a crime or crimes, along with a

lot of other Hilltop Crips” and gave information about other Crips “in hopes that he would get a deal from the State.” RP 420. The prosecutor then went on to discuss plea, declaring that, under that agreement, Smith was “obligated to tell the truth about everything that he is asked about.” RP 421.

At that point, the prosecutor said that Smith was in a “tangled web” when he started lying by leaving things out but that the jury should “temper that with the fact that he [Smith] is now looking at 10 years in prison if he doesn’t tell the truth.” RP 423. The prosecutor went on:

And his testimony, his statements, obviously, his manner of testifying and the information he gives is something that has to be evaluated as to whether he is telling the truth in order for him to get that deal, to continue to get the deal.

RP 423.

In response, counsel tried to minimize the damaging effect of the prosecutor’s argument, pointing out that, under the plea bargain, Smith had to tell what the prosecutor believed was the truth to get the “deal.” RP 439. Counsel made it clear that he was not suggesting that the prosecutor was in any way involved in putting Smith “up to anything” but said that the issue was that Smith had to tell “the right version of the truth” to get the deal. RP 439.

In rebuttal closing argument, the prosecutor pointed out that Smith had a requirement to testify against not just Simms and Broussard “but 20-plus other Hilltop Crips, multiple other cases, and he **must tell the truth in the entirety of all situations in order to get his deal.**” RP 471 (emphasis added). Next, the prosecutor told the jurors he did not get to

pick his witnesses and that he was sometimes forced to put witnesses on the stand if they have information the jurors need, even though “it obviously runs the risk of exposing this deal, so to speak, that was made.” RP 471. The prosecutor later reiterated that Smith’s “**requirement is to tell the truth about things.**” RP 473 (emphasis added).

ii. These arguments were flagrant, prejudicial misconduct

With these arguments, the prosecutor committed flagrant, prejudicial misconduct which compels reversal. It is misconduct for a prosecutor to vouch for or bolster the credibility of a state’s witness. See State v. Reed, 102 Wn.2d 140, 143-45, 684 P.3d 699 (1984). Further, evidence that a witness has entered into a plea agreement to provide “truthful testimony” is improper because it vouches for the witness’ credibility. State v. Green, 119 Wn. App. 115, 79 P.3d 460 (2003), review denied, 151 Wn.2d 1035, cert. denied, 543 U.S. 1023 (2004). And this risk exists based upon that testimony alone, even if the prosecutor never exploits that testimony in closing argument and never argues that the witness was “complying with that term of the agreement.” See State v. Ish, 170 Wn.2d 189, 194, 241 P.3d 389 (2010).

In Ish, the majority of the Court first held that admitting evidence of a plea agreement requirement for a witness to “testify truthfully” is problematic. 170 Wn.2d at 197; 170 Wn.2d at 206 (Sanders, J., dissenting). Such evidence implies that the prosecutor is somehow “forcing the truth from his witness” and that the prosecutor “knows what the truth is.” 170 Wn.2d at 197 (quotations omitted). In addition, the

truthfulness” can occur even with just admitting the evidence of the plea clause to “testify truthfully.” 170 Wn.2d at 203-204.

Here, of course, the jury heard far more than just that Smith had agreed to testify truthfully in exchange for an impressively short sentencing recommendation for all of his acts. In addition, the prosecutor told the jury what the existence of that plea clause **meant**; i.e., that Smith was “obligated” to tell the truth (RP 421), “must” tell the truth under the agreement (RP 471) and had a “requirement” to do so. RP 473. The prosecutor also told jurors that the agreement created a motivation in Smith to be truthful because otherwise he would lose the “deal” RP 412, 420, 421. And jurors were told that Smith should believe what Smith was saying now even though he admitted lying to police originally because he was “looking at 10 years in prison if he doesn’t tell the truth.” RP 423. Then in rebuttal closing argument the jurors were again told Smith “must tell the truth in the entirety of all situations in order to get his deal” (RP 471) and that Smith has a “requirement is to tell the truth about things.” RP 473.

Most egregious, however, the prosecutor reminded jurors that Smith’s testimony was being evaluated by the prosecutor to determine whether he was telling the truth:

And his testimony, his statements, obviously, his manner of testifying and the information he gives is something that has to be evaluated as to whether he is telling the truth in order for him to get that deal, to continue to get the deal.

RP 423.

Thus, unlike in Ish, jurors did not just hear, in passing, that Smith

had a plea agreement with a “testify truthfully” clause. Over and over, the prosecutor argued that the clause was making Smith more credible and reliable because he was required to tell the truth in order to get the benefit of his deal. And the prosecutor specifically reminded jurors that the prosecutor was playing the role of evaluating Smith’s truthfulness.

Notably, the jurors heard this after also hearing that Smith, a major crack dealer, a member of a criminal street gang and someone who had pointed a gun and shot at a person just before this incident was being offered just 2 ½ years in custody for all his criminal acts, and that he was being relied on in 20-30 cases. The clear implication was that the prosecution had ensured Smith would “testify truthfully” but also believed that what he was saying was the truth. Otherwise, Smith would neither be getting such an amazing “deal,” nor would he be in line to testify as the prosecutor’s star witness in so many cases.

The arguments of the prosecutor on this issue were serious, prejudicial misconduct. This Court should so hold.

b. Misstating the jury’s role and minimizing his burden of proof

i. Relevant facts

In initial closing argument, the prosecutor first told the jury, “[n]ow, this case very clearly is a case where **you have to decide who is telling the truth,**” and at there was “**no issue**” that the jury was required to make that determination. RP 411 (emphasis added). He also said the jury had “to determine whether someone is telling the truth” and that the jury instructions told them how. RP 412.

Regarding Jones, the prosecutor asked jurors if they really believed that she was just “calculating” to frame Simms and Broussard for no reason. RP 420. The prosecutor then said, “[i]f you believe she is telling the truth, if you believe that she is accurate” in her testimony, “then he is guilty.” RP 420 (emphasis added). A few minutes later, the prosecutor apparently projected a slide<sup>6</sup> which talked about motive and other parts of the case, then declared, “this is a credibility contest. **This is who is telling the truth.**” RP 427-28 (emphasis added).

The prosecutor again returned to this theme later, declaring that “**only one or the other is telling the truth.**” RP 431 (emphasis added). He again told jurors they had to decide, “one, **who is telling the truth**; and two, whether the State has met its burden of proof beyond a reasonable doubt.” RP 431 (emphasis added).

ii. This “false choice” argument has been soundly condemned

More than 20 years ago, it was made clear that this type of argument was misconduct. Called the “false choice” argument, the argument misstates the prosecution’s burden of proof and the jurors’ role by telling jurors they have to decide who is telling the truth and who is lying in order to render a verdict. See, State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995); see also, State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). The choice is “false” because jurors need not decide that anyone is lying or telling the truth in order to perform its function. State v.

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<sup>6</sup>It does not appear that this was made part of the record.

Barrow, 60 Wn. App. 869, 876, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). Instead, the jury is required only to determine whether the state has met its burden of proving every part of its case, beyond a reasonable doubt. Wright, 76 Wn. App. at 826.

Further, the choice is “false” even if the versions of events seem to be inconsistent or contradict each other. Barrow, 60 Wn. App. at 876. This is because a witness may give testimony which is wholly or partially incorrect even without “deliberate misrepresentation” being involved. State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991). And the testimony of witnesses may be in conflict even if both are attempting “in good faith” to tell the truth.” Id.

In addition, telling the jurors that they have to decide who is telling the truth in order to perform their role not only misstates that role but also improperly dilutes the prosecution’s constitutionally mandated burden of proof. Such argument invites a decision improperly based not upon the constitutional standard of whether guilt has been proved beyond a reasonable doubt but rather on the jury’s conclusion of which “side” of the case the jurors most believed. See, e.g., United States v. Pine, 609 F.2d 106, 108 (3<sup>rd</sup> Cir. 1979). Indeed, arguments that jurors have to decide which side is telling the truth amount to telling jurors they are supposed to be “determining whose version of events is more likely true, the government’s or the defendant’s.” See United States v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5<sup>th</sup> Cir.), cert. denied, 511 U.S. 1129 (1994). As a result, the jury is misled into thinking they simply must decide which version of events is more likely and then base their decision on that

determination, which clearly “intimates a preponderance of [the] evidence standard,” rather than the constitutionally mandated, much higher standard of “beyond a reasonable doubt.” Id.

That is exactly what the prosecutor did in this case. Repeatedly, the prosecutor told the jury that they had to decide which side was telling the truth in order to decide the case. The jury was told this was “very clearly” a case where they “have to decide who is telling the truth (RP 411), that there was “no issue” that this was what was required of them (RP 411), that they had to “determine whether someone is telling the truth” - the state’s witnesses and those for the defense (RP 412), that he was guilty if they “believe that she is telling the truth” (RP 420), that the case was a “credibility contest” and it was about “who is telling the truth” (RP 427-28), that “only one or the other is telling the truth,” and that part of their duty was to decide first who was telling the truth and then whether the state had met its burden of proof beyond a reasonable doubt (RP 431).

Thus, over and over, the prosecutor framed the jury’s duty and role as deciding which side was telling the truth - the defense or the prosecution - and then rendering a verdict accordingly.

But the jury’s constitutional role is not to “pick a side” or decide who is telling the truth - is to presumptively acquit unless and until it finds that the state has met its constitutionally mandated burden of proving its case, beyond a reasonable doubt. See Wright, 76 Wn. App. at 826.

The prosecutor’s repeated misstatements of his burden and the jury’s role were flagrant, prejudicial misconduct. Indeed, in Fleming, supra, the Court of Appeals found it to be so, precisely because the

argument was still being made two years after the Court had condemned it in Castaneda-Perez. Fleming, 83 Wn. App. at 214. And a member of this Court has recently noted that “[n]early two decades have passed since Castaneda-Perez” and it is “disheartening that this improper argument form has cropped up again.” State v. Anderson, 153 Wn. App. 417, 433, 220 P.3d 1273, review denied, 170 Wn.2d 1002 (2010) (Quinn-Brintnall, concurring).

The prosecutor committed flagrant, prejudicial misconduct and this Court should so hold.

c. Flagrant, prejudicial misconduct re: declaring truth

i. Relevant facts

In initial closing argument, after telling the jury repeatedly that they had to decide who was telling the truth and who was lying in order to decide the case, the prosecutor concluded by telling them, “[t]he State is asking you to use your common sense and to **render verdicts that represent your truth in this case.**” RP 431 (emphasis added).

In response, counsel argued that this statement of the prosecutor to “look for the truth of this thing” was improper, that the prosecutor was effectively telling jurors to fill in the gaps in the prosecutor’s case and that they were “not here to figure out what the truth is” but were only to “figure out what has been proven to you. Proof, not truth.” RP 442. A moment later, counsel reiterated, “[y]ou are not looking for the truth. You are looking for proof beyond a reasonable doubt.” RP 443.

In rebuttal closing argument, the prosecutor argued that counsel

had misstated the law:

Now, the statements that the State disagrees with both counsel [about] is that you are not here to figure out the truth. Truth doesn't matter, so to speak, and this fill-in-the-blank concept, and you are not to solve the case is what I heard. If there are any questions remaining, then you can't be convinced.

One other statement, in all aspects, “[t]hey have to prove the case beyond a reasonable doubt.” That’s not accurate. The instructions tell you. . . ‘[i]t’s your duty to decide the facts in the case based on the evidence presented to you during this trial.’ **And of course, that’s what our system is about. You obviously have to get to the truth; otherwise, none of this makes sense.**

**But the truth of everything is where I am going with this.** You don’t have to decide.

RP 478 (emphasis added).

Later in the same rebuttal closing argument, the prosecutor talked about the jury instruction defining reasonable doubt, reminding jurors of a point he had made during juror *voir dire* where he “called on somebody . . . to render a verdict **that represents the truth about what happened.**”

RP 480-81 (emphasis added). He then noted that the jurors had all agreed with that premise and that “this refines it. **It’s the truth about the charges.**” RP 481 (emphasis added).

ii. The arguments were flagrant, prejudicial misconduct

Again, the prosecutor misstated the jury’s role and minimized his own burden of proof. This Court has recently reaffirmed that it is not the jury’ role or responsibility to decide or declare the truth with their verdict. Anderson, 153 Wn. App. at 429. Instead, jurors are tasked solely with determining whether the state has met its constitutionally mandated burden of proving its case, beyond a reasonable doubt. Wright, 76 Wn. App. at

826; Fleming, 83 Wn. App. at 213. It is not the jury's role or duty to declare the "truth" and arguing to the contrary is misconduct. Anderson, 153 Wn. App. at 429. Once again, the prosecutor failed in his duties by urging the jury to decide the case on an improper basis. And again, he misstated the jury's crucial role, minimizing his burden and watering it down so that jurors thought only that they had to decide the "truth." But "truth" is an illusory concept, with different meanings for different people in each different context. Philosophers have been trying to define "truth" since at least Aristotle. See Nicomachean Ethics, X, ch. 8, 1179a, 16-22; McKeon, Aristotle's Conception of The Development and The Nature of Scientific Method, 8 J. of The History of Ideas 3, 40 (1947). By definition, telling different people to decide the truth of what happened is telling them to use their personal degree of certainty - the one they use and apply every day. But that is far different than applying a standard of proof beyond a reasonable doubt. While "[a] prudent person" acting in "an important business or family matter would certainly gravely weigh" the considerations and risks of even important everyday decisions, "such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment." Scurry v. United States, 347 F.2d 468, 470 (U.S. App. D.C. 1965), cert denied sub nom Scurry v. Sard, 389 U.S. 883 (1967). The prosecutor thus committed further flagrant, prejudicial misconduct.

d. Reversal is required

All of this misconduct compels reversal. Where there is no objection below, the issue is waived unless the misconduct is so flagrant and ill-intentioned that it could not have been cured by instruction, or if it is

raised by way of ineffective assistance. See e.g., State v. French, 101 Wn. App. 380, 385, 4 P.3d 857, review denied sub nom State v. Barraza, 142 Wn.2d 1022, 20 P.3d 945 (2001). Here, the misconduct all meets that standard. It is so well-settled that the “truth or lying” arguments are wholly improper that more than a decade ago the Fleming Court held them flagrant and ill-intentioned simply because they were then still being made. Fleming, 83 Wn. App. at 213-14. Further, casting the jurors’ role as deciding and declaring the “truth” not only misstates that role but also improperly dilutes the prosecution’s constitutionally mandated burden of proving guilt beyond a reasonable doubt in a highly way unlikely to be erased by simple instruction. And the implications of the prosecutor’s vouching for Smith, its star witness against Simms, while implying that the prosecution was somehow ensuring Smith’s veracity placed the weight of the prosecutor’s office and the state behind Smith in such a way that jurors would have already associated their strong, positive feelings towards the prosecutor in his role with Smith - feelings which would be very hard to “cure.”

Further, even if the individual acts of misconduct did not compel reversal, taken together, they do. Where a single act of misconduct does not, standing alone, support reversal, multiple acts of misconduct will if there is a substantial likelihood that, taken together, the misconduct affected the verdict. State v. Jones, 144 Wn. App. 284, 300-301, 183 P.3d 307 (2008). Here, all of the misconduct had a direct, corrosive effect on the jury’s ability to fairly and impartially evaluate the evidence and the state’s case. First, by being told they had to decide who was telling the truth and

who was lying, then by being told they had to decide the “truth” about what happened and render a verdict representing that “truth,” jurors were misled about their role and the state’s burden of proof. Coupled with that, the jury was effectively told that Smith was deemed so credible and reliable by the state that he was their star witness for multiple cases, and that the plea agreement ensured he was telling the truth. Taken together, the pervasive impact of all of this misconduct was such that no reasonable jury could have made a decision unaffected by its weight. Reversal is required.

e. In the alternative, counsel was ineffective

In the unlikely event this Court finds that the prosecutor’s serious, prejudicial and pervasive misconduct could have been cured if counsel had objected and requested curative jury instructions, this Court should nevertheless reverse based on counsel’s ineffectiveness. While in general, the decision whether to object or request instruction is considered “trial tactics,” that is not the case in egregious circumstances if there is no legitimate tactical reason for counsel’s failure. State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989); see also Hendrickson, 129 Wn.2d at 77-78. In such cases, counsel is shown ineffective if there is no legitimate tactical reason for counsel’s failure to object, an objection would likely have been sustained, and an objection would have affected the result of the trial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Here, there could be no “tactical” reason for counsel’s failure to object to any of the prosecutor’s serious misconduct. An objection would likely have been sustained, because any reasonable trial court would have

recognized that the prosecution's arguments were clearly improper. While Simms does not believe any of the misconduct could have been cured, if this Court disagrees, it should nevertheless reverse because no reasonably competent attorney would allow the prosecution's serious misstatements of the jury's role and the prosecutor's constitutionally mandated burden of vouching for the state's main witness pass without objection. This Court should so hold.

3           IN THE ALTERNATIVE, THE SPECIAL VERDICT  
MUST BE STRICKEN AND COUNSEL WAS AGAIN  
PREJUDICIALLY INEFFECTIVE

Even if this Court does not find that the other errors compel reversal, the special verdict and resulting enhancement must be reversed and dismissed under the controlling precedent of Bashaw, supra. Jury instructions are reviewed de novo, to determine whether they are supported by substantial evidence, allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the applicable law. See State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). The jury instruction on the deadly weapon special verdict, Instruction 22, not only misstated the law but also deprived Simms of the presumption of innocence and of the benefit of a reasonable doubt. The instruction provided, in relevant part:

**Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms.** In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. **If you unanimously have a reasonable doubt as to this question, you must answer "no."**

CP 109 (emphasis added).

In Bashaw, the Supreme Court declared, plainly, that “a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding. 169 Wn.2d at 146. Instead, unanimity is only required to find the “*presence* of a special finding increasing the maximum penalty.” 169 Wn.2d at 147 (emphasis in original); see also, State v. Goldberg, 149 Wn.2d 888, 890, 72 P.3d 1083 (2003).

Here, by telling the jurors they had to be unanimous in order to answer the special verdict “no,” Instruction 22 misstated the law. In addition, although the Bashaw Court did not explicitly so hold, the instruction deprived Smith of the benefit of any reasonable doubt and the presumption of innocence. That presumption is the “bedrock upon which the criminal justice system stands.” State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). A defendant is constitutionally entitled to the benefit of the doubt when it comes to determining whether the state has proven its case. See State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008), cert. denied, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). In the context of a special verdict, indicating to jurors that they have to be unanimous not only to answer “yes” but also to answer “no” deprives the defendant of the benefit of the doubts some jurors may have had. As the Bashaw Court noted, where, as here, the jury is under the mistaken belief that unanimity is required, “jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result.” 169 Wn.2d at 147-48.

Dismissal of the special verdict and resulting sentence is required. As the Bashaw Court pointed out, when the jury is improperly instructed in

this way, the deliberative process is so “flawed” that it is not possible to “say with any confidence what might have occurred had the jury been properly instructed.” 169 Wn.2d at 147-48. As a result, a reviewing court “cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.” 169 Wn.2d at 148.

Notably, the Bashaw Court reached this conclusion even though it had already found that there was sufficient evidence to uphold two of the three special verdicts in that case, despite evidentiary errors. 169 Wn.2d at 143-48. The Court was unconcerned with the sufficiency of the evidence when examining the instructional error, because the question was not whether there was evidence to support the enhancement but rather whether the procedure in gaining the verdict rendered it fundamentally flawed. 169 Wn.2d at 147-48. Further, the Court held, it would be improper to allow retrial on just the special verdict. Id.

Just as in Bashaw, here the procedure used to gain the verdict was fundamentally flawed. The special verdict and resulting enhancement must be reversed.

In response, the prosecution may attempt to rely on a Division Three decision in which the court refused to answer the Bashaw question on the grounds it had not been raised below. See State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2001) (petition for review pending). Any such attempt should be rejected. In Nunez, the instruction told the jury only that they had to agree in order to answer the special verdict. And the defendant in Nunez - unlike here - made no legitimate constitutional argument on appeal. 160 Wn. App. at 157-58.

Further, Nunez was simply wrongly decided. While recognizing that Bashaw applied constitutional harmless error analysis to the issue, the Nunez Court declared that the issue was nevertheless not “constitutional” because Bashaw “did not’ a constitutional basis for its decision” and because the Nunez Court thought the issue was simply one of “instructional error” which did not impact constitutional rights. 160 Wn. App. at 160-64. In contrast, in State v. Ryan, 160 Wn. App. 944, \_\_ P.3d \_\_ (2011), Division One recently held to the contrary, rejecting Nunez. 160 Wn. App. at \_\_ (slip op. at 2). The issue could be raised for the first time on appeal as manifest error affecting a constitutional right, Division One held, finding that Bashaw “strongly suggests its decision is grounded in due process.” 160 Wn. App. at \_\_ (slip op. at 2). The Court of Appeals noted that, in Bashaw, the Supreme Court identified the relevant error as “the procedure by which unanimity would be inappropriately achieved” and resulting in a “flawed deliberative process” - constitutional issues. Ryan, 160 Wn. App. at \_\_ (slip op. at 2-3). Further, the Ryan Court pointed out, the Bashaw Court applied a constitutional harmless error standard and “refused to find the error harmless even where the jury expressed no confusion and returned a unanimous verdict in the affirmative.” Ryan, 160 Wn. App. at \_\_ (slip op. at 2). It was obvious to Division One that Bashaw had found the issue constitutional and that it could be raised for the first time on appeal.

This Court should follow that well-reasoned decision. In addition, this Court should address the issue left unsettled by Bashaw - whether the error is also a violation of the rights to the presumption of innocence and to the benefit of reasonable doubt.

4. THE SENTENCING COURT ABDICATED ITS DUTIES AND VIOLATED DUE PROCESS IN IMPOSING SEVERAL CONDITIONS OF COMMUNITY CUSTODY

This Court should also strike several conditions of community custody. The state and federal due process clauses prohibit imposition of conditions which are unconstitutionally vague. See State v. Sansone, 127 Wn. App. 630, 638, 111 P.3d 1251 (2005). A condition is vague and in violation of due process if it either 1) is not defined with sufficient clarity so that an ordinary person would be on notice of what conduct was prohibited or 2) “does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” 127 Wn. App. at 639, citing, Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990).

In this case, both of those mandates were violated by the following conditions of section 4.2 of the judgment and sentence and in Appendix F to that document:

The defendant shall participate in the following crime-related treatment or counseling services: Per CCO

...

The defendant shall comply with the crime-related prohibitions: See Appendix F

CP 160-61. The conditions in Appendix F provided, in relevant part:

The offender shall participate in crime-related treatment or counseling services: Per CCO

...

The offender shall comply with any crime-related prohibitions.

CP 163-64.

These conditions violated Simms’ rights to due process, were not statutorily authorized and amounted to an improper abdication of the

sentencing court's duties, in violation of the doctrine of separation of powers. As a threshold matter, these issues are properly before the Court. Where the lower court imposes an illegal or erroneous condition, that issue may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744-46, 193 P.3d 678 (2008). Further, a challenge to such a condition may be made "preenforcement" if the challenge raises primarily a legal question and no further factual development is required. Id. The conditions in this case meets those standards, because there is no further factual development required to show their serious constitutional and statutory infirmity and the issues are primarily legal.

On review, this Court should strike the conditions. Where, as here, a condition provides that a community corrections officer "can direct what falls within the condition," the Supreme Court has recognized that "only makes the vagueness problem more apparent," because, with that language, the condition "virtually acknowledges on its face [that] it does not provide ascertainable standards for enforcement." Bahl, 164 Wn.2d at 758. Further, such conditions fail to define the prohibited conduct with "sufficient definiteness such that ordinary people can understand what it encompasses." Sansone, 127 Wn. App. at 639. Here, the conditions do not even give their general subject, instead just allowing the CCO to decide what is "crime-related" as in relation to evaluation and treatment, and leaving the definition of what will amount to "crime-related" prohibitions until some future date, presumably when there is an alleged violation. As in Bahl and Sansone, these conditions fail to define what is prohibited and fail to provide ascertainable standards for enforcement.

Notably, delegating to the CCO - the very person tasked with enforcement - the decision of what, exactly, is prohibited or mandated creates “a real danger” of arbitrary enforcement based upon the CCO’s personal beliefs about what a defendant should and should not be doing, even if those beliefs do not reflect the law. See, e.g., Sansone, 127 Wn. App. at 639.

Further, the determination of what is “crime-related” is something even learned courts have difficulty making. A prohibition is only “crime-related” if it forbids conduct that “directly relates to the circumstances of the crime.” State v. Autrey, 136 Wn. App. 460, 466, 150 P.3d 580 (2006). While it need not be “causally” connected to the crime, any prohibition must still address conduct directly related to the crime. State v. Zimmer, 146 Wn. App. 405, 413, 190 P.3d 121 (2008), review denied, 165 Wn.2d 1035 (2009) (prohibition on mobile devices not “crime-related” because there was no evidence such devices were used in crime, even though trial court thought drug dealers often use them).

With these conditions, that the sentencing court abdicated its responsibility for deciding what affirmative acts, counseling/treatment and prohibitions were proper in this case. While a sentencing court may delegate administrative tasks to DOC, it is not permitted to delegate in such a way which “abdicates its judicial responsibility” for setting the terms of community custody. Sansone, 127 Wn. App. at 642. Instead, it is the court’s responsibility to set forth those conditions in the judgment and sentence, leaving to DOC to handle monitoring and enforcement. Former

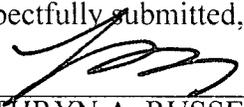
RCW 9.94A.700(5)(2008)<sup>7</sup> provides the court with the authority - and the responsibility - to decide which conditions were proper and order those conditions. Here, the court failed to take that responsibility and the result was imposition of improper, unconstitutionally vague conditions, all of which this Court should strike.

E. CONCLUSION

For the reasons stated herein, this Court should grant Simms relief.

DATED this 20<sup>th</sup> day of June, 2011.

Respectfully submitted,

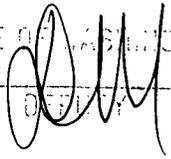
  
KATHRYN A. RUSSELL SELK, No. 23879  
Counsel for Appellant  
RUSSELL SELK LAW OFFICE  
1037 Northeast 65<sup>th</sup> Street, Box 135  
Seattle, Washington 98115  
(206) 782-3353

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<sup>7</sup>This statute was renumbered effective August 1, 2009, as RCW 9.94B.050. See Laws of 2008, ch. 231, § 56.

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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CERTIFICATION OF SERVICE BY MAIL

I hereby declare under penalty of perjury under the laws of the State of Washington that I deposited a true and correct copy of the attached document to opposing counsel and appellant by placing it in the United States Mail first-class postage prepaid to the following addresses:

TO: Kathleen Proctor, 946 County City Building, 930 Tacoma Ave. S,  
Tacoma, WA. 98402;

TO: Christopher Simms, DOC 330455, Washington State Penitentiary,  
1313 N. 13<sup>th</sup> Ave., Walla Walla, WA. 99362.

DATED this 20<sup>th</sup> day of June, 2011.

  
KATHRYN A. RUSSELL SELK, No. 23879  
Counsel for Appellant  
RUSSELL SELK LAW OFFICE  
1037 Northeast 65<sup>th</sup> Street, Box 135  
Seattle, Washington 98115  
(206) 782-3353

## APPENDIX A

The verbatim report of proceedings consists of 11 volumes, some of which are unfortunately chronologically paginated although they do not contain consecutive dates. In an effort to ensure some clarity for purposes of citation, these volumes will be referred to as follows:

November 17, 2009, as "1RP;"  
December 10, 2009, as "2RP;"  
January 6, 2010, as "3RP;"  
the volume containing the chronologically paginated proceedings of  
February 9, March 30 and May 4, 2010, as "4RP;"  
March 23, 2010, as "5RP;"  
May 6, 2010, as "6RP;"  
May 26, 2010, as "7RP;"  
the three volumes containing the chronologically paginated  
proceedings of trial on June 1-3 and 7-9, 2010, as "RP;" and  
the sentencing proceedings of August 6, 2010, as "8RP."