

NO. 41347-7

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

LARRY EDWARD TARRER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine Stolz

No. 91-1-00712-0

BRIEF OF RESPONDENT

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Table of Contents

A.	<u>ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.</u>	1
1.	Was defendant denied the right to a fair trial where the State did not commit prosecutorial misconduct?.....	1
2.	Did defendant receive constitutionally effective assistance of counsel where defendant cannot show deficient performance or prejudice where counsel was a strong advocate for his client?	1
3.	Did the State properly allege, plead, and prove the aggravating factors and did the trial court properly rely on the jury's finding of the aggravating factors?	1
B.	<u>ASSIGNMENTS OF ERROR ON CROSS APPEAL.</u>	1
1.	The trial court erred when it vacated the jury's finding on the aggravating factor that Ms. McCorvey's injuries substantially exceeded the level of injuries necessary to commit the crime of attempted murder in the first degree. .	1
2.	The trial court erred when it relied on <i>State v. Stubbs</i> where the present case is distinguishable.	1
C.	<u>ISSUES PERTAINING TO ASSIGNMENT OF ERROR ON CROSS-APPEAL.</u>	1
1.	Did the trial court err when it vacated the jury's finding on the aggravating factor that Ms. McCorvey's injuries substantially exceeded the level of injuries necessary to commit the crime of attempted murder in the first degree where <i>State v. Stubbs</i> is distinguishable?.....	1
D.	<u>STATEMENT OF THE CASE</u>	2
1.	Procedure	2
2.	Facts.....	7

E. ARGUMENT..... 16

1. DEFENDANT WAS NOT DENIED THE RIGHT TO A FAIR TRIAL AS THE STATEMENTS MADE BY THE PROSECUTOR DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT. 16

2. DEFENDANT RECEIVED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL AS DEFENDANT CANNOT SHOW DEFICIENT PERFORMANCE OR PREJUDICE. 40

3. THE STATE PROPERLY ALLEGED, PLEAD AND PROVED THE AGGRAVATING FACTORS AND THE TRIAL COURT PROPERLY RELIED ON THEM IN SENTENCING DEFENDANT. 44

4. THE TRIAL COURT ERRED WHEN IT VACATED THE JURY’S FINDING ON THE AGGRAVATING FACTOR THAT MS. MCCORVEY’S INJURIES SUBSTANTIALLY EXCEEDED THE LEVEL OF INJURIES NECESSARY TO COMMIT THE CRIME OF ATTEMPTED MURDER IN THE FIRST DEGREE WHEN *STATE V. STUBBS* IS DISTINGUISHABLE.... 56

F. CONCLUSION..... 57

Table of Authorities

State Cases

<i>In Re Andress</i> , 147 Wn.2d 602, 56 P.3d 981 (2002)	3
<i>In re Borrereo</i> , 161 Wn.2d 532, 536, 167 P.3d 1106 (2007).....	50, 51
<i>In re Orange</i> , 152 Wn.2d 795, 816-18, 100 P.3d 291 (2004).....	51
<i>In re Personal Restraint of Rice</i> , 118 Wn.2d 876, 828 P.2d 1086 (1992).....	34
<i>Jones v. Hogan</i> , 56 Wn.2d 23, 27, 351 P.2d 153 (1960)	18
<i>State v. Anderson</i> , 153 Wn. App. 417, 220 P.3d 1273 (2009).....	28, 35
<i>State v. Anderson</i> , 153 Wn. App. 471, 220 P.3d 1273 (2008).....	22, 23
<i>State v. Baird</i> , 83 Wn. App. 477, 487, 922 P.2d 157 (1996).....	53
<i>State v. Barrow</i> , 60 Wn. App. 869, 874-875, 809 P.2d 209 (1991) ...	31, 37
<i>State v. Barrow</i> , 60 Wn. App. 869, 875-76, 809 P.2d 209 (1991)	36
<i>State v. Belgarde</i> , 110 Wn.2d 504 508, 755 P.2d 174 (1988).....	24
<i>State v. Benn</i> , 120 Wn.2d 631, 633, 845 P.2d 289 (1993), <i>cert. denied</i> , 510 U.S. 944 (1993).....	43
<i>State v. Bennett</i> , 161 Wn.2d 303, 165 P.3d 1241 (2007).....	31
<i>State v. Binkin</i> , 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), <i>overruled on other grounds by State v. Kilgore</i> , 147 Wn.2d 288, 53 P.3d 974 (2002).....	17
<i>State v. Branch</i> , 129 Wn.2d 635, 649, 919 P.2d 1228 (1996)	52
<i>State v. Calle</i> , 125 Wn.2d 769, 776, 888 P.2d 155 (1995)	50, 51
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990)	47
<i>State v. Campas</i> , 59 Wn. App. 561, 568, 799 P.2d 744 (1990).....	47, 48

<i>State v. Casteneda-Perez</i> , 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991).....	36, 37
<i>State v. Castle</i> , 86 Wn. App. 48, 62, 935 P.2d 656, <i>review denied</i> , 133 Wn.2d 1014 (1997).....	30, 31
<i>State v. Cervantes</i> , 87 Wn. App. 440, 942 P.2d 382 (1997).....	30
<i>State v. Cord</i> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985).....	47
<i>State v. Curtiss</i> , 161 Wn. App. 673, 700-701, 250 P.3d 496 (2011).....	33, 35, 36
<i>State v. Denison</i> , 78 Wn. App. 566, 897 P.2d 437, <i>review denied</i> , 128 Wn.2d 1006 (1995).....	41
<i>State v. Dennison</i> , 72 Wn. 2d 842, 849, 435 P.2d 526 (1967).....	18
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 577, 79 P.3d 432 (2003).....	19
<i>State v. Drummer</i> , 54 Wn. App. 751, 759, 755 P.2d 981 (1989).....	48
<i>State v. Echevarria</i> , 71 Wn. App. 595, 598-599, 860 P.2d 420 (1993).....	24, 25
<i>State v. Evans</i> , 163 Wn. App. 635, 260 P. 3d 934 (2011).....	28
<i>State v. Falling</i> , 50 Wn. App. 47, 747 P.2d 1119 (1987).....	45, 48
<i>State v. Fleming</i> , 83 Wn. App. 209, 213- 214, 921 P.2d 1076 (1996).....	31
<i>State v. Foster</i> , 81 Wn. App. 508, 915 P.2d 567 (1996), <i>review denied</i> , 130 Wn.2d 100 (1996).....	41-42
<i>State v. Freeman</i> , 153 Wn.2d 765, 771, 108 P.3d 753 (2005).....	50, 51
<i>State v. Gakin</i> , 24 Wn. App. 681, 686, 603 P. 2d 380 (1979).....	34
<i>State v. Gentry</i> , 125 Wn.2d 570, 640, 888 P.2d 570 (1995)	16, 17
<i>State v. Gerber</i> , 28 Wn. App. 214, 217, 622 P.2d 888 (1981)	46
<i>State v. Gordon</i> , 172 Wn.2d 671, 260 P.3d 884 (2011)	46, 50, 54

<i>State v. Graham</i> , 59 Wn. App. 418, 428, 798 P.2d 314 (1990)	18
<i>State v. Green</i> , 46 Wn. App. 92, 96, 730 P.2d 1350 (1986).....	18
<i>State v. Green</i> , 94 Wn.2d 216, 221, 616 P.2d 628 (1980).....	46
<i>State v. Gregory</i> , 158 Wn.2d 759, 860, 147 P.3d 1201 (2006)	19, 32
<i>State v. Hayes</i> , 81 Wn. App. 425, 442, 914 P.2d 788, <i>review denied</i> , 130 Wn.2d 1013, 928 P.2d 413 (1996).....	43
<i>State v. Henderson</i> , 100 Wn. App. 794, 998 P.2d 907 (2000).....	31
<i>State v. Hoffman</i> , 116 Wn.2d 51, 93, 804 P.2d 577 (1991).....	16
<i>State v. Houvener</i> , 145 Wn. App. 408, 418-419, 186 P.3d 370 (2008).....	49
<i>State v. Hylton</i> , 154 Wn. App. 945, 955-958, 226 P.3d 246 (2010) ...	44-45
<i>State v. Jeffries</i> , 105 Wn.2d 398, 418, 717 P.2d 722, <i>cert. denied</i> , 497 U.S. 922 (1986).....	41
<i>State v. Johnson</i> , 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).....	49
<i>State v. Johnson</i> , 158 Wn. App. 677, 243 P. 3d 936 (2010).....	28
<i>State v. Kitchen</i> , 110 Wn.2d 403, 409, 756 P.2d 105 (1988).....	39
<i>State v. Lord</i> , 117 Wn.2d 829, 883, 822 P.2d 177 (1991), <i>cert. denied</i> , 506 U.S. 56 (1992).....	42
<i>State v. Lough</i> , 70 Wn. App. 302, 853 P.2d 920 (1993)	45, 47
<i>State v. Louis</i> , 155 Wn.2d 563, 569, 120 P.3d 936 (2005)	51
<i>State v. Lubers</i> , 81 Wn. App. 614, 619, 915 P.2d 1157 (1996)	47
<i>State v. Manthie</i> , 39 Wn. App. 815, 820, 696 P.2d 33 (1985).....	16
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	41, 42
<i>State v. Mckenzie</i> , 157 Wn.2d 44, 53 n. 2, 134 P.3d 221 (2006).....	17

<i>State v. Monday</i> , 171 Wn.2d 667, 679, 257 P.3d 551 (2011)	18
<i>State v. Newton</i> , 87 Wn.2d 363, 552 P.2d 682 (1976)	2
<i>State v. Nordby</i> , 106 Wn.2d 514, 723 P.2d 1117 (1986).....	45
<i>State v. Olson</i> , 126 Wn.2d 315, 321, 893 P.2d 629 (1995)	49
<i>State v. Owens</i> , 95 Wn. App. 619, 626, 976 P.2d 656 (1999).....	45
<i>State v. Pillatos</i> , 159 Wn.2d 459, 472, 150 P.3d 1130 (2007)	44
<i>State v. Rangel-Reyes</i> , 119 Wn. App. 494, 499, 81 P.3d 157 (2003)	46
<i>State v. Ratliff</i> , 46 Wn. App. 466, 731 P.2d 1114 (1987)	45
<i>State v. Reed</i> , 102 Wn. 2d 140, 684 P.2d 699 (1984).....	31
<i>State v. Ritchie</i> , 126 Wn.2d 388, 392, 894 P.2d 1308 (1995)	52, 53
<i>State v. Ross</i> , 71 Wn. App. 556, 568, 861 P.2d 473, 883 P.2d 329 (1993).....	52
<i>State v. Russell</i> , 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994)	18, 19
<i>State v. Sakellis</i> , 164 Wn. App. 170, --- P.3d ----, (2011)(2011 WL 4790918).....	28
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	47
<i>State v. Smith</i> , 104 Wn.2d 497, 510, 707 P.2d 1306 (1985)	19
<i>State v. Smith</i> , 58 Wn. App. 621, 794 P.2d 541 (1990)	45
<i>State v. Stenson</i> , 132 Wn.2d 668, 718, 940 P.2d 1239 (1997).....	16, 17, 31
<i>State v. Stubbs</i> , 170 Wn.2d 117, 240 P.3d 143 (2010).....	1, 2, 6, 56
<i>State v. Swan</i> , 114 Wn.2d 613, 661, 790 P. 2d 610 (1990).....	18
<i>State v. Theroff</i> , 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)	46, 47
<i>State v. Venegas</i> , 155 Wn. App. 507, 228 P.3d 813 (2010).....	28
<i>State v. Walker</i> , 164 Wn. App. 724, 265 P.3d 191 (2011).....	28

<i>State v. Walton</i> , 76 Wn. App. 364, 884 P.2d 1348 (1994), <i>review denied</i> , 126 Wn.2d 1024 (1995)	41
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P. 3d 940 (2008)	17
<i>State v. Weaver</i> , 46 Wn. App. 35, 729 P.2d 64 (1986).....	45
<i>State v. Weekly</i> , 41 Wn.2d 727, 252 P.2d 246 (1952).....	16
<i>State v. White</i> , 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)	42
<i>State v. Wright</i> , 76 Wn. App. 811, 825, 888 P.2d 1214 (1995)	37
<i>State v. Wright</i> , 87 Wn.2d 783, 786, 557 P.2d 1 (1976), <i>overruled on other grounds by, State v. Straka</i> , 116 Wn. 2d 859, 810 P.2d 888 (1991).....	34

Federal and Other Jurisdictions

<i>Blakely v. Washington</i> , 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)	52, 53
<i>Blockburger v. United States</i> , 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).....	50
<i>Brown v. United States</i> , 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973).....	38
<i>Jackson v. Virginia</i> , 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).....	30
<i>Kimmelman v. Morrison</i> , 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986)	40-41
<i>Neder v. United States</i> , 527 U.S. 1, 17, 119 S. Ct. 1827, 144 L. Ed. 2d 35 1999)	38
<i>North Carolina v. Alford</i> , 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).....	2
<i>People v. Barnes</i> , 437 N.E. 2d 848, 852 (Ill. 1982)	24, 25

<i>Rose v. Clark</i> , 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986).....	38
<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	41, 42, 43
<i>Strickler v. Greene</i> , 527 U.S. 263, 281, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).....	34
<i>United States v. Cronic</i> , 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984).....	40
<i>United States v. Harper</i> , 662 F.3d 958, 961 (7 th Cir. 2011).....	35
<i>United States v. Thiel</i> , 619 F.2d 778 (8 th Cir) (1980)	24
<i>Victor v. Nebraska</i> , 511 U.S. 1, 17, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994).....	30
Constitutional Provisions	
Article 1, Sec. 22, Washington State Constitution.....	40
Article I, Sec. 9, Washington State Constitution	50
Fifth Amendment, United States Constitution.....	50
Sixth Amendment, United States Constitution	40
Statutes	
Laws of 1997, ch 365.....	55
RCW 10.01.040	44
RCW 9.94A.390 (1991).....	44
RCW 9.94A.390(2)(b)	45
RCW 9.94A.400.....	6
RCW 9.94A.535.....	44, 52, 53

RCW 9.94A.535 (3)(h)(i)	53
RCW 9.94A.535 (3)(h)(iii)	53
RCW 9.94A.535(3)(c)	51
RCW 9.94A.537.....	52
RCW 9.94A.537(6).....	52
RCW 9.94A.585(4).....	53
RCW 9.94A.589.....	6
RCW 9A.20.021.....	55
RCW 9A.32.060.....	55

Rules and Regulations

CrR 7.8.....	3
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Other Authorities

11 Washington Practice, Pattern Jury Instructions (2d edition, 1994), 4.01A (1998 pocket part)	31
WPIC 1.02.....	20
WPIC 4.01.....	20, 31

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was defendant denied the right to a fair trial where the State did not commit prosecutorial misconduct?
2. Did defendant receive constitutionally effective assistance of counsel where defendant cannot show deficient performance or prejudice where counsel was a strong advocate for his client?
3. Did the State properly allege, plead, and prove the aggravating factors and did the trial court properly rely on the jury's finding of the aggravating factors?

B. ASSIGNMENTS OF ERROR ON CROSS APPEAL.

1. The trial court erred when it vacated the jury's finding on the aggravating factor that Ms. McCorvey's injuries substantially exceeded the level of injuries necessary to commit the crime of attempted murder in the first degree.
2. The trial court erred when it relied on *State v. Stubbs* where the present case is distinguishable.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR ON CROSS-APPEAL.

1. Did the trial court err when it vacated the jury's finding on the aggravating factor that Ms. McCorvey's injuries substantially

exceeded the level of injuries necessary to commit the crime of attempted murder in the first degree where *State v. Stubbs* is distinguishable?

D. STATEMENT OF THE CASE.

1. Procedure

On February 28, 1991, the State charged defendant, Larry Tarrer, with one count of murder in the first degree, one count of attempted murder in the first degree and one count of manslaughter in the first degree. CP 1-3. On May 20, 1991, the State amended the information to one count of murder in the second degree and one count of assault in the first degree. CP 10-11. Defendant entered into an *Alford/Newton*¹ plea to the amended charges. CP 6-9. Prior to sentencing, defendant moved to withdraw his plea. CP 12, 18-31, 32-39. The trial court denied defendant's motion to withdraw his plea. CP 720. The trial court sentenced defendant to 233 months on count I and 270 months on count II. CP 40-49. An exceptional sentence was entered for count II. CP 50-52. Defendant appealed the denial of his motion to withdraw his plea and his exceptional sentence. CP 54-73. This Court affirmed. CP 54-73.

¹ See *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), and *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

Defendant subsequently filed several personal restraint petitions. In 1996, defendant's first petition again sought to withdraw his guilty plea. CP 76-79. This Court dismissed his petition. CP 76-79. In 1997, this Court dismissed defendant's second personal restraint petition as procedurally barred. CP 80-83. Defendant filed a third personal restraint petition in 2004 and this Court dismissed the petition. CP 84-85.

Defendant subsequently filed a CrR 7.8 motion to vacate his conviction pursuant to the Supreme Court's decision in *In Re Andress*, 147 Wn.2d. 602, 56 P.3d 981 (2002). CP 108-113. The trial court denied the motion and defendant appealed. CP 108-113. This Court reversed the trial court and remanded the case back for further proceedings. CP 108-113.

On May 5, 2006, the trial court vacated defendant's conviction based on the decision in *Andress*. CP 170-171, 1RP 16.² The trial court also granted the State's motion to withdraw the amended information because there was no longer a valid plea agreement. CP 168-169, 172-173, 1RP 16. Defendant filed another direct appeal from the trial court's order vacating his conviction. CP 182-187. Defendant sought specific performance of the original plea agreement. CP 182-187. This Court dismissed defendant's appeal finding that he was not an aggrieved party

² The State will adopt the method of referring to the Verbatim Report of Proceedings that is outlined in Appendix A attached to Appellant's Opening Brief.

since he has prevailed on his motion to vacate his convictions. CP 182-187.

After the convictions were vacated, defendant was released on bail on this case, and subsequently was arrested, charged and convicted of four drug related crimes in Federal Court. 2RP 5, 3RP 4. The State sought a Writ of Habeus Corpus to have defendant transported from the Federal Detention Center to Pierce County for trial on these charges. CP 188-189.

On May 8, 2009, the State filed a corrected information that charged defendant with one count of murder in the first degree with premeditated intent, one count of attempted murder in the first degree and one count of manslaughter in the first degree. 4RP 3, CP 215-216.

Defense filed several pre-trial motions including a motion to suppress or dismiss based on discovery violations, a motion to suppress and dismiss based on the photo montage procedures, and a motion to suppress and dismiss based on the eyewitness identification of the victim. 4RP 36, 6RP 4, 8RP 4, 9RP 3-21, 22-41. The trial court denied the defense motions to suppress and dismiss. 9RP 21-22, 41-42, CP 322-326.

On September 1, 2009, the State filed an amended information. CP 320-321, 9RP 75-76. The amended information corrected the dates of the crimes. CP 320-321, 9RP 75-76. It also added three aggravating factors to count II, attempted murder in the first degree. 9RP 75. The three aggravating factors added were: bodily injury; violent offense with the victim being pregnant; and an invasion of privacy of the victim. CP

320-321, 9RP 75-76. Defense counsel objected to the addition of the aggravating factors as they were not statutory in 1991. 9RP 77. After a renewed motion to amend the information and more argument from defense counsel, the trial court granted the State's motion to amend the information. 10RP 12.

Trial commenced on September 28, 2009 in front of the Honorable Katherine Stolz. 10RP 35. On October 23, 2009, the trial court declared a mistrial because the jury was deadlocked. 18RP 105.

The second trial commenced on September 20, 2010 in front of the Honorable Katherine Stolz. 20RP 2. On September 23, 2010, it was brought to the attention of the parties and the court that an article had been printed in The News Tribune and shown on television on KIRO concerning a group of Muslim inmates that were suing the Pierce County Jail. 19RP 27-28. Defendant's photo was shown and he was labeled as a LA gang member. 19RP 27. Defendant asked for a mistrial. 19RP 31. The court conducted questioning of each juror individually. 19RP 40-52. Only two jurors had seen anything. Juror #8 saw defendant's picture but did not read anything. 19RP 44. Juror #10 said the article had something to do with religion but then she stopped reading. 10RP 46. She did see the word Muslim. 19RP 60. After conducting further inquiry, the trial court denied defendant's motion to dismiss juror #10. 19RP 62.

On October 19, 2010, the jury found defendant guilty of all three counts as charged. 30RP 16-17, CP 598, 600, 603. On Count II, the jury answered yes to all three aggravating circumstances. 30RP 17, CP 602.

Sentencing was held on October 21, 2010. 30RP 24, CP 638-650. The trial court made a finding that defendant's federal convictions would be scored as 2. 30RP 32. The trial court calculated defendant's offender score as 6 on the murder count. 30RP 34. The parties agreed that the offender score was a 0 on the attempted murder as RCW 9.94A.400³ set out that two or more serious violent offenses run consecutive and that the more serious crimes has all the points added to it and the lesser gets scored as a zero and runs consecutive. 30RP 33-34. Defendant's offender score on the murder charge was 8. 30RP 34-35. The trial court granted defendant's motion to vacate the bodily harm aggravator based on the ruling in *State v. Stubbs*, 170 Wn.2d 117, 240 P.3d 143 (2010). 30RP 38-39, CP 638-650. The trial court sentenced defendant to a high end sentence of 416 months on count I to run consecutive with 480 months on count II with 144 months on count III to run concurrent for a total of 896 months to run consecutive to the time defendant was ordered to serve on his federal crimes. 30RP 60-61.

Defendant filed a timely notice of appeal. CP 701.

³ RCW 9.94A.400 has since been recodified to RCW 9.94A.589.

2. Facts

In 1991, Claudia McCorvey was living at the Berkley Apartments in Tillicum. 25RP 6, 7. Ms. McCorvey smoked rock cocaine but stopped when she found out she was pregnant. 25RP 8-9. She also did not sell drugs during the time she was pregnant. 25RP 12. She got her drugs from a guy named Slim. 25RP 9. People would come to her apartment to smoke with her. 25RP 13. Ms. McCorvey started using cocaine again right before she was shot. 25RP 9.

On January 8, 1991, Ms. McCorvey was home smoking cocaine. 25RP 14. She was there the entire time except when she ran to the corner store. 25RP 15. Although she did not know everyone who came to her apartment that night, she knew enough of them to leave them alone in her apartment. 25RP 15. People came to her apartment that night to buy cocaine and then would leave. 25RP 16. Her door was closed so people would have to knock and be let in. 25RP 21. Slim was selling cocaine from her apartment that night. 25RP 16, 21, 65. Ms. McCorvey spent much of that evening in her bedroom hanging out with Mr. Johns and Ms. Simpkins. 25RP 22, 69-70.

Defendant came to her apartment that night. 25RP 18. Ms. McCorvey recalled defendant drinking alcohol from a bottle that night while he was in her apartment. 25RP 100. Defendant appeared intoxicated. 25RP 123. Defendant got loud, rude and obnoxious while at her apartment and Slim told him to leave. 25RP 23, 75. Defendant said

he had lost the canister that held his drugs. 25RP 24, 30. There was no argument between Ms. McCorvey and defendant. 25RP 62. When Ms. McCorvey went into the living room to change the cassette, her door flew open, she turned around and then there were gunshots. 25RP 32, 35. Ms. McCorvey saw defendant and the flashes of the muzzle. 25RP 35, 81. Defendant was inside her doorway. 25RP 35, 81. Ms. McCorvey does not remember defendant saying anything but she said to defendant at about the same time she was shot, "Larry, what the fuck?" 25RP 38. Ms. Simpkins was also hit by the gunshots. 25RP 38.

After the gunshots, Ms. McCorvey fell and tried to crawl. 25RP 36, 37. She told the ambulance attendant that she was pregnant and to save her baby. 25RP 36. Ms. McCorvey was visibly pregnant as she was six and half months along and had heard the baby's heartbeat and felt the baby move. 25RP 40, 44, 47. She had been hit by two bullets, one that was by her breast and the other in the middle of her abdomen. 25RP 37. She is now a T-9 paraplegic which means she has no movement below her navel and is permanently paralyzed. 25RP 11, 53. Ms. McCorvey lost the baby she was carrying. 25RP 48-49, 50-51.

While she was in the hospital, Ms. McCorvey spoke with police and was shown a photo of defendant. 25RP 54, 59. Ms. McCorvey identified defendant in the courtroom. 25RP 19. Ms. McCorvey was confident defendant was the person who shot her. 25RP 45, 62-63.

In 1991, Bishop Johns had a drug habit and was also a dealer. 23RP 11, 41. He went by the name of Slim. 23RP 12. While Mr. Johns would exchange crack for liquor, he was not a Tanqueray drinker. 23RP 49, 50. Mr. Johns knew Ms. McCorvey and knew that she smoked rock cocaine. 23RP 11, 15. In January of 1991, Mr. Johns refused to smoke with Ms. McCorvey because she was obviously pregnant. 23RP 15. Mr. Johns would sometimes sell drugs at Ms. McCorvey's apartment. 24RP 6. On the night of January 8, 1991, Mr. Johns got a ride with Ms. Simpkins to Ms. McCorvey's apartment to smoke. 23RP 20. When they arrived a bunch of people were there smoking including a man named Rickey Owens. 23RP 21. Mr. Johns also knew defendant. 23RP 23. Defendant was also a dealer but not a big dealer. 24RP 4. Mr. Johns would not sell to defendant because of his age. 24RP 4. Defendant also came to Ms. McCorvey's that night and asked to speak to Ms. McCorvey. 23RP 26. Defendant and Ms. McCorvey went into the bathroom and talked. 23RP 27. After she talked with defendant, Ms. McCorvey remarked that some cocaine was missing. 23RP 30. Mr. Johns left Ms. McCorvey's apartment and then he heard gunshots. 23RP 32. When he left the apartment, Ms. McCorvey, Ms. Simpkins, defendant, and a man named Tab were still in the apartment. 23RP 33. Mr. Johns never had a disagreement with defendant. 24RP 12. Mr. Johns told police that Mr. Owens gave defendant liquor and he did not think he got enough drugs in

return. 27RP 76. They argued and defendant pulled out a gun that he had retrieved from the trunk of his car. 27RP 76-77.

In 1991, Rickey Owens was a cocaine addict. 25RP 130-131. On the night of the shooting, Mr. Owens had purchased drugs from defendant. 25RP 133. Mr. Owens had gone to Ms. McCorvey's apartment and knocked on the door. 25RP 137. Ms. McCorvey was the one who opened the door. 25RP 138. Mr. Owens had never met Ms. McCorvey before that night. 25RP 138. There were two women in the apartment that night and one was obviously pregnant. 25RP 138-139. Mr. Owens asked for defendant, defendant came out and Mr. Owens showed a bottle of liquor that he had. 25RP 138-139. Mr. Owens exchanged the bottle of Tanqueray for some cocaine. 25RP 141, 26RP 8, 20. After the deal was done, defendant told him to get the hell out. 25RP 139, 140. As he was leaving, Mr. Owens heard someone say, "somebody got my shit." 25RP 145, 170. Mr. Owens saw defendant go to a car and get a silver automatic pistol. 25RP 145, 147, 171, 26RP 20. The car was a green and white Cutlass. 25RP 146, 26RP 9. The gun looked like a .45. 25RP 149. Defendant got the gun and walked back to the apartment. 25RP 149. Mr. Owens identified defendant in photo lineup as well as in court. 25RP 142-143, 158. Mr. Owens was confident defendant is the one he saw with the gun. 25RP 160.

Deputy Stril was working the graveyard shift on January 8, 1991. 19RP 70, 81. During her shift, Deputy Stril was called to the Berkley

Apartments. 19RP 82. She was the first to arrive on the scene. 19RP 83. Deputy Stril observed a woman struggling to breathe who told the Deputy that her baby was going to die. 19RP 83. The woman was moaning, trying to talk, and saying that she could not breathe. 19RP 96. The woman was later identified as Ms. McCorvey. 19RP 103. When asked who had done this to her, Ms. McCorvey refused to answer. 19RP 105, 141. Another female was face down in the kitchen. 19RP 87. The woman in the kitchen, later identified as Ms. Simpkins, was dead. 19RP 92, 130.

Susan Hicks was a registered nurse at Madigan Army Medical Center. 21RP 9. Ms. Hicks worked in the neonatal intensive care unit (NICU). 21RP 10. On January 9, 1991, she was involved in the emergency delivery of a pre-term baby. 21 RP 11. The baby, who was 28 weeks, was born alive at 2:18 a.m. 21RP 20, 21, 29. However, the baby's heart rate was low and so resuscitation efforts were started immediately. 21RP 20. The baby was extremely pale and did not respond to resuscitation efforts. 21RP 21, 24. The baby was intubated. 21RP 21. Ms. Hicks indicated that since the mother had been shot, it was not surprising the baby was fluid deprived. 21RP 25. The mother would have massive bleeding and her body would pull fluid from the rest of the body to protect the area. 21RP 25. As a result, the rest of the mother's body, including the baby, would lose fluid. 21RP 25. After over thirty minutes

of resuscitation efforts, the baby could not be revived and was declared dead at 2:57 a.m. 21RP 28, 29.

Detective Reinicke was the lead detective on the case. 26RP 25, 27. After interviewing two to three people at the scene, the Detective learned that the suspect's name was Larry. 26RP 31-32. Detective Reinicke then went to Harborview to show Ms. McCorvey a photo montage. 26RP 35. Since the suspect was an acquaintance of the victim, the Detective did not do a montage with people that looked similar to defendant but instead got photos of known acquaintances. 26RP 36. Ms. McCorvey was asked the same question for all six photos, "Is this the man that shot you?" 26RP 39. Ms. McCorvey nodded yes to photo number three which was a picture of defendant. 26RP 39, 41. As Ms. McCorvey had been unable to speak, the Detective went back two days later and Ms. McCorvey again identified defendant. 26RP 44-45. Mr. Owens was shown the same photo montage and also identified defendant. 26RP 73, 75.

Five shell casings were collected from the kitchen and the living room. 21RP 54, 55, 62. Slugs were also recovered from the scene. 21RP 58, 60. The five shell casings were .45 auto cartridge cases. 22RP 100. All five cartridges were fired from the same gun. 22RP 104. The four bullets recovered were all fired from the same gun. 22RP 106, 107.

A bottle of Tanqueray gin was also found at the scene. 21RP 74. The bottle was found on the kitchen counter and two prints were recovered

from the bottle. 21RP 79. The fingerprints on the bottle belonged to defendant. 21RP 102-103.

Autopsies were performed on both Ms. Simpkins and Baby Boy McCorvey. Ms. Simpkins was shot twice in the chest. 22RP 18. One of the bullets traveled through her whole body while the other directly struck her heart. 21RP 18, 26, 28. Her death was rapid based on her injuries and her death was caused by gunshot wounds to the chest. 22RP 28, 29. Baby Boy McCorvey was at 28 weeks gestational age and did not show any abnormal development. 22RP 42, 43. There were no physical injuries to the baby. 22RP 45. The cause of death was hypoxia due to fetal distress caused by maternal injury. 22RP 46. The baby was deprived of oxygen and nutrients based on the impairment to the mother's circulation. 22RP 47. While cocaine and cocaine metabolites were found in the baby, they did not cause the baby's death. 22RP 52, 56.

An Oldsmobile Cutlass was processed by the Sheriff's Department on January 23, 1991. 21RP 68. The car was believed to be associated with this incident and had been impounded on January 19, 1991. 26RP 50. The vehicle matched the description of the vehicle defendant was seen with but not the color. 26RP 57. However, the paint on the car had an orange peel effect which indicated a cheap paint job. 26RP 65, 66. More than one color was apparent on the vehicle so paint scrapings were taken.

21RP 70. The primer color was bluer and the rest of the car was painted black. 21RP 71-72.

Monte Moore testified for the defense. Mr. Moore testified that he lived at the Berkley Apartments and on the night of the shooting he heard loud noise, then shots and then someone say, "Bitch." 27RP 23, 28. Mr. Moore also heard a female scream. 27RP 30. The blinds to the apartment where the shooting occurred were down so Mr. Moore only saw shadows. 27RP 33. Mr. Moore heard five shots in total. 27RP 34. He saw three men leave the apartment followed by a fourth man who fired the last two shots into the apartment. 27RP 38. All four men got into a vehicle which was an Oldsmobile Cutlass. 27RP 49, 108. When Mr. Moore went to see if people in the apartment were all right, he saw a woman in the kitchen and Ms. McCorvey in the living room. 27RP 55. The woman in the kitchen was dead. 27RP 56. Ms. McCorvey was obviously pregnant and was saying "save my baby." 27RP 131-132. Mr. Moore was unable to identify the shooter because he could not see any facial features. 27RP 105, 133. All Mr. Moore could see was that the shooter was a black male, medium build, six foot and strong and agile. 27RP 61-62, 133.

Defendant took the stand in his own defense. Defendant was seventeen years old in 1991. 28RP 16. He started selling crack in April of 1990. 28RP 19. Defendant knew Slim but said Slim was aggressive and

hostile toward defendant and wanted to let defendant know about his territory. 28RP 22. However, he also said that Slim later told him he was not mad at him. 28RP 23. Defendant admitted to being at the Berkley Apartments twice. 28RP 24. The first time he went, it was just defendant and Slim. 28RP 26. The second time defendant went to the Apartments was in January of 1991. 28RP 31. Defendant did not know the exact date but said it was right after New Year's. 28RP 31. He went there to buy drugs from Slim.. 28RP 31. He went to the same apartment, Slim said, "not here" and took defendant to his car. 28RP 33. While they were in his car, Slim passed defendant his alcohol bottle. 28RP 34. Defendant claimed he never went into the apartment on the second time. 28RP 34.

Defendant said he drove a 1983 Cutlass but that it was sky blue originally. 28RP 27. However, a friend of his was drunk and had wrecked his car so he had to get it painted black in November of 1990. 28RP 28-29.

Defendant said he did not know either victim. 28RP 36, 67. Defendant denied trading crack for alcohol. 28RP 40. Defendant denied that he shot anyone. 28RP 41. Defendant did not deny that his fingerprints were on the bottle of gin. 28RP 67-68.

E. ARGUMENT.

1. DEFENDANT WAS NOT DENIED THE RIGHT TO A FAIR TRIAL AS THE STATEMENTS MADE BY THE PROSECUTOR DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.

“Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.” *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *Stenson*, 132 Wn.2d at 718. Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury’s verdict. *Id.* at 718-19.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995) citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If a curative instruction could have cured the error and the defense

failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132 Wn.2d at 719, *citing Gentry*, 125 Wn.2d at 593-594.

In addition to the general principal of issue preservation, it is important for trial counsel to object to improper argument. Timely objections serve to discourage a prosecutor from escalating improper comments on a topic or theme that has been rejected by the court. *See, e.g. State v. Warren*, 165 Wn.2d 17, 195 P. 3d 940 (2008). Proper objections may stop repetitive or continuing improper questions or argument in trial. *See, e.g., State v. Mckenzie*, 157 Wn.2d 44, 53 n. 2, 134 P.3d 221 (2006). A timely objection gives the trial court the opportunity to instruct the jury or otherwise cure the error, insuring a fair trial and avoiding a costly retrial. *See, e.g., Warren*, 165 Wn.2d at 25. The trial court is in the best position to determine whether misconduct or improper argument prejudiced the defendant. *See Stenson*, 132 Wn.2d at 718. In other words, the best time and place to address an improper argument is in the trial court, where the court can take remedial action.

Failure to object or move for mistrial at the time of the argument “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P. 2d 610 (1990); *see also State v. Monday*, 171 Wn.2d 667, 679, 257 P.3d 551 (2011). In *Swan*, the Court further observed that “[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.” *Id.*, quoting *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960).

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994) *citing State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990), *State v. Green*, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986). “Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” *Russell*, 125 Wn.2d at 86, *citing State v. Dennison*, 72 Wn. 2d 842, 849, 435 P.2d 526 (1967). The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87.

- a. The State's remarks did not misstate or minimize the State's burden of proof or shift the burden to defendant.

In closing argument, a prosecutor is permitted to argue the facts in evidence and reasonable inferences therefrom. *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). The prosecutor does not shift the burden of proof when it points out the evidentiary deficiencies of defendant's arguments. *See Russell*, 125 Wn.2d at 85-86.

A prosecutor does not shift the burden of proof when they argue that a defendant's version of events is not corroborated by the evidence. *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). "The State is entitled to comment upon quality and quantity of evidence presented by the defense. An argument about the amount or quality of evidence presented by defense does not necessarily suggest that the burden of proof rests with the defense." *Id.* A jury is presumed to follow the court's instructions regarding the proper burden of proof. *Id.* at 861-862.

In that instant case, the court instructed the jury on the law including the reasonable doubt standard and the presumption of innocence.

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless

during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 604-637, Instruction 2, *see also* Washington Pattern Jury Instructions

Criminal, WPIC 4.01. Further, the court instructed the jury:

The lawyer's remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions

CP 604-637, Instruction 1, *see also* Washington Pattern Jury Instructions

Criminal, WPIC 1.02.

i. The State did not minimize the burden of proof.

In the instant case, the State made the following argument in its initial closing.

Beyond a reasonable doubt is not a common phrase that you say in your everyday life, but it is a standard that you apply. It's a serious decision. Don't minimize it. I'm not trying to minimize it for you and trying to lessen it for you here. You can only reach that beyond a reasonable doubt after you considered all of the evidence.

Each of you has a different level of certainty that you will require before you will say I am convinced beyond a reasonable doubt. There is no percentage that gets attached. No number gets attached to beyond a reasonable doubt. It is a firmly held conviction.

The way that a criminal trial starts is that a criminal defendant is presumed innocent and the presumption continues all the way through. Essentially what it means is this: When you're at home and you're trying to reach a decision about your family, you are going to not make that decision unless you're convinced beyond a reasonable doubt it's the right decision to make. For example, child care. Each one of us has a different standard at which point we will allow someone else to care for our children, especially when we're talking about, for example, a daycare facility. You will research the daycare facility. How long has it been in business? What's its reputation. Do I know anyone else who is there? Who are the employees? Do I know any of them? Do they let other younger people have contact with the kids? What about the other kids in the daycare? What do we know about them? What do we know about their families?

All of those things are factors you're going to consider and if any one of those things doesn't meet your level of certainty, you're not going to leave your child at that daycare and walk out the door. If you do, you have reached a level of being convinced beyond a reasonable doubt that it's the right decision to make. It doesn't mean you won't have questions in your mind and that you won't think to yourself I hope this is the right decision. But it is

This defendant obviously has a lot at stake in this case and there's a lot to think about before you. Manslaughter. And I don't minimize that at all and I don't tell you any of this in order to make it impossible for you to go back there and do that because the evidence in this case is overwhelming that this defendant is the shooter who killed Lavern Simpkins, paralyzed Claudia McCorvey, and killed that baby.

So the other thing the instruction says to you is if you have an abiding belief in the truth of the charge, you are convinced beyond a reasonable doubt. And what that

means is, remember I just talked to you earlier about the morning after the verdict when the judge says you're released from your restriction to discuss this and the morning after the verdict whenever you reached a verdict, one of your family or friends says, hey, tell me about that trial you were on, and you said it's a charge of murder, attempted murder and manslaughter. It was horrible because there was an infant or an unborn baby. It was emotional. It was a tough case. What'd you do? We found him guilty. Was it the right thing to do? Yeah, it is. If you can say that, then you have an abiding belief.

Two years down the road when you get your jury summons in the mail, and you don't just throw it in the garbage but you respond, and people say, have you ever been on jury duty before and you say, yeah, I was. What kind of case? It was a murder case. We found him guilty. Was that the right decision? You better believe it was. That's an abiding belief in the truth of the charge.

29RP 50- 53

While the State's choice to use an example to explain reasonable doubt may not have been the best choice, it does not rise to the level of reversible misconduct. The State's argument is distinguishable from the argument in *State v. Anderson*, 153 Wn. App. 471, 220 P.3d 1273 (2008). In *Anderson*, the State discussed reasonable doubt in relation to everyday decision making ranging from choosing which cereal to have for breakfast to changing lanes on the freeway to leaving you child with a babysitter. *Id.* at 424-25. However, the court in *Anderson*, while finding the arguments improper, affirmed defendant's conviction. *Id.* at 432. In addition, the court found that the court's instructions minimized any impact that these arguments had on the jury. *Id.*

In the instant case, defendant did not object to the State's example. Defendant has to show that the remark was flagrant and ill-intentioned and defendant cannot do so. The State only used one example of an important decision of trusting someone to leave your child with, which is far more important than choosing a cereal and changing lanes. Further, this argument was part of a much larger argument about reasonable doubt that started with the State referencing the jury instruction on reasonable doubt. 29RP 42. The State's example did not seek to minimize the burden of reasonable doubt but even if the court finds it to be improper, the State pointed the jury to the actual jury instruction. 29RP 42. In addition to the quote above, the State continually reminded the jurors of the proper burden of proof, that the State had to prove every element, and even made it clear to the jury that defendant had no burden and did not have to do anything. *See* 29RP 14, 42, 47-48, 89, CP 659-687 (page 5). The State was aware of this court's decision in *Anderson* and was trying to make its closing argument in a way that complied with this court's ruling. 29RP 45-46. The State's arguments and slides were meant to show the jury that while the burden of proof is a high standard and requires serious decision making, it is not unattainable. The argument was in line with the jury instructions, and was not flagrant and ill-intentioned. Defendant has not met his burden.

Defendant also asserts that the State erred by using the World Trade Center in rebuttal closing to help explain reasonable doubt. In *State*

v. Belgarde, the Supreme Court held that a prosecutor's statements during closing argument were improper when the prosecutor argued that the defendant was prominent in a group which the prosecutor described as "a deadly group of madmen" made up of "butchers that kill indiscriminately." The prosecutor compared the group to Kadafi and Sinn Fein. The court explained that the prosecutor was not permitted "to call to the attention of the jury matters or considerations which the jurors have no right to consider." *State v. Belgarde*, 110 Wn.2d 504 508, 755 P.2d 174 (1988).

Defendant argues that the State's use of the World Trade Center as an exercise improperly appealed to the jurors' passions and prejudices. Defendant did not object to the State's use of the World Trade Center as an exercise to explain reasonable doubt. The State used this in rebuttal closing to help explain how the jurors could still find beyond a reasonable doubt despite not having all the answers to every tiny question. In contrast to the cases cited by defense, the State was not using the World Trade Center example to show that this crime or this case were as serious at the World Trade Center. *See* Brief of Appellant, page 32-33. In *United States v. Thiel*, the prosecutor compared the thought processes of the defendant to the thought processes of those behind the Holocaust and other horrific examples. *United States v. Thiel*, 619 F.2d 778 (8th Cir) (1980). In *Barnes*, the prosecutor compared the defendant to John Wayne Gacey and in *Echevarria*, the State in opening statement set a tone of fear by

comparing the war on drugs to the Gulf War. *See People v. Barnes*, 437 N.E. 2d 848, 852 (Ill. 1982) and *State v. Echevarria*, 71 Wn. App. 595, 598-599, 860 P.2d 420 (1993). The State was using a common example that all the jurors could relate to and would be able to identify some information but also identify information they did not have but did not need. There was absolutely nothing in the argument that invited the jurors to draw parallels between this case and the World Trade Center or that if they doubted that the World Trade Center happened they then in turn doubted the State's case. Further, the fact that defendant was a Muslim had absolutely nothing to do with the example. The jurors did not even know that defendant was Muslim so there can be no prejudice assumed related to the World Trade Center exercise. *See* 19RP 40-52. The jury was instructed not to let emotions overcome its rational thought process and to base the verdict on the law and evidence and not on "sympathy, prejudice, or personal preference." CP 604-637, Instruction No 1. Jurors are presumed to follow the court's instructions. Defendant cannot show this illustrative exercise to be flagrant and ill-intentioned. Defendant has not met his burden.

Defendant also asks this court to find improper the State's exercise involving relating to someone their own wedding day or graduation day and what details they could remember. *See* 29RP 94, 96. However, the State's exercise was in rebuttal closing. Defendant did not object to any of this line of argument. Defense counsel's theme in closing was that if

every piece of the story was not consistent then the jurors could not find defendant guilty beyond a reasonable doubt. Defense counsel focused on the lack of memories and the things that the police had not done or had not documented to show that without the little details, the jurors could not possibly find defendant guilty beyond a reasonable doubt. *See generally* 29RP 65-68. The State's exercise was in response to that argument. The State pointed out that in describing their wedding day, jurors could probably not answer questions such as who sat where but that did not mean that without those details it could not be proven beyond a reasonable doubt that the event occurred. The State never asked the jurors to put themselves in the victim's shoes or any other witnesses' shoes; no such argument was ever made. The State was responding to the arguments of counsel and showing what details mattered, what did not and how to evaluate the evidence presented. There is no error.

ii. The State did not misstate or shift the burden of proof.

Defendant also takes issue with the State's argument that the jury could find defendant guilty beyond a reasonable doubt even if they did not have all the evidence they wanted. *See* 29RP 49. Defendant did not object to any part of this argument. The State does not misstate the burden of proof by acknowledging that the jury would probably have questions or want more evidence. The State went through the instruction and

addressed the portion that talked about a reasonable doubt arising from the lack of evidence. 29RP 49. The issue then becomes does the jury have enough evidence and not does the jury wish it had more. 29RP 49. The State correctly tells them that they may like more evidence, or have unanswered questions but that the additional evidence or answers to their questions may not be necessary in order to find that the State has proven the case beyond a reasonable doubt. The State's argument does not misstate the burden or tell the jury not to give defendant the benefit of the doubt. The State's argument is proper based on the jury instruction. The argument is not flagrant or ill-intentioned. There is no error.

Defendant did object to the State's argument about the phrase, "a doubt for which a reason exists." In the present case, as part of his explanation of reasonable doubt, the prosecutor made the following argument.

Reasonable doubt instruction is important also for what it does say. "A doubt for which a reason exists." And that means at the end of this trial, if you were to find the defendant not guilty and the judge releases you from your restriction about talking about this case and you go home and your family and friends say, hey, is that trial finally over and you say, yes, it is. What did you do. We found the defendant not guilty. You did? How come? Well, we had a reasonable doubt or I had a reasonable doubt and then the person says to you, what was it. You have to answer that question.

29RP 43-44. Defense counsel objected and the parties discussed the objection outside the presence of the jury. 29RP 44-46. The State

acknowledged that a previous case by this Court had addressed a previous version of the argument that he had made. 29RP 45-46. This new argument was designed to comply with this Court's previous ruling. 29RP 45-46.

In several recent cases, this Court has found "fill in the blank" arguments to be misconduct. *See State v. Walker*, 164 Wn. App. 724, 265 P.3d 191 (2011); *State v. Sakellis*, 164 Wn. App. 170, --- P.3d ----, (2011)(2011 WL 4790918); *State v. Evans*, 163 Wn. App. 635, 260 P. 3d 934 (2011); *State v. Johnson*, 158 Wn. App. 677, 243 P. 3d 936 (2010); *State v. Venegas*, 155 Wn. App. 507, 228 P.3d 813 (2010); *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009). However, the argument in the instant case was not the same argument disapproved by those cases.

Here, the prosecutor attempted to make a reasonable argument based on the law as given to the jury in the court's instructions as well as seeking guidance from this court's decisions.⁴ The prosecutor was clear in his argument that the burden of proof in a criminal case is on the State and that burden is proof beyond a reasonable doubt while defendant has the presumption of innocence. RP 43-44, 47-48. After defendant's objection, the State clarified its argument.

⁴ Only the *Anderson* and *Venegas* cases had been decided by the time the instant case went to trial.

Folks, I want to be clear about something. I want to be real clear about something. This defendant is presumed innocent. As he sits there still today, he carries the presumption of innocence. The presumption doesn't leave him even after you go back in there and start deliberations. When you deliberate the evidence and you put together all the evidence, if you find that it meets the burden of proof beyond a reasonable doubt, that overcomes the presumption of innocence and that's when you find him guilty and that's what the evidence in this case suggests.

But when I just made this argument I'm not telling you folks to start with the fact that he's guilty and then only come back with a not guilty verdict if you can fill in this blank. That's not what I'm saying.

What I'm saying is, if you go back there and you deliberate this evidence and you say to yourselves, we do not find beyond a reasonable doubt this defendant is guilty, you will come out and return a verdict of not guilty. The only way you can really do that is if you find the State has not met its burden and you find that you have a reasonable doubt. Because you're not allowed in criminal cases to say we find the defendant not guilty because we don't like the prosecutors, because the chairs aren't comfortable enough and we had to get up and down 57 times. You have to have a reasonable doubt from the evidence or the lack of evidence and we're going to talk about a lack of evidence in just a second. But I'm telling you that because if you were to find the defendant not guilty and folks asked you why, you would have to explain it to them. That's what it means: A doubt for which a reason exists.

29RP 47-48

Defendant did not object to the State's clarification. The State repeatedly reminded the jurors of the burden of proof. *See* 29RP 14, 42, 47-48, 89. The prosecutor pointed the jurors to the reasonable doubt instruction and quoted the law directly from the jury instructions in his PowerPoint. 29RP 42, CP 659-687 (page 21). The State was exceedingly

clear that defendant has the presumption of innocence. Nothing in the record indicates that he was acting in bad faith or trying to mislead the jurors. The prosecutor's statements were an attempt to expound on the concept of reasonable doubt. The language "a reasonable doubt is one for which a reason exists" is taken directly out of the instruction. CP 604-637, Instruction 2

The State's argument mirrored the jury instruction and also explained the State's burden. "A 'reasonable doubt,' at a minimum, is one based upon 'reason.'" "A fanciful doubt is not a reasonable doubt." *Victor v. Nebraska*, 511 U.S. 1, 17, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994) (citing *Jackson v. Virginia*, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A juror who has a reasonable doubt should be able to articulate a reason for that doubt and it can be as simple as "there was not enough evidence."

The explanation of the concept of "reasonable doubt" has challenged courts and attorneys for many years. In 1997, in considering a non-standard reasonable doubt instruction, Division I observed that: "Scholars will continue endlessly to debate the best definition of reasonable doubt." *State v. Castle*, 86 Wn. App. 48, 62, 935 P.2d 656, review denied, 133 Wn.2d 1014 (1997). That same year, Division I considered yet another nonstandard reasonable doubt instruction in *State v. Cervantes*, 87 Wn. App. 440, 942 P.2d 382 (1997). For a period of time, the *Castle* instruction was approved for general use. See 11

Washington Practice, Pattern Jury Instructions (2d edition, 1994), 4.01A (1998 pocket part). Eventually, in *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007), the Supreme Court requested that trial courts cease using the *Castle* instruction, in favor of the standard WPIC 4.01.

The appellate courts have found a number of different acts to be prosecutorial misconduct. *State v. Reed*, 102 Wn. 2d 140, 684 P.2d 699 (1984) is a notorious case where, despite defense objections, the prosecutor committed numerous acts of misconduct including insulting defense counsel and defense experts, pandering to the prejudices of the jury, and calling the defendant a liar. In *State v. Stenson*, 132 Wn.2d at 719-724, and *State v. Henderson*, 100 Wn. App. 794, 998 P.2d 907 (2000), the prosecutor elicited improper comments from witnesses regarding improper opinion (*Stenson*) and commented on the defendant's right to remain silent (*Henderson*).

In *State v. Barrow*, 60 Wn. App. 869, 874-875, 809 P.2d 209 (1991), and *State v. Fleming*, 83 Wn. App. 209, 213- 214, 921 P.2d 1076 (1996), the prosecutor argued that in order to acquit, the jury had to find that the State's witnesses were lying. In *Fleming*, the prosecutor also commented in closing on the defendant's failure to present evidence. *Id.*, at 214. The Court of Appeals found that the prosecutor's errors "pervaded" the closing. *Id.*, at 21.

In the present case, the prosecutor did not engage in any of these flagrant acts. He attempted to argue reasonable doubt to the jury in the

words of the instruction. Defendant objected and the trial court, who was in the best position to judge the argument in the context of the entire argument and trial, overruled the objection. 29RP 46.⁵ However, the jury was correctly instructed on the law. They were told what standards to apply and also to disregard any remarks that were not supported by the law or the court's instructions. A jury is presumed to follow the court's instructions regarding the proper burden of proof. *Gregory*, 158 Wn.2d at 860-1-862. The State's remark was not flagrant or ill-intentioned. Even if this Court finds it was in error, the jury was still properly instructed and presumed to follow the court's instructions on the law.

In its rebuttal closing, the State used a puzzle in an effort to explain reasonable doubt to the jury. 29RP 97-98. The State argued that once enough pieces are placed into the puzzle, a person is able to recognize the picture in the puzzle. This description during closing argument did not misstate the law; it was an illustration or analogy. 29RP 97-98. The State attempted to pattern its illustration after Jury Instruction No. 2, which correctly defined reasonable doubt. CP 604-637.

The puzzle analogy is used to show juries that it is possible to have an abiding belief in the truth of the charge, even though there are some "holes" or "pieces" missing, i.e.: questions left unanswered or not every piece of evidence one would like to have. The puzzle analogy does not

⁵ Defendant does not challenge the trial court's ruling in this regard.

diminish the State's burden. It is merely one way to argue the concepts of "piecing together" evidence and that of reasonable doubt. This Court has found that such an argument does not shift the burden. *State v. Curtiss*, 161 Wn. App. 673, 700-701, 250 P.3d 496 (2011).

Even if the prosecutor's statements were error, if any prejudice arose in the analogy, a curative instruction could have resolved it. But defendant did not ask for such an instruction. These comments were not so "flagrant" or "ill intentioned" that a simple curative instruction would not have remedied any possible prejudice. In this case, not only did defendant not object, but it was defendant who brought up the puzzle analogy in the first place in his own closing. 29RP 85. The State is entitled to respond to arguments made by defense counsel. There is no error.

The jury was properly instructed and is presumed to follow the court's instructions as to the burden of proof. Even if the court finds that the prosecutor's arguments were error, in the context of the entire argument, the evidence presented and the instructions given to the jury, defendant cannot show prejudice. The court's instructions to the jury that contained the proper burden of proof cured any prejudice that may have resulted. Defendant cannot show error.

- b. The State did not err when it argued that a trial is a search for truth and made proper evaluations of the evidence.

In his rebuttal, the prosecutor argued that the trial is a search for the truth. 29RP 8. Defendant did not object below. Case law shows this argument to be proper. In *Strickler v. Greene*, 527 U.S. 263, 281, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999), the United States Supreme Court considered whether the prosecution had violated the defendant's rights by withholding evidence in a capital case. The Court noted the "special role played by the American prosecutor in the search for truth in criminal trials." In *State v. Wright*, 87 Wn.2d 783, 786, 557 P.2d 1 (1976) (*overruled on other grounds by, State v. Straka*, 116 Wn. 2d 859, 810 P.2d 888 (1991)) the Washington Supreme Court noted that law enforcement and investigatory agencies were required to insure every criminal trial is a "search for truth, not an adversary game." In *State v. Gakin*, 24 Wn. App. 681, 686, 603 P. 2d 380 (1979), this Court described the search for truth as "the ultimate objective of a criminal trial." In his dissent in *In re Personal Restraint of Rice*, 118 Wn.2d 876, 828 P.2d 1086 (1992), Justice Utter wrote:

We must bear in mind that a criminal trial should be the search for truth, and this purpose is not furthered if the rules of the game turn the trial into a mere "poker game" to be won by the most skilled tactician.

Id., at 902. "There was nothing wrong with referring to trials as "searches for truth." As we commented at oral argument, trials are searches for the

truth; the burden of proof is just a device to allocate the risk of error between the parties.” *United States v. Harper*, 662 F.3d 958, 961 (7th Cir. 2011). The State’s argument is supported by the jury instructions and case law. It cannot be said to be improper.

Defendant also takes issue with the State’s reference to the jury reaching a just verdict, a true verdict and to find the truth of the charges. This court in *Anderson* did find that asking the jury to declare the truth of what happened on the day in question is improper. *Anderson*, 153 Wn. App. at 429. However, in this case, the State did not ask the jury to declare the truth in terms of solving the case. The State asked the jury to evaluate the truth of the charges. 29RP 55. Defendant did not object to this argument. There is nothing improper about this argument as that is the jury’s job. They are to evaluate the truth of the charges by employing the reasonable doubt standard and seeing if the State has met their burden. There is nothing flagrant or ill-intentioned about this argument. There is not error.

Further, defendant only objected once to the State’s use of the term true verdict. 29RP 54. The State had used the term just verdict and true verdict twice without objection. 29RP 11 50. Urging the jury to do justice or to render a just verdict is not improper. *See Anderson*, 153 Wn. App. at 429. In *Curtiss*, the court did not find similarly worded arguments about returning a verdict that speaks the truth to be improper. *Curtiss*, 161 Wn. App. at 701. That court held:

Urging the jury to render a just verdict that is supported by evidence is not misconduct. Moreover, courts frequently state that a criminal trial's purpose is a search for truth and justice. *See, e.g., Strickler v. Greene*, 527 U.S. 263, 281, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (stating that an attorney's interest “in a criminal prosecution is not that it shall win a case, but that justice shall be done” (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935))); *State v. Gakin*, 24 Wn.App. 681, 686, 603 P.2d 380 (1979) (stating that the “search for the truth” is the “ultimate objective of a criminal trial”), *review denied*, 93 Wn.2d 1011 (1980). Accordingly, the State's gut and heart rebuttal arguments in this case were arguably overly simplistic but not misconduct.

Curtiss, 161 Wn.2d at 701-02. The State has been unable to find any other jurisdiction that has held arguments urging the jury to “declare the truth” or to “return a just verdict” to be improper. Defendant cannot meet his burden. There is no error.

Defendant further takes issues with the State's argument and slide that indicated that both Ms. McCorvey's story and defendant's story could not be true. 29RP 29, CP 659-687, page 16. It is sometimes improper for a prosecutor to tell the jury that their verdict rests on whether they believe one witness or another. *State v. Casteneda-Perez*, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991) (“[I]t is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying.”); *State v. Barrow*, 60 Wn. App. 869, 875-76, 809 P.2d 209 (1991) (concluding that it was misconduct for prosecutor to argue that “in order for you to find the defendant not guilty . . . you have to believe his

testimony and completely disbelieve the officers' testimony"). Statements that guilt or innocence depend on a determination that a witness is lying are inappropriate when it is possible that the testimony of the witness could be "unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved."

Casteneda-Perez, 61 Wn. App. at 363; accord *Barrow*, 60 Wn. App. at 871, 875-76 (misconduct for prosecutor to say that the defendant was calling the State's witnesses liars when the defendant presented a mistaken identity theory). However, where "the parties present the jury with conflicting versions of the facts and the credibility of the witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other." *State v. Wright*, 76 Wn. App. 811, 825, 888 P.2d 1214 (1995).

In the instant case, the State was merely pointing out the obvious: that either Ms. McCorvey was correct that defendant shot her or defendant was correct that he did not shoot her. The State was evaluating the evidence presented and stating the obvious. The State did not make any of the improper arguments above or present a false dichotomy. Defendant did not object to this argument. Defendant also did not object to other parts of the State's argument where the State evaluated the evidence presented and pointed out the flaws and holes in defendant's version of events. 29RP 31-32, 39, 91, 92. The State is permitted to argue the facts in evidence and the reasonable inferences. The State is also permitted to

show the deficiencies in the defendant's argument as well as to respond to arguments by the defense. The State did just that, defendant did not object and defendant has not met his burden of showing prosecutorial misconduct. There is not error.

c. If error, the prosecutor's remarks were harmless.

Any error in making the argument was harmless error. The central purpose of a criminal trial is to determine guilt or innocence. *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Neder v. United States*, 527 U.S. 1, 17, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). "[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials." *Brown v. United States*, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973) (internal quotation omitted).

Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also State v.*

Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

In the present case, the State presented evidence that defendant was at the victim’s apartment on the night of the shooting. 25RP 18, 23RP 26, 25RP 137. There was evidence that defendant was drunk and was loud, rude and obnoxious. 25RP 23, 75, 123, Defendant was asked to leave. There was also evidence that defendant was upset and had an argument with at least one person. 25RP 24, 30, 23RP 30, 27RP 76, 25RP 138-140, 145, 170. Defendant’s fingerprints were on a bottle of alcohol inside the apartment. 21RP 74, 79, 102-103. Mr. Owens has exchanged the same type of bottle, Tanqueray, for cocaine from defendant on the night of the incident. 25RP 141, 26RP 8, 20. Defendant was seen getting a gun and going back to the apartment. 27RP 76-77, 25RP 145, 147, 149, 160, 171, 26RP 20. The victim was able to identify defendant as the person who shot her. 25RP 19, 32, 35, 38, 45, 62-63, 81, 26RP 39, 41, 44-45. Defendant drove the same car that was seen driving away from the scene and the car had a new, bad paint job when it was impounded shortly after the incident. 25RP 146, 26RP 9, 57, 65, 66, 27RP 49, 108. Defendant’s explanation as to how his fingerprint got on the bottle and the date he was at the apartment were vague and not supported by any other evidence. 28RP 31, 33, 34. There was clear evidence that defendant was the shooter and committed the three crimes as charged. Multiple

witnesses testified to defendant's presence at the scene on the night of the incident. The victim was able to identify defendant as the one who shot her and Mr. Owens saw defendant with a gun. The amount of evidence was clearly sufficient for the jury to find defendant guilty of the three crimes. There is no evidence that the prosecutor's arguments relieved the State of its burden or affected the jury's verdict. Any error in the argument was harmless.

2. DEFENDANT RECEIVED
CONSTITUTIONALLY EFFECTIVE
ASSISTANCE OF COUNSEL AS DEFENDANT
CANNOT SHOW DEFICIENT PERFORMANCE
OR PREJUDICE.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article 1, Sec. 22 of the Constitution of the State of Washington. The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* The court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S.

Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that “the essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect.”

The test to determine when a defendant’s conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, cert. denied, 497 U.S. 922 (1986). The test is as follows:

First, the defendant must show that the counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as “counsel” guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. See also *State v. Walton*, 76 Wn. App. 364, 884 P.2d 1348 (1994), review denied, 126 Wn.2d 1024 (1995); *State v. Denison*, 78 Wn. App. 566, 897 P.2d 437, review denied, 128 Wn.2d 1006 (1995); *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995); *State v. Foster*, 81

Wn. App. 508, 915 P.2d 567 (1996), *review denied*, 130 Wn.2d 100 (1996).

State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 56 (1992), further clarified the intended application of the *Strickland* test.

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

Citing Strickland, 466 U.S. at 689-90.

Under the prejudice aspect, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Because the defendant must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel's performance was deficient. *Strickland*, 466 U.S. at 697, *Lord*, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d, at 335 (*citing State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the

reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S., at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510 U.S. 944 (1993). Defendant has the "heavy burden" of showing that counsel's performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S., at 689.

In the instant case, defendant claims that his counsel was ineffective for failing to object to claimed prosecutorial misconduct in closing. However, defense counsel did object on two occasions during closing as addressed above. 29RP 44-46, 54. Defense counsel did not object to much of what is now alleged on appeal but as argued above, it is unlikely defendant would have succeeded on such objections. Further, whether or not to object is a tactical decision. Defense counsel clearly objected when he felt it was necessary. Defense counsel is not required to make unnecessary objections.

Case law directs the court to look at the entire record when evaluating claims of ineffective assistance of counsel. A review of the entire record in this case shows that counsel was a tireless advocate for his

client and truly tested the State's case. Defense counsel conducted substantial pre-trial investigation and interviews; filed and argued several pre-trial motions; put forth numerous motions in limine; made numerous objections; did extensive cross-examination; and put on a defense case. Defendant cannot prove that counsel's performance was deficient or that he was prejudiced by it. The record does not support a finding of ineffective assistance of counsel. Defendant's claim cannot prevail.

3. THE STATE PROPERLY ALLEGED, PLEAD AND PROVED THE AGGRAVATING FACTORS AND THE TRIAL COURT PROPERLY RELIED ON THEM IN SENTENCING DEFENDANT.

a. The State properly alleged the aggravating factors.

RCW 10.01.040 generally requires that crimes be prosecuted under the law in effect at the time they were committed. *State v. Pillatos*, 159 Wn.2d 459, 472, 150 P.3d 1130 (2007). In 1991, the exceptional sentence provisions of the SRA started with this statement: "The following are illustrative factors which the court may consider in the exercise of its discretion to impose an exceptional sentence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences." RCW 9.94A.390 (1991) (recodified as 9.94A.535). Proceeding under aggravators that were not statutory at the time defendant committed his crime does not violate the savings statute or ex-post facto laws. *See State v. Hylton*, 154 Wn. App. 945, 955-958, 226

P.3d 246 (2010). Defendant was eligible for an exceptional sentence in 1991 and was also eligible for one at the time of his trial so the statutory changes in adding the aggravators to the SRA did not affect defendant's substantive rights. *See Id.*

An exceptional sentence can be based on the infliction of injuries greater than necessary under the statute. *See State v. Owens*, 95 Wn. App. 619, 626, 976 P.2d 656 (1999) (citing *State v. Weaver*, 46 Wn. App. 35, 729 P.2d 64 (1986) and *State v. Smith*, 58 Wn. App. 621, 794 P.2d 541 (1990)). An exceptional sentence can be based on having been committed in an area that violates the victim's privacy. *See, e.g., State v. Falling*, 50 Wn. App. 47, 747 P.2d 1119 (1987) (victim raped in her bedroom); *State v. Ratliff*, 46 Wn. App. 466, 731 P.2d 1114 (1987) (victim's tires slashed in her apartment complex parking lot); *see also State v. Lough*, 70 Wn. App. 302, 853 P.2d 920 (1993) (virtually any room inside the victim's home is a "zone of privacy"). An exceptional sentence can be based on having a particularly vulnerable victim, and vulnerability is not limited to the specific examples set out in RCW 9.94A.390(2)(b). *See State v. Nordby*, 106 Wn.2d 514, 723 P.2d 1117 (1986) (victim who was a "defenseless pedestrian" on the sidewalk when struck by a car was particularly vulnerable).

In the instant case, the egregious injury and zone of privacy aggravating factors clearly pre-date the incident date. Given the

longstanding principle that the list of aggravating factors is illustrative, it is difficult to see how defendant can argue that in 1991 the State could not have alleged his crime was aggravated because it was committed against a pregnant woman. The SRA list of aggravators was not exclusive and the three aggravators the State alleged existed in common law at the time defendant committed his crimes. The State did not violate defendant's right by alleging the three aggravating circumstances.

- b. There was sufficient evidence for the jury to find that the crime of attempted murder in the second degree involved an invasion of the victim's privacy.

When reviewing sufficiency of the evidence, the court must view the evidence in the light most favorable to the prosecution and determine if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3d 157 (2003), *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). This standard also applies to aggravating circumstances. *See State v. Gordon*, 172 Wn.2d 671, 260 P.3d 884 (2011). Challenging the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from the evidence. *State v. Gerber*, 28 Wn. App. 214, 217, 622 P.2d 888 (1981), *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). All reasonable inferences from the evidence must favor the State and must be interpreted most strongly against the

defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Both circumstantial and direct evidence are equally reliable. *State v. Lubers*, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). In the case of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses and decide disputed questions of fact. *Theroff*, 25 Wn. App. at 593. Credibility determinations are for the trier of fact and not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

As noted above, virtually any room inside the victim's home is a "zone of privacy." *Lough*, 70 Wn. App. at 336. Contrary to defendant's assertions, the court in *Campas* declined to address the zone of privacy

issue. *State v. Campas*, 59 Wn. App. 561, 568, 799 P.2d 744 (1990). While being murdered in ones' own home may not be an aggravating factor, an attempted murder in one's own home lends itself to the aggravating circumstance. *See State v. Drummer*, 54 Wn. App. 751, 759, 755 P.2d 981 (1989). The difference is that an attempted murder victim has to deal with the psychological effects of the zone of privacy invasion. *See Falling*, 50 Wn. App. 47, 55, 747 P.2d 1119 (1987).

In the instant case, the State produced sufficient evidence that defendant invaded the victim's privacy. The victim was shot in her home, in her living room. 25RP 32, 35. While people came to her house to smoke and sometimes buy cocaine, the door was closed and people had to knock to be admitted. 25RP 13, 16, 21, 137, 138. The blinds to the apartment were drawn. 27RP 33. Ms. McCorvey indicated that she did leave people alone in her home that night while she ran to the store but it was because she knew most of them. 25RP 15. Defendant was told to leave the apartment. 25RP 23, 75. The victim was did have control over who entered her home and defendant was told to leave the house. Looking at the evidence in the light most favorable to the State, there was no support for the proposition that the victim had turned her house over to Mr. Johns and was unaware of the people in her home. The evidence supported the finding that defendant invaded the victim's privacy.

Defendant's argument that having people in her house coming and going diminished the victim's right to privacy it not well taken.⁶ By the logic of defendant's argument, any time someone had a party or invited people over, they would have given up their right to privacy. If someone brought someone with them to the party that the host didn't know, the right to privacy would be diminished. The evidence in this case does not support the conclusion that the victim's door was thrown open and anyone who wanted to come in could do so. The victim's door was closed, people had to be granted admittance to the apartment and people, like the defendant were asked to leave the apartment. There was sufficient evidence to support the aggravating circumstance.

Further, defendant in passing argues that the jury instructions did not define privacy. However, defendant does not assign error to the jury instructions on appeal and defendant did not object to the jury instructions in the trial court nor propose any of his own. An issue raised on appeal that is raised in passing or unsupported by authority or persuasive argument will not be reviewed. *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995); *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). Even if this court were to consider this argument, the Supreme

⁶ In addition, the case cited by defendant concerns a warrantless entry of a dorm by a police officer working undercover. It has nothing to do with an analysis of privacy in terms of a crime being committed against someone or in terms of the aggravating circumstance. See *State v. Houvener*, 145 Wn. App. 408, 418-419, 186 P.3d 370 (2008).

Court in *Gordon* held that failure to provide instructions that defined the meaning of the terms in instructions for aggravating circumstances was not a manifest error of constitutional magnitude that could be raised for the first time on appeal. *Gordon*, 172 Wn.2d at 674. This court should decline to address this issue.

- c. The fact that the victim was pregnant was a proper aggravating circumstance for the attempted murder charge and did not constitute double jeopardy.

The double jeopardy clause bars multiple punishments for the same offense. *In re Borrereo*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007) (citing U.S. Const. amend. V; Wash. Const. art. I, sec. 9; *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995)). When a defendant's act supports charges under two statutes, the court must determine whether the legislature intended to authorize multiple punishments for the crimes in question. *Id.* "If the legislature intended that cumulative punishments can be imposed for the crimes, double jeopardy is not offended." *Id.* (citing *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005)). Where the legislature's intent is not expressly stated in the statutes in question, courts turn to the "same evidence" or *Blockburger* test. *Borrereo*, 161 Wn.2d at 536 (citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). Under the same evidence test, double jeopardy is violated if a defendant is convicted of

offenses that are identical in fact and in law. *Borrereo*, 161 Wn.2d at 537 (citing *State v. Louis*, 155 Wn.2d 563, 569, 120 P.3d 936 (2005)); *Calle*, 125 Wn.2d at 777. “If each offense contains an element not contained in the other, the offenses are not the same; if each offense requires proof of a fact that the other does not, the court presumes the offenses are not the same.” *Id.* (citing *In re Orange*, 152 Wn.2d 795, 816-18, 100 P.3d 291 (2004)); *Calle*, 125 Wn.2d at 777-78. *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005)).

Defendant contends that the manslaughter charge in count III and the pregnant victim aggravating circumstance found on count II violate double jeopardy. However, the two are not the same in law and fact. The aggravating circumstance does not require that the woman be pregnant with a quick child. RCW 9.94A.535(3)(c), CP 604-637, instruction 22. The aggravator also does not require that the unborn quick child die. *Id.* An unborn quick child means the baby has moved in the womb. CP 604-637, instruction 26. The only thing that the aggravator requires is that the defendant knows that the victim was pregnant. RCW 9.94A.535(3)(c), CP 604-637, instruction 22. The victim in the attempted murder charge was Ms. McCorvey. CP 604-637, instruction 22. The victim in the manslaughter charge is the unborn quick child. CP 604-637, instruction 25, 27. The elements of the crime of manslaughter and the aggravating circumstance are different. The facts that support the charge of manslaughter and the facts that support the aggravating circumstance for

the separate crime of attempted murder are different. Defendant was not subject to double jeopardy.

- d. The State properly plead and proved the aggravating circumstance to the jury and the court sentenced accordingly.

The decision in *Blakely* and RCW 9.94A.537, require the State to prove facts supporting an aggravating circumstance to a jury beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Once the jury finds that the facts alleged by the State support an aggravated sentence, the court may sentence the defendant to the maximum sentence allowed by statute. RCW 9.94A.537(6). RCW 9.94A.535 provides “the court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.” Once the sentencing court finds substantial and compelling reasons for imposing an exceptional sentence, it is permitted to use its discretion to determine the precise length of that sentence. *State v. Ritchie*, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995); *State v. Ross*, 71 Wn. App. 556, 568, 861 P.2d 473, 883 P.2d 329 (1993). The length of an exceptional sentence is reviewed for abuse of discretion. *State v. Branch*, 129 Wn.2d 635, 649, 919 P.2d 1228 (1996) (citing *Ritchie*, 126 Wn. at 392). In order to reverse an exceptional sentence, the court must find that either: 1) the reasons relied on by the

sentencing court are not supported by the record or the reasons do not justify the exceptional sentence, or 2) the sentence was “clearly excessive or clearly too lenient.” RCW 9.94A.585(4).

“An exceptional sentence is clearly excessive only if it is clearly unreasonable, i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken.” *State v. Baird*, 83 Wn. App. 477, 487, 922 P.2d 157 (1996). As the aggravators here have been declared by the Legislature to provide substantial and compelling reasons for an exceptional sentence the court is left to review whether the reasons were supported by the record and whether the sentence defendant received was clearly excessive. *Id.*, RCW 9.94A.535 (3)(h)(i) & (iii). The court does not need to state reasons to justify the length of the sentence. *Richie*, 126 Wn.2d at 394.

In the instant case, the State alleged three aggravating circumstances to the jury and the jury found that the State had proven them beyond a reasonable doubt. Defendant cannot show a violation of *Blakely*. The trial court was then allowed to sentence defendant up to the statutory maximum. The trial court may impose an exceptional sentence if it finds there are substantial and compelling reasons to do so. RCW 9.94A.535. When the court sentences a defendant outside the standard range, the trial court is required to “set forth the reasons for its decision in written findings of fact and conclusions of law.” RCW 9.94A.535.

The findings entered in defendants' cases reiterate the jury findings of aggravating circumstances, then articulate why the court found these findings provided substantial and compelling reasons for imposing an exception sentence. CP 711-717. The trial court also found that any one of the aggravating circumstances justified the exceptional sentence imposed. CP 711-717. The trial court's findings comply with the statute.⁷ The jury's findings, which are supported by the record, justify the imposition of an exceptional sentence. The sentencing court properly sentenced defendant to a sentence outside the standard range.

In passing, defendant says there is a significant difference in the sentence defendant received as a result of his plea and the sentence he received after trial. Defendant does not assign error to the length of his sentence. As noted above issue raised on appeal that is raised in passing or unsupported by authority or persuasive argument will not be reviewed. Even if the court were to consider this issue, there is nothing in the court's sentence that shocks the conscience or shows the sentence to be clearly excessive. Defendant pleaded guilty in 1991 to reduced charges. 1RP 11. Under the statutes in effect at the time, his sentence should have been 503 months. 1RP 11. It is disingenuous to say that both courts were reviewing

⁷ The State is aware of the court's statements in *State v. Gordon*, however, the case provides little guidance as to how the trial court is supposed to comply with the statute. *State v. Gordon*, 153 Wn. App. 516,533, 223 P.3d 519 (2009). Further, the *Gordon* case was decided after this trial was completed.

the same record when they sentenced defendant. The amount of information available at a plea versus the amount of information that is set out in a trial is very different. Further, the judge in this case was exceedingly fair all the way through trial and including sentencing. The judge ruled on many motions and objections and there is nothing in the record that shows that she was in any way partial to either side. The fact that the judge remarked that she was going to give defendant the high end all along is not improper. After defendant is found guilty, the court is required to sentence defendant. The high end is within the court's discretion. Again, this argument was raised in passing but even if the court were to consider the argument, defendant's argument fails.

e. The trial court did not sentence defendant above the statutory maximum.

Manslaughter was a class B felony in 1991. RCW 9A.32.060 (*See* Laws of 1997, ch 365). The statutory maximum for a class B felony is 10 years. RCW 9A.20.021. With an offender score of 8, defendant's range on the manslaughter charge was 108-144 months. CP 638-650. The court was aware that the maximum sentence was 120 months and that 144 would be reduced to 120 months. 30RP 45. There is a notation on the judgment and sentence that notes that the statutory maximum is 120 months. CP 638-650. That is the most time that defendant can serve on the manslaughter charge. Count III is also set to run concurrent with the

other two charges. The court did not err in its sentencing. However, if this Court does not find the trial court's notation clear enough, this court can remand to make the notation clearer that defendant cannot serve more than the statutory maximum on count III which is 120 months.

4. THE TRIAL COURT ERRED WHEN IT VACATED THE JURY'S FINDING ON THE AGGRAVATING FACTOR THAT MS. MCCORVEY'S INJURIES SUBSTANTIALLY EXCEEDED THE LEVEL OF INJURIES NECESSARY TO COMMIT THE CRIME OF ATTEMPTED MURDER IN THE FIRST DEGREE WHEN *STATE V. STUBBS* IS DISTINGUISHABLE.

The jury found beyond a reasonable doubt the aggravating factor that Ms. McCorvey's injuries substantially exceeded the level of injuries necessary to commit the crime of attempted murder in the first degree. However, on defense counsel's motion, the trial court vacated the aggravating factor based on *State v. Stubbs*, 170 Wn.2d 117, 240 P.3d 143 (2010).

In *Stubbs*, the Supreme Court found that the trial court erred when it relied on the jury's finding on the severity of the victim's injuries. *Stubbs*, 170 Wn.2d at 131. The defendant in *Stubbs* was charged with assault in the first degree. *Id.* at 121. One of the elements of assault in the first degree is great bodily harm. *Id.* at 127. Because great bodily harm "encompasses the most serious injuries short of death, [no] injury can

exceed that level of harm, let alone substantially exceed it.” *Id.* at 128.

The court found that the aggravator could not apply. *Id.* at 131.

The instant case is distinguishable. The crime of attempted murder in the first degree does not have a level of bodily harm as one of its elements. Defendant had to take a substantial step toward committing murder in the first degree. The fact that defendant shot the victim twice, and that she is now a T-9 paraplegic who will never walk again is substantially more than is necessary to commit the crime. The holding in *Stubbs* was specific to the level of bodily harm needed to commit assault in the first degree and can not be seen to extend to a crime without such an element. Because attempted murder in the first degree does not have a certain level of bodily harm as one of its elements, the trial court erred in finding that the *Stubbs* case controlled. This Court should reinstate the jury’s finding as it serves as another basis for the exceptional sentence.

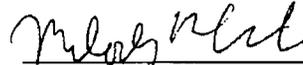
F. CONCLUSION.

The State respectfully requests this Court affirm defendant’s convictions and sentence. The State also requests that this Court reinstate the jury’s verdict on the aggravating factor that Ms. McCorvey’s injuries

substantially exceeded the level of injuries necessary to commit the crime
of attempted murder in the first degree.

DATED: February 10, 2012

MARK LINDQUIST
Pierce County
Prosecuting Attorney



MELODY M. CRICK
Deputy Prosecuting Attorney
WSB # 35453

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