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Division II  
State of Washington  
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No. 48214-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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STATE OF WASHINGTON

V.

GARY LEE BROWN, Jr.

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BRIEF OF APPELLANT

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A. Assignments of Error

Assignments of Error

1. The trial court erred in defining “deadly weapon” for the jury.
2. The prosecutor committed prosecutorial misconduct by asking the defendant whether another witness was lying.
3. The prosecutor committed prosecutorial misconduct when he referenced Mr. Brown’s right to remain silent during his cross-examination of Mr. Brown.
4. Cumulative error requires reversal.

Issues Pertaining to Assignments of Error

1. The trial court’s instruction defining “deadly weapon” conflated the deadly weapon definition from chapter 9A.04 RCW and the per se definition from chapter 9.94A RCW (a deadly weapon includes any knife having a blade longer than three inches). Did the trial court err in defining knife having a blade longer than three inches as “deadly weapon?”
2. The prosecutor’s cross-examination of the defendant repeatedly asked whether the victim was lying. Did the prosecutor commit prosecutorial misconduct by asking the defendant whether another witness was lying?

3. Did the prosecutor commit prosecutorial misconduct when he referenced Mr. Brown's right to remain silent during his cross-examination of Mr. Brown?
4. Does cumulative error require reversal?

B. Statement of Facts

Gary Brown was charged by Information with second degree assault, fourth degree assault, and felony harassment, all alleged to have been committed against a family or household member. CP, 1. The jury convicted of all three counts. CP, 62. The Court imposed 120 months. CP, 82. A timely notice of appeal was filed. CP, 93.

In what is essentially a classic he-said-she-said case, Edna Ferry and Gary Brown both testified to a series of confrontations immediately following their break up as a dating couple. Ms. Ferry testified to a series of threatening texts and voicemails in late January-early February culminating with him holding a knife to her neck on February 13, 2014. Mr. Brown denied the alleged conduct. The next day, February 14, 2014, Mr. Brown showed up at a house and pulled her out of the house by her hair. Mr. Brown essentially conceded guilt to a fourth degree assault for this last incident. RP, 92, 183. This case, which was tried in a little over a

day, was fraught with a series of errors that cumulatively deprived Mr. Brown of a fair trial. A new trial on Counts I and III is required.

The State's primary witness was Edna Ferry. Mr. Brown and Ms. Ferry were in a dating relationship starting in late 2013. RP, 6. They broke up in January of 2014. RP, 7. Mr. Brown was upset about the break up. RP, 18. He would become angry and threatening, saying he would kill her. RP, 20. After they broke up, they continued to communicate by email and phone calls for a while, until Ms. Ferry tried to terminate the communication entirely. RP, 7. Some of the emails and voicemails were nice, but a lot of them were threatening. RP, 21. But Ms. Ferry did not believe the threats initially. RP, 21. On January 20, 2014, Ms. Ferry called the police to report that someone had vandalized her van. RP, 15, 57. Someone had flattened her tires and written "C-U-N-T" on her driver's side door. RP, 59. Mr. Brown was not charged with the vandalism.

In late January, Mr. Brown allegedly sent Ms. Ferry some text messages using the pseudonym "Muddy Road." RP, 17. One of the text messages read: "Oh, so now who you fucking or are you too scared to tell me. Enjoy it. When I'm done you'll never do it again. I'm going to find you Edna and we will just see how much of a smartass you are. And what I got I don't care who steps in. You will just love my new friend – Muddy

Roads.” RP, 22. Mr. Brown also said he had a friend who was accurate at 100 yards. RP, 23. Another message read, “Trust me, you won’t ever fuck again.” RP, 24.

On February 13, 2014, Ms. Ferry agreed to drive Mr. Brown to John Moody’s house in Humptulips. RP, 25-26. En route, Mr. Brown got very angry and told her he should slit her throat. RP, 26. Ms. Ferry responded by stopping in the middle of the road. RP, 27. Mr. Brown grabbed the keys, got out of the van, walked around to the driver’s side door, opened the door, and put a knife to her throat. RP, 27. He said he should cut her throat and he didn’t know why he wasn’t going to stab her. RP, 29. Ms. Ferry pushed the knife away and said, “I thought you wanted to talk. This isn’t talking.” RP, 28. He explained he was doing this because he loved her. RP, 29. The knife caused a “scratch” on her face and finger from when she pushed it away. RP, 33. Officer Henderson observed the “scratch” on her neck, which he described as “scratch going down her neck, a vertical injury.” RP, 66. Eventually, he calmed down and she finished giving him a ride to his destination. RP, 30.

The next day, Valentine’s Day, Mr. Brown contacted Ms. Ferry at Rod Turney’s house. RP, 30. Mr. Brown wanted to go somewhere private and speak with her, but she did not want to speak with him. RP, 31. When she would not leave with him, he grabbed her and dragged her out of the

house by her hair. RP, 31. He threw her into his truck, but she got out on the other side and ran into the house and locked it. RP, 32. Mr. Brown followed her and was banging on the door trying to get in. RP, 32. Mr. Turney observed most of this interaction. RP, 53.

Mr. Brown testified on his own behalf. RP, 82. He denied sending her the threatening “Muddy Road” texts. RP, 101. Regarding the February 13 incident, he admitted having an argument, but denied holding a knife to her throat. RP, 94. He denied telling her he was going to kill her. RP, 103. Regarding the February 14, incident, he admitted grabbing her by the hair at Mr. Turney’s house. RP, 92.

### C. Argument

#### 1. The trial court erred in defining “deadly weapon” for the jury.

The knife allegedly used by Mr. Brown was described by Ms. Ferry as a “small hunting knife” that did not fold. RP, 29. When asked if it was longer than her hand, she answered, “No. Not longer.” RP, 29. When asked if it was the about the same size, she answered, “Perhaps.” RP, 29. When asked to estimate the size of the knife, she was unable. RP, 29.

At the conclusion of the case, the Court instructed the jury on the definition of a deadly weapon. Instruction 12 read: “Deadly weapon means any weapon, device, instrument or article, which under the

circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm. A knife having a blade longer than three inches is a deadly weapon. A deadly weapon is an implement or instrument that has the capacity to inflict death and, from the manner in which it is used, is likely to produce or may easily produce death. Whether a knife having a blade less than three inches long is a deadly weapon is a question of fact that is for you to decide.” This instruction combines the language of WPIC 2.06.01 and 2.07.01. The Court also instructed the jury on the lesser included offense of fourth degree assault. RP, 154-55. See instructions 20 and 21.

The jury instruction defining “deadly weapon” was erroneous. Washington law confusingly has two different definitions of “deadly weapon.” RCW 9A.04.110(6) defines "Deadly weapon" as “any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a ‘vehicle’ as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.” On the other hand, RCW 9.94A.833 defines a deadly weapon as including any knife having “a blade longer than three inches.” The chapter 9A.04 RCW definition is to be used in defining “deadly weapon” for substantive crimes, including second degree assault,

first degree burglary and first degree robbery. The chapter 9.94A RCW definition is to be used in defining a deadly weapon enhancement. Regardless of its length, a knife only qualifies as a deadly weapon for purposes of second degree assault if it is used in a manner that is capable of causing death or substantial bodily harm. Conversely, a knife having a blade longer than three inches is per se a deadly weapon for purposes of a deadly weapon enhancement, regardless of how it is used.

This case is controlled by *State v. Gotcher*, 52 Wn.App. 350, 759 P.2d 1216 (1988). In *Gotcher*, the Court of Appeals reversed a conviction for first degree burglary with a deadly weapon enhancement. The deadly weapon at issue was a switchblade with a 4-1/2 inch blade. The jury was properly instructed on the difference between a “deadly weapon” under chapter 9A.04 RCW and “deadly weapon” under chapter 9.94A RCW, but the prosecutor’s argument conflated the definitions. The Court of Appeals reversed the first degree burglary conviction because it could not determine whether the jury found the knife was used in a manner capable of causing death or substantial bodily injury. Accord *In re Martinez*, 171 Wn.2d 354, 256 P.3d 277 (2011) (the Supreme Court reversed a robbery conviction, finding insufficient evidence as a matter of law that the knife with a 3-1/2 inch blade was used in a manner capable of causing death or substantial bodily injury).

Mr. Brown was not charged with a deadly weapon enhancement, so it was error to instruct the jury on the per se definition of chapter 9.94A. RCW. In order to convict him of second degree assault the jury had to find he used the knife in a manner capable of causing death or substantial bodily harm. But there is no way to determine whether the jury made that finding because the jury was instructed on both definitions of “deadly weapon” in a conflated jury instruction. The error in this case is even more manifest than it was in *Gotcher*. In *Gotcher*, the jury was properly instructed on the difference, but the prosecutor conflated the definitions in his closing argument. In Mr. Brown’s case, it was the trial court that conflated the definitions in its jury instructions. Jury instruction 12 was error.

Mr. Brown was substantially prejudiced by the erroneous instruction. During closing argument, the prosecutor argued the knife qualified as a deadly weapon under the per se definition. He argued, “Edna said they were driving somewhere and they were in an argument or something. And she stopped the car and the defendant got out, came around and pulled his knife on her, the hunting knife that he always carries. She said the blade was about as big as her hand. That’s a deadly weapon. Assault in the second degree is a simple assault committed with a deadly weapon.” RP, 168. The prosecutor came back to that issue later,

arguing, “The instruction says by law, any knife over three inches is a deadly weapon. And that's a question for you. She said the knife was about the size of her hand. There's nobody under the age of 6 whose hand isn't at least three inches.” RP, 170. And yet a third time, “What did she say he said? I should cut your throat, something like that. Should slit your throat. That's an assault in the second degree, if that knife is a deadly weapon. And it was bigger than her hand, there is no question that it was.” RP, 176.

In the defense closing argument, defense counsel repeatedly emphasized that no knife had been admitted into evidence. RP, 184, 185. Defense counsel argued that there was a reasonable doubt whether the knife qualified as a deadly weapon and suggested the jury convict of the lesser included offense of fourth degree assault. RP, 185.

This Court should reverse the second degree assault conviction and remand for a new trial.

2. The prosecutor committed prosecutorial misconduct by asking the defendant whether another witness was lying.

During the prosecutor’s cross-examination of Mr. Brown, the following colloquy occurred:

Q. All right. And when Edna - Edna tried to break up with you in January, didn't she?

A. No, she did not break up with me.

Q. She didn't? Did she try to break up with you? Did she tell you you were over?

A. You're - you're going - you're - you're going to someplace that you have - all you're going by is what your paperwork says. And I'm telling you, it was never nothing like that until Edna talked to Dante a couple of days later, because she thought. . .

Q. Were you in the courtroom when Edna testified?

A. Yes, I was.

Q. Okay. And you heard her say that, right?

A. Yes, I did.

Q. So was she lying?

A. Well, it - it - you're not - you're not understanding.

Q. Yes or no, was she lying?

A. Yes, she is.

RP, 102.

It is prosecutorial misconduct for a prosecutor to ask a defendant to comment on the veracity of another witness. *State v. Casteneda-Perez*, 61 Wn.App. 354, 810 P.2d 74, *review denied*, 118 Wn.2d 1007 (1991). The

reason for this “is because it places irrelevant information before the jury and potentially prejudices the defendant.” *State v. Wright*, 76 Wn.App.811, 888 P.2d 1214 (1995). It is particularly egregious when the prosecutor asks a defendant whether another witness is lying. As the Court of Appeals explained in *Casteneda-Perez*:

Lying is stating something to be true when the speaker knows it is false. As the word “lie” was used by the prosecutor, it meant giving testimony which the officer witness knew to be false for the purpose of deceiving the jury. The tactic of the prosecutor was apparently to place the issue before the jury in a posture where, in order to acquit the defendant, the jury would have to find the officer witnesses were deliberately giving false testimony. Since jurors would be reluctant to make such a harsh evaluation of police testimony, they would be inclined to find the defendant guilty. While such a prosecutorial tactic would be totally unavailing in a bench trial, we cannot be confident it would not be effective with some jurors. With the prosecutor persistently seeking to get the witnesses to say that the officer witnesses were lying, and doing so with the trial court's apparent approval, it is readily conceivable that a juror could conclude that an acquittal would reflect adversely upon the honesty and good faith of the police witnesses.

*Casteneda-Perez* at 360.

The Court of Appeals has treated the case as a seminal case on this issue. Prosecutors are expected to know the holding of *Casteneda-Perez* and to follow it. Failure to do so will be deemed flagrant and ill-intentioned and will be deemed reversible error, even when the cross-examination is not objected to. *State v. Fleming*, 83 Wn.App. 209, 214, 921 P.2d 1076 (1996), *review denied*, 131 Wn.2d 1018 (1997).

In this case, the prosecutor's questions about whether its key witness was lying placed Mr. Brown in the untenable position of either accusing her of lying or conceding she was being truthful. Mr. Brown initially tried to skirt the issue by claiming the prosecutor did not understand the situation, but the prosecutor would not permit him to avoid the question, forcing him to take an unequivocal position on her veracity, "Yes or no, was she lying?" RP, 102. Faced with this binary choice, Mr. Brown took the only path that presented his testimony as truthful, "Yes, she is." This binary choice constituted flagrant prosecutorial misconduct.

3. The prosecutor committed prosecutorial misconduct when he referenced Mr. Brown's right to remain silent during his cross-examination of Mr. Brown.

During his cross-examination of Mr. Brown, the prosecutor asked him:

Q. But you didn't give a statement when the police came back to talk to you?

A. No, I didn't see the police. I wasn't there.

Q. So you didn't talk to the police, because talking to the police makes you a rat, right?

A. No, I - you're wrong. I had another appointment at a shake mill about picking up some money for some shingle blocks that I had sold and that's where I went to.

RP, 104.

A prosecutor may not comment on a suspect's prearrest silence and it is prosecutorial misconduct to do so. *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996). If the defendant fails to object, he waives the issue unless the misconduct was so flagrant or ill-intentioned that it caused prejudice that the court could not cure by admonishing the jury. *State v. Thomas*, 142 Wn.App. 589, 174 P.3d 1264 (2008).

In this case, the prosecutor clearly committed misconduct by commenting on Mr. Brown's decision to not talk to the police and make a statement. The prosecutor flagrantly compounded the misconduct by implying that people who talk to the police are "rat[s]." In our society, the term "rat," when used in reference to people who talk to the police, is a disparaging term implying that the person is a liar.<sup>1</sup> The misconduct was flagrant and ill-intentioned.

4. Cumulative error requires reversal.

When a case contains multiple errors which, standing alone, might not be of sufficient gravity to constitute grounds for a new trial, this Court should still reverse if the combined effect of the accumulation of errors demonstrates prejudice. *State v. Coe*, 101 Wash.2d 772684 P.2d 668

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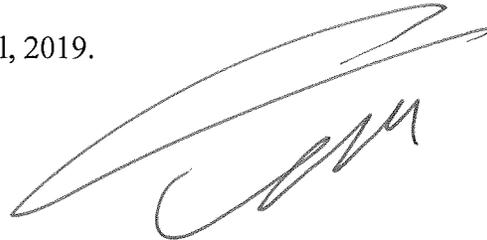
<sup>1</sup> For instance, on December 17, 2017, President Donald Trump used the terms "rat" and "serial liar" interchangeably to reference his former lawyer turned witness, Michael Cohen. See <https://app.abcnews.go.com/GMA/News/video/trump-calls-michael-cohen-rat-serial-liar-59859255>

(1984). In this case, a trial of barely one day produced one instructional error and two incidents of flagrant prosecutorial misconduct. Although none of the errors was objected to, the cumulative effect was to deprive Mr. Brown of a fair trial in this he-said-she-said case. This Court should reverse Counts I and III. Because Mr. Brown admitted pulling Ms. Ferry's hair on February 14, any error is harmless beyond a reasonable doubt on Count II.

D. Conclusion

This Court should reverse and remand for a new trial on Counts I and III.

DATED this 2<sup>nd</sup> day of April, 2019.

A handwritten signature in black ink, appearing to read 'T. E. Weaver', written over a horizontal line.

Thomas E. Weaver, WSBA #22488  
Attorney for Defendant/Appellant

**THE LAW OFFICE OF THOMAS E. WEAVER**

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

STATE OF WASHINGTON, ) Court of Appeals No.: 48214-2-II  
 )  
Plaintiff/Respondent, ) DECLARATION OF SERVICE OF  
 ) BRIEF OF APPELLANT  
vs. )  
 )  
GARY LEE BROWN, Jr. )  
 )  
Defendant/Appellant. )

STATE OF WASHINGTON )  
 )  
COUNTY OF KITSAP )

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

On April 2, 2019, I e-filed the Brief of Appellant in the above-captioned case with the Washington State Court of Appeals, Division Two; and designated a copy of said document to be sent to Jason Walker of the Grays Harbor County Prosecuting Attorney's Office via email to: [jwalker@co.grays-harbor.wa.us](mailto:jwalker@co.grays-harbor.wa.us),

On April 2, 2019, I deposited into the U.S. Mail, first class, postage prepaid, a true and correct copy of the Brief of Appellant to the defendant:

Gary Lee Brown, Jr., DOC #922871  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

////

////

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

3 DATED: April 2, 2019, at Bremerton, Washington.

4  
5   
6 Alisha Freeman

**THE LAW OFFICE OF THOMAS E. WEAVER**

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