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No. 50316-6-II  
Cowlitz County No. 16-1-00867-1

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

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STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER BURTON,

Appellant.

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

The Honorable Judge Michael Evans

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*APPELLANT'S OPENING BRIEF*

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to support the deadly weapon enhancement for residential burglary under State v. Brown, 162 Wn.2d 422, 432, 173 P.3d 245 (2007).
2. The trial court abused its discretion in allowing the state to play a 9-1-1 call regarding an unrelated assault charged in a different county and involving a different victim.
3. The trial court abused its discretion by admitting evidence of a telephone call Burton made to his mom from jail.
4. The prosecutor committed serious, flagrant and prejudicial misconduct at the second trial which was so pervasive that no curative instruction could have erased the prejudice.
5. Counsel was prejudicially ineffective.
6. Even if each independent error would not compel reversal standing alone, their cumulative effect deprived Mr. Burton of a fundamentally fair trial.

B. QUESTIONS PRESENTED

1. Does the state fail to prove the defendant was “armed” with a knife during a residential burglary where the knife was stolen when the knife was never used, displayed or even removed from secretion during the crime?
2. Mr. Burton was accused of residential burglary for entering a house after he was in a car accident nearby. At trial, over defense objection, the state was allowed to play a 9-1-1 call which included the audible sounds of an ongoing assault allegedly committed by Burton against a different victim, in a different county.

Did the trial court err in finding the evidence of the assault was relevant and necessary to prove part of the state’s case?

Did the trial court abuse its discretion in admitting the evidence under ER 404(b), because the prejudicial value of the evidence was substantially outweighed by its prejudicial impact?

Did the trial court further abuse its discretion in finding that the assault of another in a different county was admissible as “res gestae” to prove residential burglary where the state failed to prove that the violent assault was part of an “unbroken” sequence of events leading up to the residential burglary of another victim in a different county?

3. Is it an abuse of discretion to admit recordings of jail phone calls under ER 404(b) when those recordings include the defendant making offensive comments and the calls were irrelevant and prejudicial?
4. Did the prosecutor improperly appeal to passions and prejudices and commit misconduct by repeatedly urging the jurors to speculate about the injuries that could have resulted as a result of a knife the defendant stole but never displayed once during the incident and invoking fear of Mr. Burton throughout the second trial?
5. Was counsel prejudicially ineffective in failing to object to the prosecutor’s repeated, highly improper misconduct?
6. Where the entire case depends upon the jury’s evaluation of credibility, does the cumulative effect of the errors deprive the defendant of a fundamentally fair proceeding?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Christopher Burton was charged by amended information filed in Cowlitz County superior court with hit and run, obstructing a law enforcement officer, and residential burglary alleged with a deadly weapon enhancement. CP 49-51; RCW 9A.52.025, RCW 9A.76.021(1), RCW 9.94A.533(4), RCW 9.94A.825, RCW 46.52.010(2).

Pretrial hearings were held before the Honorable Judges G. Bashor, Michael Evans and S. Warning, as follows: July 6, 2017

(Bashor), July 7, 2016 (Evans), July 19 and August 9, 2016 (Warning), September 15 and October 11, 2016 (Evans), November 10, 17 and 22, 2016 (Warning).<sup>1</sup> RP 1. A jury trial was held before Judge Evans on December 1, 2 and 5, 2016, after which Mr. Burton was acquitted of 3hit-and-run but convicted of obstructing a law enforcement officer. CP 112-15; RP 298-99, 303. On the burglary charge, the jury hung. RP 298-99, 303.

After several continuances on December 6 and 13, 2016, January 12 and 26, February 1, 23, and 28, March 9 and April 6, 2017, retrial was held before Judge Evans April 11 and 12, 2017. RP 301-31, 487. A jury convicted Mr. Burton as charged. RP 684; CP 176-77.

On April 13, 2017, Judge Evans imposed a standard-range sentence of 77 months for the burglary, with 12 months of that added for the deadly weapon enhancement. RP 693, 714; CP 182-84. The sentence for the obstruction was a suspended, concurrent sentence of 364 days. RP 712-15; CP 192-93. Mr. Burton appealed and this pleading follows. See CP 196-97.

2. Testimony at the trials

a. The first trial

At about 10 in the morning of July 5<sup>th</sup>, 2016, Evelyn Plant was returning to her home on Coal Creek Road in Longview, Washington, when she saw a one-car accident on the side of the road. RP 111-12. The accident was about a block and a half from her

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<sup>1</sup>The verbatim report of proceedings in this case consists of five volumes, chronologically paginated, which will be referred to as “RP.”

house and Plant could see that the small red “pickup” truck involved had left the road, and rolled over completely. RP 112-21. The “cab” of the truck looked crushed and the truck seemed completely unusable. RP 121.

Ms. Plant got out of her car to investigate. RP 121. She saw items strewn all over which appeared to have been inside the truck. RP 121. She also saw some liquid dripping and thought she smelled “like maybe alcohol.” RP 112. Plant and another woman who had stopped decided to call the police emergency telephone number, 9-1-1, before going their separate ways. RP 112.

Her home was nearby and Plant drove home and went inside, noting nothing amiss. RP 113-14. When she got into her kitchen, however, she saw a pop bottle she had left in the sink drainer was now on the counter and half full of what appeared to be water. RP 113-14. Ms. Plant then noticed that the back door to her kitchen was not properly latched and was slightly ajar. RP 114.

Ms. Plant opened that back door onto her back porch, which also led down to her basement. RP 123. At that moment, a man Plant did not know came up out of her basement stairwell, his hands up. RP 115. Although she was scared, Ms. Plant ordered the man to leave, telling him, get “out of my house.” RP 115. The man immediately complied. RP 115-16. Plant followed, walking with the man around to the front of the house - as she would later explain, trying to “walk him back” towards the road. RP 115-16.

As they walked, Plant said, the man admitted to being the

driver of the crashed truck. RP 115-16. He said he had been on the phone with his mom in California when the accident occurred. RP 115-16. The man also told Ms. Plant that he wanted to go to California but his mom, who lived there, was telling him, “no.” RP 117-18. He said his mom had told him to look at something on Facebook and he was doing that at the time the crash occurred. RP 116. According to Plant, the man also declared that he was running from police and his girlfriend had “framed” him. RP 116.

The man showed Plant a cell phone which was completely smashed. RP 117-18. Indeed, Ms. Plant described it as looking “like an elephant stepped on it.” RP 123. After telling her he had no working phone or truck, the man asked for a ride to the bus terminal. RP 117. He even opened his wallet to expose the bills inside and offering them to Plant. RP 118.

As they talked, Plant conceded, the man was crying. RP 118. She would later tell police he was clearly “emotionally distressed.” RP 123-24, 190-91. He “rambled” when he spoke, seeming “passive” and repeating statements several times. RP 123-24, 190-91. Ms. Plant testified that the man was “extremely distraught” and even “appeared desperate.” RP 124. She also thought he could have been disoriented and in shock. RP 123-24, 190-91.

Ms. Plant and the man were standing in the front yard still talking when Plant’s boyfriend, Ward Linden, arrived. RP 104, 118. Mr. Linden approached and said that the man Plant was talking to was “acting nervous,” looked “a little disheveled,” was wet and

smelled of beer. RP 131. He also told Linden that he had just wrecked the truck, police were looking for him and he needed to leave. RP 131-32. The man also offered Linden money for a ride to the bus station. RP 131-32.

When she went inside, Plant went to the bathroom, then grabbed a phone, called police and told them she “had the driver.” RP 119. Deputy Sheriff Jeremy Tonissen of the Cowlitz County Sheriff’s Office had gone to the accident scene and drove to Plant’s house, noting two men standing in the driveway as the patrol car went by. RP 141-42. After Tonissen had turned his car around and returned, one of the men was gone. RP 142-43.

Tonissen followed the direction the remaining man, Linden, gestured. RP 142-43. When the officer yelled at the man ahead to stop, the man complied. RP 142-43. The officer then started questioning the man about where he had been. RP 143-44. According to Tonissen, the man said he was a neighbor and pointed to a house other than Plant’s. RP 143-44. The officer then challenged the man about being in Plant’s driveway. RP 144. The man still demurred and another officer arrived. RP 144-45. Upon seeing the second officer, the man inquired and Tonissen said he was investigating the collision down the road. RP 144-45. The man then took off running. RP 145.

Deputy Sergeant Tonissen gave chase and saw the man throw something which looked like a wallet as he ran. RP 174-78. After Tonissen threatened to use a “taser” on the man, he ultimately

stopped. RP 145-46, 178-79. The officers arrested the man and took him to a patrol car, where he was searched. RP 145-47. A knife was found tucked in the waistband of his pants. RP 146-47.

An officer would testify that he thought the man smelled like alcohol but admitted that the man was not processed or accused of “DUI.” RP 183-84. It was explained there were “enough” other charges that police decided not to pursue a “DUI.” RP 165, 183-84. The same officer admitted that he said nothing about the man smelling of alcohol in the report but maintained that his report was just a “supplement.” RP 151, 164-65.

Ms. Plant collects knives as “art.” RP 106-119. She identified the knife as hers. RP 150. She said it was a “feather knife” and that Linden had replaced the original handle with a piece of antler. RP 106-109. Plant had a box full of knives on a table near the entrance to her bedroom and said this knife was there. RP 109. The knife was not taken into evidence but just brought in later by Ms. Plant, to whom it had been returned. RP 167.

During the entire time she was with him, Ms. Plant never saw the man display a knife. RP 126. Indeed, she admitted, she did not even know he had it or any other weapon. RP 126. Throughout the whole incident, the knife remained concealed. RP 187.

The truck was registered to Christopher Burton and Mr. Burton was ultimately charged with hit-and-run, residential burglary with a deadly weapon enhancement, and obstruction of a law enforcement officer. RP 174; see CP 49-51. A friend testified that

Burton called him on July 4<sup>th</sup> and was planning to visit on July 5. RP 212-14. Mr. Burton said he was headed to visit his friend, took a wrong turn, got lost and was trying to turn on his phone when the wreck occurred. RP 218. He described crawling out of the truck window after the crash, then falling in the ditch. RP 220-21. He wanted to make a phone call for help but his phone was completely destroyed. RP 220-21.

Mr. Burton said he was yelling for help and his neck and back hurt. RP 222. He was scared and confused and headed towards the nearest house he saw to try to get help. RP 222. He remembered talking to Ms. Plant in the house and said she was friendly. RP 222. He could not, however, remember exactly what was said. RP 223-24. He was confused and had a headache, Burton said, and mostly just remembered opening the door to the back porch and asking for help. RP 228-29. He did not remember taking the knife or asking for a trip to the bus station. RP 228-32.

Mr. Burton was convicted of obstruction but acquitted of hit-and-run. CP 113-15; RP 297. After multiple jury questions, the trial court declared a mistrial on the residential burglary, because the jury was unable to agree. CP 106-111; RP 297.

b. The second trial

At the retrial for the residential burglary count, essentially the same evidence and testimony was introduced, with a few notable changes. Just as in the first trial, Ms. Plant testified about coming home, seeing the accident, stopping at the truck and calling police.

RP 394-439. Again she described going home and seeing the soda bottle, noticing the back door ajar, going out the door and seeing the man later identified as Burton come up the stairs with his hands up. RP 399-403. Ms. Plant repeated her testimony about the admissions Burton had made about crashing the truck while talking to his mom in California and not wanted to be caught by police. RP 403-404.

At the second trial Ms. Plant again described Burton as crying, “passive,” and appearing to be in shock when they spoke. RP 438-39. She and Linden both testified about Burton asking for a ride to the bus station and offering them money to take him there. RP 404-407, 446-54. Both repeated their testimony that Burton had said he did not want to get caught by or was running from police. RP 404-405, 407, 446-54.

Officers also related their involvement again, with Sergeant Tonissen again describing following after Burton, Burton initially claiming he was a neighbor and had not been in Plant’s driveway, that Burton ran again when told the officers were investigating the smashed truck and that Burton stopped only upon threat of being “tased.” RP 458-66. Deputy Hammer repeated his testimony about finding the knife in a sheath in Burton’s waist area and of Burton admitting to being the driver of the wrecked truck. RP 519-26. Ms. Plant again confirmed that, after police asked if she was missing a knife, she searched through her collection and found that a “feather knife” she had in a bin outside her bedroom was gone. RP 407-10.

Mr. Burton’s friend again testified that Burton was headed to

visit him on July 5. RP 593-95. Mr. Burton also testified again on his own behalf, relating the incident largely as he had in the first trial. RP 597-600.

Before any of that testimony, however, at the second trial the prosecution was allowed to play a recording of a 9-1-1 emergency phone call made by Burton's girlfriend, alleging an assault in a different county. RP 383. In the call, the caller declared, "I've been assaulted." RP 383-84. She said Burton, her ex-boyfriend, had come to her house "intoxicated" and she "was [unable] to get away from him." RP 383-84. She told the operator Burton was actually still there, in the living room. RP 384. The call also included audible sounds of the caller then being assaulted, including her screaming "stop," sounds of physical contact and her weeping. RP 384-85. On the call, she identified Burton as the assailant. RP 385. Operators are also heard discussing the injuries as including "quite a bit of blood." RP 385-89.

Also new at this trial was information on the extent of Plant's weapons collection. RP 429-30. She testified about having 40 or 50 knives, one sword, with blades "12 inches or less," and a "battle ax" in her room. RP 436-37. She also said half of them were useful and the other more half decorative, like the feather knife. RP 436.

Other new evidence at the second trial included that Burton asked Plant at one point where he was in Oregon and she laughed and said he had missed it by a few miles and was still in Washington. RP 404. Ms. Plant also testified that, when they walked around to

the front of her house, she noticed his shirt was on backwards and on the back - formerly the front- the shirt appeared wet. RP 405-406. This time, instead of describing Burton's broken cell phone as looking like it was stepped on by an elephant (as in the first trial), Plant described it as looking "like he threw it down and stepped on it." RP 439-40.

Over defense objection, the prosecutor asked if it seemed to Plant when she spoke to Burton that "he didn't have his faculties." RP 445. She responded, "[h]e knew exactly what he wanted," to go to town to the bus or train depot. RP 445. Mr. Linden, too, was asked more about his perceptions and gave his opinion that Burton did not seem disoriented or confused and made no complaint of injuries. RP 454.

Also new to this trial, the prosecutor played a recording of a phone call Mr. Burton made from jail to his mom after his arrest. RP 538. In it, he told his mom he was sore from wrecking his truck and could have gotten thrown out the window and killed in the accident. RP 538-39. He said he had to go to a neighbor's house to call the "cops" because his phone battery was not working and that "they're trying to get me for a residential burglary." RP 540. Mr. Burton told his mom none of it was true and that his girlfriend had been trying to set him up for a while and finally managed it. RP 540-51. Her mom said there were pictures of the results of the assault. RP 541.

In the call, Burton also said that he was "literally coming home," had been on his way and could not "take any more." RP 543-

44. He then begged his mom to keep a “line of communication” open with Burton’s girlfriend to try to mitigate how bad things would be for him, and she demurred, telling him she was not going to befriend “a train wreck.” RP 544. She also told him she had already told his girlfriend, “[n]either of you have really looked to see how your behavior is affecting those around you,” and that she could not be a part of Burton’s life as a result. RP 545.

After the recording was played, the court read jurors a stipulation that Burton’s girlfriend had called King County dispatch at 2:46 a.m. on July 5 and the phone call to his mother was 6:19 p.m. on July 6, 2016. RP 545-46.

Mr. Burton also presented new evidence at the second trial, including the testimony of Dr. Theodore Leslie, the emergency room doctor who treated Burton after the incident. RP 550-52. The doctor said Burton had a concussion without loss of consciousness, contusion of the scalp, cervical strain, thoracic strain, and lumbar strain. RP 550-52. The doctor also said that Burton did not really want to answer questions, was uncooperative with tests, and did not let the doctor rule out alcohol or drugs being in his system. RP 557. The doctor did not know if this was “volitional” or because of Burton’s confusion after his injuries. RP 557-58. The doctor said a He said he had not been drinking and that he had collected a bunch of trash and items at the job site he was supervising, in order to throw them away. RP 599-600. Burton denied being in the house to commit any crimes, did not recall running from the officers at any

point, did not recall the doctor or much about the hospital except the CT scanner, and did not remember taking the knife or even seeing it. RP 603-605. A scan of Burton's head did not show "edema swelling" but that someone who had a concussion could be dizzy, lightheaded, nauseated and not able to think well for weeks or even months. RP 568-69.

D. ARGUMENT

1. THE DEADLY WEAPON ENHANCEMENT SHOULD BE STRICKEN BECAUSE THE STATE FAILED TO PROVE APPELLANT WAS "ARMED" WITH THE KNIFE STOLEN DURING THE BURGLARY

Under RCW 9.94A.537, when a person is accused of certain crimes, the state may also seek a sentencing enhancement based on the allegation that the person was armed with a "deadly weapon" in committing that crime. See In re Cruze, 169 Wn.2d 422, 432, 237 P.3d 274 (2010). State and federal due process further mandates that the state prove all essential elements of a crime including any enhancements, beyond a reasonable doubt. See State v. Tongate, 93 Wn.2d 751, 754, 613 P. 121 (1980); In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); 14<sup>th</sup> Amend.; Wa. Const. Art. 1, § 3. Where there is insufficient evidence to support an enhancement, it should be stricken and the defendant ordered resentenced. State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993).

Correction of an improperly imposed enhancement is a significant issue for the accused, because anyone convicted of a crime and given such an enhancement must serve all of that time

without accumulating any “good time” towards earned early release, before any other time is deemed “served.” See, e.g., State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017).

In this case, this Court should strike the “deadly weapon” enhancement imposed on the residential burglary, because the state failed to provide constitutionally sufficient evidence to support it.

As a threshold matter, it is important to note the standard of review which this Court applies. Unlike other cases involving sufficiency of the evidence on review, the question of whether someone was “armed” is not a pure question of fact. State v. Schelin, 147 Wn.2d 562, 565, 55 P.3d 632 (2002); see State v. Johnson, 94 Wn. App. 882, 892, 974 P.2d 855 (1999), review denied, 139 Wn.2d 1028 (2000). Instead, it is a “mixed” question of fact and law. Schelin, 147 Wn.2d at 565. As such, it is reviewed by this Court de novo. Schelin, 147 Wn.2d at 565.

Applying such review here, this Court should reverse, because the state failed to prove that Mr. Burton was “armed” with the feather knife he stole during the burglary.

To prove someone is “armed” during a crime, the state must prove, first, that the weapon was “easily accessible and readily available for either offensive or defensive purposes.” Valdobinos, 122 Wn.2d at 282. Second, the prosecution must show a “nexus” between the defendant, the crime and the weapon. See State v. Willis, 153 Wn.2d 366, 373, 103 P.3d 1213 (2005).

To determine if the state has proven the required “nexus” for

these purposes, the Supreme Court has set forth several factors the Court must consider: 1) the nature of the crime, 2) the type of weapon and 3) “the circumstances under which the weapon is found.” Schelin, 147 Wn.2d at 570. The mere presence of a weapon during the commission of the crime is not enough. Schelin, 147 Wn.2d at 570. Indeed, the Supreme Court has declared, “[a] person is not armed merely by virtue of owning, or even possessing a weapon” at the same time they are alleged to have committed a crime. State v. Eckenrode, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007).

Indeed, the Court has so held in a case which is directly on point, Brown, supra, 162 Wn.2d at 432. In Brown, the defendants were involved in a burglary and were interrupted before the crime was complete. 162 Wn.2d at 426. Inside the home, a rifle which had been in a bedroom closet was found on the bed. 162 Wn.2d at 426. The state’s theory in Brown was that the defendant was “armed” for the burglary because the rifle was “easily accessible” for use during the crime. 162 Wn.2d at 430.

The Supreme Court, however, disagreed. 162 Wn.2d at 432. The presence of the gun during the burglary was not sufficient to “support a conclusion that Brown was ‘armed’ as intended by the legislature.” 162 Wn.2d at 432. The Court noted that the defendants had treated the gun as loot and had even “left a pistol in that same location untouched.” Id. Further, the Court pointed out, there was no evidence “that Brown or his accomplice handled the rifle on the bed at any time during the crime in a manner indicative of an intent

or willingness to use it in furtherance of the crime.” 162 Wn.2d at 432. Without such evidence, the Brown majority held, the weapon was not “a facilitator of the crime” but was instead “loot.” Id. As a result, the Court struck the enhancement for that weapon. Id.

In reaching its conclusion, the Brown Court rejected the state’s invitation to hold that any possession of a weapon during a crime was sufficient to uphold an enhancement. 162Wn.2d at 433-34. The state urged the Court to so hold based on the theory that, if there is possession during a crime, by definition that weapon was “easily accessible and readily available for use for offensive or defensive purposes.” 162 Wn.2d at 433-34. But the Brown majority held, to the contrary, that showing a weapon was “accessible during a crime does not necessarily show a nexus between the crime and the weapon.” 162 Wn.2d at 432. It rejected the idea that an enhancement may be imposed based on the idea that a weapon not *actually* used in commission of a crime was “there to be used.” 162 Wn.2d at 434.

Put simply, the Court held, this state still requires proof of a “nexus” between the weapon and the crime, more than just mere possession during a crime. Brown, 162 Wn.2d at 432. As a result, “the defendant’s intent or willingness to use the [weapon] is a condition of the nexus requirement” - and thus mandatory to support imposition of an enhancement in a burglary case. 162 Wn.2d at 434.

Here, the state failed to prove that Burton handled the knife

“in a manner indicative of an intent or willingness to use it in furtherance of the crime.” The knife was secreted in Burton’s waistband before Plant arrived home. It remained there, hidden, until found later by police. It was not pulled out during the burglary or “flight therefrom.” Indeed, Plant herself did not even know that the knife was missing - or that Burton had it - until she verified it was gone after police asked if it was hers. RP 438-50.

Just as in Brown, here “the facts suggest that the weapon was merely loot.” Brown, 162 Wn.2d at 434. There was no evidence whatsoever that Burton handled the knife in any way indicating an intent or willingness to use it to further the residential burglary, as required to support the sentencing enhancement imposed here. In fact, the prosecutor’s entire argument about the knife was to invoke the passions and prejudices of jurors about how dangerous having a knife *could have* been - not what actually happened. See RP 647 (“[m]aybe he took the knife and said a person comes home, I’ll threaten her with the knife and take a car. Maybe he took the knife and said I’ll use the knife and force someone to give me a ride somewhere because I don’t want the car with me when I go”).

The prosecution failed to present sufficient evidence to support the deadly weapon enhancement for the knife stolen during the residential burglary. The subsequent enhancement should be stricken.

2. THE TRIAL COURT ERRED IN ADMITTING THE EXTREMELY PREJUDICIAL, INFLAMMATORY AND IRRELEVANT 9-1-1 AND JAIL PHONE CALLS

In addition to striking the sentencing enhancement, this Court should order remand for a retrial of the residential burglary count without that enhancement, because the trial court improperly admitted the 9-1-1 call for the unrelated assault and the jail phone call between Burton and his mom. Further, there is more than a reasonable probability that the admission of the highly inflammatory evidence affected the outcome of the trial. Indeed, the admission of this irrelevant, extremely prejudicial evidence corrupted the entire proceeding, depriving Mr. Burton of a fundamentally fair trial.

a. Relevant facts

Prior to the second trial, the prosecution moved to admit 1) a 9-1-1 call made about an alleged assault in King County which occurred before the incident in Cowlitz county and 2) jail phone calls between Mr. Burton and his mother, after his arrest. RP 338-39, 361. The 9-1-1 call had occurred hours before the 10:30 crash, probably about 2:30 in the morning, and the jail calls were after the arrest, about 6 p.m. at night. RP 363. The prosecutor argued that the 9-1-1 call regarding an alleged assault in King County was admissible as part of the “res gestae” and was “outside of [ER] 404(b) because “it shows. . . the immediate context as well as the complete story.” RP 363-65. Regarding the jail call, the prosecutor said that was “relevant evidence of the crime that’s charged because they complete the the story and they give context,” without which the jury would be

“hampered” in “understanding” what happened. RP 365.

The prosecutor also argued that the evidence was admissible under ER 404(b) for “intent, motive, absence of mistake,” because it dovetailed with what Ms. Plant said Mr. Burton had told her about heading to California, his girlfriend having framed him and running from the police. RP 365. The state said this would show “this is not just some mistaken, confused rambling, but it’s actually a person who committed an intentional crime” in entering the home. RP 365-66. The prosecutor was very focused on the fact that only the knife was stolen and that could be “used to rob a person of a vehicle or to force a person to take you somewhere or a fight with a person who’s returning home or a fight with police.” RP 366-67.

Counsel strongly objected, noting that the case here was a residential burglary and the case in Seattle was an alleged sexual assault, not even admissible as a crime of dishonesty. RP 368. In addition, counsel noted, there was significant distance and time between the alleged crimes in the different jurisdictions. RP 369.

More importantly, counsel pointed out, the 9-1-1 tape could not be described as anything “other than horrific:”

It’s troubling to listen to, and for a jury to hear that, there’s no way they can’t incorporate the screams that are recorded in that 911 tape when sitting here looking at my client listening to him testify and maybe making conclusions about what may or may not have happened in Seattle and that interfering with their ability to objectively look at the evidence in this case.

RP 369.

When the judge admitted that he had not listened to the tape

recently and did not really remember the specifics, counsel reminded the judge that the tape had sounds of the alleged victim in Seattle “screaming hysterically while presumably or allegedly being beaten” by Mr. Burton in the recording. RP 370-71. He told the court there was no way to “redact that tape” because the emotion permeated the call, indicating the alleged victim had “been sexually assaulted and is now being physically violated by the same person.” RP 371. Counsel urged the court to exclude the evidence, saying its admission would result in “tainting the whole jury’s perspective on an alleged burglary in Cowlitz County.” RP 371.

The prosecutor admitted that “we actually hear the noises that sound of a person being assaulted” at one point on the 9-1-1 call, after which the woman was “back on the phone crying and ultimately he is identified.” RP 371. The prosecutor argued, however, that the 9-1-1 “call shows something that’s very important for the jury to understand” about Mr. Burton having a motive “to get away” and there being an “urgency” to that, which was “res gestae” evidence. RP 372-73.

A transcript of the tape was then offered to the court by the prosecutor, and a discussion of some of the language about the alleged victim possible “fucking dead,” which counsel noted was “pretty prejudicial.” RP 375. The judge ultimately ruled, however, that the tape and phone call were admissible to “provide some context” to the current charges. RP 376-77. While the judge conceded “you do hear assaultive behavior and you do hear the

alleged assailant in the background,” the judge thought the evidence provide context of “why somebody would leave that area” and that it provided “basically a context” and would “fill in the holes of why it’s happening.” RP 377-78.

The judge also held that the evidence provided a “motive and an intent and maybe even the no mistake or accident provision under that.” RP 378. Noting that Burton had said he was suffering a concussion and thus not aware of what was happening, the judge said the 9-1-1 call evidence “could serve as a rebuttal to any head injury or comment.” RP 379-80. The judge then ruled that the 9-1-1 call and the jail call were both admissible “under both the res gestae exception and also the 404(b) exception.” RP 379. He concluded, “I don’t think that the unfair prejudice rises to a level where it overpowers and becomes an issue of such a magnitude that the probative value shouldn’t be seen by the jury. So I’ll allow both.” RP 379.

The state began the second trial by playing the 9-1-1 call from the alleged assault in King County. RP 383. In that call, the caller declared, “I’ve been assaulted,” that her ex-boyfriend had come to her house, “intoxicated,” and she had tried and “was [unable] to get away from him.” RP 383-84. She also said he was in the living room. RP 384. The following exchange occurred:

OPERATOR: Did he hit you?

CALLER: Yes, he punched me in my ribs. He punched me in my back and (UNINTELLIGIBLE).

OPERATOR: (INAUDIBLE OVERTALK) boyfriend?

CALLER: Yes. And I chased him out of my house more than two months ago - -

RP 384. The caller started crying and asked the operator to listen, saying he was still in the house. RP 384-85. The operator asked her to be quiet so “I can hear my operator” and another voice then said something about “the assault as 622 Southwest Othello,” but the caller continued to talk about what she said police needed to know before they arrived. RP 85. The following exchange then occurred:

OPERATOR 2: Go ahead, operator.

OPERATOR: Her ex-boyfriend was touching her. He is still in the house in the living room. (INAUDIBLE OVERTALK).

CALLER: (Screaming) Stop. (Screaming) Stop. Stop. (Screaming, crying, and hitting sounds.) (Screaming, crying).

OPERATOR: Are you still there?

CALLER: (Screaming and crying.)

OPERATOR: Operator, have the medics (UNINTELLIGIBLE).

CALLER: (Screaming and crying.)

RP 384-85. The operators then talked about addresses, said they were on their way, said, “[s]he may be injured,” confirmed an address, and the following occurred:

CALLER: (UNINTELLIGIBLE).

MALE: Is it a woman that’s hurt?

FEMALE: A woman is hurt quite badly.

MALE: Okay. Now, (UNINTELLIGIBLE)

approximately, just guess.

FEMALE: She's in her 40s.

MALE: All right. And what kind of injuries does she have so I know how much help to send?

FEMALE: I don't know. There's quite a bit of blood. She's talking.

MALE: Okay. Okay. And the guy that did this, is he gone or still there?

FEMALE: She said he's gone.

MALE: Okay, all right. (UNINTELLIGIBLE).

FEMALE: (UNINTELLIGIBLE) as fast as possible, please. I'm a little nervous (UNINTELLIGIBLE).

RP 386-87. At that point, there was a description of the assailant and that he was driving a red pickup truck. RP 386. There was continued crying in the background. RP 385, 386, 387. The operator asked if the man had "any weapons, any guns or knives?" RP 387. The answer was "I don't think so," with the original caller getting back on the phone around the time officers were arriving. RP 388. There was further recorded "[s]creaming and crying" and the caller said she did not know where he would have gone. RP 388. The next exchange was as follows:

CALLER: I don't know where he stays.  
(UNINTELLIGIBLE) (crying).

OPERATOR: We've already called the ambulance and they're on their way as well, okay, they're going to come out and they'll be getting everything set up, okay?

CALLER: Okay.

OPERATOR: The officer is right out front, so  
(UNINTELLIGIBLE), okay?

CALLER: Okay. He's going to get really mad at me  
(crying). Oh, my God.

OPERATOR: Does anyone else live there with you?

CALLER: No (crying).

OPERATOR: Your daughter will bring the officer - -

CALLER: My daughter and my grandson  
(UNINTELLIGIBLE).

OPERATOR: Okay. What's his name?

CALLER: It was Christopher Burton.

OPERATOR: (UNINTELLIGIBLE)?

CALLER: (UNINTELLIGIBLE). He was hitting me really  
hard at first. Yeah, he was beating me with his  
(UNINTELLIGIBLE).

RP 389.

Later, before the jail phone call was played, counsel objected again, arguing that it was especially inflammatory to allow it after “a pretty dramatic recording in Seattle we now magnify that with a rape allegation stemming from that incident.” RP 497-98. He argued there was little to no relevance for the phone call as compared with “the possible repercussions of prejudice” with its admission. RP 498.

The prosecutor again urged the “res gestae” theory, saying that the evidence was needed to show how serious the situation was in Seattle to explain in part why Burton had committed a residential burglary in the charged case. RP 499-500. The prosecutor also said it was admissible “under several reasons under 404(b),” with no

further explanation. RP 500-501.

The judge conceded the 9-1-1 call already had given jurors evidence of “an assault from the sounds of things [was] not very good.” RP 501. The judge also described hearing it as “pretty significant emotional testimony.” RP 501. The judge again refused to exclude the evidence, however, and the edited jail recording was played at trial. RP 543-545. In it, Burton talked about wrecking the truck, saying he had gone to a neighbor’s house afterwards to call the “cops” because his phone battery was not working, but now “they’re trying to get me for a residential burglary.” RP 540. Mr. Burton told his mom that his girlfriend had been trying to set him up for a while and finally managed it. RP 540-51. His mom said, “I told you to stay away from her” and “I don’t want to hear about it.” RP 540-41. She also said that the girlfriend had sent Burton’s mom photos of “her at the hospital beat up” already. RP 541.

Mr. Burton and his mom then discussed him getting “bailed out,” and her responding, “I mean, I’m not [trying] to be rude, but get one of your friends to do it. I told you to stay away from her[.]” RP 541. Mr. Burton said he could not believe “she is doing this” and that it was “crazy.” RP 541-42. The following exchange then occurred:

MR. BURTON: I’m going to tell you about something. So when we had sex first, right, and she smelled (UNINTELLIGIBLE), right, and it was gross and I said something and she lashed out, went to the phone and called the fucking cops. I’m trying to get the fuck out, but she attacks me, starts

screaming and then it ends up in an altercation. That's exactly what happened, mom.

MRS. BURTON: Well, then you tell it to the judge. Like I say, I mean, it is what it is. Would I bring the money to help you? I don't have the time to come up here. That is a conversation that you have with the judge. I don't know what to tell you. I mean, any man that would (UNINTELLIGIBLE) me and then have the nerve to say that, I'd want to bash your face in.

MR. BURTON: Ma, it was gross, it was (UNINTELLIGIBLE).

MRS. BURTON: It doesn't matter. It doesn't matter. Wasn't too dirty for you to have sex with her.

RP 542-43. When Burton said “[h]er goal is to completely bury me,” his mom told him, “everyone within a thousand miles told you to stay away from her.” RP 543.

In the call, Burton also said that he was “literally coming home,” had been on his way and could not “take any more.” RP 543-44. He then begged his mom to keep a “line of communication” open with Burton’s girlfriend to try to mitigate how bad things would be for him, and she demurred, telling him she was not going to befriend “a train wreck.” RP 544.

b. The trial court abused its discretion in admitting the 9-1-1 and jail call evidence

The trial court abused its discretion in admitting the 9-1-1 recording and jail call below. The evidence was admitted below under both ER 404(b) and the “res gestae” theory. RP 378-79. But

the evidence was not admissible under either of those theories, as it was irrelevant, cumulative at best and so prejudicial that any purpose for which it was admitted was completely overshadowed by the extraordinary prejudice its admission caused.

First, the evidence was inadmissible under ER 404(b). Under that rule, evidence of other crimes, wrongs or acts, is inadmissible to show the defendant's "character." See State v. Halstein, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). ER 404(b) provides, in relevant part, that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion[.]" Evidence of other crimes, wrongs or acts *may* be admissible for other purposes, however, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b); see State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982).

For evidence to be admissible for any of those limited purposes, however, it must be both relevant and necessary to prove an essential part of the state's case. State v. Kelly, 102 Wn.2d 188, 198, 685 P.2d 564 (1984); State v. White, 43 Wn. App. 580, 587-88, 718 P.2d 841 (1986). Even if evidence is relevant and necessary for such purposes, it must still be excluded if its probative value is outweighed by the potential it has to cause unfair prejudice. ER 401, 403; see Kelly, 102 Wn.2d at 198; State v. Boot, 89 Wn. App. 780, 788, 950 P.2d 964, review denied, 135 Wn.2d 1015 (1998).

In general, the admissibility of evidence under ER 404(b) is

reviewed for abuse of discretion. See State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). But the trial court should begin its analysis with the presumption that the evidence is *inadmissible*. See id.

Before admitting evidence of other crimes, wrongs or acts, the trial court must 1) identify the purpose for which the evidence is offered, 2) determine if the evidence is relevant to an essential element of the crime, 3) balance the probative value of the evidence against the prejudicial effect it will have and 4) determine that the alleged other crime or bad act was proven by a preponderance of the evidence. See State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

All doubts must be resolved in favor of excluding the evidence. State v. Thang, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002); State v. Trickler, 106 Wn. App. 727, 733, 25 P.3d 445 (2001). Further, even if ER 404(b) evidence is relevant for one of the purposes allowed in the rule, such as identity, the evidence must still be excluded unless it is “necessary to prove an essential ingredient of the crime.” White, 43 Wn. App. at 587-88. In addition, the trial court must admit only the quantum of evidence necessary to provide the required proof, in light of the other evidence available to the proponent. White, 43 Wn. App. at 587-88.

The trial court did not follow these limits here. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. The

state accused Mr. Burton of committing residential burglary by entering or remaining unlawfully in Ms. Plant's home with intent to commit a crime against a person or property therein. The fact that Mr. Burton was alleged to have committed a violent assault against his ex-girlfriend in King County hours before the alleged burglary of Plant's home hours later was completely irrelevant to whether the state had proven that he entered or remained unlawfully in Plant's home.

The only reasons put forth were to prove that Mr. Burton had a "motive" to "get away" and an "urgency" to do so (RP 372-73), and to show that Mr. Burton was not engaging in "mistaken, confused rambling" because he had committed a prior intentional crime and thus likely committed an intentional crime in entering Plant's home. RP 365-66. For the jail call, the same argument was made, that the evidence was needed to show how serious things were in Seattle. RP 499-500.

But the reason Mr. Burton was fleeing Seattle was not relevant to whether he had entered or remained unlawfully in Plant's home hours later. Further, even assuming for the sake of argument that this was actually proof of relevance of the violent King County assault, the evidence of the highly inflammatory 9-1-1 call and jail call was not necessary to prove this point. The state *already* had evidence that Burton was running from police. Both Plant and her boyfriend testified that he told them so, and that his girlfriend had "framed him." RP 115-18, 130-32, 405, 445. They also said that Burton

had said he was headed towards California, and that he had asked where he was in Oregon. The extremely prejudicial assault evidence was cumulative of the evidence the state already had that Mr. Burton was fleeing or running from police.

Further, while under ER 404(b), proof of “motive” may be admissible, it is not admissible by “introducing evidence that the defendant committed or attempted to commit an unrelated crime in the past.” State v. Fuller, 169 Wn. App. 797, 282 P.3d 126 (2012). Thus, in Fuller, this Court reversed after finding error in admitting ER 404(b) evidence that the defendant had told someone he had been hired to commit a robbery and was planning to do so. 169 Wn. App. at 830-31. This was so even though the state’s theory was that Fuller had murdered a taxi driver as part of a botched robbery. 169 Wn. App. at 830-31. The evidence circumstantially linked Fuller to the crime, but the state provided no evidence of an actual robbery, instead just showing that Fuller was in financial distress at the time of the crime and admitting the objected-to evidence. 169 Wn. App. at 831. Because the state’s focus was to push that “robbery motive,” the Court found more than a reasonable probability that the improper evidence affected the outcome of the trial, and reversal and remand for a new trial was required. Id.

Here, the prosecutor’s focus in closing argument was to push the theory of Mr. Burton’s being a dangerous man, running from officers after having committed a heinous assault. Throughout the trial, the prosecutor relied on the assault in invoking the fears of the

jury about how dangerous the burglary *could* have been, then relied on the claim that Mr. Burton was desperate and dangerous to further invoke those fears. The evidence was not properly admitted under ER 404(b).

Nor was the evidence admissible under the “res gestae” theory. In this Court, “res gestae” is *not* treated as an exception to ER 404(b), unlike in other courts. State v. Briejer, 172 Wn. App. 209, 289 P.3d 698 (2012). This is because characterizing “res gestae” as an ER 404(b) exception creates a serious risk of admission of improper evidence by rendering the rule “indefinite” and “prone to abuse.” State v. Grier, 168 Wn. App. 635, 278 P.3d 225 (2012), cert. denied sub nom Grier v. Washington, \_\_\_ U.S. \_\_\_, 135 S. Ct. 153, 190 L.Ed.2d 112 (2014).

As a result, this Court treats the theory of “res gestae” as an exception to ER 401’s definition of “relevant evidence.” Grier, 168 Wn. App. at 646. Applying that analysis, here, this Court should hold that the trial court erred in admitting the 9-1-1 tape and jail call under the “res gestae” theory below. The court may admit evidence to prove the “res gestae” of the offense if that evidence is necessary to complete the story of the incident by proving the immediate context of events near in time and place. See State v. Tharp, 97 Wn.2d 591, 599, 637 P.2d 961 (1981). To qualify as res gestae, however, the other acts have to be “inseparable parts of the whole deed or criminal scheme.” See State v. Mutchler, 53 Wn. App. 898, 901, 771 P.2d 1168 (1989). Put another way, “res gestae” evidence is admissible because

it is a “link in the chain of an unbroken sequence of events surrounding the charged offense.” See State v. Thrift, 4 Wn. App. 192, 194-95, 480 P.2d 222 (1971).

Thus, where the defendant was on trial for a stolen credit card, evidence that the police had investigated him as a result of other stolen property they had found him with was inadmissible as “res gestae.” Trickler, 106 Wn. App. at 733-34. The rule allows only that evidence which is in the “unbroken” sequence of events surrounding the charged offense - not other, uncharged offenses. Id. Here, the assault occurred in a different county, hours before the alleged burglary, and the state showed no evidence of any “unbroken chain” between that assault and the residential burglary against a different victim, in a different county. And the jail call, occurring *after the events*, cannot be deemed part of the “unbroken chain” of those events leading up to the crime.

Reversal is required. The improper admission of evidence compels reversal unless the Court can conclude within reasonable probabilities that the error had no effect on the outcome of the trial. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). There is simply no way that this Court can reach that conclusion with the improperly admitted 9-1-1 call - or the jail call - in this case.

Evidence causes unfair prejudice when it is more likely to arouse an emotional response in the jury, as opposed to a rational decision. See City of Auburn v. Hedlund, 165 Wn.2d 645, 654, 201 P.3d 315 (2009). Unfair prejudice can also occur if the evidence is

likely to lead the jury to make erroneous inferences from the evidence which undermine the goals of accuracy and fairness in the factfinding. Hedlund, 165 Wn.2d at 654-55.

Evidence of uncharged or unrelated crimes essentially places the defendant on trial for “offenses with which he is not charged, and which may well be better calculated to inflame the passions of the jurors than to persuade their judgment[.]” State v. Goebel, 36 Wn.2d 367, 378, 218 P.2d 300 (1950). Even with a limiting instruction, the evidence was extraordinarily prejudicial. The 9-1-1 tape had *the sounds of the defendant committing a violent assault and a woman screaming*. It was the first piece of evidence the prosecution played - and the focus of its arguments at trial. The jail phone call further focused the jury on the alleged assault, and the cavalier discussion regarding sex with his mom was unnecessary and likely only to invoke the jurors’ disgust.

Notably, the jury was not told that Mr. Burton was facing charges in relation to the assault. The introduction of the evidence of the assault at trial likely tempted jurors to punish Burton not for the evidence of residential burglary actually presented at trial but in order to ensure he was punished for the vicious assault each juror heard committed on the 9-1-1 tape - or his nasty comments about a woman with whom he had sex.

Evidentiary error is prejudicial if, within reasonable probabilities, the error had an effect on the outcome of the trial. See State v. Oswalt, 62 Wn.2d 118, 122, 381 P.2d 617 (1963). An error is

“trivial” and has no effect if it is only of minor significance in relation to the evidence or case as a whole. Id. But here, the prosecutor’s entire case at the second trial depended upon the exploitation of the assault evidence as “proof” of the residential burglary. The trial court abused its discretion in admitting the evidence and the error was not trivial or of minor significance but in fact permeated the entire trial. Reversal and remand for a new trial is required.

3. THE PROSECUTOR’S FLAGRANT, PREJUDICIAL MISCONDUCT ALSO COMPELS REVERSAL

The public prosecutor is a quasi-judicial officer who has a duty to act impartially and in the interests of justice, rather than working to “gain” convictions at any cost. See State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). A prosecutor’s failure to act in honor of this role can violate the accused’s rights to a fair trial. See id.; 14<sup>th</sup> Amend.; Const. Art. 1, § 3. A trial “in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial.” State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). Reversal and remand for a new trial is required if there is a substantial likelihood the misconduct affected the verdict. In re Personal Restraint of Glasmann, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012). Even if counsel did not object to the argument below, reversal will still be required if the misconduct was so flagrant and ill-intentioned as to be incurable by instruction. Id.

In this case, this Court should reverse, because the prosecutor

committed flagrant, prejudicial misconduct which could not have been cured by instruction, by invoking strong passions and prejudices against Mr. Burton as a violent guy who was armed and *could have* hurt people, even though there was no claim of violence in this case.

a. Relevant facts

In closing argument, the prosecutor started by pointing to the danger to Plant which *could have* - but did not - occur. First, the prosecutor mentioned “if the knife had actually been used to rob her of something” or kidnap Plant or something else, there would be “another crime and a more serious crime we might even have.” RP 637. The prosecutor told the jurors that a person’s home was a “private place” and they had a right not to have someone go into their home without their permission or take something. RP 638. The prosecutor also said these acts did not become “okay” because “a person is on the run from the police when he breaks into the home and steals something.” RP 638.

Next, the prosecutor reminded jurors of how traumatizing a burglary would be on someone years later, because it was “an invasion of privacy” and “affects what people do in the future.” RP 638. The prosecutor then went on:

We know he’s running and we’ve known he’s running from the very beginning of this case for a very big reason and that’s the 911 call. We know he was aware his girlfriend was calling 911 because we heard during the 911 call her being assaulted by him while she’s on the phone calling 911. He knows the police are coming, he knows they’re coming at the moment, and he’s willing to assault her and then he goes because of that. That’s

a person who's all in on one line of acti[o]n and that's get away from the cops.

RP 640-41. The prosecutor continued, “[h]e’s on the run because of this incident in Seattle and he ends up down here[.]” RP 641.

The prosecutor also focused on the potential danger of the knife:

[m]aybe he took the knife and said a person comes home, I’ll threaten her with the knife and take a car. Maybe he took the knife and said I’ll use the knife and force someone to give me a ride somewhere because I don’t want the car with me when I go.

The selection of the knife only, the selection of the knife only under these circumstances is extremely concerning because it’s a weapon. He even said I think that’s - - to paraphrase, that’s not a very impressive knife to him when he looked at the knife in court. Didn’t really like it. Not a very impressive knife to him. He didn’t really think this would be something he’d want to collect. He has no interest in collecting knives. That’s what he said.

**So clearly he’s got this knife on him and he’s got this knife on him for some type of purpose, and on a situation where he’s on the run from an imminent call to the police. . .**

He . . has this knife, and this knife is for use in some manner. That’s why he selected the knife to use in some manner. And what is the knife? It’s a weapon.

RP 647 (emphasis added).

The prosecutor later returned to the knife, speculating that Burton might have gone into the house just to steal water and maybe “just hide out,” but then went on:

But then while he’s in there he says, hmm, look at this knife, that could be pretty useful to me under the circumstances. Yeah, I think I’ll just be taking that with me and puts it in his belt. It doesn’t matter that he didn’t know there was a knife in there when he went in the house in the first place. It doesn’t matter if he didn’t have an intent to

steal something yet when he was going in the house because while remaining in the house, he formed that intent to commit a crime against property that was in the house. **And likely it was something much worse if it involved a knife.**

**And fortunately nothing worse happened to Evelyn Plant. And that's what makes it so concerning is the knife, but,** yes, because we know he actually stole a knife from inside the house. We know he had intent to commit a crime against property or persons in that house, either when he entered or while he was in there because the knife was in the house and then it was on him.

RP 652-53 (emphasis added).

Again, a moment later, the prosecutor returned to how potentially dangerous the crime might have been:

So, yes, while he was committing the crime of residential burglary he was armed with a deadly weapon, and that's actually what makes this crime so concerning. Its' not just breaking in a house and stealing property, **it's a person who's on the run from police up in Seattle after assaulting his girlfriend and now he's armed himself with this knife because he's got to get away by any means necessary and it's very frightening and it's a good thing that nothing happened to Evelyn Plan. Because something could have, and [that's what] she has to live with . . .afterwards.**

RP 654 (emphasis added). In rebuttal closing argument, the prosecutor conceded that it was "true that whether or not he committed a crime in Seattle is not the issue" but went on:

But it's absolutely got an impact on understanding the evidence here. Because from that phone call you heard, you knew he was on the run, you knew the things he was saying to Evelyn Plant were not just a person who's concussed talking crazy talk. Because you had already heard that phone call from up here in Seattle. You also knew he was running from the police[.]

RP 672. The prosecutor said it "also informs us on why he did choose to steal a knife, a weapon," which was "[b]ecause he's running from

something of a very serious magnitude up north” and “[t]his is a bigger deal than just wrecking your car.” RP 673.

A moment, later, the prosecutor again raised the spectre of violence in the residential burglary even though no such violence had been alleged. The prosecutor declared, “[t]he fact that he didn’t use the knife to attack the officer or Evelyn Plant, again, that would be a different crime. If we had that, we might have a even more serious crime. It doesn’t make this not a crime.” RP 675. The prosecutor speculated that maybe when Burton was caught he decided, “**I’m not going to win this one, I’m not going to use this [knife] on an officer or whatever**, but he had it.” RP 675 (emphasis added).

Regarding the defense claim that Mr. Burton was not “acting right” and was affected by the crash, the prosecutor again cited the King County assault, saying, “[w]ell clearly it’s not acting right to assault a woman while she’s making a 911 call, to run from the cops,” RP 677. The prosecutor then declared that Mr. Burton’s crying during the conversation with Plant could be explained because Burton was “very afraid of what’s going to happen based on what he did in Seattle.” RP 677.

b. The prosecutor committed flagrant, prejudicial misconduct which compels reversal

The prosecutor’s misconduct in closing argument serves as a telling illustration of the magnitude of the error in admitting the 9-1-1 and jail call evidence, further exacerbating the prejudicial effect. It

is improper - and misconduct - for a prosecutor to play on the fears of jurors by invoking hypothetical situations. See State v. Russell, 125 Wn.2d 24, 89, 882 P.2d 747 (1994). Other jurisdictions have condemned the use of appeals to a jury's fear of what *could have* occurred had the crime been different. See, e.g., United States v. Nobari, 574 F.3d 1065, 1077 (9<sup>th</sup> Cir. 2009); State v. Tyler, 346 N.C. 187, 206, 285 S.E.2d 599 (1997). Thus, in Nobari, the defendants were involved in drug activity and were arrested in the parking lot of a McDonald's. In closing, the prosecutor told the jury, "[h]ad these agents not been out there, this would have been another drug rip and **who knows what would have happened to that little boy that was coming out of that McDonald's.**" 574 F.3d at 1077 (emphasis added). The defense objection was sustained and a curative instruction given. On review, the Court declared the prosecutor had made an improper appeal to jurors' emotions and fears and that the statement was not sufficiently "neutralized" because the court had not told the jury to disregard the comment. 574 F.3d at 1077.<sup>2</sup>

Here, there were no objections raised below. But the prosecutor's misconduct was flagrant and ill-intentioned and could not have been cured by instruction. The theory that the assault showed Mr. Burton likely was guilty of the residential burglary permeated the prosecution's entire case. And the trial court had

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<sup>2</sup>Because there was such an overwhelming amount of evidence, however, the Court found the argument in passing was harmless. 547 F.3d at 1037.

already ruled that the assault evidence was admissible and relevant, thus giving an official imprimatur on its use.

It is especially egregious misconduct, given how the assault evidence was introduced - with the stark reality of the sounds of the alleged assault - the smacking sounds, the screaming, the talk of how much blood. The prosecutor deliberately started the entire residential burglary trial in Cowlitz County with the audible sounds of a horrific assault, playing out in the tape. The spectre of that violence overlaid the entire trial, and the prosecutor's comments were intended to exploit and expand any fears. No juror could be expected to "unhear" such viscerally powerful evidence. There is no "cure" which could have unrung this particular emotional bell.

In the alternative, in the unlikely event that the Court finds that the prosecutor's repeated, flagrant misconduct could have been cured had counsel objected, counsel's failure to do so should be the basis for a new trial. The right to effective assistance is guaranteed under the Sixth Amendment and Article 1, § 22. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Counsel is ineffective despite a strong presumption of reasonableness where the attorney's performance was deficient and that deficiency prejudiced the defendant. Strickland, 466 U.S. at 687. Counsel is deficient when his performance falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. While in general failing to object is a strategic or tactical decision, failing to object when it is

not reasonable to do so is not reasonable performance. See State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

Counsel himself noted the extreme prejudice the assault evidence would cause if admitted - that was why he objected in the first place. To then fail to object during closing argument when the prosecutor invoked the fear generated by the violent assault should be deemed ineffective assistance, if the Court finds that the flagrant, prejudicial misconduct could have been cured.

4. THE CUMULATIVE EFFECT OF THE ERRORS DEPRIVED MR. BURTON OF A FUNDAMENTALLY FAIR TRIAL

The right to a fundamentally fair trial is part of the due process rights guaranteed by the state and federal constitutions. See State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007). Even if each trial error standing alone does not compel reversal, this Court will reverse and remand for a new trial when it is reasonably probable that the errors cumulatively produced an unfair trial by affecting the outcome. See State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Here, all of the trial errors went directly to the heart of the prosecution's case. The admission of the highly improper, extremely emotional and inflammatory 9-1-1 call and jail call invoked the jurors' passions and prejudices against Burton as a violent guy who was by "propensity" more likely to have committed the residential burglary. Indeed, that was the purpose for which the prosecutor deliberately exploited it throughout trial. The improper admission of the evidence and the prosecutor's misconduct were hand-in-hand the

foundation of the state's case. There is more than a reasonable likelihood that jurors were swayed by the emotional impact of the audible sounds of Burton *physically beating a woman while she screamed* hours before the nonviolent alleged residential burglary, let alone his crude comments about her later. And that assault - and his comments - were irrelevant to whether Burton committed the non-violent residential burglary for which he was on trial. Reversal and remand for a new trial (absent the unsupported deadly weapon enhancement) is required.

E. CONCLUSION

There was insufficient evidence to prove the "deadly weapon" enhancement, and it should be stricken. In addition, remand for a new, fair trial without the incredibly improper, inflammatory evidence of the 9-1-1 tape and the jail phone call, without misconduct by the prosecutor and based on the actual evidence presented, is required. This Court should so hold.

DATED this 4th day of April, 2018.

Respectfully submitted,

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DECLARATION OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Opening Brief to opposing counsel VIA this Court's upload service, and to appellant Mr. Burton at DOC 357617, WCC, 1313 N. 13<sup>th</sup> Ave., Walla Walla, WA. 99362.

DATED this 4th day of April, 2018,

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