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State of Washington  
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NO. 50865-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

BRANDON K. GORHAM,

Appellant.

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BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. TABLE OF AUTHORITIES .....	iii
B. ASSIGNMENT OF ERROR	
1. Assignment of Error .....	1
2. Issue Pertaining to Assignment of Error .....	2
C. STATEMENT OF THE CASE	
1. Factual History .....	3
2. Procedural History .....	7
D. ARGUMENT	
<b>I. THE TRIAL COURT ERRED WHEN IT SENTENCED THE     DEFENDANT ON A FIRST DEGREE ASSAULT CHARGE BECAUSE     SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE JURY'S     FINDING OF GUILTY FOR THAT OFFENSE .....</b>	<b>10</b>
<b>II. THE TRIAL COURT ERRED WHEN IT ADMITTED STATEMENTS     INTO EVIDENCE THE DEFENDANT MADE DURING CUSTODIAL     INTERROGATION WITHOUT PROOF THAT THE INTERROGATING     OFFICER ADEQUATELY WARNED THE DEFENDANT OF HIS RIGHTS     UNDER <i>MIRANDA v. ARIZONA</i> .....</b>	<b>13</b>
<b>III. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL     WHEN IT ALLOWED THE PROSECUTOR OVER DEFENSE OBJECTION     TO GIVE ITS OPINION ON THE CREDIBILITY OF A KEY STATE'S     WITNESS .....</b>	<b>19</b>
E. CONCLUSION .....	23

F. APPENDIX	
1. Washington Constitution, Article 1, § 3	24
2. Washington Constitution, Article 1, § 9,	24
3. United States Constitution, Fifth Amendment	24
4. United States Constitution, Fourteenth Amendment	24
G. AFFIRMATION OF SERVICE	25

**TABLE OF AUTHORITIES**

Page

***Federal Cases***

*Bruton v. United States*,  
391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968) ..... 19

*Duckworth v. Eagan*,  
492 U.S. 195, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989) ..... 17

*Edwards v. Arizona*,  
451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) ..... 15

*In re Winship*,  
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) ..... 10

*Jackson v. Virginia*,  
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) ..... 11

*Michigan v. Mosley*,  
423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313, (1975) ..... 16

*Miranda v. Arizona*,  
384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) ..... 14-18

*United States v. Hernandez*,  
93 F.3d 1493 (10th Cir. 1996) ..... 17

***State Cases***

*State v. Baeza*, 100 Wn.2d 487, 670 P.2d 646 (1983) ..... 10

*State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997) ..... 14

*State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991) ..... 14, 15

*State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980) ..... 11

<i>State v. Grisby</i> , 97 Wn.2d 493, 647 P.2d 6 (1982) .....	16
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985) .....	18
<i>State v. Holland</i> , 98 Wn.2d 507, 656 P.2d 1056 (1983) .....	15
<i>State v. Johnson</i> , 12 Wn.App. 40, 527 P.2d 1324 (1974) .....	11
<i>State v. Moore</i> , 7 Wn.App. 1, 499 P.2d 16 (1972) .....	10
<i>State v. Rhoden</i> , 189 Wn.App. 193, 356 P.3d 242 (2015) .....	18
<i>State v. Richmond</i> , 65 Wn.App. 541, 828 P.2d 1180 (1992) .....	15
<i>State v. Swenson</i> , 62 Wn.2d 259, 382 P.2d 614 (1963) .....	19
<i>State v. Taplin</i> , 9 Wn.App. 545, 513 P.2d 549 (1973) .....	11
<i>State v. Wheeler</i> , 108 Wn.2d 230, 737 P.2d 1005 (1987) .....	15

***Constitutional Provisions***

Washington Constitution, Article 1, § 3 .....	10, 19
Washington Constitution, Article 1, § 9 .....	14
United States Constitution, Fifth Amendment .....	13
United States Constitution, Fourteenth Amendment .....	10, 19

***Statutes and Court Rules***

CrR 3.5 .....	16-18
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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court erred when it sentenced the defendant on a first degree assault charge because substantial evidence does not support the jury's finding of guilty for that offense.

2. The trial court erred when it admitted statements into evidence the defendant made during custodial interrogation without proof that the interrogating officer adequately warned the defendant of his rights under *Miranda v. Arizona*.

3. The court denied the defendant a fair trial when it allowed the prosecutor over defense objection to give its opinion on the credibility of a key state's witness.

### ***Issues Pertaining to Assignment of Error***

1. Does a trial court err and deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it accepts a jury's verdict on a charge of first degree assault charge when substantial evidence does not support the conclusion that the defendant acted with intent to inflict great bodily harm?

2. Does a trial court err under CrR 3.5, Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, if it admits statements into evidence that a defendant made during custodial interrogation without proof that the interrogating officer adequately warned that defendant of his or her rights under *Miranda v. Arizona*?

3. Does a court deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment if it allows the prosecutor over defense objection to give its opinion on the credibility of a key state's witness during closing argument?

## STATEMENT OF THE CASE

### *Factual History*

In September of 2016, 32-year-old defendant Brandon Goram was sharing a home at 104 N. Fredericksburg Way in Vancouver with his mother. RP 244, 260-263. 351-354<sup>1</sup>. His friends “Rich” and “TR” were also living in the home for the summer. *Id.* Upon returning from work during the late afternoon of Friday, September 9<sup>th</sup>, the defendant along with his two friends began drinking alcohol. RP 351-354. They continued drinking until about 3 in the morning, at which time the defendant slept for a few hours. *Id.* Upon arising the next morning he again began drinking with his two friends. *Id.* For a portion of time they were sitting in front of the house on chairs as the weather was quite warm. RP 247, 260-263, 351-354. The defendant estimated that he drank about 18 beers during the day. RP 351-354.

At little after 5:00 pm a person by the name of Zachary Lucore walked up to the house across the street, rang the door bell, and then looked in the back yard after nobody responded. RP 147. Zachary Lucore is a homeless drug addict who routinely abuses methamphetamine and

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<sup>1</sup>The record on appeal includes four, continuously numbered volumes of verbatim reports of the jury trial and sentencing hearing in this case. There are referred to herein as “RP [page #].”

heroin, among other drugs. RP 147-148, 167. He is also a paranoid schizophrenic who constantly has auditory hallucinations. RP 164. Although he denied using any drugs on September 10<sup>th</sup>, a urine screen performed later that evening showed positive for methamphetamine. RP 337-339.

On September 19<sup>th</sup> Mr. Lucore had spent some time at his parents home in Vancouver. RP 147. However, by the late afternoon his parents had ordered him to leave their home given his continued drug use. *Id.* Upon leaving his parents' house Mr. Lucore walked over to his friend Stephanie's house on Fredericksburg Way across from the home where the defendant lived with his mother and two friends. RP 147, 149, 244, 260, 351. According to Mr. Lucore, his friend did not answer the door so he went around to look in the back yard to see if she was outside smoking. RP 147-148. At that time the defendant's mother saw him and called from across the street, asking what he was doing and ordering him to leave. RP 147-148, 251. Apparently she recognized him from prior visits he had at that address. RP 251.

At some point during the conversation the defendant, who was also out front with his friends, got into an argument with Mr. Lucore. RP 147-149, 351-355. Although the particulars of the conversation are somewhat

in dispute, both Mr. Lucore and the defendant later agreed that they were both using profane, abusive and threatening language. *Id.* The defendant claimed that Mr. Lucore took out a straight razor and threatened him and his mother with it. RP 354. Mr. Lucore admitted that he had a straight razor with him, which he retrieved during the argument. RP 151-152. However, he denied threatening the defendant and his mother with it. *Id.* Rather, he claimed that the defendant threatened to beat him up and run over him with his truck, although he admitted inviting the defendant out into the street to fight. RP 149-152, The defendant denied making any threat about running over Mr. Lucore. RP 355-356.

Eventually Mr. Lucore left the area, walked north on Fredericksburg Lane, turned left onto North Tennessee Lane, and walked up a block to North Garrison Road, where he intended to turn right and follow Garrison to Mill Plain, which is a main arterial through Vancouver. RP 151-153. Three people were out at the mail box in front of a house on Tennessee Lane and said hello as Mr. Lucore passed by. RP 61-62, 78-79, 102-104. As he did Mr. Lucore took out some blue tooth ear phones and turned on some music, ostensibly to calm down. RP 170

After Mr. Lucore walked up Fredericksburg Lane, the defendant, went in the house to get his truck keys. RP 355. His intent was to find Mr.

Lucore, stop and get out of the truck, and then “kick his ass.” *Id.* The defendant then retrieved his truck keys, drove up Fredericksburg, turned left onto Tennessee Lane and then drove the block up to North Garrison Road. RP 356-358. The defendant later admitted that at the time he was driving too fast and that he was highly intoxicated. RP 356-358, 368. According to the defendant, as he drove up to the intersection of Tennessee and Garrison the defendant walked out from between two parked vehicles directly into the path of his truck, which ran over Mr. Lucore. RP 356-358. The defendant denied intentionally hitting Mr. Lucore. RP 356-361. However, he admitted that when he did he panicked and drove off. RP 357-359. The people standing at the mailbox saw the accident and immediately called 911. RP 64-65, 80-85.

Once medical aid arrived they took Mr. Lucore, who was semi-unconscious, to a local hospital. RP 124-125. He had suffered a number of serious injuries as a result of the accident, including a concussion, broken ribs, a burst bladder, and other injuries. RP 326-339. He was in the hospital recovering for over three months and had to undergo more than one surgery. RP 343.

A few days after the incident an investigating officer saw the defendant’s truck in front of the house on Fredericksburg, seized it as

evidence, arrested the defendant, and booked him into the jail. RP 193-194. Over the next few months the defendant made a number of phone calls from the jail, during which he admitted that he felt bad about what he had done. RP 174-190. However, at no point during any of those recorded calls did he state that he had intentionally run over Mr. Lucore. RP 227-228.

### ***Procedural History***

By information filed September 14, 2016, and later twice amended, the Clark County Prosecutor charged the defendant Brandon Kenneth Gorham with attempted murder in the first degree in Count I, hit and run in Count II, and first degree assault in Count III. CP 1-2, 56-57, 71-72. This case later came on for trial before a jury during which the state called 11 witnesses, included four people who had seen the accident or the immediate aftermath from it, a responding fireman, a responding policeman, an ER physician, as well as an investigating officer, the defendant's mother, one of the defendant's friends, and Zachary Lucore. RP 60-343. The defendant then took the stand on his own behalf. RP 350-370. These witnesses testified to the facts included in the preceding factual history. *See Factual History, supra.*

In the middle of the trial the court held a CrR 3.5 hearing to determine the admissibility of custodial statements the defendant made to

Officer Jeffrey Starks, who was the investigating officer in the case. RP 234-242. According to Officer Starks, he interviewed the defendant at the Vancouver West Precinct. *Id.* At the time the defendant was in handcuffs. *Id.* Officer Starks went on to explain that prior to asking the defendant any questions, he gave the defendant his “Miranda” rights. *Id.* However, during the CrR 3.5 hearing he did not testify concerning what he told the defendant those rights were. *Id.* Following short argument after this testimony the court ruled that the defendant’s statements were admissible. RP 239-242. The court then called the jury back into the courtroom, and Officer Starks informed them that he had interviewed the defendant and that the defendant claimed that he had not had a good weekend and that he had gotten into a fight. RP 270.

Following the presentation of evidence in this case the court instructed the jury and the parties presented their closing arguments, with the defense admitting that the defendant had committed the hit and run but denying that he had intentionally hit Mr. Lucore with his truck. RP 442-455. During the state’s close the following exchange occurred among the prosecutor, the defense and the court:

So when Mr. Gorham is telling you he had – that there was three 18-packs of beer and he had been drinking all day, weigh that against what his mother and Richard Rigney said, where they – his

mother was adamant that he had worked that day. Would it have been easier for her to say, “Well, I could definitely be wrong about that today. I might not know if he worked that day or not. He perhaps had been drinking all day”? That would have been easy – that would have been the easy thing for her to do, but she told the truth, and she –

MR. RAMSAY: Objection, Your Honor; comment on the truth of what witnesses say.

THE COURT: You will determine what the truth is.

MR. BARTLETT: Correct. Well, obviously. Sorry, Your Honor.

She did her best to tell the truth and that was what she remembered, that on that – on the day in question, and she was adamant it was a Saturday and that's what all the testimony has been, it's been a Saturday, that Brandon worked, so he couldn't have been home drinking all day.

RP 418-419.

Following argument in this case the jury retired for deliberation and eventually brought back a verdict of “not guilty” to the charge of attempted murder, “guilty” to the charge of hit and run, and “guilty” to the charge of first degree assault. RP 470-473; CP 186-189. The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 208-209; 223-227.

## ARGUMENT

### I. THE TRIAL COURT ERRED WHEN IT SENTENCED THE DEFENDANT ON THE FIRST DEGREE ASSAULT CHARGE BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE JURY'S FINDING OF GUILTY ON THAT OFFENSE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3, and the United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of

the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974).

The test for determining the sufficiency of the evidence is whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

In the case at bar, the state charged the defendant in Count III with attempted first degree assault “CONTRARY TO RCW 9A.36.011(1)(a)&(1)(c),” under an information that alleged the following:

That he, BRANDON KENNETH GORHAM, in the County of Clark, State of Washington, or or about September 10, 2016 with intent to inflict great bodily harm, did assault another person, to wit: Zachary Lucore with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm and/or did inflict great bodily harm, contrary to Revised Code of Washington 9A.36.011(1)(a) and/or (c).

CP 72.

In RCW 9A.36.011 the legislature has defined the crime of first degree assault as follows:

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

(b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or

(c) Assaults another and inflicts great bodily harm.

RCW 9A.36.011.

In this case the defendant admitted that he was driving the truck that hit Mr. Lucore and the defense did not dispute that Mr. Lucore suffered “great bodily harm” as a result of that accident. Thus, under the statute, substantial evidence supports the conclusion that a truck can be considered a “force or means likely to produce great bodily harm or death” under subsection (1)(a). Similarly, under this statute substantial evidence supports the conclusion that Mr. Lucore suffered “great bodily harm” under subsection (1)(c).

By contrast, substantial evidence does not support the conclusion that the defendant acted with “the intent to inflict great bodily harm,”

which is an essential element under all three alternative methods to commit the crime. Although Mr. Lucore claimed that the defendant had previously stated that he was going to run over Mr. Lucore, this evidence does not constitute substantial evidence that the defendant did, in fact, follow through with that threat even were it uttered. The defendant denied making any such threat, and Mr. Lucore himself stated that both at the time of his injury as well as at the time he testified he suffered from paranoid schizophrenia, routinely had auditory hallucinations, and was abusing mind altering drugs. In addition, the witnesses who actually saw the accident did not claim that the defendant had acted intentionally to run over Mr. Lucore, even though they were best situated to see the act. Thus, substantial evidence does not support the conclusion that the defendant acted with the requisite intent to commit the crime. As a result, this court should reverse the defendant's conviction on Count I and remand for dismissal of this charge.

**II. THE TRIAL COURT ERRED WHEN IT ADMITTED STATEMENTS INTO EVIDENCE THE DEFENDANT MADE DURING CUSTODIAL INTERROGATION WITHOUT PROOF THAT THE INTERROGATING OFFICER ADEQUATELY WARNED THE DEFENDANT OF HIS RIGHTS UNDER *MIRANDA v. ARIZONA*.**

The United States Constitution, Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against

himself.” Similarly, Washington Constitution, Article 1, § 9 states that “[n]o person shall be compelled in any criminal case to give evidence against himself.” The protection of Washington Constitution, Article 1, § 9 is coextensive with the protection of the Fifth Amendment. *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991). In addition, under United States Constitution, Sixth Amendment, a defendant has the right to consult an attorney prior to answering any questions during custodial interrogation. This protection is also guaranteed under Washington Constitution, Article 1, § 22.

In order to effectuate these rights, the United States Supreme Court held in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), that before a defendant’s “custodial statements” may be admitted as substantive evidence, the state bears the burden of proving that prior to questioning the police informed the defendant that: “ (1) he has the absolute right to remain silent, (2) anything that he says can be used against him, (3) he has the right to have counsel present before and during questioning, and (4) if he cannot afford counsel, one will be appointed to him.” *State v. Brown*, 132 Wn.2d 529, 582, 940 P.2d 546 (1997) (quoting *Miranda*, 384 U.S. 436, 86 S.Ct. 1602). The state bears the burden of proving not only that the police properly inform the defendant of these

rights, but that the defendant's waiver of these rights was knowing and voluntary. *State v. Earls, supra*. If the police fail to properly inform a defendant of these four rights, then the defendant's answers to custodial interrogation may only be admitted as impeachment and then only if the defendant testifies and the statements were not coerced. *State v. Holland*, 98 Wn.2d 507, 656 P.2d 1056 (1983).

The "triggering factor" requiring the police to inform a defendant of his or her rights under *Miranda* is "custodial interrogation." Just what the words "custodial" and "interrogation" mean has been the subject of significant litigation. *State v. Richmond*, 65 Wn.App. 541, 544, 828 P.2d 1180 (1992). Generally speaking, an interrogation is "'any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Richmond*, 65 Wn.App. at 544 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)).

Once an accused asserts his or her right to remain silent and right to counsel, all interrogation must cease until an attorney is present "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *State v. Wheeler*, 108 Wn.2d 230, 737

P.2d 1005 (1987). At this point, the right to silence and counsel must be “scrupulously honored.” *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S.Ct. 321, 46 L.Ed.2d 313, (1975); *State v. Grisby*, 97 Wn.2d 493, 504, 647 P.2d 6 (1982).

In order to implement the requirements the Supreme Court in *Miranda* created, the Washington Supreme Court has adopted a procedure that, absent a waiver, must be followed prior to the admission of a defendant’s custodial statements given in response to police interrogation.

This procedure is found in CrR 3.5, which states in part:

(a) Requirement for and Time of Hearing. When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) Duty of Court to Inform Defendant. It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) Duty of Court to Make a Record. After the hearing, the

court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

CrR 3.5.

In the case at bar the only evidence presented at the CrR 3.5 hearing concerning any advice of rights was the officer's claim that he read the defendant "his constitutional rights." At no point did the officer claim that he told the defendant that he had the "absolute right" to remain silent, that anything he said could be used against him, that he had the right to have counsel present before and during questioning, and that if he could not afford counsel, one would be appointed to him.

While there is no requirement under *Miranda* that an arresting officer use any specific language when informing a defendant of his or her rights prior to custodial interrogation, to be adequate, whatever language is used must convey that (1) a defendant need not speak to the police, (2) that any statement made may be used against the defendant, (3) that a defendant has the right to an attorney, and (4) that an attorney will be appointed if the defendant cannot afford one. *See Duckworth v. Eagan*, 492 U.S. 195, 210–15, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989); *see also United States v. Hernandez*, 93 F.3d 1493, 1502 (10th Cir. 1996). Since there is no

evidence in the record at the CrR 3.5 hearing in this case that the defendant was warned of any of his four specific *Miranda* rights the trial court erred when it admitted the defendant's statements into evidence over the defendant's objection.

A trial court's admission of a defendant's statement obtained in violation of *Miranda* is an error of constitutional magnitude and requires reversal unless the reviewing court finds it harmless beyond a reasonable doubt. *State v. Rhoden*, 189 Wn.App. 193, 202, 356 P.3d 242 (2015). To find a *Miranda* violation harmless beyond a reasonable doubt, the courts look only at the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). Under this standard, the state has the burden of demonstrating that the admission of the statement did not contribute to the final conviction. *Id.* Thus, the court will reverse if there is any reasonable chance that the use of the inadmissible evidence was necessary to reach the guilty verdict. *Id.*

In the case at bar the untainted evidence of guilt presented in this case was far from "so overwhelming that it necessarily leads to a finding of guilt." Rather, the only evidence that the defendant acted with intent when he ran over Zachary Lucore came from Mr. Lucore himself. While this court

might ultimately rule that his testimony meets the substantial evidence rule, this testimonial claim was unsupported by any other evidence. In addition, Mr. Lucore's ability to accurately remember what happened and what was said was questionable at best given his methamphetamine abuse, his chronic paranoid schizophrenia, and his constant auditory hallucinations. Thus, in this case, the trial court's error in admitting the defendant's statements into evidence requires reversal and a remand for a new trial.

**III. THE COURT DENIED THE DEFENDANT A FAIR TRIAL WHEN IT ALLOWED THE PROSECUTOR OVER DEFENSE OBJECTION TO GIVE ITS OPINION ON THE CREDIBILITY OF A KEY STATE'S WITNESS.**

While due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment does not guarantee every person a perfect trial, it does guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). This due process right to a fair trial is violated when the prosecutor commits misconduct. *State v. Charlton*, 90 Wn.2d 657, 585 P.2d 142 (1978). To prove prosecutorial misconduct, the defendant bears the burden of proving that the state's conduct was both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997). In order to prove prejudice, the

defendant has the burden of proving a substantial likelihood that the misconduct affected the jury's verdict. *State v. Evans*, 96 Wn.2d 1, 633 P.2d 83 (1981).

Under both Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, it is misconduct for a prosecutor to assert his or her personal opinion as to the “credibility of a witness” or the “guilt or innocence of an accused.” *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984). Any such personal expression on the credibility of a witness or of “personal belief in the defendant’s guilt” is “not only unethical but extremely prejudicial.” *State v. Case*, 49 Wn.2d 66, 68, 298 P.2d 500 (1956). Thus, a prosecutor should never introduce “evidence of any matter immaterial or irrelevant to the single issue to be determined.” *State v. Devlin*, 145 Wn. 44, 49, 258 P. 826 (1927). The courts “will not allow such testimony, in the guise of argument, whether or not defense counsel objected or sought a curative instruction.” *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

In the case at bar, the prosecutor directly violated this rule and committed misconduct during closing argument when she expressed her personal belief that the defendant’s mother was telling the truth about statements she made concerning the defendant’s level of intoxication. This

exchange went as follows:

So when Mr. Gorham is telling you he had – that there was three 18-packs of beer and he had been drinking all day, weigh that against what his mother and Richard Rigney said, where they – his mother was adamant that he had worked that day. Would it have been easier for her to say, “Well, I could definitely be wrong about that today. I might not know if he worked that day or not. He perhaps had been drinking all day”? That would have been easy – that would have been the easy thing for her to do, *but she told the truth*, and she –

MR. RAMSAY: Objection, Your Honor; comment on the truth of what witnesses say.

THE COURT: You will determine what the truth is.

MR. BARTLETT: Correct. Well, obviously. Sorry, Your Honor.

*She did her best to tell the truth* and that was what she remembered, that on that – on the day in question, and she was adamant it was a Saturday and that's what all the testimony has been, it's been a Saturday, that Brandon worked, so he couldn't have been home drinking all day.

RP 418-419 (emphasis added).

The defendant anticipates that the respondent will argue that even if this was misconduct there was insufficient prejudice to justify reversing the defendant's convictions even though the court did not sustain the objection and did not instruct the jury to disregard the improper comments. The problem with any such argument is that it ignores the fact that during a jury trial there are some bells which are rung so loud that no instruction

from the court can undo the harm.

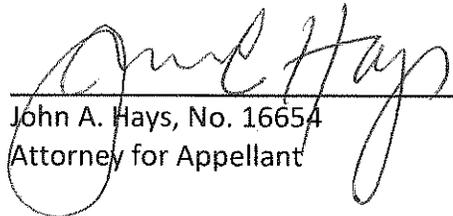
These two comments were direct statements of the prosecutor's personal belief on the credibility of the defendant's mother when she failed to corroborate the defendant's claim of severe intoxication. That these comments constitute one of those bells that can't be un-rung is illustrated by two points. The first is that, as was recognized in *State v. Case, supra*, a prosecutor's claim that she personally believes a particular witness or if the guilt of a defendant is not just unethical "but extremely prejudicial." *State v. Case*, 49 Wn.2d at 68. The second point is that the evidence supporting the charge of first degree assault in this case was equivocal at best. The underlying facts and lack of any claim of intentional conduct by any of the eye witnesses corroborates the defendant's claim that he did not intentionally run over Mr. Locore. Thus, in this case, this court should reverse the defendant's conviction for first degree assault and remand for a new trial because the prosecutor's misconduct in closing argument denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

## CONCLUSION

The trial court erred when it accepted the jury's verdict on a charge unsupported by substantial evidence. As a result this court should reverse the defendant's conviction for first degree assault and remand for dismissal of this charge. In the alternative, the trial court erred when it admitted the defendant's statements made during custodial interrogation and when it failed to sustain the defendant's objection to the prosecutor's misconduct in commenting on the credibility of one of its witnesses. Under this alternative this court should reverse the defendant's conviction for first degree assault and remand for a new trial.

DATED this 18<sup>th</sup> day of January, 2018.

Respectfully submitted,



John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 9**

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

**UNITED STATES CONSTITUTION,  
FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,  
Respondent,

vs.

BRANDON K. GORHAM,  
Appellant.

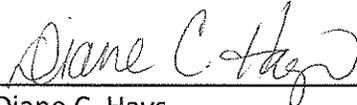
NO. 50865-6-II

AFFIRMATION  
OF SERVICE

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 18<sup>th</sup> day of January, 2018, at Longview, WA.

  
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**JOHN A. HAYS, ATTORNEY AT LAW**

**January 18, 2018 - 4:10 PM**

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