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No. 53202-6-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL R. WILKINS,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION.

Deonta Wilkerson said he tussled with and punched Michael Wilkins after a fender bender provoked a fistfight. When Mr. Wilkerson later realized he was bleeding from a cut on his back, he blamed Mr. Wilkins even though no one saw Mr. Wilkins holding anything that could have caused it.

Where no one observed Mr. Wilkins with any weapon and without evidence he used a weapon in a manner likely to cause death, the evidence does not support a deadly weapon enhancement. The enhancement was also improperly imposed when the jury initially returned with a blank special verdict form, as the instructions allowed, but the court ordered the jury to complete this form.

During voir dire, the prosecutor repeatedly told the jury they would not receive all the evidence the State had and misstated the elements of assault, despite the defense's objections. The prosecution used its opening statement to also explain its view of the law, drawing more objections and warnings from the court. These improprieties tainted the jury and undermined the fairness of the trial.

B. ASSIGNMENTS OF ERROR.

1. The prosecution did not prove the essential elements of a deadly weapon enhancement as required by statute and the constitutional right to due process.

2. The court impermissibly coerced the jury to reach a verdict on the deadly weapon enhancement.

3. The prosecution's improper comments during voir dire and opening statement denied Mr. Wilkins a fair trial by jury as protected by the Sixth and Fourteenth Amendments and article I, section 22.

4. The court erroneously refused to declare a mistrial when the prosecutor repeatedly misused jury voir dire to send messages to the jury unrelated to jury selection.

5. The court improperly ordered Mr. Wilkins pay interest on legal financial obligations (LFOs) contrary to the controlling statute.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The essential elements of a deadly weapon enhancement require the prosecution to prove the accused person either used a weapon that is automatically designated as

a “deadly weapon” by statute or used some type of weapon in a manner that was actually likely to cause death. Here, the prosecution had no evidence that Mr. Wilkins used a specific implement that qualified as a per se deadly weapon, so it needed to prove a weapon was used in a manner likely to cause death. Without evidence Mr. Wilkins used a weapon in a manner likely to cause death, did the prosecution fail to meet its burden of proving the deadly weapon enhancement?

2. The court may not suggest a deliberating jury must reach a verdict. Here, the court’s written instruction said the jury did not need to fill out the special verdict form if it did not unanimously agree but when the jury returned a blank verdict form, the court refused to accept it and told the jury it must complete this verdict form. Did the court improperly direct the jury it must reach a verdict?

3. A prosecutor may never tell the jury about information the jurors will not receive at trial, suggest they should dilute the State’s burden of proof, or misrepresent the law. Here, the prosecutor used voir dire to repeatedly inform the jury that it would have to decide the case without receiving all the evidence

the prosecution and police had, even though the court sustained several defense objections. It also misrepresented the law and pressed the jury to commit to reaching a verdict even if they had unanswered questions. Did the prosecution improperly taint the jury when it continued to make impermissible arguments despite the court's efforts to curb these arguments?

4. Did the court improperly impose interest on legal financial obligations despite the prohibition on this interest by the recent amendments to the statutory scheme governing LFOs?

D. STATEMENT OF THE CASE.

A fistfight erupted outside a downtown Tacoma nightclub after Deonta Wilkerson backed his car into a pick-up truck. 5RP 672; 6RP 822, 831, 898. Mr. Wilkerson and his passenger, Rakim Robertson, were confronted by the owner of the pick-up truck, Michael Wilkins, and two other men. 6RP 25-26, 905. Mr. Wilkerson ended up tussling with Mr. Wilkins, while Mr. Robertson fought with one of the other men from the pick-up truck. 6RP 911.

According to Mr. Wilkerson, after a back and forth struggle with Mr. Wilkins, he hit Mr. Wilkins hard, knocking Mr. Wilkins to the ground. 6RP 913. When Mr. Wilkins was on the ground, Mr. Wilkerson realized he was bleeding from his back. 6RP 914. Mr. Wilkerson did not know when or how this injury happened, but learned that something struck him in the kidney area, causing an incision and a “small nick” in his lowest rib. 6RP 797, 800, 916.

Mr. Robertson did not see Mr. Wilkerson get injured or notice anyone holding any weapon. 6RP 841, 877. Robert Williams, a friend of Mr. Robertson’s, thought he saw Mr. Wilkins reach back to grab for something when fighting with Mr. Wilkerson but he did not see anything in Mr. Wilkins’ hands. 5RP 690, 694, 701.

Mr. Wilkins left the area in the pick-up truck. 6RP 915. Mr. Wilkerson was taken to the hospital. 6RP 785. A CAT scan revealed a wound to his kidney, but there was no internal bleeding or impairments to related arteries or veins. 6RP 808-09, 798. Doctors monitored Mr. Wilkerson’s condition and

released him from the hospital once they verified no other complications occurred from the injury. 6RP 809.

The prosecution charged Mr. Wilkins with first degree assault with a deadly weapon, second degree assault with a deadly weapon, and felony harassment. CP 1-3.

At the close of the State's case, the court dismissed the felony harassment allegation based on a lack of evidence. 7RP 1090. It also dismissed the separate charge of second degree assault, because there was only a single allegation of assault. 7RP 1097-99. It instructed the jury on first degree assault and the inferior offenses of second, third, and fourth degree assault and presented the jury with a special verdict for the alleged deadly weapon enhancement. 7RP 1096; CP 62-63.

The prosecution conceded in its closing argument that it had no evidence about what tool was used to cause the injury to Mr. Wilkerson's kidney. 8RP 1140.

The jury found Mr. Wilkins not guilty of first degree assault but guilty of second degree assault. CP 65. It initially returned as blank the special verdict form for the deadly weapon enhancement. 8RP 1220-21. The court immediately directed the

jury to go back to the deliberation room and fill out the special verdict form. 8RP 1221. The jury returned with a verdict form answering “yes” to whether Mr. Wilkins possessed a deadly weapon. CP 67. The defense objected to the court telling the jurors they needed to complete this verdict form because the originally offered blank special verdict was a permitted verdict. 8RP 1223-24.

The court imposed a standard range sentence of 26 months in prison, including a 12-month deadly weapon enhancement. CP 80.

Pertinent facts are discussed in further detail in the argument sections below.

E. ARGUMENT.

1. The prosecution failed to prove Mr. Wilkins possessed and used a deadly weapon.

a. No conviction may rest on pure speculation.

The burden of proving the essential elements of a crime unequivocally rests upon the prosecution. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. Proof beyond a reasonable

doubt of all essential elements is an “indispensable” threshold of evidence the State must establish to garner a conviction.

Winship, 397 U.S. at 364.

To determine whether there is sufficient evidence for a conviction, reasonable inferences are construed in favor of the prosecution but they may not rest on speculation. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). The essential elements of a crime “may not be inferred from conduct that is ‘patently equivocal.’” *State v. Vasquez*, 178 Wn.2d 1, 7, 309 P.3d 318 (2013).

b. A deadly weapon enhancement requires proof the defendant used a weapon in a manner likely to result in death.

Mr. Wilkins was charged with committing assault with a deadly weapon as well as a deadly weapon enhancement. CP 1-2.¹ The definition of a “deadly weapon” for a general verdict of second degree assault is different from the “deadly weapon” required for an enhancement imposed by a special verdict.

For purposes of second degree assault, a deadly weapon is defined as a firearm, weapon, or device,

which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is *readily capable of causing death or substantial bodily harm.*

RCW 9A.04.110 **Error! Bookmark not defined.**(6) (emphasis added); *see* RCW 9A.36.021(1)(c). Substantial bodily harm includes an injury that is temporary but involves a substantial impairment of the function of any bodily part or organ, and includes a fractures bone. RCW 9A.04.110(4)(b).

But to prove a “deadly weapon” for a sentencing enhancement, the prosecution must establish the accused person used either a specific weapon listed in the statute, including a knife with a blade longer than three inches, or “an implement or instrument which has the capacity to inflict death and *from the manner in which it is used, is likely to produce or may easily and readily produce death.*” RCW 9.94A.825 (emphasis added).

¹ The jury instructions for second degree assault presented the alternative means of committing assault by recklessly inflicting substantial bodily harm or by a deadly weapon. The jury did not specify the basis of its verdict.

Thus, absent proof of a per se deadly weapon, to authorize a deadly weapon enhancement “the State must prove that the weapon had the capacity to cause death and death alone”. *State v. Cook*, 69 Wn. App. 412, 418, 848 P.2d 1325 (1993).

The prosecution alleged Mr. Wilkins used some kind of knife or knife-like implement to injure Mr. Wilkerson, however, it conceded it had no evidence of what the knife looked like. The prosecutor told the jurors in her closing argument, “I cannot tell you how long the length of that blade was.” 8RP 1140.

The prosecution offered no evidence about what this instrument was. No one saw it. No one described any type of blade. No one testified that the blade was longer than three inches. No one said Mr. Wilkins ever claimed he had a knife.

The doctor who examined the wound gave no opinion on what type of implement caused it. Dr. Tran admitted he was not an expert on weapons or measuring tracks of wounds. 6RP 803-04. From a CAT scan, he deduced a “rough estimate” that Mr. Wilkerson’s wound was approximately three inches long, but he believed the wound’s track did not indicate the length of a blade that caused it. 6RP 805-07. Because of the way a body moves

and compresses, Dr. Tran testified it was just as likely that the blade was less than three inches as it was any other length. 6RP 807.

The weapon must have been small because no witness could see it well enough to identify or describe it. 5RP 690; 6RP 841, 986. Mr. Wilkerson was facing Mr. Wilkins while fighting with him and he did not see anything in Mr. Wilkins' hands. 6RP 977, 984, 986. Mr. Williams was watching the fight and claimed he saw Mr. Wilkins reach for something but he could not see what, if anything, it was. 5RP 690. The jury's verdict cannot rest on speculation about the implement's blade length. An unknown weapon does not qualify as a "per se" deadly weapon under the criteria of RCW 9.94A.825.

Consequently, the prosecution had to prove this small implement was used in a manner "likely to produce or may easily and readily produce death" in order to prove the deadly weapon special verdict. RCW 9.94A.825. It must show "the weapon had the capacity to cause death and death alone" from the manner in which it was actually used. *Cook*, 69 Wn. App. at 418.

But there was no evidence the tool that injured Mr. Wilkerson was actually used in a way that was likely to kill. Something struck one of Mr. Wilkerson's kidneys, but it did not injure arteries or veins and did not render the kidneys unable to perform their functions. He received a small bandage at the hospital and then doctors monitored him to verify he had no internal injuries. 6RP 788. There was no active bleeding when Mr. Wilkerson arrived at the hospital. 6RP 788. The implement did not penetrate the vascular artery or cause damage to the kidney's ability to work as a body requires. 6RP 809-10. Doctors closely monitored Mr. Wilkerson to be sure he did not develop problems with his kidney later, but no problems arose. *Id.*

Dr. Tran said the hospital staff would always be concerned when a person has a possible kidney injury. 6RP 790, 792, 804. But for Mr. Wilkerson, this concern was simply a matter of monitoring him to verify that he was not more serious injured. 6RP 803, 809-10.

Mr. Wilkerson did not suffer an injury that was actually likely to result in death as required for the deadly weapon enhancement. Mr. Wilkerson was not at risk of death, according

to the doctor who treated him. 6RP 804, 810-11. The knife-like implement was not used in a manner likely to cause death.

It is impermissible to impose a deadly weapon enhancement based on the capacity of a weapon to cause substantial bodily injury. *Cook*, 69 Wn. App. at 417-18. For example, in *State v. Zumwalt*, the court ruled that stabbing a person in the hand, with a knife that is less than three inches long, does not meet the essential elements of a deadly weapon enhancement because it was not used in a manner likely to cause death. 79 Wn. App. 124, 126, 130, 901 P.2d 319 (1995), *overruled in part on other grounds*, *State v. Bisson*, 156 Wn.2d 507, 130 P.3d 820 (2006).

The deadly weapon enhancement may not be predicated on a weapon's ability to cause substantial bodily injury, unlike a deadly weapon element of an assault conviction, under the plain terms of the statute. The legislature intended to reserve added enhancements for actually lethal situations, by limiting a deadly weapon sentencing enhancement to a weapon used in a manner capable of producing death at the time of the offense, while creating a lesser standard for a weapon capable of causing

substantial bodily injury. *See State v. Thompson*, 88 Wn.2d 546, 549, 564 P.2d 323 (1977). The prosecution did not prove Mr. Wilkerson suffered an injury from a weapon used in a manner likely to produce or readily capable of causing death and death alone.

c. The deadly weapon enhancement must be vacated.

When there is insufficient evidence to prove the essential elements of a deadly weapon enhancement, the enhancement may not be imposed. *State v. Gurske*, 155 Wn.2d 134, 143-44, 118 P.3d 333 (2005). Mr. Wilkins' sentencing enhancement must be reversed and vacated.

2. The court's behavior after the jury failed to answer "yes" on the special verdict form impermissibly coerced the jury's verdict.

a. The court may not pressure jurors into reaching a unanimous verdict.

The right to a fair trial by an impartial jury prohibits a judge from suggesting to jurors that they need to reach an agreement during deliberations. *Jenkins v. United States*, 380 U.S. 445, 446, 85 S. Ct. 1059, 13 L. Ed. 2d 957 (1965); *State v. Boogaard*, 90 Wn.2d 733, 736-37, 585 P.2d 789 (1978); U.S.

Const. amends. VI, XIV; Const. Art. I, §§ 21, 22. Each juror must render a verdict uninfluenced by factors outside the evidence or by improper instruction. *State v. Jones*, 97 Wn.2d 159, 641 P.2d 708 (1982). The constitution protects the right to have jurors fail to agree. *State v. McCullum*, 28 Wn. App. 145, 149, 662 P.2d 870 (1981).

To effectuate these constitutional rights, CrR 6.15(f)(2) places strict restrictions upon the court's interactions with deliberating jurors. CrR 6.15(f)(2) provides:

After jury deliberations have begun, the court *shall not instruct the jury in such a way as to suggest* the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate.

(Emphasis added). CrR 6.15(f)(2) is intended to prevent a judge from suggesting the need for agreement. *Boogaard*, 90 Wn.2d at 736.

When a jury appears genuinely deadlocked, the trial court, in its discretion, may ask the jurors if there is a reasonable probability of reaching a verdict in a reasonable time. *Id.*; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.70 (4th Ed. 2016). But, as the WPIC cautions, it is “not proper to

give any further instruction to an apparently deadlocked jury as to the need for agreement, or the consequences of no agreement” WPIC 4.70, Note on Use.

b. *The court improperly refused to accept a blank special verdict form despite instructing the jury to leave it blank if the jurors did not unanimously agree.*

A court should instruct jurors to “leave a special verdict form blank” if they cannot agree. *State v. Guzman Nunez*, 174 Wn.2d 707, 719, 285 P.3d 21 (2012). This instruction accurately reflects the State’s burden of proof and serves the purposes of jury unanimity. *Id.*

As *Guzman Nunez* directs, the court properly instructed the jurors to “not fill in” the special verdict form if they were not able to agree. CP 63 (Instruction 64). Despite this accurate instruction, the court refused to accept the jurors’ blank special verdict form. 8RP 1221.

When the jury reported deliberations were complete and returned its verdict, the jurors gave the court Verdict Form A, stating they decided Mr. Wilkins was not guilty of first degree assault. 8RP 1220-21; CP 65. They returned Verdict Form B,

finding Mr. Wilkins guilty of second degree assault. CP 66. They returned the other verdict forms, which showed they did not complete the forms for the inferior degree offenses of third and fourth degree assault. 8RP 1221; CP 68. 69. They similarly did not fill out the special verdict form for the deadly weapon enhancement. 8RP 1221.

But when the court saw the blank special verdict form, it told the jurors they must return to the jury room and complete it. 8RP 1221. The court said, “I’m going to send you right back in with all the instructions.” 8RP 1221. The court told the jurors if they could not agree, “there’s an option for that too.” *Id.* It directed the jurors, “I’m going to excuse you to fill out the Special Verdict Form.” *Id.*

Mr. Wilkins promptly objected. 8RP 1222-23. He told the judge it had an obligation to accept the verdict form as blank. 8RP 1223. The blank verdict form was acceptable and proper, and the court lacked authority to require the jury to fill it out. 8RP 1223. He asked the judge to treat the deadly weapon enhancement as if it was left blank as originally submitted, showing the jury was unable to agree. *Id.* The court refused,

noting the jury did not deliberate for a long time once it directed them to go back and fill out the special verdict form. The court termed it “maybe two minutes” for the jury to return, although the minutes reflect six minutes passed after the jury told the court it reached an additional verdict. Supp. CP __, clerk’s minutes Feb. 28, 2019 (supplemental designation filed).

The court did not individually poll the jurors when they returned to the courtroom. 8RP 1222. Instead, the court asked the jurors for a show of hands “if that’s your personal vote” and commented that all 12 jurors raised their hands. *Id.* This show of hands did not speak to whether the jurors originally could not agree as the blank form indicated, because it occurred only after the court refused to accept the blank form.

c. Reversal of the deadly weapon enhancement is required.

By refusing to accept a blank special verdict form and directing the jury to “fill out” the form, the court intimated that it expected an agreement. This reaction to the blank form violated the strict commands of CrR 6.15 (f)(2), which bars even the *suggestion* of the need for agreement. Whether a judge

intentionally or unintentionally influences jurors to reach a unanimous verdict, such possible influence requires reversal. *Boogaard*, 90 Wn.2d at 740.

If the deadly weapon verdict is not vacated based on legally insufficient evidence, it should be reversed due to the court's improper suggestion to the deliberating jurors that it must complete this form. *Boogaard*, 90 Wn.2d at 740.

3. The prosecutor tainted the jury by repeatedly informing them the State had other evidence but the jurors would not be given it to decide the case, despite the defense's objections.

a. The right to a fair trial includes the right to have jurors decide the case based solely on properly admitted evidence.

Prosecutorial misconduct affects a defendant's constitutional right to a fair trial. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012); U.S. Const. amends. VI; XIV; Const. art. I, § 22. A prosecutor is a quasi-judicial officer whose duties include ensuring a defendant receives a constitutionally fair trial. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

A prosecutor commits misconduct by using arguments that create a danger the jury may convict for reasons other than the evidence offered at trial. *Glasmann*, 175 Wn.2d at 704. It is improper for a prosecutor to discuss information that is not part of the trial evidence or imply out-of-court information supports the State’s case. *Boehning*, 127 Wn. App. 511, 518

“[A] prosecutor may *never* suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty.” *State v. Perez-Mejia*, 134 Wn. App. 907, 916, 143 P.3d 838 (2006); *United States v. Brooks*, 508 F.3d 1205, 1209-10 (9th Cir. 2007) (prosecutor “threatens integrity” of conviction by indicating information not presented to jury supports government’s case).

Information given to jurors during voir dire affects their ability to impartially decide the case based on permissible factors. *State v. Townsend*, 142 Wn.2d 838, 846, 15 P.3d 145 (2001). For example, telling prospective jurors about potential sentencing consequences during jury selection presents an unacceptable risk of unfairly influencing their deliberation. *Id.*

The purpose of voir dire is to enable the parties to learn the state of mind of the prospective jurors, so they can determine whether any of them may be subject to a challenge for cause or the exercise of a peremptory challenge. *State v. Laureano*, 101 Wn.2d 745, 758, 682 P.2d 889 (1984); CrR 6.4(b). Jury voir dire should not be used to prejudice the jury for or against a party or to argue matters of law. *State v. Frederiksen*, 40 Wn. App. 749, 752, 700 P.2d 369 (1985). It is not an opportunity for the parties to argue the case or compel the jurors to commit themselves to a particular vote. *Id.*

The American Bar Association similarly directs the prosecutor not to use voir dire to talk about information that is unlikely to be admitted at trial:

The opportunity to question jurors personally should be used solely to obtain information for the well-informed exercise of challenges. The prosecutor should not seek to commit jurors on factual issues likely to arise in the case, and should not intentionally present arguments, facts, or evidence which the prosecutor should know will not be admissible at trial. . . .

Am. Bar. Assoc'n, Criminal Justice Standards for the Prosecution Function, 4th Ed., 3-6.3(d).²

b. The prosecutor used jury selection to tell jurors about evidence they would not receive and to dilute its burden of proof, over objection.

The prosecutor began its voir dire by telling the jurors about information they would not receive at trial, even though it is well-settled that jurors may not consider facts not in the record and the prosecution may not suggest it has other information implicating the accused. *Boehning*, 127 Wn. App. at 522.

The prosecutor told the jurors she likes “to start” voir dire by addressing what information they “may not receive” at trial. 3RP 267-68. She said, “one of the first things I’ll let you know is you will likely hear from police officers who have authored reports.” 3RP 268. The defense objected and the court sustained the objection, telling the prosecutor, “Get into jury selection.” *Id.*

Despite the sustained objection, the prosecutor immediately resumed telling jurors about evidence that exists

² Available at: https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ (last viewed Oct. 23, 2019).

that they would not receive: “You are not going to receive police reports. You are not going to receive transcripts of testimony or have things read back to you that may have been testified –.”

3RP 268. The defense again objected. *Id.*

The court told the prosecutor it would “tell the jurors the law and what evidence is going to be admitted. I need you to get into questions regarding their qualifications as jurors” in this case. *Id.*

But the prosecutor re-started from the same premise, asking the jurors, “knowing you’re not going to receive these items, are you comfortable being able to make your decision based upon what you hear?” 3RP 268. Without waiting for a response, the prosecutor told the jurors they would be deciding the case without “what you might like [to have] in terms of documents or reports like I’ve alluded to” and only what the witnesses said in court and physical evidence. *Id.*

The prosecutor asked Juror 8 to give a “reaction to learning that you’re not going to get everything” such as reports that have been written. 3RP 268-69. When this juror said “yes” to being comfortable with “only” listening to what witnesses say,

the prosecutor pressed further. 3RP 269. The prosecutor told this same juror that there are “pieces of information” that “you will and will not get,” and requested the juror state “what were you thinking” when you heard about this lack of information.

3RP 269. This juror had no specific response. *Id.*

The prosecutor continued with several more jurors, requesting they acknowledge that they were “not going to see the police reports” or other information. 3RP 269-71.

Later in voir dire, the prosecutor similarly told jurors they would have unanswered questions since they would not get all of the facts. 3RP 323-30. The prosecutor asked jurors if they were curious about something, “will you look at whether or not that curiosity goes to the elements that the State has to prove beyond a reasonable doubt.” 3RP 323.

The defense objected and the court told the prosecutor not to ask jurors “to speculate as to what they are going to do,” but the court overruled the objection when the prosecutor reframed the question. 3RP 323-24.

The prosecutor spoke to the jurors without asking questions, discussing how they would be curious about

information for which they did not get an answer. 3RP 324-25. The defense objected and the court told the prosecutor to ask questions to the jurors and “stop the speeches.” 3RP 325.

The prosecutor continued by asking jurors if they would be “comfortable” in deliberations despite wishing they were given more information. 3RP 326. The defense objected to the prosecutor asking jurors whether they need “to have all [your] questions answered.” 3RP 326-27. The court told the prosecutor to move to a different topic and sustained the objection. 3RP 327.

The prosecutor then told the jurors they would be deciding “based upon the reasonableness of what happened” during the incident. 3RP 329. The defense objected to the misstatement of the law and the court sustained it, telling the prosecutor to rephrase her remarks and ask questions. 3RP 329.

The prosecutor complained to the jurors there had been “back and forth here that’s interrupted the question just a bit,” referring to the defense objections and court’s rulings. 3RP 329. The court told the prosecutor to “move on” and said it did not “appreciate that comment.” *Id.*

The prosecutor then posed a winding question, asking “can you refrain from speculating, appealing to anybody’s sympathies from either party? . . . What I need to know is, are you able to separate those speculations, those thoughts, from your factual determination that you’re asked to deliberate?” 3RP 330.

The defense objected and the court asked the jurors to step outside. 3RP 330. The court told the prosecution to stop asking jurors “to speculate” about what they would do if different things happened that had nothing to do with their qualifications to serve. *Id.* The court also said, “I really disapprove of you trying to tell them what the law is that I’m going to tell them at some point. I need you to stop doing both of those things.” 3RP 330.

Defense counsel explained the prosecutor was improperly trying to “indoctrinate this jury” as the theme of its voir dire. 3RP 331. He objected to the prosecution’s continued efforts to have the jurors speculate and telling them they will not get all the facts but that should not matter. *Id.* The defense moved for a mistrial due to the tainted jury selection. *Id.*

The court denied the motion for a mistrial, but told the prosecutor, “I agree with [defense counsel], it’s very close to getting rid of the whole panel.” 3RP 331.

The prosecutor immediately asked the jurors whether they would be able to serve, saying “You haven’t heard much, you don’t know much, but it will be up to you to make those decisions.” 3RP 333. The defense objected and the court overruled it. *Id.*

The prosecutor again disregarded the court’s rulings during its opening statement. A prosecutor's opening statement should be confined to a brief statement of the issues of the case, an outline of the anticipated material evidence, and reasonable inferences to be drawn therefrom. *State v. Campbell*, 103 Wn.2d 1, 15-16, 691 P.2d 929 (1984). Argument and inflammatory remarks have no place in the opening statement. *State v. Kroll*, 87 Wn.2d 829, 835, 558 P.2d 173 (1976).

Despite the court telling the prosecutor not to instruct the jury on the law, the prosecution gave a lengthy opening statement, describing its view of the evidence in detail and then described the law. 3RP 330; 4RP 412-33. The defense objected

four times when the prosecutor kept explaining the legal elements of the charges and misstated the law when discussing it. 4RP 429-32, 438. The court told the prosecutor to stop talking about the law several times. 4RP 429-36. The court was forced to excuse the jury and tell the prosecutor that it must comply with its rulings following defense objections. 4RP 436-38.

Jury selection is not an opportunity for a prosecutor to encourage jurors to lower their expectations about the State's ability to present persuasive arguments or to signal to the jury that there is more information the State has that jurors will not hear. It may not suggest the defendant or the court is preventing them from present the full account as known to the State. Opening statements are not properly used to present a one-sided view of the law. The prosecutor misused these opportunities to speak to the jury and tainted the trial.

c. The prosecutor's continued improper arguments to the jury during voir dire and opening statements undermined Mr. Wilkins' right to a fair trial.

When the defense objects to the prosecutor's improper remarks, as occurred here, this Court determines whether the

improper comments caused prejudice. *State v. Lindsay*, 180 Wn.2d 423, 431, 326 P.3d 125 (2014).

The prosecution's case was far from overwhelming. The jury rejected the first degree assault charge, finding Mr. Wilkins not guilty, even though the prosecutor focused its argument solely on this greater charge. 8RP 1142; *see also* 8RP 1137-38, 1140, 1213. The jury did not initially vote "yes" on the special verdict form until the court ordered it to complete this verdict form. 8RP 1221.

By suggesting information outside the record further supports their case, there is an unacceptable risk the jury will infer guilt based on facts not in the record. *Boehning*, 127 Wn. App. at 522. In *Boehning*, the prosecution commented on dismissed charges and implied that it had other evidence the jury did not hear. Even without any defense objections, this court ruled this improper argument "compels reversal." *Id.*

Here, the court also dismissed one charge at the close of evidence and reorganized a second as a lesser offense rather than a separate charge. 7RP 1090, 1097-99. In its closing argument, the prosecution twice called the jury's attention the

case being submitted to them differently “than initially contemplated.” 8RP 1112, 1207. While the prosecution did not discuss these differences in detail, it had already shaped the jury’s expectations by telling them at the outset that it had information it did not present. 3RP 267-69. It had already pressed them on the need to reach a verdict even without having important questions answered. 3RP 323-31.

During voir dire, the prosecution presented a theme focused on the unavailability of evidence and the need for the jury to decide the case without getting questions answered even when the jury thought unanswered information was important. When the defense moved for a mistrial after this litany of improper remarks to the jury, the court agreed the continued improper questioning was a cause for concern but did not grant the mistrial. 3RP 331. Review of the record shows the court should have granted this request because the prosecutor’s arguments and speeches to the jury could not be cured. The prosecutor’s repeated remarks firmly cemented the message that the prosecution had evidence the jury was not given and the jury

should not expect that it had all the damning information known to the State.

The defense vigorously disputed that Mr. Wilkins was the person who injured Mr. Wilkerson and faulted the police for failing to investigate whether any witnesses identified someone else as the perpetrator. 5RP 708-09, 730; 8RP 1169, 1180. It pressed officers and witnesses to acknowledge inaccuracies and inconsistencies in their police reports or statement given outside of court. 4RP 483-84; 555; 5RP 680, 693. It pointed to officers giving testimony that was not contained in their police reports. 4RP 476-78, 483-84, 555. Because the prosecution had already signaled to the jury that they would not receive the full story during the trial, it preemptively encouraged the jury to disregard flaws in the State's case, knowing the State was unable to give the jury all the information it knew.

Despite several witnesses who said Mr. Wilkins yelled at and struggled with Mr. Wilkerson, no one saw Mr. Wilkins holding a knife or other weapon that could have caused Mr. Wilkerson's injury. 5RP 711; 6RP 841, 878, 913, 916; 7RP 977, 980.

In a close case, the prosecutor’s improper efforts to minimize its burden of proof or ensure the jury that it has other evidence justifying a conviction are likely to affect the jurors and constitute actual prejudice. *See State v. Lopez*, 190 Wn.2d 104, 126, 410 P.3d 1117 (2018). It was improper and prejudicial for the prosecutor to thematically insist that the jury would not have all the evidence before it when deciding the case. Because the allegations required the jury to surmise Mr. Wilkins was the person who stabbed Mr. Wilkerson despite no one seeing Mr. Wilkins holding a knife, the prosecution’s improper theme likely prejudiced the jurors and requires a new trial.

4. The court improperly ordered interest imposed on mandatory LFOs contrary to the statutory scheme.

The court ordered interest accrue on all LFOs imposed “from the date of the judgment until payment in full.” CP 79. However, RCW 10.82.090(1) prohibits the accrual of interest on nonrestitution LFOs.³ The court imposed a mandatory \$500 victim penalty assessment as well as restitution. CP 785.

³ The statute was amended effective June 7, 2018, prior to Mr. Wilkins’ April 5, 2019 sentencing. Laws of 2018, ch. 269, §§ 1-2.

Interest is prohibited for a nonrestitution LFO. RCW 10.82.090(1).

This Court should remand the case with a directive that the interest accrual be stricken from Mr. Wilkins' judgment and sentence for any LFO other than restitution. *State v. Catling*, 193 Wn.2d 252, 259 n.5 438 P.3d 1174 (2019) (remanding and directing court to revise judgment and sentence to eliminate nonrestitution interest on LFOs); *State v. Ramirez*, 191 Wn.2d 732, 747-50, 426 P.3d 714 (2018) (recognizing House Bill 1783 eliminated interest accrual on nonrestitution portions of LFOs and remanding for court to amend judgment and sentence to strike discretionary LFOs and interest).

F. CONCLUSION.

Mr. Wilkins should receive a new trial due to the prosecution's misconduct which denied him a fair trial. Furthermore, the deadly weapon enhancement should be reversed and dismissed and the interest accrual on the judgment and sentence must be stricken for the victim penalty assessment.

DATED this 28th day of October 2019.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 53202-6-II
)	
MICHAEL WILKINS,)	
)	
Appellant.)	

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<p>[X] MICHAEL WILKINS 1008 JOHNS RD E TACOMA, WA 98445</p>	(X) () ()	U.S. MAIL HAND DELIVERY _____

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