

**FILED**

JUL 17, 2015

Court of Appeals  
Division III  
State of Washington

32667-5-III

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

---

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MCNEARNEY,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

---

**BRIEF OF RESPONDENT**

---

LAWRENCE H. HASKELL  
Prosecuting Attorney

Brian C. O'Brien  
Senior Deputy Prosecuting Attorney

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

**INDEX**

**I. APPELLANT’S ASSIGNMENTS OF ERROR ..... 1**

**II. ISSUES PRESENTED ..... 1**

**III. STATEMENT OF THE CASE ..... 1**

**IV. ARGUMENT ..... 2**

    A. A CRIMINAL DEFENDANT ALLEGING FOR THE FIRST TIME ON APPEAL THAT HIS CONSTITUTIONAL RIGHT TO UNANIMOUS VERDICT WAS VIOLATED MUST DEMONSTRATE THE EXISTENCE OF MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT PURSUANT TO RAP 2.5(A)(3) .....2

    B. THE TRIAL RECORD WAS NOT SUFFICIENTLY DEVELOPED TO ALLOW THE APPELLANT TO RAISE A MANIFEST CONSTITUTIONAL ERROR CLAIM BASED ON THE FAILURE TO GIVE A UNANIMITY INSTRUCTION, WHEREAS HERE, THE EVIDENCE AT TRIAL ESTABLISHES THAT THIS IS A CONTINUING COURSE OF CONDUCT CASE.....9

    C. SINCE DEFENDANT FAILED TO OBJECT TO ANY OF THE CHALLENGED STATEMENTS MADE DURING CLOSING, HE CAN NOT PROVE MISCONDUCT BECAUSE THE CHALLENGED STATEMENTS WERE NOT SO FLAGRANT THEY COULD NOT HAVE BEEN CURED BY AN INSTRUCTION.....13

    D. THE STATE’S ARGUMENT IN REBUTTAL SIMPLY ADDRESSED THE DEFENDANT’S ARGUMENT THAT THE ASSAULT DID NOT OCCUR IF NO ONE OTHER THAN MS. MOCK SAW THE DEFENDANT GRAB HER OR HEARD THE DEFENDANT YELL “I WANT THAT” .....14

**V. CONCLUSION ..... 19**

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<i>State v. Anderson</i> , 153 Wn. App. 417, 220 P.3d 1273 (2009).....	16, 17
<i>State v. Bowen</i> , 51 Wn. App. 42, 751 P.2d 1226 (1988) .....	7
<i>State v. Brown</i> , 132 Wn.2d 529, 940 P.2d 546 (1997) .....	18
<i>State v. Brown</i> , 159 Wn. App. 1, 248 P.3d 518 (2010).....	8, 10
<i>State v. Charlton</i> , 90 Wn.2d 657, 585 P.2d 142 (1978).....	13, 18
<i>State v. Crane</i> , 116 Wn.2d 315, 804 P.2d 10 (1991) .....	11
<i>State v. Fiallo–Lopez</i> , 78 Wn. App. 717, 899 P.2d 1294 (1995).....	10
<i>State v. Fleming</i> , 83 Wn. App. 209, 921 P.2d 1076, (1996).....	16
<i>State v. Graham</i> , 59 Wn. App. 418, 798 P.2d 314 (1990).....	13
<i>State v. Gregory</i> , 158 Wn.2d 759, 147 P.3d 1201 (2006) .....	16
<i>State v. Handran</i> , 113 Wn.2d 11, 775 P.2d 453 (1989).....	10, 11
<i>State v. Hoffman</i> , 116 Wn.2d 51, 804 P.2d 577 (1991) .....	13
<i>State v. Johnson</i> , 158 Wn. App. 677, 243 P.3d 936 (2010).....	16
<i>State v. Marko</i> , 107 Wn. App. 215, 27 P.3d 228 (2001).....	11
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756, (2009).....	5
<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P.2d 173 (1984) .....	6, 11
<i>State v. Reed</i> , 102 Wn.2d 140, 684 P.2d 699 (1984) .....	13
<i>State v. Riley</i> , 121 Wn.2d 22, 846 P.2d 1365 (1993).....	9
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988) .....	5
<i>State v. Strine</i> , 176 Wn.2d 742, 293 P.3d 1177, (2013).....	3, 4

<i>State v. Walker</i> , 164 Wn. App. 724, 265 P.3d 191, 195 (2011).....	16
<i>State v. Wilson</i> , 56 Wn. App. 63, 782 P.2d 224 (1989).....	8

**RULES**

CrR 6.15.....	8
Fed. R. Crim. P.51 .....	3
Fed. R. Crim. P.52 .....	3
RAP 2.5.....	3, 4

**FEDERAL CASES**

<i>United States v. Olano</i> , 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993).....	3
---	---

**OTHER SOURCES**

BENNETT L. GERSHMAN, <i>Trial Error and Misconduct</i> § 6–2(b), at (2d ed. 2007) .....	4
<i>People v. Mota</i> , 115 Cal.App.3d 227, 171 Cal.Rptr. 212 (1981) .....	11

**I. APPELLANT’S ASSIGNMENTS OF ERROR**

1. The trial court erred in failing to give a *Petrich* instruction when the State presented evidence of two separate acts to support a single charge of assault.
2. The State committed flagrant misconduct in its closing argument by trivializing the State’s burden of proof and the jury’s responsibility to assess the evidence.

**II. ISSUES PRESENTED**

1. Did the trial court err in failing to give a *Petrich* instruction when the defendant failed to request one, and when the acts involved the same parties, location, and ultimate purpose?
2. Did the failure to object to alleged prosecutorial misconduct at trial fail to preserve any issue regarding this claim for appeal, where the complained of closing argument is neither so flagrant nor ill-intentioned that it evinces an enduring and resulting prejudice incurable by a curative instruction?

**III. STATEMENT OF THE CASE**

Brittany Mock, a cocktail waitress at the Davenport Hotel, was assaulted on February 26, 2014, while at work. 2RP 99-100. As Ms. Mock was walking with a tray of drinks, she crossed paths with the

defendant who reached under her tray, grabbed her vaginal area, and said: “I want that.” 2RP 99-10; 115 ll. 16-17. After grabbing her, the defendant walked off. 2RP 102. Ms. Mock told the bartender not to serve him anymore. 2RP 102-03. Three to four minutes later, the defendant came back into the lobby area and grabbed Ms. Mock in the stomach area. 2RP 104-05.<sup>1</sup> Police obtained video surveillance from inside the hotel that showed the defendant reaching out and touching Ms. Mock as he walked toward the front doors of the hotel. 2RP 220-21, 224.

The defendant was convicted of fourth degree assault with a special finding that the assault was committed with sexual motivation. CP 53-54. He was also convicted of second degree theft. CP 51.

#### **IV. ARGUMENT**

##### **A. A CRIMINAL DEFENDANT ALLEGING FOR THE FIRST TIME ON APPEAL THAT HIS CONSTITUTIONAL RIGHT TO UNANIMOUS VERDICT WAS VIOLATED MUST DEMONSTRATE THE EXISTENCE OF MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT PURSUANT TO RAP 2.5(A)(3).**

It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal

---

<sup>1</sup> It may have been five or six minutes:  
[Victim Mock]: “Just, you know, 6 minutes, 5 minutes. It was all kind of in the same time frame.” 2RP 105.

a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177, 1180 (2013). This principle is embodied federally in Fed. R. Crim. P.51 and 52,<sup>2</sup> and in Washington under RAP 2.5.

---

<sup>2</sup> **RULE 52. HARMLESS AND PLAIN ERROR**

(a) HARMLESS ERROR. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) PLAIN ERROR. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

In *United States v. Olano*, 507 U.S. 725, 734-35, 113 S. Ct. 1770, 1778, 123 L. Ed. 2d 508 (1993), the Court analyzed the Rule, explaining:

When the defendant has made a timely objection to an error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record—a so-called “harmless error” inquiry—to determine whether the error was prejudicial. Rule 52(b) normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. In most cases, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial. *See, Young, supra*, 470 U.S., at 17, n. 14, 105 S.Ct., at 1047 n. 14 (“[F]ederal courts have consistently interpreted the plain-error doctrine as requiring an appellate court to find that the claimed error ... had [a] prejudicial impact on the jury's deliberations”). This burden shifting is dictated by a subtle but important difference in language between the two parts of Rule 52: While Rule 52(a) precludes error correction only if the error “does *not* affect substantial rights” (emphasis added), Rule 52(b) authorizes no remedy unless the error *does* “affect substantial rights.” *See also*, Note, *Appellate Review in a Criminal Case of Errors Made Below Not Properly Raised and Reserved*, 23 MISS.L.J. 42, 57 (1951) (summarizing existing law) (“The error must be real and such that it probably influenced the verdict ...”).

RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *State v. Strine*, 176 Wn.2d at 749, quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984). This rule supports a basic sense of fairness, perhaps best expressed by this court in *Strine*, where the court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT  
§ 6–2(b), at 472–73 (2d ed. 2007) (footnotes omitted).

*State v. Strine*, 176 Wn. 2d at 749-50.

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not raised at trial unless the claim involves (1) trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. Specifically regarding RAP 2.5(a)(3), our courts have indicated that “the constitutional

error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988), quoting *State v. Valladares*, 31 Wn. App. 63, 76, 639 P.2d 813 (1982), *aff’d in part, rev’d in part*, 99 Wn.2d 663, 664 P.2d 508 (1983).

Here, the defendant alleges that the trial court was required to give a *Petrich*<sup>3</sup> instruction even though one was not requested. The failure to assert or raise this issue prior to the verdict is not reviewable, because there is neither a showing that the alleged error is manifest, nor is the record below sufficient to allow review.

#### Manifest error

To establish that the alleged constitutional error is reviewable, the defendant must establish that the error is “manifest.” Additionally, any error relating to the trial court’s failure to *sua sponte* supply a *Petrich* instruction was not manifest or obvious, as is required by RAP 2.5. *State v. O’Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756, (2009), *as corrected* (Jan. 21, 2010) (footnote omitted).

---

<sup>3</sup> The eponymous case, *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), requires that in cases presenting evidence of several acts which could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specified criminal act. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing *Petrich*, 101 Wn.2d at 570, 683 P.2d 173).

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review. *See Harclon*, 56 Wn.2d at 597, 354 P.2d 928; *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

There is nothing in appellant’s claim of manifest error that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such that a judge trying the case could not have failed to ascertain a *Petrich* violation. This is because no election or unanimity instruction is required in cases like the instant one, where the evidence establishes a “continuing course of conduct.” *State v. Petrich*, 101 Wn.2d 566, 571, 683 P.2d 173 (1984). That this case is a continuing course of conduct case is argued below. However, the fact that the defendant attempts to *preemptively* counter this argument<sup>4</sup> demonstrates that whether the case involves a continuing course of conduct is *debatable* and therefore not manifest – not obvious or flagrant.

---

<sup>4</sup> Appellant’s brief, pp. 8-10.

Moreover, the failure to timely raise the claim is attributable to trial tactics. If the defendant's attorney raises the claim that a unanimity instruction is necessary, he is alleging that the factual circumstances amount to two crimes.<sup>5</sup> If he raises this claim before the close of the State's case, the State could move to add an additional count of fourth degree assault pursuant to CrR 2.1(d)<sup>6</sup>. An additional gross misdemeanor conviction would expose the defendant to an additional year of jail that could run consecutively to any other sentence imposed. *State v. Bowen*, 51 Wn. App. 42, 44, 751 P.2d 1226 (1988) (Sentencing Reform Act does not apply to misdemeanors or year-long sentences on fourth degree assault discretionary with the court).

That is the likely situation here where the instruction conference<sup>7</sup> and objections to instructions occurred *before* the State rested. 2RP 315,

---

<sup>5</sup> This is a two crimes or alternative acts case, where the complaint is the lack of unanimity where there are two acts, each that would support conviction of a criminal offense, as opposed to a means case, where the crime can be committed in different or alternate ways. *See, State v. Crane*, 116 Wn.2d 315, 804 P.2d 10 (1991).

<sup>6</sup> CrR 2.1(d) (formerly CrR 2.1(e)) "permits an amendment 'at any time before verdict or finding if substantial rights of the defendant are not prejudiced.' Amendments are addressed to the sound discretion of the trial court. *State v. Collins*, 45 Wn. App. 541, 551, 726 P.2d 491 (1986), *review denied*, 107 Wn.2d 1028 (1987)." *State v. Wilson*, 56 Wn. App. 63, 65, 782 P.2d 224, 226 (1989).

<sup>7</sup> RP 312 "(Court: "That's the only change I made[to the instructions]")"

lines 1-11; 317 ll. 1-5; 317, l. 25 (State rests). Had the defendant felt compelled to timely complain about the lack of a unanimity instruction, he would have had to do so at the time the jury instructions were discussed. *See*, CrR 6.15(c) (objection to instructions). Because the jury instructions were agreed to before the State rested, a properly objecting defendant could have faced an amendment adding an additional count of fourth degree assault, risking an additional year of custody. *See, State v. Wilson*, 56 Wn. App. 63, 65, 782 P.2d 224, 226 (1989). Interestingly, if that amendment had occurred, he would be raising a double jeopardy claim on appeal, the other side of the *Petrich* gambling coin. *See, eg. State v. Brown*, 159 Wn. App. 1, 9, 248 P.3d 518 (2010):

Brown argues that his “multiple convictions for violating the no [-]contact order on consecutive days in October and December violate the prohibition against double jeopardy, as [his] conduct was continuing.” Br. of Appellant at 23. The State counters that the legislature intended to make each no-contact order violation a chargeable offense, and therefore, under a unit of prosecution analysis, the convictions do not violate double jeopardy. We agree.

The resolution of the issue as to whether the instant case involves a continuing course of conduct, or involves a *Petrich* error, is open to debate, as is whether the belatedly claimed error is a result of trial tactics

and waiver - therefore the error is not obvious or manifest.<sup>8</sup> This court should decline the invitation to address the unpreserved argument that the trial court should have *sua sponte* supplied a *Petrich* instruction in the instant case. The belated debate is a product of trial tactics.

**B. THE TRIAL RECORD WAS NOT SUFFICIENTLY DEVELOPED TO ALLOW THE APPELLANT TO RAISE A MANIFEST CONSTITUTIONAL ERROR CLAIM BASED ON THE FAILURE TO GIVE A UNANIMITY INSTRUCTION, WHEREAS HERE, THE EVIDENCE AT TRIAL ESTABLISHES THAT THIS IS A CONTINUING COURSE OF CONDUCT CASE.**

Because the defendant failed to provide a *Petrich* instruction and failed to raise the issue in the trial court, the record does not clearly or adequately support his present claim. If he had properly raised the issue at the trial level, the court and the parties, perhaps through additional testimony, could have clarified and developed the issue. Instead, the defendant invites this court to determine and ponder whether this is or is not an “election” or “continuing course of conduct” case. This court should decline to consider the allegation of instructional error when the record lacks specificity for review. *See, State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

---

<sup>8</sup> With perfect hindsight, the defendant’s attorney, Mr. Al Rossi, informed the court that he has practiced in the criminal law area for 30 years. RP 391, ll. 17-19. He then mentioned in passing that maybe he should have, or the State should have, submitted a *Petras* (sic) instruction on the assault. *Id.*, ll 20-25.

An election or unanimity instruction is not required in all cases where there are multiple acts, each of which could support the charge. Where the State presents evidence of multiple acts that constitute a “continuing course of conduct,” no election or unanimity instruction is required. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). To determine whether criminal conduct constitutes but one continuing act, the court reviews the facts in a commonsense manner. *State v. Fiallo-Lopez*, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995). In distinguishing between distinct criminal acts and a continuing course of conduct, courts have held that “evidence that the charged conduct occurred at different times and places tends to show that several distinct acts occurred ...,” while “evidence that a defendant engages in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct...” *Brown*, 159 Wn. App at 13-15, quoting *State v. Fiallo-Lopez*, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995).

In *State v. Fiallo-Lopez*, *supra*, the defendant sought a *Petrich* or unanimity instruction on the charge of delivery of cocaine. The evidence showed two discrete acts of delivering cocaine - a sample at a restaurant and baggies of cocaine at Safeway. The court disagreed that an instruction was needed because the two deliveries of cocaine were a continuing

course of conduct. The purchaser of each sale was the same and the purchases were near in time.

In *State v. Marko*, 107 Wn. App. 215, 221, 27 P.3d 228 (2001), the court found that multiple separate threats made over an hour and a half time period constituted a single continuing act of intimidating a witness.

In *Handran*, 113 Wn.2d at 17, the Supreme Court held that the defendant's unwanted kissing of the victim, and his later striking of her in the face, was a continuous single act of assault. The defendant's actions showed a continuing course of conduct intended to secure sexual relations with the victim rather than several distinct acts.

In *State v. Crane*, 116 Wn.2d 315, 330, 804 P.2d 10 *cert. denied*, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991), the Supreme Court held there was no unanimity instruction required where multiple assaults occurred during a two hour period, and the assaults resulted in a child's death.

In *People v. Mota*, 115 Cal.App.3d 227, 171 Cal.Rptr. 212 (1981) (cited with approval in *Petrich*, 101 Wn.2d at 571) the court held that the repeated gang rape of a victim in the back of a van by three men over an hour period was one continuing offense as to each defendant.

Here, defendant McNearny's conduct throughout the incident constitutes one continuing course of conduct. He grabbed the victim and

told her “I want that.” 2RP 99. Only minutes later, to effectuate his stated goal, he grabbed at “that” again. RP 104-105. Victim Mota testified those actions were preceded by the defendant and the girl he was seated with “saying things about taking me upstairs and stuff about my rear-end, things like that.” 2RP 98. Ms. Mota testified that these assaultive actions occurred in the same time frame. 2RP 105.

The assaults were closely related in time, occurred at the same place, and were directed at the same victim as part of a single plan and purpose – as the jury specially found that the assault was committed with sexual motivation. These actions were all part of the same event occurring within minutes at the same establishment. The trial court did not err by not submitting a *Petrich* instruction on unanimity on its own accord. Here, the fact that the defendant engaged in a series of actions intended to secure the same objective - sexual contact - supports the characterization of those actions as a continuing course of conduct. Because the two acts of assault against Ms. Mock were part of a continuing course of conduct, it was unnecessary for the trial court to give a *Petrich* instruction. There was no error here.

**C. SINCE DEFENDANT FAILED TO OBJECT TO ANY OF THE CHALLENGED STATEMENTS MADE DURING CLOSING, HE CAN NOT PROVE MISCONDUCT BECAUSE THE CHALLENGED STATEMENTS WERE NOT SO FLAGRANT THEY COULD NOT HAVE BEEN CURED BY AN INSTRUCTION.**

Standard of Review

When improper argument is alleged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

In determining whether prosecutorial comments have denied the defendant a fair trial, a reviewing court must decide whether the comments are improper and, if so, whether there is a substantial likelihood that the comments affected the verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). “Allegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.” *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990). A failure to object to an improper remark constitutes a waiver unless the comment is flagrant and ill-intentioned, and the resulting prejudice is so enduring that jury admonitions could not neutralize its effect. *State v. Charlton*, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

**D. THE STATE’S ARGUMENT IN REBUTTAL SIMPLY ADDRESSED THE DEFENDANT’S ARGUMENT THAT THE ASSAULT DID NOT OCCUR IF NO ONE OTHER THAN MS. MOCK SAW THE DEFENDANT GRAB HER OR HEARD THE DEFENDANT YELL “I WANT THAT,”**

Defendant mischaracterizes the propriety of the State’s rebuttal closing argument. First, the defendant alleged that if someone other than Ms. Mock did not observe the assault or hear him yell “I want that,” then it likely did not occur; implying if the grabbing was not on the video, then it did not occur. 2RP 353-55.

Defendant’s counsel argued and implied in closing that when the defendant allegedly grabbed the victim, Ms. Mock, and stated: “I want that,” that without corroboration from a witness other than Ms. Mock, it did not occur. 2RP 353, 16-21. Continuing, he argued; “If anyone else saw it, we don’t know about it; and this was investigated. Would there be any reason that somebody saw it and just is not coming forth? I don’t know.” 2RP 354, ll. 4-7. Further, he implied that if no one saw it, it did not occur: “But you also have to wander (sic), then, where that accusation comes from because you don’t see it. You don’t see it on that video.” 2RP 355, ll. 18-20.

The State’s rebuttal argument, complained of on appeal, can be summarized as setting forth, in a principled fashion, the proper statement of law that there is no requirement for percipient observation of a crime

occurring, that circumstantial evidence is properly relied upon,<sup>9</sup> and that reasonable doubt does not require an unreasonable belief in the absurd. The argument deals with “common sense and experience,” and inferential evidence. There is nothing improper in the argument. In fact, the argument complained of is preceded by the prosecutor’s statement that if the example he is about to relate seems like it is making light of the situation, to forgive him, that, “I’m not meaning to make light of the situation, to make this seem any less serious than it is.” 2RP 359 ll. 21-23.

The story related may be considered sophisticated, or sophomoric, deep or shallow – you do not have to see something to believe it - but it cannot be considered improper or prejudicial. Defendant attempts to misclassify this argument as an “every day decision” argument, when the argument lacks any reference to the everyday decision-making examples found to be improper in the cases cited by the defendant.

---

<sup>9</sup> Instruction No. 5 stated:

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other. (RP 29).

Here, there is no argument that in order to acquit you must find that the state's witnesses are lying or mistaken, a was found to be improper in *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076, 1078 (1996).

Defendant relies on *State v. Walker*, 164 Wn. App. 724, 731, 265 P.3d 191, 195 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded*, 175 Wn.2d 1022, 295 P.3d 728 (2012). There, the court found improper the PowerPoint slide show that told the jury it had to articulate a reason before it could find the defendant not guilty. The rebuttal in the instant case simply refuted Defendant's argument that a percipient witness, other than the victim, is necessarily required to establish a crime. The rebuttal argues circumstantial evidence is also acceptable. That is a correct and proper response to the defendant's argument that extra witnesses are needed. The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence. *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006), *overruled on other grounds*, *State v. W.R., JR.*, 181 Wn.2d 757, 336 P.3d 1134 (2014).

This is not the "fill in the blank" arguments found to be improper in *State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010), or *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009). Nor is

there any comparison in the instant case to everyday decision making, such as choosing to have elective surgery, leaving children with a babysitter, and changing lanes on the freeway, found to be error in *Anderson*,<sup>10</sup> where the court held the argument was improper because it subverted the presumption of innocence by implying that the jury had an initial affirmative duty to convict and that the defendant bore the burden of providing a reason for the jury not to convict him. *Anderson*, 153 Wn. App. at 431. *And see, Johnson*, 158 Wn. App. at 684.

The prosecutor's rebuttal in the instant case carries none of the flaws addressed by the above cases. It simply pointed out the same thing that the trial court pointed out in jury instruction no. 5. CP 29. Circumstantial evidence can be as forceful as direct evidence, and an

---

<sup>10</sup> In *State v. Anderson*, 153 Wn. App. at 432, the court stated:

Finally, during closing, the prosecutor discussed common decisions in which one might choose to act or refrain from acting, focusing on the degree of certainty the jurors would have to be *willing* to act, rather than that which would cause them to *hesitate* to act. These comments were also improper because they confused the jury's duty to find Anderson not guilty unless the State proved its case against him beyond a reasonable doubt with the idea that it should convict him unless it found a reason not to. This essentially amounted to an invitation to the jury to render a decision based on a standard less than what is constitutionally required.

*Anderson*, at 432 (underlining added, italics the court's).

additional eye witness is not necessary. And do not believe that Bigfoot ate the brownies when Sally has crumbs on her face. There was no improper argument here.

Additionally, the defendant bears the burden of establishing that there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998). The defendant does not address this requirement; instead he prays for a new trial because the “State’s disregard of prior decisions on this issue should be deemed flagrant and ill-intentioned and McNearney should receive a new trial.” Brief of App. 14.

Finally, there is no discussion of how this allegation of misconduct affected the theft case when the rebuttal argument complained of dealt with the assault charge. The defendant devotes no argument to the requirement that the resulting prejudice be so enduring that jury admonitions could not neutralize its effect. *State v. Charlton*, 90 Wn.2d at 661. His argument is incomplete.

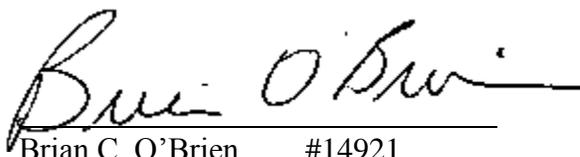
There was no objection because there was no improper argument, never mind one that was flagrant and ill intentioned. There is no showing of resulting prejudice, never mind a prejudice that is so enduring that a jury admonition would not neutralize its effect.

**V. CONCLUSION**

There is no manifest or obvious constitutional error as the assault case involved a continuing course of conduct. There was no improper argument, flagrant, or otherwise. There was no resulting prejudice or prejudice so enduring that a jury admonition could not cure its effect. This court should affirm the lower court.

Dated this 17<sup>th</sup> day of July, 2015.

LAWRENCE H. HASKELL  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian O'Brien", written over a horizontal line.

Brian C. O'Brien #14921  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JAMES MCNEARNEY,

Appellant,

NO. 32667-5-III

CERTIFICATE OF MAILING

---

I certify under penalty of perjury under the laws of the State of Washington, that on July 17, 2015, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart  
Andrea@Burkhart.com

7/17/2015

(Date)

Spokane, WA

(Place)

*Crystal McNees*

(Signature)