

NO. 88437-4

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SUPREME COURT OF THE  
STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

JENNIFER SARAH HOLMES  
JAMES LEROY LINDSAY, SR., APPELLANTS

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Appeal from the Superior Court of Pierce County  
The Honorable Brian M. Tollefson

No. 88437-4

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*(CORRECTED)* RESPONDENT'S SUPPLEMENTAL BRIEF

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**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

    1. Have the defendants failed to show that the prosecutor's conduct warranted reversal where they cannot show prejudice?..... 1

B. STATEMENT OF THE CASE. ..... 1

C. ARGUMENT......5

    1. THE DEFENDANTS HAVE FAILED TO SHOW THAT THE PROSECUTOR'S CONDUCT WAS PREJUDICIAL WHERE THE BEHAVIOR WAS PROVOKED BY THE CONDUCT OF DEFENSE COUNSEL AND THE JURY AQUITTED DEFENDANTS ON SEVERAL COUNTS. ....5

D. CONCLUSION. .....30

## Table of Authorities

### State Cases

<i>In re Glasmann</i> , 175 Wn.2d 696, 286 P.3d 673 (2012) .....	3, 29, 30, 31
<i>State v. Anderson</i> , 153 Wn. App. 417, 430, 220 P.3d 1273 (2009) .....	9, 13, 14, 17, 23
<i>State v. Avendano-Lopez</i> , 79 Wn. App. 706, 712, 904 P.2d 324 (1995), review denied, 129 Wn.2d 1007 (1996) .....	28
<i>State v. Belgarde</i> , 110 Wn.2d 504, 507–10, 755 P.2d 174 (1988).....	30
<i>State v. Binkin</i> , 79 Wn. App. 284, 902 P.2d 673 (1995), rev. denied, 128 Wn.2d 1015 (1996).....	4
<i>State v. Charlton</i> , 90 Wn.2d 657, 664, 585 P.2d 142 (1978).....	30
<i>State v. Coristine</i> , 177 Wn.2d 370, 375, 300 P.3d 400 (2013) .....	14
<i>State v. Curtiss</i> , 161 Wn. App. 673, 701, 250 P.3d 496 (2011).....	14
<i>State v. Emery</i> , 174 Wn.2d 741, 760, 278 P.3d 653 (2012).....	23
<i>State v. Fuller</i> , 169 Wn. App. 797, 825, 282 P.3d 126 (2012) .....	11
<i>State v. Gakin</i> , 24 Wn. App. 681, 686, 603 P.2d 380 (1979) , rev. denied, 93 Wn.2d 1011 (1980).....	15
<i>State v. Gonzales</i> , 111 Wn. App. 276, 283, 45 P.3d 205 (2002).....	19
<i>State v. Gregory</i> , 158 Wn.2d 759, 810, 147 P.3d 1201 (2006) .....	8
<i>State v. Johnson</i> , 158 Wn. App. 677, 682, 243 P.3d 936 (2010) .....	11
<i>State v. Kindsvogel</i> , 149 Wn.2d 477, 481, 69 P.3d 870 (2003) .....	7
<i>State v. Lindsay</i> , 171 Wn. App. 808, 288 P.3d 641 (2012).....	2
<i>State v. Lopez</i> , 142 Wn. App. 341, 354, 174 P.3d 1216 (2007).....	17

<i>State v. Manthie</i> , 39 Wn. App. 815, 820, 696 P.2d 33 (1985).....	8
<i>State v. McKenzie</i> , 157 Wn.2d 44, 52, 134 P.3d 221 (2006).....	4, 19, 23
<i>State v. Monday</i> , 171 Wn.2d 667, 257 P.3d 551 (2011).....	2, 30
<i>State v. Pirtle</i> , 127 Wn.2d 628, 672, 904 P.2d 245 (1995) .....	4
<i>State v. Russell</i> , 125 Wn.2d 24, 87, 882 P.2d 747 (1994).....	8
<i>State v. Sargent</i> , 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985) .....	23
<i>State v. Thomas</i> , 70 Wn. App. 296, 298, 852 P.2d 1130 (1993) .....	26
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 442, 258 P.3d 43 (2011) .....	3, 19, 20
<i>State v. Warren</i> , 165 Wn.2d 17, 29–30, 195 P.3d 940 (2008).....	19, 20
<i>State v. Weber</i> , 159 Wn.2d 252, 270, 149 P.3d 646 (2006), <i>cert. denied</i> , 551 U.S. 1137 (2007) .....	8
<i>State v. Weber</i> , 159 Wn.2d 252, 276–77, 149 P.3d 646 (2006).....	4
<i>State v. Weekly</i> , 41 Wn.2d 727, 252 P.2d 246 (1952).....	8
<b>Constitutional Provisions</b>	
Sixth Amendment.....	14
<b>Federal and Other Jurisdiction</b>	
<i>Beck v. Washington</i> , 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).....	8
<i>Brown v. United States</i> , 356 U.S. 148, 154, 78 S. Ct. 622, 2 L. Ed. 2d 589 (1958).....	8
<i>State v. Mak</i> , 105 Wn.2d 692, 726, 718 P.2d 407, <i>cert. denied</i> , 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986).....	3
<i>Viereck v. United States</i> , 318 U.S. 236, 247-48, 63 S. Ct. 561, 87 L. Ed. 734 (1943).....	25

*Strickler v. Greene*, 527 U.S. 263, 281, 119 S.Ct. 1936, 144 L. Ed. 2d 286  
(1999).....14

A. ISSUES PERTAINING TO SUPREME COURT REVIEW.

1. Have the defendants failed to show that the prosecutor's conduct warranted reversal where they cannot show prejudice?

B. STATEMENT OF THE CASE.

Defendants Jennifer Sarah Holmes (Holmes) and James Leroy Lindsay, Sr. (Lindsay), were each charged with first degree burglary, first degree robbery, first degree kidnapping, and first degree assault and four counts of theft of a firearm. CPH 1-3, 53-58; CPL 1-3, 70-75.

Trial commenced March 19, 2008, before the Honorable Brian Tollefson. RP (1) 1. Holmes made twenty-two motions<sup>1</sup> for mistrial, generally based on alleged prosecutorial misconduct. Lindsay joined in some of Holmes's motions for mistrial and the motion for new trial. RP (35) 2708; RP (44) 3841; RP 51 4306-07, 4361-62. Lindsay's counsel also noted that he was not denigrated by the prosecutor, but was joining in the motion because his defense was tied in with that of Holmes. *See* RP (56PM) 23-24; RP (97) 8970.

The jury found Holmes guilty of first degree burglary, first degree robbery, the lesser-included crime of unlawful imprisonment, the lesser-

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<sup>1</sup> RP (2/24/09) 6, 12; RP (3/6/09) 18, 23; RP (20) 1339, 1345; RP (35) 2705, 2728-29; RP (38) 3023-24, 3029; RP (43) 3574, 3664; RP (44) 3828; RP (45) 3894; RP (47) 4085; RP (51) 4305, 4312, 4325, 4329, 4358, 4371; RP (52) 4560; RP (53) 4569, 4581; RP (56PM) 19, 26; RP (61) 5431, 5464-65; RP (65) 5864, 5865; RP (71) 6329; RP (72) 6329; RP (87) 8075, 8104; RP (93) 8601; RP (94) 8633, 8664; RP (95) 8683-84, 8889, 8895; RP

included crime of second degree assault, and only one count of theft of a firearm. CPH 708, 712, 719, 721, 724-27. The jury found Lindsay guilty of first degree burglary, first degree robbery, the lesser-included crime of second degree kidnapping, the lesser-included crime of second degree assault, and only one count of theft of a firearm. CPL 382-89. The jury found that neither defendant was armed with a firearm during the commission of the crimes. CPH 728-31; CPL 728-31.

On direct appeal, Holmes alleged numerous instances of prosecutorial<sup>2</sup> misconduct. *See State v. Lindsay*, 171 Wn. App. 808, 288 P.3d 641 (2012) (Appendix A). At oral argument, Lindsay joined in Holmes' prosecutorial misconduct argument, despite not having raised the issue in his opening brief. *See State's Response to Joinder* (Appendix B). After oral argument, Lindsay filed a motion for joinder. Appendix B. The Court of Appeals allowed Lindsay to join Holmes' argument over the State's objection. The Court of Appeals also required supplemental briefing on the question of whether *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011), applied here. The Court of Appeals held that the prosecutor engaged in numerous acts of misconduct, but found that the defendants had failed to show prejudice. Appendix A. Though it affirmed

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(96) 8919.

<sup>2</sup> The defendants raised several other issues on direct appeal; however, as this Court has accepted review on the issue of prosecutorial misconduct only, the State does not address

the convictions, the cases were remanded for resentencing. Appendix A.

Lindsay filed a petition for discretionary review with this Court, alleging that prosecutorial misconduct<sup>3</sup> warranted reversal under *In re Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012). Petition for Discretionary Review (Petition Lindsay). Holmes also filed a petition for discretionary review. Petition for Discretionary Review (Petition Holmes). Holmes adopted the arguments made by Lindsay and alleged misconduct during the prosecutor's closing argument. Lindsay did not join Holmes's claims. This Court granted review for both defendants on the issue of prosecutorial misconduct only.

C. ARGUMENT.

1. THE DEFENDANTS HAVE FAILED TO SHOW THAT THE PROSECUTOR'S CONDUCT WAS PREJUDICIAL WHERE THE BEHAVIOR WAS PROVOKED BY THE CONDUCT OF DEFENSE COUNSEL AND THE JURY AQUITTED DEFENDANTS ON SEVERAL COUNTS.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks are both improper and prejudiced the defense. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); *State v. Binkin*, 79 Wn.

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those issues here.

<sup>3</sup> The State has repeatedly objected to Lindsay's raising of any claim of prosecutorial

App. 284, 902 P.2d 673 (1995), *rev. denied*, 128 Wn.2d 1015 (1996). Prejudice is established only if there is a substantial likelihood that the instances of misconduct affected the jury's verdict. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). Instead of examining improper conduct in isolation, a court will determine the effect of a prosecutor's improper conduct by examining that conduct in the full trial context, including the evidence presented, the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

A prosecutor's improper remarks are not grounds for reversal "if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *State v. Weber*, 159 Wn.2d 252, 276–77, 149 P.3d 646 (2006). Under the facts of this case, this Court should find that the conduct by the prosecutor was not misconduct warranting reversal where it was provoked by the behavior of defense counsel. Moreover, none of the challenged statements were prejudicial to the defendants in light of the context of the entire argument, the evidence presented, and the court's instructions to the jury.

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misconduct, as he raised it for the first time at oral argument on direct appeal.

While the issues raised in the petition for discretionary review involve accusations of misconduct during closing argument, here it is necessary to review the trial record as a whole. There can be no doubt that this was a contentious legal battle in which counsel for Holmes and the prosecutor<sup>4</sup> engaged in unprofessional conduct. While the State does not condone the behavior of the prosecutor, when his remarks are taken in context of the surrounding circumstances, it is clear that his unprofessional behavior throughout this trial and in closing argument arose in response to that of counsel for Holmes. By the time the prosecutor started closing argument, he had been goaded by personal attacks and accusations of unethical conduct throughout the entire, eleven-month trial. The trial court made no effort to stop the behavior, leaving the prosecutor to endure the taunts until he finally lost his temper and professional detachment. During the defendants' motion for mistrial held after closing arguments, the prosecutor stated:

Well, Your Honor, I've never been treated so rudely and poorly for a better part of 10 months in my entire career. I think this has been a joke from day one to [counsel for Holmes]. I think she's treated the vast majority of the people in this courtroom with a disrespect like no other attorney I've ever come across. It continued right up until the absolute bitter end here. And to - - it will continue, I imagine, every day that, you know, we go forward. But

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<sup>4</sup> The State does not intend to include counsel for Lindsay in its assessment of the attorneys' conduct. The record indicates that the prosecutor and Lindsay's counsel behaved in a professional manner toward each other throughout the entire trial.

that's the way it is.

RP (95) 8893. The only reasonable conclusion to be drawn is that Holmes was seeking a dismissal based on outrageous governmental conduct and was attempting to goad the prosecutor into such behavior. While it is unfortunate that the prosecutor was unable to ignore counsel's taunts, the record shows that the prosecutor endured repeated accusations of unethical behavior, attempted to move the trial along, and encouraged the court to control counsel's repeated personal attacks without success. *See generally*, RP (24) 1854, (29) 2140-41, (42) 3564-65, (51) 4362-64.

Under the unusual facts of this case, this Court should find that the conduct by the prosecutor was not misconduct warranting reversal where it was provoked by the behavior of defense counsel. Moreover, none of the challenged statements were prejudicial to the defendants in light of the context of the entire argument, the evidence presented, and the court's instructions to the jury.

- a. The unobjected to statements made by the prosecutor were neither flagrant and ill-intentioned, nor was any possible prejudice uncurable by instruction<sup>5</sup>.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the

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<sup>5</sup> A prevailing party need not cross-appeal a ruling if it seeks no further affirmative relief; it may argue any ground to support an order which is supported by the record. *State v.*

prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). Where a criminal defendant testifies in his own defense, "his credibility may be impeached and his testimony assailed like that of any other witness[.]" *Brown v. United States*, 356 U.S. 148, 154, 78 S. Ct. 622, 2 L. Ed. 2d 589 (1958).

A prosecutor is allowed to argue that the evidence doesn't support a defense theory and is entitled to make a fair response to the arguments of the defense. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

When a defendant fails to object at trial to alleged prosecutorial misconduct, he waives any error on appeal unless he can show that the misconduct was so flagrant or ill intentioned that the trial court could not have cured the error by instructing the jury. *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137 (2007).

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*Kindsvogel*, 149 Wn.2d 477, 481, 69 P.3d 870 (2003).

Here, Holmes has raised several allegations of prosecutorial misconduct. Many of the statements she now challenges were not objected to at trial by either defendant: the prosecutor’s argument that parts of Holmes’s testimony were “ridiculous;” “[i]t would be funny if it weren’t so disgusting. I mean it would be comical, this story, if the truth weren’t so horrific;” “[t]his is fun;”; the prosecutor’s use of a puzzle as an analogy of proof beyond a reasonable doubt; the use of everyday decision making; the definition of “verdict” as “to speak the truth;” “[t]his is a crock. What you’ve been pitched for the last four hours is a crock;” “[w]hy the distraction;” “don’t get up here and sit here and lie;” “[d]o they want you to think about the truth;” “Ms. Holmes’ story about what happened afterwards is as silly as her claim that she wasn’t mad because she was just upset[.]”<sup>6</sup> Holmes must show that the statements were so flagrant and ill intentioned that an instruction could not have cured any prejudice.

**i. Holmes’s testimony was  
“ridiculous,” “funny,”  
“disgusting” and “this is fun.”**

In *State v. Anderson*, 153 Wn. App. 417, 430, 220 P.3d 1273 (2009), the prosecutor referred to the defendant’s testimony as “made up

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<sup>6</sup> (RP (95) 8706, 8711, 8886, 8717, 8718, 8727-28, 8728-29, 8730, 8877, 8878, 8881, 8882, 8886, 8887.

on the fly,” “ridiculous,” and “utterly and completely preposterous.” On appeal, the defendant claimed that these statements were serious and prejudicial misconduct. *Id.* at 430. However, when taken in context, these statements were intended to clarify the law and argue inferences from the evidence. *Id.* at 431. Moreover, the jury had been properly instructed by the court that it was the sole judge of credibility and that the lawyers’ remarks, statements, and arguments were intended to help them understand the evidence and apply the law. *Id.* at 431.

The majority of the remarks to which Holmes assigns error are not flagrant or ill-intentioned. When reviewed in context, the prosecutor’s statements that Holmes’s testimony was “silly,” “ridiculous,” or “disgusting,” were intended to clarify the evidence. The prosecutor discussed how Holmes’s testimony that Mr. Wilkey stole belongings that were important to her and her children, her inability to receive help from the police or her insurance company, and the excruciating physical pain she claimed to have had made her assertion that she was never mad at Mr. Wilkey not credible. RP (95) 8708. This was a reasonable inference based on the evidence presented at trial.

The prosecutor’s argument that Holmes’s testimony that her attorney and the Idaho officers advised her to engage in self-help was ridiculous was also an inference based on the evidence when reviewed in

context. The prosecutor argued Holmes's testimony was not credible because police officers would never advise a person to repossess their own property and that an attorney would encourage someone to reacquire their property in the middle of the night. *See* RP (95) 8710-12. This was also reasonable argument based on the evidence presented.

The prosecutor's statement that it would be "funny if it weren't so disgusting" came during a discussion of Holmes's testimony that she did not take anything from Mr. Wilkey that did not already belong to her. *See* RP (95) 8717. The prosecutor noted that mail addressed to Mr. Wilkey was recovered from the house in Idaho, which directly contradicted Holmes's affirmative defense. RP (95) 8717.

The prosecutor's statement, "this is fun," is not a comment on any evidence, but was an aside due to the fact that he could not find the exhibit he was looking for during his argument.

**ii. Puzzle analogy.**

The use of a puzzle as an analogy to proof beyond a reasonable doubt has been disapproved of in some cases and approved in others. Compare *State v. Johnson*, 158 Wn. App. 677, 682, 243 P.3d 936 (2010), with *State v. Fuller*, 169 Wn. App. 797, 825, 282 P.3d 126 (2012). The court considers whether the State's use of a jigsaw puzzle analogy at

closing constituted misconduct on a case-by-case basis, considering the context of the argument as a whole.

Here, the puzzle analogy did not trivialize the State's burden of proof, nor did it quantify the level of certainty necessary to satisfy the beyond a reasonable doubt standard. The prosecutor's use of the puzzle did not tell the jury they could be satisfied with only ten pieces of the puzzle present, nor did he tell the jury they only needed to be 50 percent certain in order to convict. The noted that criminal cases are not as easy as puzzles bought from a store. The analogy correctly explained how the jury has to look how the evidence fits together and, even if some of the pieces are missing, what remains may be sufficient to prove the charges beyond a reasonable doubt.

Moreover, the court instructed the jury on the definition of reasonable doubt and the State's burden of proof. CPH 593-707; CPL 267-381 (Jury Instruction 2). During closing argument, the prosecutor quoted, verbatim, the trial court's instructions to the jury. RP (95) 8725-26. The prosecutor then went on to argue that the case was about the evidence, and whether the State proved the elements of the crimes beyond a reasonable doubt. RP (95) 8726. The use of a puzzle as an analogy for the concept of proof beyond a reasonable doubt was neither flagrant nor

ill-intentioned, did not trivialize the State's burden of proof, and was not an attempt to shift the burden of proof to either defendant.

**iii. Everyday decision-making.**

The prosecutor's discussion of the degree of certainty needed before a person makes every day decisions has been found improper. *See Anderson*, 153 Wn. App. at 431 (choosing to have elective surgery, leaving children with a babysitter, and changing lanes on the freeway trivialized the burden of proof). Division II held that the arguments in *Anderson* were improper because they "trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing" the State's case against the defendant and because they implied, by "focusing on the degree of certainty the jurors would have to have to be willing to act, rather than that which would cause them to hesitate to act," that the jury should convict the defendant unless it found a reason not to do so. *Id.* at 431–432. Yet the *Anderson* court did not reverse the conviction, as the jury had been properly instructed and the defendant had not objected to the argument at trial. *Id.* at 432.

The prosecutor's statements here discussed the degree of certainty a person would need before entering a potentially dangerous situation: before crossing a public street with a moving car present. The prosecutor never claimed that the burden was less than beyond a reasonable doubt or

that the defendants had any part of that burden. *See* RP (95) 8712, 8725.

This argument is not flagrant or ill-intentioned and is not reversible error.

**iv. Declare the truth.**

The prosecutor asked the jury to render verdicts and explained that the word “verdict” is Latin and means “to tell the truth.” RP (95) 8730. The prosecutor then asked the jury to “do what you know is true: Speak the truth.” RP (95) 8730. Several months after the prosecutor in the present case made this argument, Division II held the “declare the truth” argument to be improper. *Anderson*, 153 Wn. App. at 429. Despite the defendant’s objection in *Anderson*, the court did not reverse the conviction, finding that the argument in the context of the court’s instructions to the jury was not prejudicial. *Id.* at 429.

Yet urging the jury to render a just verdict that is supported by evidence is not misconduct. *State v. Curtiss*, 161 Wn. App. 673, 701, 250 P.3d 496 (2011). Courts have stated that a criminal trial’s purpose is a search for truth and justice. *Id.* at 701-02 (*citing Strickler v. Greene*, 527 U.S. 263, 281, 119 S.Ct. 1936, 144 L. Ed. 2d 286 (1999) (stating that an attorney’s interest “in a criminal prosecution is not that it shall win a case, but that justice shall be done”)); *State v. Coristine*, 177 Wn.2d 370, 375, 300 P.3d 400 (2013) (The Sixth Amendment gives the accused the right to present a defense, “in order to further the truth-seeking aim of a criminal

trial.”); *State v. Gakin*, 24 Wn. App. 681, 686, 603 P.2d 380 (1979) (stating that the “search for the truth” is the “ultimate objective of a criminal trial”), *rev. denied*, 93 Wn.2d 1011 (1980). Moreover, the jury instructions inform a jury that if it has “an abiding belief in the *truth* of the charge, you are satisfied beyond a reasonable doubt.” CPH 593-707; CPL 269-381 (Jury Instruction 2 (emphasis added)). Asking the jury to render a verdict that it believes to be true is a correct statement of the law.

**v. Description of the defendants’  
version of the events as a “crock.”**

The prosecutor’s statement in rebuttal closing argument that “This is a crock. What you’ve been pitched for the last four hours is a crock,” is unfortunate, but in the context of the entire argument, is not misconduct, but a response to the arguments of defendants. RP (95) 8877.

In closing, Holmes argued that Mr. Wilkey had concocted a plan with his neighbor to either shoot Holmes if she appeared at his house, or to get her into trouble with the law. RP (95) 8766, 8772, 8795. Holmes also referred to Mr. Wilkey by a litany of derogatory terms including suggestions that he was a pedophile (RP (95) 8758), a “pig,” (RP (95) 8802), an “abusive . . . thug” (RP (95) 8794), he had “raped” Holmes’s

house (RP (95) 8764), and he was a blackmailer (RP (95) 8771). She also made several accusations alluding to ethical violations by the prosecutor<sup>7</sup>.

Lindsay argued Mr. Wilkey was a “gold digger,” who initiated the assault when he entered Mr. Wilkey’s house. *See* RP (95) 8851-52, 8861. Lindsay argued that Mr. Wilkey attacked the defendants with a pipe and Lindsay “did what any person would do,” which was take him down and tie him up only to make sure he could not attack them again. RP (95) 8851-52. Lindsay also suggested that Mr. Wilkey lured the defendants to his house because he “had the perfect plan which was to tell the police I got the crud beat out of me. And then he hatched the rest of his plan, which was to put the black zip ties on him, make it look like he had been in fact assaulted and beaten, the tar beat out of him, and all these other things.” RP (95) 8870. The prosecutor responded:

Let’s see... Lawrence Wilkey is a greedy, bankrupt, gold digger, panty-stealing, porno-watching, lawsuit-happy, sloppy, poor housekeeper who spent tons of money on tobacco and casinos, doesn’t get along with his dad. That’s what we learned, isn’t it?

We also learned - this is where things start to break down pretty quickly - that he’s a bully, abusive, and a thug. Those

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<sup>7</sup> *See* RP (95) 8738 (the prosecutor does not want the jury to examine the evidence), RP (95) 8761 (the prosecutor gave away evidence so the jury could not review it), RP (95) 8764 (the prosecutor withheld evidence), RP (95) 8773 (prosecutor would prefer that affirmative defense did not exist), RP (95) 8823 (implied that the prosecutor altered evidence or tailored testimony), RP (95) 8829 (the prosecutor needs to see “Miss Manners” after he made an objection), RP (95) 8836 (prosecutors use the puzzle analogy to be deceptive), RP (95) 8828-29 (lesser-included offenses are the State’s way of “hanging the meat low” so that the jury will convict without considering the evidence).

were the three words I've heard in the last few hours. Does that make sense? The bully, abusive thug said, Oh, Jen, you're here for your property, and our eighth grade dropout had this plan. I know, I'm going to let them in and then I'm going to try to take on the bigger, stronger, younger guy, and then I'm going to call my friend, Richard Vazquez, then he's going to tie me up because the guy who did tie me up really didn't tie me up, even though he admits he tied me up, but he didn't assault me when he tied me up because he was stopping an assault. Is that what we just heard?

You're not -- let's cut to the chase. If you go into somebody's house and they try to assault you, what do you do? Leave. You aren't welcome anymore. You were never welcome if it's the first thing he does to you. This isn't brain surgery. This is a crock. What you've been pitched for the last four hours is a crock. Why? Because so much of it, frankly, just wasn't true. Was there any sense of reality here?

RP (95) 8876-77. Although the prosecutor's language could have been more professional, he was responding directly to the arguments set forth by the defendants by pointing out that they do not fit the evidence or even common sense. The unfortunate phrasing of the argument, while improper, does not warrant reversal because, as in *Anderson*, an instruction could have cured any potential prejudice.

**vi. Do not lie.**

It is not improper for a prosecutor to draw inferences that a witness is not being truthful because of inconsistencies in his or her testimony.

*State v. Lopez*, 142 Wn. App. 341, 354, 174 P.3d 1216 (2007).

Here, the prosecutor's rebuttal argument stating that Holmes

should not “get up here and sit here and lie,” was a response to Holmes’s closing argument and a continuation of his earlier argument that Holmes needed to “own” her conduct. During direct closing, the prosecutor noted that when evidence was introduced that Holmes was dating both Lindsay and Mr. Wilkey at the same time, rather than admit that she had human faults, she changed her story to avoid any negative perception of her behavior. *See* RP (95) 8714-15. The prosecutor noted that dating two men at once was not criminal, but that her inability to admit to anything that might portray her in a negative light called into question her credibility. RP (95) 8714-15. On rebuttal, the prosecutor addressed Holmes’s insistence that she provided all the money used for the household and supported Mr. Wilkey financially for the entirety of their relationship as a continuation of her inability to admit anything that portrayed her in a bad light. The prosecutor’s argument was that admitting that Mr. Wilkey had paid some of the bills would not have harmed her theory of the case, but her inability to admit she had needed such help called into question her credibility. RP (95) 8882-83. This was a reasonable argument based on the evidence presented at trial. Even if the comments had been improper, Holmes did not object and has not shown that a curative instruction would not have effectively remedied any resulting prejudice.

**viii. Do the defendants want the jury to think about the truth?**

A prosecutor should not make arguments that disparage or impugn the role of defense counsel. *Thorgerson*, 172 Wn.2d at 451; *State v. Warren*, 165 Wn.2d 17, 29–30, 195 P.3d 940 (2008). Similarly, it is improper for a prosecutor to “draw the cloak of righteousness around the prosecutor in his personal status as government attorney.” *State v. Gonzales*, 111 Wn. App. 276, 283, 45 P.3d 205 (2002). However, in the absence of a timely objection, such remarks do not warrant reversal of a criminal conviction unless the resulting prejudice could not have been neutralized by a curative instruction. *McKenzie*, 157 Wn.2d at 52.

In *Thorgerson*, the Court held that a prosecutor’s description of the defendant’s case was “bogus” and “sleight of hand.” *Thorgerson*, 172 Wn.2d at 451–52. The Court found the remarks to be improper as they impugned the defense counsel’s integrity. *Id.* at 451. Moreover, the Court found the prosecutor’s “sleight of hand” statement ill-intentioned misconduct as it had been planned in advance. *Id.* at 452. Nonetheless, the Court held that *Thorgerson* failed to prove that the misconduct had a substantial likelihood of altering the jury’s verdict and affirmed his conviction. *Id.* at 452.

In *Warren*, this Court determined that it was improper for the

prosecutor to have stated during closing argument that defense counsel's tactics were "an example of what people go through in a criminal justice system when they deal with defense attorneys," and that counsel's argument consisted of "taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing." 165 Wn.2d at 29. As in *Thorgerson*, the defendant did not object to these comments at the time that they were made. *Id.* at 30. Accordingly, the court again determined that, because these remarks were not so flagrant and ill-intentioned that they could not have been cured by an instruction from the trial court, reversal of the defendant's conviction was unwarranted. *Id.* at 30.

Here, as in *Thorgerson* and *Warren*, the prosecutor's remarks were not so flagrant and ill-intentioned that a curative instruction would not have sufficed to dispel any resulting prejudice. The prosecutor's description of defense counsels' tactics as "distraction," and "do [the defendants] want you to think about the truth" is similar to the prosecutor's characterization of defense counsel's argument as "sleight of hand" in *Thorgerson*. RP (95) 8881, 8886. Had the defendants objected, the trial court could have instructed the jury to disregard the prosecutor's remarks and explained the important role of defense counsel within the adversarial system. Such an instruction would have been sufficient to

overcome any prejudice resulting from the prosecutor's remarks. Because the prosecutor's conduct was not so flagrant and ill-intentioned that any resulting prejudice could not have been neutralized by a curative instruction, reversal is unwarranted.

- b. Holmes's argument that the trial court's ruling regarding objections during closing argument chilled her ability to object is not supported by the record.

Holmes claims that the Court of Appeals held that she failed to preserve issues relating to prosecutorial misconduct because she did not object below. According to Holmes, she did not object because the trial court's ruling was similar to a "blanket overruling of all objections." *See* Petition of Holmes at 7. The record does not support Holmes's argument.

Prior to closing arguments, the trial court indicated that it had standard rulings as to objections during closing argument. *See* RP (95) 8675-76. The court stated that objections to issues of fact would receive an instruction that issues of fact were always to be decided by the jury, objections to issues of law would be ruled upon by the court at the time they were made, and objections based on attorney conduct would be considered at the end of the argument when the court would entertain them as motions for mistrial, as mistrial was the only remedy. RP (95) 8675-76. The prosecutor recommended that the parties agree upon a mistrial

objection that did not use the term “misconduct,” as to avoid the unprofessional behavior which had plagued the trial. RP (95) 8677. Lindsay found this appropriate, Holmes did not. RP (95) 8677.

During the State’s initial closing argument, Holmes objected eighteen<sup>8</sup> times. Each time, the court informed the jury that it was to decide matters of facts, or overruled the objections that it believed were without merit. During the State’s rebuttal, Holmes objected nine<sup>9</sup> times, including joining in Lindsay’s sole objection. Clearly, Holmes had no trouble objecting when she felt an objection was warranted.

Moreover, the Court of Appeals did not hold Holmes to the standard of showing flagrant and ill-intentioned misconduct. Rather, the court noted that Holmes had objected to most of the behavior which she claimed was misconduct on appeal and examined *every* instance of claimed misconduct for the effect it had on the jury’s verdict. *See* Appendix A. Because the Court of Appeals considered all of the claims of misconduct as if she had objected at trial, Holmes’ claim that the Court of Appeals erred in ruling that she did not preserve the issue is without merit.

- c. The challenged statements to which defendants objected did not have a prejudicial effect on the verdict.

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<sup>8</sup> RP (95) 8687, 8693, 8695, 8705, 8707, 8708, 8709, 8711, 8712, 8713, 8718, 8721, 8722, 8724.

<sup>9</sup> RP (95) 8877, 8878, 8879, 8880, 8881, 8883, 8884, 8885, 8888.

If a defendant establishes that the State made improper statements and preserved the issue by objecting at trial, the court will evaluate whether there was a substantial likelihood that the improper comments prejudiced the defendant by affecting the jury. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *Anderson*, 153 Wn. App. at 427.

Holmes preserved the issue of her remaining challenges in this petition for discretionary review by objecting below.

**i. Favorite part.**

A prosecutor's statement that clearly expresses his personal opinion as to the defendant's guilt constitutes misconduct. *McKenzie*, 157 Wn.2d at 53. But prejudicial error does not occur unless it is unmistakable that counsel is not arguing an inference from the evidence but is instead expressing *only* a personal opinion. *State v. Sargent*, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985) (emphasis added).

Here, while discussing Holmes's testimony and her credibility, the prosecutor stated, "This may be part of my favorite though, I wasn't mad at him - -." RP (95) 8707. After Holmes's objection was overruled by the court, the prosecutor went on, "Why is it my personal favorite? Come on. It may be the most ridiculous thing I've ever heard. Probably the most ridiculous thing you've ever heard." RP (95) 8708. The prosecutor continued to argue that Holmes's testimony that she was not mad at Mr.

Wilkey for stealing her property and putting her through substantial hardship and physical pain was not credible. RP (95) 8708-09.

The prosecutor's statement of Holmes's testimony being his "favorite part" appears to be a personal expression regarding Holmes's credibility. However, it is clear from the context of the argument that he was arguing an inference from the evidence and was not expressing only a personal belief. As such, the statements were not prejudicial.

**ii. Disgusting and comical.**

During closing, the prosecutor argued that the defendants' theory that they had a good faith claim of title to the property they took from Mr. Wilkey was not reasonable. RP (95) 8720-22. The prosecutor argued that by taking Mr. Wilkey's Verizon bill, which was delivered to his address in Pierce County, by force, amounted to robbery and negated their defense of good faith claim of title. RP (95) 8721-22. The prosecutor concluded, "Like I said, but for it being as disgusting as it is, it would be comical." RP (95) 8722. This argument explained how something as small as a piece of paper could constitute a serious crime and the acts the defendants committed against Mr. Wilkey to take that piece of paper were extreme. As this was a reasonable inference based on the evidence presented at trial, it was neither improper argument nor prejudicial.

**iii. Thrilled the jury will be deciding issues of fact and counsel talking.**

Comments that demean the role of defense counsel impugn the integrity of the adversary system and are inconsistent with the prosecutor's obligation to ensure a verdict is free from prejudice and based on reason rather than passion. *Viereck v. United States*, 318 U.S. 236, 247-48, 63 S. Ct. 561, 87 L. Ed. 734 (1943).

Here, neither statement to which Holmes objected and now claims error denigrated or demeaned the role of defense counsel. In the first instance, the prosecutor was arguing inconsistencies between Holmes's testimony and her closing argument. RP (95) 8877. Holmes objected stating, "counsel once again is misstating the evidence." RP (95) 8877-78. The court instructed the jury that it was to decide all issues of fact. RP (95) 8878. The prosecutor continued his argument, stating, "I am thrilled you're going to be deciding the issues of fact, because the recitation we've gotten all day wasn't anything close to what we heard." RP (95) 8878. This was not a denigration of defense counsel but an argument that the defendants' theory of the case was not supported by the evidence.

The second instance occurred when the prosecutor's voice had become too quiet for the defendants and the court reporter to hear. Holmes objected and the court reporter also indicated that she had not

heard the prosecutor's last statement. RP (95) 8886. The prosecutor stated, "[m]aybe if counsel and her client could just be quiet for a few minutes they might be able to hear something[.]" RP (95) 8887.

Lindsay's counsel then indicated that he also could not hear, even though he had not been talking to his client. RP (95) 8887. The prosecutor's statement was not a denigration of counsel. Clearly he believed everyone could hear him, and it was a conversation between counsel and her client which caused them to miss his remarks. While Holmes's counsel stated that she was not talking to her client, the remark made by Lindsay's counsel suggests she was.

d. Inaudible speech was not misconduct.

A criminal defendant is constitutionally entitled to a "record of sufficient completeness" to permit effective appellate review of his or her claims. *State v. Thomas*, 70 Wn. App. 296, 298, 852 P.2d 1130 (1993).

Here, the prosecutor's voice dropped during rebuttal closing argument three times. *See* RP (95) 8884, 8886, 8888. In the first two cases, the court asked the prosecutor to repeat himself. RP (95) 8884, 8886. In the third, the court reporter asked for clarification. RP (95) 8888. During the defendants' motion for mistrial, the trial court stated that it was satisfied that the prosecutor had repeated himself. RP (95) 8993. The record supports the trial court's determination.

In the first instance, the prosecutor stated, “Ten months. Do they get . . . (sotto voce). RP (95) 8884. When it was brought to his attention that he could not be heard, the prosecutor said, “Do these two get away with it? It’s a simple question.” RP (95) 8885. In the second, the prosecutor stated, “I mean, the Jennifer Homes story is arguably - well it’s silly . . . (sotto voce).” RP (95) 8886. After an exchange between the parties, the prosecutor said, “What I was saying was . . . Ms. Holmes[’s] story about what happened afterward is as silly as her claim that she wasn’t mad.” RP (95) 8886. In the third, the prosecutor stated, “Ask yourself who wants to find the truth and . . . (sotto voce).” When asked for clarification by the court reported, the prosecutor said, “Who wants to find the truth. Ask yourself what the truth is. Convict them.” RP (95) 8888.

During the defendant’s motion for mistrial, the prosecutor admitted that his voice dropped for a few seconds, but noted that it was a common irregularity in trial that sometimes people are too quiet to be heard and it did not warrant a new trial. RP (95) 8985. The trial court ruled that “I did tell Mr. Sheeran to speak up and he did speak up, and I thought he repeated everything that he said in a voice that everybody could hear, and I think that’s what he said on the record.” RP (95) 8993. The record bears out the trial court’s rulings as, in each instance, the secondary statement repeats the beginning of the inaudible statement.

The inaudible portions of the prosecutor's argument were not "private communication, . . . with a juror" when they occurred in an open courtroom in front of the court, the opposing parties, and any spectators. Appendix A (Armstrong, J. dissenting). Rather, the prosecutor's voice briefly dropped and he repeated his statements to the court's satisfaction. The incident did not preclude review on the question of prosecutorial misconduct as the record was sufficient to allow review.

- e. The verdicts returned by the jury show that it held the State to its burden of proof beyond a reasonable doubt.

In instances of prosecutorial misconduct, reversal is required only if there is a substantial likelihood that the misconduct affected the jury's verdict. *State v. Avendano-Lopez*, 79 Wn. App. 706, 712, 904 P.2d 324 (1995), *review denied*, 129 Wn.2d 1007 (1996). Here, the prosecutor's conduct did not influence the jury's verdicts.

Both defendants were charged with multiple crimes, but the jury returned verdicts on lesser-included crimes and acquittals on several counts. CPH 708, 712, 719, 721; CPL 382-389. The jury found that the State did not prove beyond a reasonable doubt that the defendants committed three of the four allegations of theft of a firearm or that either defendant was armed with a firearm during the commission of any crime. CPH 724-31; CPL 728-31. The verdicts show that the jury carefully

considered the evidence admitted, the law as provided by the judge, and ultimately determined whether the prosecution proved the defendants' guilt beyond a reasonable doubt as to each count separately. This jury, despite having been empanelled for eleven months<sup>10</sup> in an unpleasant and contentious trial, held the State to its burden of proof of guilt beyond a reasonable doubt for each allegation against each defendant.

f. *Glasmann* does not require a different result.

While the State concedes that some of the prosecutor's conduct was inappropriate, the defendants have utterly failed to show prejudice, even under the stringent test as articulated in *Glasmann*, 175 Wn.2d at 696. "The focus [on determining prejudice] must be on the misconduct and its impact, not on the evidence that was properly admitted." *Id.* at 711. Here, the impact of the prejudice was non-existent, as evidenced by the jury's verdicts. Had the jury been so swayed by the prosecutor's conduct, it would not have acquitted the defendants on any of the charges. As the trial resulted in acquittal on several counts, it is difficult to comprehend how the verdicts were affected by the prosecutor's conduct.

In *Glasmann*, this Court reversed a defendant's conviction based on prosecutorial misconduct, despite the fact that the defendant had

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<sup>10</sup> The jury was chosen June 6, 2008, and began deliberations May 4, 2009. RP (15) 825, (95) 8908.

conceded committing several of the crimes against him. 175 Wn.2d 696. The prosecutor had made repeated assertions of the defendant's guilt, used modified exhibits, and stated that jurors could acquit Glasmann only if they believed him. *Id.* at 710. The Court held that the question of whether reversal is required was not a matter of whether there was sufficient evidence to justify upholding the verdicts, but whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. *Id.* at 711. The Court then listed several cases in which the instances of prosecutorial misconduct were particularly egregious, such as *Monday*, 171 Wn.2d at 678–80 (racist arguments by prosecutor); *State v. Belgarde*, 110 Wn.2d 504, 507–10, 755 P.2d 174 (1988) (inflammatory remarks associating defendant with an organization the prosecutor described as “deadly group of madmen”); and *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978) (prosecutor commented on the defendant's spouse's failure to testify, despite the marital privilege, with the inference being that the defendant was concealing or withholding testimony). *Glasmann*, 175 Wn.2d at 711. The Court held that this “type of pronounced and persistent misconduct that cumulatively causes prejudice demand[s] that a defendant be granted a new trial” irrespective of the evidence admitted at trial. *Id.* at 710.

Here, the Court of Appeals did not weigh the evidence to determine if it was sufficient to support a conviction. Rather, the court noted that Lindsay had confessed to using zip ties to restrain Mr. Wilkey and, in light of that confession, the prosecutor's statements could have had little impact on the jury's verdict. Appendix A. Moreover, the majority found *Glasmann* factually distinguishable because the prosecutor did not introduce altered exhibits, nor did he repeatedly assert his personal belief that the defendants were guilty. Appendix A. The prosecutor's behavior was not the type of pronounced and persistent misconduct that cumulatively causes prejudice demanding that a defendant be granted a new trial. The court applied the proper standard of review for prosecutorial misconduct, which was whether the misconduct had a substantial likelihood of affecting the jury's verdict.

D. CONCLUSION.

The State respectfully requests this Court affirm the defendants' convictions.

DATED: September 5, 2013.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
KIMBERLEY DEMARCO  
Deputy Prosecuting Attorney  
WSB # 39218

Certificate of Service:

The undersigned certifies that on this day she delivered by <sup>file</sup> U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9/13/07  
Date Signature

# **APPENDIX “A”**

*State v. Lindsey*

▷

Court of Appeals of Washington,  
Division 2.

STATE of Washington, Respondent,  
v.

James Leroy LINDSAY, Sr., Appellant.  
State of Washington, Respondent,  
v.

Jennifer Sarah Holmes, Appellant.

Nos. 39103-1-II, 40153-3-II, 39113-9-II.  
Nov. 7, 2012.

As Amended Feb. 8, 2013.

**Background:** First defendant was convicted in a jury trial in the Superior Court, Pierce County, Brian Maynard Tollefson, J., of first-degree burglary, first-degree robbery, unlawful imprisonment, second-degree assault, and theft of a firearm. Second defendant was convicted in a jury trial in the Superior Court, Pierce County, Brian Maynard Tollefson, J., of first-degree burglary, first-degree robbery, second-degree kidnapping, second-degree assault, and theft of a firearm. Both defendants appealed.

**Holdings:** The Court of Appeals, Johanson, A.C.J., held that:

- (1) prosecutor's continued denigration of defense counsel constituted prosecutorial misconduct;
- (2) comparison of beyond a reasonable doubt to everyday decision making constituted prosecutorial misconduct;
- (3) characterizations of defendant's testimony constituted prosecutorial misconduct;
- (4) statement concerning cross-examination of State's witness did not constitute impermissible statement about witness's credibility;
- (5) prosecutor whispering to jury did not constitute prosecutorial misconduct;
- (6) prosecutorial misconduct did not prejudice defendants;
- (7) kidnapping and robbery convictions violated

double jeopardy; and  
(8) assault and robbery convictions violated double jeopardy.

Affirmed and remanded for resentencing.

Armstrong, J., filed dissenting opinion.

West Headnotes

[1] **Criminal Law 110** ↪ **1163(2)**

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1163 Presumption as to Effect of Error

110k1163(2) k. Conduct of trial in general. Most Cited Cases

**Criminal Law 110** ↪ **1171.1(1)**

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1171 Arguments and Conduct of Counsel

110k1171.1 In General

110k1171.1(1) k. Conduct of counsel in general. Most Cited Cases

When asserting a claim of prosecutorial misconduct, the defendant bears the burden of showing that: (1) the State committed misconduct and (2) the misconduct had prejudicial effect.

[2] **Criminal Law 110** ↪ **1037.1(1)**

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1037 Arguments and Conduct of Counsel

## 110k1037.1 In General

110k1037.1(1) k. Arguments and conduct in general. Most Cited Cases

**Criminal Law 110**  **1171.1(2.1)**

## 110 Criminal Law

## 110XXIV Review

## 110XXIV(Q) Harmless and Reversible Error

110k1171 Arguments and Conduct of Counsel

## 110k1171.1 In General

110k1171.1(2) Statements as to Facts, Comments, and Arguments

## 110k1171.1(2.1) k. In general.

## Most Cited Cases

When asserting a claim of prosecutorial misconduct, if a defendant establishes that the State made improper statements, then the Court of Appeals reviews whether those improper statements prejudiced the defendant under one of two different standards of review; if the defendant preserved the issue by objecting at trial, the Court evaluates whether there was a substantial likelihood that the improper comments prejudiced the defendant by affecting the jury, but if the defendant failed to object to the improper argument at trial, defendant must show that the State's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice.

**[3] Criminal Law 110**  **1037.1(1)**

## 110 Criminal Law

## 110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

## 110XXIV(E)1 In General

110k1037 Arguments and Conduct of Counsel

## 110k1037.1 In General

110k1037.1(1) k. Arguments and conduct in general. Most Cited Cases

When a defendant asserts a claim of prosecutorial misconduct based on unobjected-to conduct, the defendant must show that: (1) no curative in-

struction would have obviated any prejudicial effect on the jury, and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict.

**[4] Criminal Law 110**  **1037.1(1)**

## 110 Criminal Law

## 110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

## 110XXIV(E)1 In General

110k1037 Arguments and Conduct of Counsel

## 110k1037.1 In General

110k1037.1(1) k. Arguments and conduct in general. Most Cited Cases

The Court of Appeals judges unobjected-to prosecutorial misconduct by the effect likely to flow from it and focus more on whether an instruction could have cured the State's misconduct.

**[5] Criminal Law 110**  **1037.1(1)**

## 110 Criminal Law

## 110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

## 110XXIV(E)1 In General

110k1037 Arguments and Conduct of Counsel

## 110k1037.1 In General

110k1037.1(1) k. Arguments and conduct in general. Most Cited Cases

When a claim of prosecutorial misconduct is based on unobjected-to conduct, the Court of Appeals inquires whether the misconduct has engendered a feeling of prejudice that would prevent a defendant's fair trial.

**[6] Criminal Law 110**  **1980**

## 110 Criminal Law

## 110XXXI Counsel

110XXXI(D) Duties and Obligations of Prosecuting Attorneys

110XXXI(D)1 In General  
110k1980 k. In general. Most Cited  
Cases

**District and Prosecuting Attorneys 131 ↪7(1)**

131 District and Prosecuting Attorneys  
131k7 Representation of State or County in  
General  
131k7(1) k. In general. Most Cited Cases

As a state agent, the prosecuting attorney represents the people and presumptively acts with impartiality in the interest of justice.

**[7] District and Prosecuting Attorneys 131 ↪8(3)**

131 District and Prosecuting Attorneys  
131k8 Powers and Proceedings in General  
131k8(3) k. Duties. Most Cited Cases  
Prosecutors are quasi-judicial officers tasked with prosecuting those who violate the peace and dignity of the state and tasked with searching for justice.

**[8] Criminal Law 110 ↪2153**

110 Criminal Law  
110XXXI Counsel  
110XXXI(F) Arguments and Statements by  
Counsel  
110k2145 Appeals to Sympathy or Prejudice  
110k2153 k. Attacks on opposing  
counsel. Most Cited Cases

Prosecutor's denigration of defense counsel numerous times in front of the jury constituted prosecutorial misconduct in robbery and assault prosecution; prosecutor and defense counsel displayed mutual animosity and frequently argued over legal objections, for example, referring to defense counsel, prosecutor said, "she doesn't care if the objection is sustained or not," "we're going to have like a sixth grader argument," and "we're into silly," another time, defense counsel was in middle of objection and prosecutor interrupted her saying, "yeah, we all

know that," another time, prosecutor responded objection by stating, "maybe if counsel and her client could just be quiet for a few minutes they might be able to hear something," at one point, prosecutor became visibly upset and counsel said prosecutor was having "a tantrum," prosecutor replied, "and counsel walked right into this after freaking six weeks" and said directly to counsel, "tantrum, because you."

**[9] Criminal Law 110 ↪2094**

110 Criminal Law  
110XXXI Counsel  
110XXXI(F) Arguments and Statements by  
Counsel  
110k2093 Comments on Evidence or Witnesses  
110k2094 k. In general. Most Cited  
Cases

**Criminal Law 110 ↪2153**

110 Criminal Law  
110XXXI Counsel  
110XXXI(F) Arguments and Statements by  
Counsel  
110k2145 Appeals to Sympathy or Prejudice  
110k2153 k. Attacks on opposing  
counsel. Most Cited Cases

Although a prosecutor may comment on the evidence before the jury, a prosecutor's comments demeaning defense counsel's integrity are improper.

**[10] Criminal Law 110 ↪2153**

110 Criminal Law  
110XXXI Counsel  
110XXXI(F) Arguments and Statements by  
Counsel  
110k2145 Appeals to Sympathy or Prejudice  
110k2153 k. Attacks on opposing  
counsel. Most Cited Cases  
Prosecutorial expressions, maligning defense

counsel, severely damage an accused's opportunity to present his case before the jury.

**[11] Constitutional Law 92 ↪4629**

92 Constitutional Law  
92XXVII Due Process  
92XXVII(H) Criminal Law  
92XXVII(H)4 Proceedings and Trial  
92k4627 Conduct and Comments of Counsel; Argument  
92k4629 k. Prosecutor. Most Cited Cases

**Criminal Law 110 ↪2153**

110 Criminal Law  
110XXXI Counsel  
110XXXI(F) Arguments and Statements by Counsel  
110k2145 Appeals to Sympathy or Prejudice  
110k2153 k. Attacks on opposing counsel. Most Cited Cases  
Prosecutorial expressions maligning defense counsel constitute an impermissible strike at the very fundamental due process protections that the Fourteenth Amendment has made applicable to ensure an inherent fairness in our adversarial system of criminal justice. U.S.C.A. Const.Amend. 14.

**[12] Criminal Law 110 ↪2085**

110 Criminal Law  
110XXXI Counsel  
110XXXI(F) Arguments and Statements by Counsel  
110k2084 Statements Regarding Applicable Law  
110k2085 k. In general. Most Cited Cases  
When a prosecutor compares the reasonable doubt standard to everyday decision making, it improperly minimizes and trivializes the gravity of the standard and the jury's role.

**[13] Criminal Law 110 ↪2086**

110 Criminal Law  
110XXXI Counsel  
110XXXI(F) Arguments and Statements by Counsel  
110k2084 Statements Regarding Applicable Law  
110k2086 k. In particular prosecutions. Most Cited Cases

Prosecutor's comparison of reasonable doubt standard to everyday decision making improperly minimized and trivialized the gravity of the standard and the jury's role, and therefore constituted prosecutorial misconduct in robbery and assault prosecution, where prosecutor used a puzzle analogy to describe the experience of a person who began a puzzle not knowing what picture it would make but eventually knew beyond a reasonable doubt that the picture was of Seattle, prosecutor compared beyond a reasonable doubt to confidence a person felt walking with the "walk sign" at a crosswalk at a busy street without being run over by a car, prosecutor told jury that although it was possible that the car would not stop, it was not reasonable, prosecutor told jury that reasonable doubt was not an impossible standard but a standard they probably used pretty much every day.

**[14] Criminal Law 110 ↪2101**

110 Criminal Law  
110XXXI Counsel  
110XXXI(F) Arguments and Statements by Counsel  
110k2099 Comments Shifting or Misstating Burden of Proof  
110k2101 k. In particular prosecutions. Most Cited Cases

**Criminal Law 110 ↪2157**

110 Criminal Law  
110XXXI Counsel  
110XXXI(F) Arguments and Statements by Counsel  
110k2157 k. Comments to jurors as to duties and obligations. Most Cited Cases

Prosecutor's statement to jury that it needed to find the truth misstated the burden of proof, and therefore constituted prosecutorial misconduct in robbery and assault prosecution, where prosecutor asked jury, "to do what you swore to do, render verdicts," prosecutor stated that "verdict" was a Latin word meaning, "to speak the truth" and "voir dire" was French for "speak the truth," prosecutor explained that they started trial with "voir dire," and now the jury would end the trial with "verdictum" or verdict, prosecutor urged jury, "to do what you know is true, speak the truth," finally, prosecutor instructed the jury to "find the truth" and to "speak the truth."

**[15] Criminal Law 110 ↪731**

110 Criminal Law  
110XX Trial  
110XX(F) Province of Court and Jury in General  
110k731 k. Functions as judges of law and facts in general. Most Cited Cases  
The jury's duty is to determine whether the State has met its burden, not to solve a case.

**[16] Criminal Law 110 ↪2098(2)**

110 Criminal Law  
110XXXI Counsel  
110XXXI(F) Arguments and Statements by Counsel  
110k2093 Comments on Evidence or Witnesses  
110k2098 Credibility and Character of Witnesses; Bolstering  
110k2098(2) k. Credibility of accused. Most Cited Cases  
Prosecutor's statement to jury telling them that defendant needed to "own" her behavior was based on reasonable inferences from the evidence, and therefore did not constitute prosecutorial misconduct in robbery and assault prosecution, where the prosecutor argued that because defendant had been not forthright in her testimony about the timing of her relationship with codefendant, the jury should

question her general credibility.

**[17] Criminal Law 110 ↪2098(1)**

110 Criminal Law  
110XXXI Counsel  
110XXXI(F) Arguments and Statements by Counsel  
110k2093 Comments on Evidence or Witnesses  
110k2098 Credibility and Character of Witnesses; Bolstering  
110k2098(1) k. In general. Most Cited Cases

**Criminal Law 110 ↪2139**

110 Criminal Law  
110XXXI Counsel  
110XXXI(F) Arguments and Statements by Counsel  
110k2139 k. Expression of opinion as to guilt of accused. Most Cited Cases  
The State may not assert its personal opinion as to the defendant's guilt or a witness's credibility.

**[18] Criminal Law 110 ↪2098(1)**

110 Criminal Law  
110XXXI Counsel  
110XXXI(F) Arguments and Statements by Counsel  
110k2093 Comments on Evidence or Witnesses  
110k2098 Credibility and Character of Witnesses; Bolstering  
110k2098(1) k. In general. Most Cited Cases

**Criminal Law 110 ↪2103**

110 Criminal Law  
110XXXI Counsel  
110XXXI(F) Arguments and Statements by Counsel  
110k2102 Inferences from and Effect of Evidence

110k2103 k. In general. Most Cited Cases

A prosecutor enjoys wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence.

**[19] Criminal Law 110 ⚡2091**

110 Criminal Law  
110XXXI Counsel  
110XXXI(F) Arguments and Statements by Counsel

110k2088 Matters Not Sustained by Evidence

110k2091 k. Personal knowledge, opinion, or belief of counsel. Most Cited Cases

There is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case.

**[20] Criminal Law 110 ⚡1134.47(4)**

110 Criminal Law  
110XXIV Review  
110XXIV(L) Scope of Review in General  
110XXIV(L)4 Scope of Inquiry  
110k1134.47 Counsel  
110k1134.47(4) k. Arguments and conduct of counsel. Most Cited Cases

**Criminal Law 110 ⚡2139**

110 Criminal Law  
110XXXI Counsel  
110XXXI(F) Arguments and Statements by Counsel

110k2139 k. Expression of opinion as to guilt of accused. Most Cited Cases

To determine whether the prosecutor is expressing a personal opinion of the defendant's guilt, independent of the evidence, the Court of Appeals views the challenged comments in context and look for clear and unmistakable expressions of personal opinion.

**[21] Criminal Law 110 ⚡2098(2)**

110 Criminal Law  
110XXXI Counsel  
110XXXI(F) Arguments and Statements by Counsel  
110k2093 Comments on Evidence or Witnesses

110k2098 Credibility and Character of Witnesses; Bolstering

110k2098(2) k. Credibility of accused. Most Cited Cases

Prosecutor's characterization of defendant's testimony as "funny," "disgusting," "comical," and "the most ridiculous thing he had ever heard," in addition to prosecutor's comment that testimony was a lie and that defendant's story was a "crock," constituted impermissible statements about defendant's credibility, and therefore constitute prosecutorial misconduct in robbery and assault prosecution; prosecutor did not merely argue that defendant's version of events seemed unreasonable, illogical, or unlikely, rather, statements were a clear and unmistakable expression of personal opinion.

**[22] Criminal Law 110 ⚡2098(5)**

110 Criminal Law  
110XXXI Counsel  
110XXXI(F) Arguments and Statements by Counsel  
110k2093 Comments on Evidence or Witnesses

110k2098 Credibility and Character of Witnesses; Bolstering

110k2098(5) k. Credibility of other witnesses. Most Cited Cases

Prosecutor's statement that State's witness did the best he could under cross-examination did not constitute an impermissible statement concerning witness's credibility, and therefore did not constitute prosecutorial misconduct in robbery and assault prosecution; examined in context, the prosecutor's statement did not refer witness's credibility or veracity, rather, the statement referred to witness's cooperativeness responding to defense counsel.

**[23] Criminal Law 110 ↪2094**

110 Criminal Law  
110XXXI Counsel  
110XXXI(F) Arguments and Statements by Counsel  
110k2093 Comments on Evidence or Witnesses  
110k2094 k. In general. Most Cited Cases

Prosecutor informing the jury that the non-testifying codefendant's confession could be used as evidence against defendant constituted a permissible statement regarding the evidence, and therefore did not constitute prosecutorial misconduct in robbery and assault prosecution, where, although prosecutor did not clarify that jury could not consider codefendant's testimony against defendant, prosecutor's statement properly highlighted the jury's role to weigh victim's testimony against all the evidence, including defendant's testimony and codefendant's police statement.

**[24] Criminal Law 110 ↪662.9**

110 Criminal Law  
110XX Trial  
110XX(C) Reception of Evidence  
110k662 Right of Accused to Confront Witnesses  
110k662.9 k. Availability of declarant.  
Most Cited Cases

Unless the witness is unavailable to testify and the defendant has had a prior opportunity to cross-examine the witness, the confrontation clause prohibits admission of the witness's testimonial statements when that witness does not take the stand at trial. U.S.C.A. Const.Amend. 6.

**[25] Criminal Law 110 ↪1086.11**

110 Criminal Law  
110XXIV Review  
110XXIV(G) Record and Proceedings Not in Record  
110XXIV(G)1 Matters to Be Shown by

Record

110k1086.11 k. Proceedings at trial in general. Most Cited Cases

Prosecutor whispering during closing argument so that only the jury could hear him did not deprive the defendant of a complete record for appellate purposes, and therefore did not constitute prosecutorial misconduct in robbery and assault prosecution, where, although a prosecutor was never permitted to whisper to the jury, the trial court ordered the prosecutor to repeat the whispered statements.

**[26] Criminal Law 110 ↪1088.1**

110 Criminal Law  
110XXIV Review  
110XXIV(G) Record and Proceedings Not in Record  
110XXIV(G)2 Scope and Contents of Record  
110k1088.1 k. In general. Most Cited Cases

A criminal defendant is constitutionally entitled to a record of sufficient completeness to permit effective appellate review of his or her claims.

**[27] Criminal Law 110 ↪1171.3**

110 Criminal Law  
110XXIV Review  
110XXIV(Q) Harmless and Reversible Error  
110k1171 Arguments and Conduct of Counsel  
110k1171.3 k. Comments on evidence or witnesses, or matters not sustained by evidence.  
Most Cited Cases

**Criminal Law 110 ↪2199**

110 Criminal Law  
110XXXI Counsel  
110XXXI(F) Arguments and Statements by Counsel  
110k2191 Action of Court in Response to Comments or Conduct  
110k2199 k. Matters not sustained by

evidence. Most Cited Cases

**Criminal Law 110** ⚡️2200

110 Criminal Law

110XXXI Counsel

110XXXI(F) Arguments and Statements by Counsel

110k2191 Action of Court in Response to Comments or Conduct

110k2200 k. Comments on evidence or witnesses. Most Cited Cases

Prosecutorial misconduct in the form of misstating the burden of proof and expressing personal opinion did not prejudice defendants so as to warrant reversal in robbery and assault prosecution, where trial court's instructions to the jury clearly set forth both the jury's actual duties and the State's proper burden of proof, all of the improper statements occurred during closing argument, and trial court directed the jury to disregard any argument not supported by the law and the trial court's instructions.

**[28] Criminal Law 110** ⚡️1171.1(6)

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1171 Arguments and Conduct of Counsel

110k1171.1 In General

110k1171.1(2) Statements as to Facts, Comments, and Arguments

110k1171.1(6) k. Appeals to sympathy or prejudice; argument as to punishment. Most Cited Cases

**Criminal Law 110** ⚡️1171.7

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1171 Arguments and Conduct of Counsel

110k1171.7 k. Responsive statements

and remarks. Most Cited Cases

**Criminal Law 110** ⚡️2207

110 Criminal Law

110XXXI Counsel

110XXXI(F) Arguments and Statements by Counsel

110k2191 Action of Court in Response to Comments or Conduct

110k2207 k. Appeals to sympathy or prejudice. Most Cited Cases

Prosecutor's misconduct in impugning defense counsel throughout the trial did not prejudice defendants so as to warrant reversal in robbery and assault prosecution, where most of the remarks came outside the presence of the jury, many of the statements were provoked by defense counsel, trial court instructed jury to disregard statements that did occur in its presence, statements were likely only to make jury think poorly of prosecutor, and trial court issued curative instruction.

**[29] Criminal Law 110** ⚡️1171.7

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1171 Arguments and Conduct of Counsel

110k1171.7 k. Responsive statements and remarks. Most Cited Cases

A prosecutor's improper remarks are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.

**[30] Criminal Law 110** ⚡️1186.1

110 Criminal Law

110XXIV Review

110XXIV(U) Determination and Disposition of Cause

110k1185 Reversal

110k1186.1 k. Grounds in general.

Most Cited Cases

Under the cumulative error doctrine, the Court of Appeals may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant her right to a fair trial, even if each error standing alone would be harmless.

[31] **Criminal Law 110** ⚡️1186.1

110 Criminal Law

110XXIV Review

110XXIV(U) Determination and Disposition of Cause

110k1185 Reversal

110k1186.1 k. Grounds in general.

Most Cited Cases

Cumulative error does not apply where the errors are few and have little or no effect on the outcome of the trial.

[32] **Criminal Law 110** ⚡️1171.1(1)

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1171 Arguments and Conduct of

Counsel

110k1171.1 In General

110k1171.1(1) k. Conduct of counsel in general. Most Cited Cases

Whether prosecutorial misconduct is so prejudicial that a new trial must be granted is necessarily fact specific.

[33] **Criminal Law 110** ⚡️1139

110 Criminal Law

110XXIV Review

110XXIV(L) Scope of Review in General

110XXIV(L)13 Review De Novo

110k1139 k. In general. Most Cited Cases

The Court of Appeals reviews de novo double jeopardy claims. U.S.C.A. Const.Amend. 5; West's

RCWA Const. Art. 1, § 9.

[34] **Double Jeopardy 135H** ⚡️28

135H Double Jeopardy

135HII Proceedings, Offenses, Punishments, and Persons Involved or Affected

135Hk28 k. Multiple sentences or punishments. Most Cited Cases

The legislature may constitutionally authorize multiple punishments for a single course of conduct. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

[35] **Double Jeopardy 135H** ⚡️134

135H Double Jeopardy

135HV Offenses, Elements, and Issues Foreclosed

135HV(A) In General

135Hk132 Identity of Offenses; Same Offense

135Hk134 k. Several offenses in one act; separate statutory offenses and legislative intent. Most Cited Cases

Where the legislature has provided a statutory scheme distinguishing different degrees of a crime, the Court of Appeals may determine that the legislature intended a single punishment for a higher degree of a single crime rather than multiple punishments for several, separate, lesser crimes. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

[36] **Double Jeopardy 135H** ⚡️134

135H Double Jeopardy

135HV Offenses, Elements, and Issues Foreclosed

135HV(A) In General

135Hk132 Identity of Offenses; Same Offense

135Hk134 k. Several offenses in one act; separate statutory offenses and legislative intent. Most Cited Cases

If the evidence proving one crime is also necessary to prove a second crime or a higher degree of

the same crime, the Court of Appeals considers whether the facts show that the additional crime was committed incidental to the original crime when considering a double jeopardy claim. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

**[37] Double Jeopardy 135H ↪134**

135H Double Jeopardy

135HV Offenses, Elements, and Issues Foreclosed

135HV(A) In General

135Hk132 Identity of Offenses; Same Offense

135Hk134 k. Several offenses in one act; separate statutory offenses and legislative intent. Most Cited Cases

If one crime was incidental to the commission of the other, the merger doctrine precludes additional convictions; but if the offenses have independent purposes or effects, the court may impose separate punishment. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

**[38] Double Jeopardy 135H ↪134**

135H Double Jeopardy

135HV Offenses, Elements, and Issues Foreclosed

135HV(A) In General

135Hk132 Identity of Offenses; Same Offense

135Hk134 k. Several offenses in one act; separate statutory offenses and legislative intent. Most Cited Cases

To establish an independent purpose or effect of a particular crime so as to warrant separate punishment in addition to another crime in compliance with double jeopardy, that crime must injure the person or property of the victim or others in a separate and distinct manner from the crime for which it also serves as an element. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

**[39] Double Jeopardy 135H ↪149**

135H Double Jeopardy

135HV Offenses, Elements, and Issues Foreclosed

135HV(A) In General

135Hk139 Particular Offenses, Identity of

135Hk149 k. Kidnapping. Most Cited

Cases

Defendant's restraint of victim, charged as second-degree kidnapping, was incidental to crime of first-degree robbery, and therefore convictions for both first-degree robbery and second-degree kidnapping violated double jeopardy, where defendant and codefendant burst into victim's home, subdued victim by striking him with a pipe, tied victim up, and moved substantial amount of property from victim's home to a vehicle, purpose of the restraint was not to demean, humiliate, and assault victim, rather, the restraint was for the purpose of facilitating the robbery. U.S.C.A. Const.Amend. 5; West's RCWA 9A.40.030, 9A.56.200.

**[40] Kidnapping 231E ↪22**

231E Kidnapping

231Ek22 k. Other crimes distinguished. Most Cited Cases

Restraint and movement of a victim that are merely incidental and integral to commission of another crime, such as rape or murder, do not constitute the independent, separate crime of kidnapping.

**[41] Double Jeopardy 135H ↪145**

135H Double Jeopardy

135HV Offenses, Elements, and Issues Foreclosed

135HV(A) In General

135Hk139 Particular Offenses, Identity of

135Hk145 k. Robbery. Most Cited

Cases

Assault did not have a purpose separate and distinct from defendant's contemporaneous robbery of victim, and therefore convictions for both second-degree assault and first-degree robbery violated double jeopardy, where jury found that the assault was committed with an intent to commit a

felony, presumably the robbery since the jury did not identify the specified felony. U.S.C.A. Const.Amend. 5; West's RCWA 9A.56.200.

**[42] Criminal Law 110 ↪30**

110 Criminal Law

110I Nature and Elements of Crime

110k30 k. Merger of offenses. Most Cited

Cases

An exception to the merger doctrine arises when the included crime has an independent purpose or effect from the other crime.

**[43] Criminal Law 110 ↪893**

110 Criminal Law

110XX Trial

110XX(K) Verdict

110k893 k. Construction and operation.

Most Cited Cases

An ambiguity in the jury's verdict under the rule of lenity must be resolved in the defendants' favor.

**[44] Double Jeopardy 135H ↪145**

135H Double Jeopardy

135HV Offenses, Elements, and Issues Foreclosed

135HV(A) In General

135Hk139 Particular Offenses, Identity of

135Hk145 k. Robbery. Most Cited

Cases

Assault was incidental to the robbery, and therefore defendant's convictions for both second-degree assault and first-degree robbery violated double jeopardy, where jury found that the assault was committed with an intent to commit a felony, presumably the robbery since the jury did not identify the specified felony. U.S.C.A. Const.Amend. 5.

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Kimberley Ann Demarco, Pierce County Prosecutor's Office, Tacoma, WA, for Respondent.

PART PUBLISHED OPINION

JOHANSON, A.C.J.

¶ 1 Jennifer Sarah Holmes appeals her jury convictions for first degree burglary, first degree robbery, unlawful imprisonment, second degree assault, and theft of a firearm. James Leroy Lindsay, Sr., appeals his jury convictions for first degree burglary, first degree robbery, second degree kidnapping, second degree assault, and theft of a firearm. Among other arguments, in the published portion of this opinion, Lindsay and Holmes argue that the prosecutor engaged in multiple acts of misconduct requiring reversal of their convictions and that the trial court violated constitutional protections against double jeopardy.

¶ 2 In the unpublished portion of this opinion, Holmes and Lindsay argue that the trial court violated their public and open trial right. Additionally, Lindsay argues that the jail guard's disposal of Lindsay's notebook \*646 violated his right to counsel. Holmes argues that (1) the trial court abused its discretion by failing to admit evidence of the alleged victim's cocaine addiction; (2) her restitution hearing lacked due process; and (3) several errors combine to create cumulative error.

¶ 3 In the published portion of this opinion, we hold that although the prosecutor committed misconduct, the misconduct did not substantially affect the jury's verdict. We further hold that both Lindsay's conviction for second degree assault and his conviction for second degree kidnapping merge with his first degree robbery conviction. Additionally, we hold that Holmes's conviction for second degree assault merges with her first degree robbery conviction. Finally, in the unpublished portion of this opinion, we address and reject Holmes's and Lindsay's remaining issues. Thus, we affirm both Lindsay's and Holmes's convictions and remand for resentencing on the merged convictions.

## FACTS

## I. SUBSTANTIVE FACTS AND PROCEDURE

¶ 4 Jennifer Holmes and Lawrence Wilkey began their seven-year romantic relationship in 1998. In 2004, after living in Washington State, the couple moved to Idaho. Thereafter, Holmes met James Lindsay, decided to marry him and told Wilkey that she no longer loved him. Three weeks later, when Holmes and Lindsay were away on a day trip, Wilkey moved out, taking many property items<sup>FN1</sup> with him to Washington.

FN1. Throughout the trial, the parties contested who rightfully owned the property.

¶ 5 When Holmes returned home, she called the sheriff's office and reported that a theft had occurred. The deputies concluded that Holmes's property loss was a civil matter and advised her to consult with a civil attorney.

¶ 6 Months later, Holmes and Lindsay drove from Idaho to Wilkey's home in Pierce County. According to Wilkey, Lindsay "burst open" Wilkey's door and entered with a pipe in his raised hand. 25 VRP at 1901. After Lindsay and Holmes violently invaded his home, they bound him with zip ties and a leash, beat and choked him, with a pipe, rendered him unconscious, taunted him, and took his property.

¶ 7 In contrast, Lindsay told the police<sup>FN2</sup> that Wilkey opened the front door and then ran toward the back door saying something about a gun. Lindsay claimed that he was worried Wilkey was about to arm himself, so he ran into the house and the two men wrestled. Lindsay admitted that he used zip ties to restrain Wilkey so he would not interfere as Lindsay and Holmes collected their belongings. According to Holmes, Wilkey seemed happy, albeit surprised, to see her and, although he did not protest to her entering his home, she remembered a scuffle between the two men. Holmes further claimed that she never saw Wilkey restrained in any way and that Wilkey never objected to her taking her property.

FN2. Lindsay gave a statement to police. He did not testify at trial.

¶ 8 After Lindsay and Holmes left his home, Wilkey eventually freed himself, went to his neighbor's house, and his neighbor called the police. The responding paramedic unit found Wilkey upset, with scratches and bruises on both legs and zip ties around his wrists and ankles, and they took him to the hospital. The attending doctor treated Wilkey for abrasions on his extremities, a contusion on his head, and issues relating to diabetes. But the doctor did not find bruises on Wilkey's torso consistent with being beaten with a pipe. Nor did Wilkey's computed tomography (CT) scan, x-rays, or urine tests reveal other assault injuries.

¶ 9 Based on the March 2006 events, the State charged Holmes and Lindsay with one count each for first degree burglary,<sup>FN3</sup> first degree robbery,<sup>FN4</sup> first degree kidnapping,<sup>FN5</sup> first degree assault,<sup>FN6</sup> and four counts each for \*647 theft of a firearm.<sup>FN7</sup> The jury found Holmes guilty of first degree burglary, first degree robbery, unlawful imprisonment, second degree assault, and one count of theft of a firearm. The jury found Lindsay guilty of first degree burglary, first degree robbery; the lesser-included charges of second degree kidnapping, second degree assault, and one count of theft of a firearm. By special verdict, the jury found that neither Holmes nor Lindsay was armed with a firearm during the commission of the crimes. Also, by special verdict, the jury found that Lindsay and Holmes committed the lesser-included charge for second degree assault on the basis of an "assault committed with the intent to commit a felony." Clerk's Papers (Lindsay) (CPL) at 394; Clerk's Papers (Holmes) (CPH) at 732.

FN3. RCW 9A.52.020(1)(a), (b).

FN4. Former RCW 9A.56.190 (1975) and RCW 9A.56.200(1)(a)(ii).

FN5. Former RCW 9A.40.020(1)(c) (1975).

FN6. RCW 9A.36.011(1)(a).

FN7. RCW 9A.56.020 and RCW 9A.56.300(1)(a).

¶ 10 The trial court sentenced Holmes on each count, to be served concurrently for a total of 89.5 months.<sup>FN8</sup> The trial court sentenced Lindsay on each count, to be served concurrently for a total of 102 months.<sup>FN9</sup> The trial court ordered both defendants to pay restitution. Holmes and Lindsay appeal.

FN8. The trial court sentenced Holmes to 66 months for first degree burglary, 89.5 months for first degree robbery, 14 months for unlawful imprisonment, 38 months for second degree assault; and 36 months for firearm theft.

FN9. The trial court sentenced Lindsay to 78 months for first degree burglary; 102 months for first degree robbery; 60 months for second degree kidnapping; 50 months for second degree assault; 36 months for firearm theft.

## II. OBJECTIONABLE CONDUCT

### A. Trial Conduct

¶ 11 Holmes and Lindsay's joint trial occurred over more than a year and produced 98 volumes reporting the proceedings. Holmes and Lindsay had separate counsel. The record reveals objectionable conduct by the prosecutor and Holmes's counsel throughout the trial; much of which occurred outside the jury's presence.<sup>FN10</sup> The following are descriptions of conduct that occurred in the jury's presence.

FN10. Because misconduct or unprofessional behavior occurring outside the jury's presence could not affect the jury's verdict, we do not discuss it extensively here. We note, however, that outside the jury's presence, the prosecutor described Holmes's counsel as having an absolute disregard for

the truth, and Holmes's counsel described the prosecutor's conduct as "slimy" and disingenuous.

¶ 12 At one point, Holmes's counsel objected to the prosecutor's examination of Wilkey saying, "Oh, your Honor, let's lead a little bit more." 24 VRP at 1852. The prosecutor objected and asked for a sidebar, and Holmes's counsel said, "I would like it on the record outside the presence of the jury if counsel is going to be personally attacking me for my meritorious objections." 24 VRP at 1853.

¶ 13 Several days later, Holmes's counsel objected to the prosecutor's questions as eliciting hearsay, the prosecutor replied that he asked the question to put the defendant's statement into context. Holmes's counsel replied that she did not know the "context exception" and that perhaps the prosecutor could point it out for her. 40 VRP at 3222. The prosecutor asked that parties make objections to the court instead of insulting fellow counsel. Holmes's counsel requested an opportunity to argue outside the jury's presence and the prosecutor responded, "Maybe counsel should have asked that two minutes ago." Holmes's counsel replied, "[M]aybe [the prosecutor] should keep his mouth shut." 40 VRP at 3223.

¶ 14 Days later as Holmes's counsel cross-examined a witness, this exchange occurred:

[THE STATE]: Same objection [calls for speculation].

[HOLMES'S COUNSEL]: He said that he does—

THE COURT: Can I hear the question?

[THE STATE]: She's making argument as we go and she doesn't care if the objection is sustained or not.

[HOLMES'S COUNSEL]: Your Honor, once again we have Mr. Sheeran reporting to read my mind.

47 VRP at 4118.

¶ 15 During the State's redirect of Wilkey, Holmes's counsel objected to the prosecutor's \*648 question saying that the answer to that question would be new discovery that she had not been "blessed with" before her cross-examination of Wilkey. 51 VRP at 4341. The prosecutor stated, "I can't respond politely," then offered, "I'll ask another question." 51 VRP at 4341–42.

¶ 16 Later that day, when the prosecutor and Holmes's counsel argued about one of Holmes's objections, the prosecutor said, "We're going to have like a sixth grader [argument]—" 51 VRP at 4357. At that point, the trial court excused the jury.

¶ 17 The next day, although the trial court had previously determined that the defendants could elicit testimony regarding Wilkey's alleged drug use only for relevant time periods,<sup>FN11</sup> Holmes's counsel asked the witness whether 13 years ago, Wilkey's father had kicked Wilkey out of the house for drug use. Becoming upset, the prosecutor said:

FN11. The relevant time periods included the time of the Wilkey and Holmes's break up, the time of the division of property, and the time of the allegations.

[THE STATED]: Objection, Your Honor, and motion outside the presence.

And counsel walked right into this after freaking six weeks—

THE COURT: Hold on just a minute.

[HOLMES'S COUNSEL]: Mr. Sheeran is having a tantrum.

THE COURT: If I could have the jury go into the jury room.

[THE STATE]: Tantrum, because you—

52 VRP at 4554. After the jury left, the parties continued to argue.

¶ 18 Several days later, as Holmes's counsel cross-examined a witness, the prosecutor objected saying, "[I]t seems like impeachment on a collateral matter and we're into silly." 61 VRP at 5423. After the jury was at recess, Holmes's counsel told the trial court that the prosecutor's remark about "silly" denigrated the defense counsel and the prosecutor should know better. 61 VRP at 5428.

¶ 19 While Holmes testified on her own behalf that, during their relationship, Wilkey hurt her physically and emotionally, she added that while she was testifying, the prosecutor was laughing and that his behavior upset her. During cross-examination, the State asked Holmes if she remembered whether Wilkey ever owned guns during their relationship. Holmes responded, "That's a complicated question," and the State replied, "Not really." 87 VRP at 8092. Holmes's counsel objected noting that "she thinks that there are some—" 87 VRP at 8092. The prosecutor said, "Yeah, we all know that." 87 VRP at 8092. Holmes's counsel told the prosecutor, "Counsel, I think your rudeness has reached a new low." 87 VRP at 8092. After the jury recessed, the parties continued to argue.

#### B. Closing Argument

¶ 20 The prosecutor began closing argument with Holmes's counsel frequently objecting on grounds of misstatement or mischaracterization of the evidence. The trial court repeatedly responded, "[T]he jury will decide all issues of fact in this case." 95 VRP at 8693; *see also* 8695.

¶ 21 The prosecutor then reviewed Holmes's testimony, characterizing parts of it as "the most ridiculous thing I've ever heard." 95 VRP at 8708. He told the jury:

She sat there and told you she wasn't mad at him when he took the stuff; she wasn't mad that he took the kids' computer; she wasn't mad that he took the blender; she wasn't mad that he took the food; she wasn't mad that he took the entertainment center; she wasn't mad that he took the bed; she wasn't mad when the police told her it was a

civil action and she should go hire an attorney; she wasn't mad when the insurance company wasn't paying out; she wasn't mad after six-plus hours of driving over here on her horribly bad back that had to be in excruciating pain, she still wasn't mad at [Wilkey].

95 VRP at 8708. Holmes's counsel objected to the prosecutor's statement as an expression of personal opinion; the trial court overruled her objection.

¶ 22 Referring to Holmes's testimony that her attorney advised her to repossess her things, the prosecutor commented, "Now \*649 that's a little ridiculous." 95 VRP at 8711. The prosecutor characterized Holmes's testimony that Wilkey "was fine" with her taking things and her testimony that she had a good faith claim to the property she took as "funny," "disgusting," and "comical." 95 VRP at 8717, 8722. Holmes's counsel objected repeatedly to his characterizations. The trial court responded that the jury would decide all issues of fact.

¶ 23 During his rebuttal closing argument, the prosecutor argued that the defense had tried to portray Wilkey as a bully and an abusive thug but that this portrayal did not make sense because Holmes and Lindsay were the aggressors who came into his house and Lindsay admitted that he tied up Wilkey. The prosecutor told the jury that this portrayal of Wilkey "is a crock.... What you've been pitched for the last four hours is a crock." 95 VRP at 8877. There was no objection.

¶ 24 The prosecutor next referenced several exhibits regarding Holmes's financial documents and told the jury:

She sat up here day after day after day telling you she always made enough to pay for her bills. Always made enough. She didn't.

That a—you know, this is similar to when she started dating [Lindsay]—that a mother of three is having trouble paying her bills and not making

enough to do so is understandable. It is not something that anybody would look down on. Own it. Don't get up here and sit here and lie.

95 VRP at 8882. Holmes did not object to this statement.<sup>FN12</sup>

FN12. Holmes did object shortly thereafter, but her objection appears to be connected to the statement the prosecutor made after this statement regarding evidence of guns in the house.

¶ 25 The prosecutor also responded to Lindsay's closing argument, saying:

You compare what Mr. Wilkey said with all the evidence when you're looking at his credibility, and then you compare what Jennifer Holmes said to you for two months.

95 VRP at 8884. Holmes's counsel immediately moved for a mistrial, arguing that the State was improperly asking the jury to consider Lindsay's statement against Holmes. The trial court stated it would consider the matter outside the jury's presence after all of the closing argument.

¶ 26 The prosecutor continued his rebuttal:

[THE STATE]: Ten months. Do they get ... (sotto voce)

Holmes's counsel: I can't hear you.

[THE STATE]: Do they?

[HOLMES'S COUNSEL]: Your Honor, I can't hear him. My clients have a right to hear what's going on at their—at her trial. Possibly Mr. Sheeran could raise his voice.

THE COURT: Keep your voice up, please, so everybody can hear.

[THE STATE]: Thank you.

Holmes's counsel: Could the court reporter read

back the last couple of comments?

[LINDSAY'S COUNSEL]: Did the court reporter hear it?

COURT REPORTER: I said I couldn't hear it.

[HOLMES'S COUNSEL]: Oh, then it's not in the record.

[THE STATE]: Do these two get to get away with it? It's a simple question.

95 VRP at 8884–85.

¶ 27 Later, the prosecutor said, “I mean, the Jennifer Holmes story is arguably—well, it's silly ... (sotto voce).” 95 VRP at 8886. Holmes's counsel immediately stated she could not hear him. The prosecutor responded, “Maybe if counsel and her client could just be quiet for a few minutes they might be able to hear something.” 95 VRP at 8887. Holmes's counsel objected, arguing that the prosecutor must not behave so rudely. Both the court reporter and Lindsay affirmed that they had not heard the prosecutor. The prosecutor said:

I'll try to do my best, Your Honor. Thank you.

What I was saying was—

...

\*650 —Ms. Holmes[s] story about what happened afterward is as silly as her claim that she wasn't mad.

95 VRP at 8887.

¶ 28 After a short while, the prosecutor continued addressing the jury:

[THE STATE]: So everything that happened happened in what, 90 seconds? Called Richard Vazquez, had him come running over, zip tie, beat him up, go to the cops? Yeah. Ask yourself who wants to find the truth and ... (sotto voce).

[COURT REPORTER]: Ask yourself ...?

[THE STATE]: Who wants to find the truth. Ask yourself what the truth is. Convict them.

95 VRP at 8888. Outside the jury's presence, the trial court ruled that the jurors had been instructed how to handle the charges with respect to each defendant who was joined for trial, and it denied Holmes's mistrial motion.

## ANALYSIS

### I. PROSECUTORIAL MISCONDUCT

¶ 29 Holmes and Lindsay argue that we must reverse their convictions because of extensive prosecutorial misconduct throughout the trial.<sup>FN13</sup> Specifically, they argue that the prosecutor committed misconduct by denigrating Holmes's counsel numerous times; misstating and trivializing the burden of proof; expressing personal opinion about the credibility of the State's witness and the defendant; telling the jury it is to consider all the evidence, without clarifying that Lindsay's police statement must not be considered against Holmes; and speaking to the jury in a whisper. The State responds that Holmes and Lindsay do not meet their burden to show that the prosecutor's conduct caused prejudice. Although we strongly disapprove of both the prosecutor's and Holmes's counsel's repeated unprofessional conduct, we do not conclude that the prosecutor's misconduct prejudiced the jury.

FN13. Lindsay makes this same argument in his statement of additional grounds for review; we consider it here. RAP 10.10(a).

#### A. Standard of Review

[1][2] ¶ 30 Holmes and Lindsay bear the burden of showing that (1) the State committed misconduct and (2) the misconduct had prejudicial effect. *State v. Anderson*, 153 Wash.App. 417, 427, 220 P.3d 1273 (2009), *review denied*, 170 Wash.2d 1002, 245 P.3d 226 (2010). If a defendant establishes that the State made improper statements, then we review whether those improper statements prejudiced the defendant under one of two different

standards of review. *State v. Emery*, 174 Wash.2d 741, 760, 278 P.3d 653 (2012).

[3][4][5] ¶ 31 If the defendant preserved the issue by objecting at trial, we evaluate whether there was a substantial likelihood that the improper comments prejudiced the defendant by affecting the jury. *Emery*, 174 Wash.2d at 760, 278 P.3d 653; *Anderson*, 153 Wash.App. at 427, 220 P.3d 1273. But if the defendant failed to object to the improper argument at trial, defendant must show that the State's misconduct "was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *In re Pers. Restraint of Glas-mann*, 175 Wash.2d 696, 704, 286 P.3d 673 (2012) (citing *State v. Thorgerson*, 172 Wash.2d 438, 455, 258 P.3d 43 (2011)). This more stringent second standard of review requires the defendant to show that: "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Emery*, 174 Wash.2d at 761, 278 P.3d 653 (quoting *Thorgerson*, 172 Wash.2d at 455, 258 P.3d 43). But we judge misconduct by the effect likely to flow from it and focus more on whether an instruction could have cured the State's misconduct. *Emery*, 174 Wash.2d at 762, 278 P.3d 653. We inquire whether the misconduct has engendered "a feeling of prejudice" that would prevent a defendant's fair trial. *Emery*, 174 Wash.2d at 762, 278 P.3d 653 (quoting *Slattery v. City of Seattle*, 169 Wash. 144, 148, 13 P.2d 464 (1932)).

**\*651 B. The Unique Role of a Prosecutor**

[6][7] ¶ 32 As a state agent, the prosecuting attorney represents the people and presumptively acts with impartiality in the interest of justice. *State v. Fisher*, 165 Wash.2d 727, 746, 202 P.3d 937 (2009). Prosecutors are quasi-judicial officers tasked with prosecuting those who violate the peace and dignity of the state and tasked with searching for justice. *State v. Case*, 49 Wash.2d 66, 70, 298 P.2d 500 (1956) (quoting *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497 (1899)). Our Supreme Court has

pronounced that although prosecutors must deal with all that is coarse and brutal in human life:

"[T]he safeguards which the wisdom of ages has thrown around persons accused of crime cannot be disregarded, and such officers are reminded that a fearless, impartial discharge of public duty, accompanied by a spirit of fairness toward the accused, is the highest commendation they can hope for. Their devotion to duty is not measured, like the prowess of the savage, by the number of their victims."

*State v. Warren*, 165 Wash.2d 17, 27–28, 195 P.3d 940 (2008) (quoting *State v. Charlton*, 90 Wash.2d 657, 665, 585 P.2d 142 (1978)), cert. denied, — U.S. —, 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009). Recently, our Supreme Court reiterated that prosecutors have a duty of fairness to the defendant:

Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Thus, a prosecutor must function within boundaries while zealously seeking justice.

*State v. Monday*, 171 Wash.2d 667, 676, 257 P.3d 551 (2011) (citations omitted).

**C. Impugning Defense Counsel**

[8] ¶ 33 Holmes and Lindsay argue that the prosecutor committed misconduct by denigrating Holmes's counsel numerous times and that this misconduct easily satisfies any definition of "the most intolerable government conduct." Br. of Appellant (Holmes) at 41. The State responds that both the prosecutor and Holmes's counsel engaged in unprofessional conduct, which although regrettable, does not constitute prosecutorial misconduct. We agree that both the prosecutor and Holmes's counsel acted unprofessionally, however, we conclude that denigrating counsel is prosecutorial misconduct.

[9][10][11] ¶ 34 Although a prosecutor may comment on the evidence before the jury, a prosec-

utor's comments demeaning defense counsel's integrity are improper. *Thorgerson*, 172 Wash.2d at 451, 258 P.3d 43. Prosecutorial expressions, maligning defense counsel, "severely damage an accused's opportunity to present his case before the jury." *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir.1983), cert. denied, 469 U.S. 920, 105 S.Ct. 302, 83 L.Ed.2d 236 (1984). Therefore, such expressions constitute "an impermissible strike at the very fundamental due process protections that the Fourteenth Amendment has made applicable to ensure an inherent fairness in our adversarial system of criminal justice." *Bruno*, 721 F.2d at 1195. We view any abridgment of this principle's sanctity as "particularly unacceptable." *Bruno*, 721 F.2d at 1195.

¶ 35 In *Thorgerson*, our Supreme Court held that the prosecutor "went beyond the bounds of acceptable behavior" and committed misconduct by calling defense arguments "bogus," and "sleight of hand." *Thorgerson*, 172 Wash.2d at 451-52, 258 P.3d 43. Here, the prosecutor and Holmes's counsel displayed mutual animosity and frequently argued over legal objections. For example, referring to Holmes's counsel, the prosecutor said, "[S]he doesn't care if the objection is sustained or not," "We're going to have like a sixth grader [argument]," and "we're into silly." 47 VRP at 4118, 51 VRP at 4357, 61 VRP at 5423. Another time, Holmes's counsel was in the middle of an objection and the prosecutor interrupted her saying, "Yeah, we all know that." 87 VRP at 8092. Yet another time, the prosecutor responded to Holmes's counsel's objection by stating, "Maybe if counsel and her client could just be quiet for a few minutes they might be able to hear something." 95 VRP at 8887. At one point, the prosecutor became visibly upset and Holmes's counsel said the prosecutor is having "a tantrum." 52 VRP at 4554. The prosecutor replied, "And counsel walked \*652 right into this after freaking six weeks" and said directly to Holmes's counsel, "Tantrum, because you—" 52 VRP at 4554.

¶ 36 Over and over again, courts have reminded prosecutors that they are something more than mere advocates or partisans and that they represent the people and act in the interest of justice. *Fisher*, 165 Wash.2d at 746, 202 P.3d 937. In a similar <sup>FN14</sup> New York case, the prosecutor referred to defense counsel with words such as "puke" and "stinks" and accused defense counsel of untruth, befuddlement, entrapment, and trickery. *People v. Steinhardt*, 9 N.Y.2d 267, 270, 213 N.Y.S.2d 434, 173 N.E.2d 871 (1961). We agree with the *Steinhardt* court that a decent respect for the defendants' rights, the trial courts, and for the law itself, requires that we declare this degree of quarreling and bandying of insults between counsel misconduct. *Steinhardt*, 213 N.Y.S.2d 434, 173 N.E.2d at 873-74.

FN14. We note that the *Steinhardt* court does not specify that the jury was present during the outbursts. But we assume from the context that insults between counsel occurred in the jury's presence. See *Steinhardt*, 213 N.Y.S.2d 434, 173 N.E.2d at 872.

#### D. Misstating Burden of Proof

¶ 37 Holmes and Lindsay also argue that the prosecutor misstated and trivialized the State's burden of proof. Among their arguments, Holmes and Lindsay argue that the prosecutor misstated the burden of proof by comparing it to everyday decision making and by telling the jury it needed to find "the truth." Br. of Appellant (Holmes) at 47. We agree that, in some matters, the prosecutor misstated and trivialized its burden.

##### 1. Everyday decisions

[12] ¶ 38 When a prosecutor compares the reasonable doubt standard to everyday decision making, it improperly minimizes and trivializes the gravity of the standard and the jury's role. *Anderson*, 153 Wash.App. at 431, 220 P.3d 1273; see also *State v. Walker*, 164 Wash.App. 724, 732, 265 P.3d 191 (2011); *State v. Johnson*, 158 Wash.App. 677, 684, 243 P.3d 936 (2010), review denied, 171

Wash.2d 1013, 249 P.3d 1029 (2011). We note that we came to a different conclusion distinguishing *Curtiss* from *Anderson* by stating, "Here, the State's comments about *identifying* the puzzle with certainty before it is complete are not analogous to the weighing of competing interests inherent in a *choice* that individuals make in their everyday lives." *State v. Curtiss*, 161 Wash.App. 673, 700-01, 250 P.3d 496, *review denied*, 172 Wash.2d 1012, 259 P.3d 1109 (2011).

[13] ¶ 39 Here, the prosecutor used a puzzle analogy to describe the experience of a person who begins a puzzle not knowing what picture it will make but eventually knows beyond a reasonable doubt that the picture is of Seattle. The prosecutor described for the jury, "[Y]ou put in about 10 more pieces and see this picture ... you can be halfway done with that puzzle.... You could have 50 percent of those puzzle pieces missing and you know it's Seattle." 95 VRP at 8727. Additionally, the prosecutor compared "beyond a reasonable doubt" to the confidence a person feels walking with the "walk sign" at a crosswalk at a busy street without being run over by a car. 95 VRP at 8728. The prosecutor told the jury that although it is possible that the car will not stop, "it's not reasonable. We don't live our life in fear." 95 VRP at 8729. The prosecutor told the jury that reasonable doubt "is not an impossible standard" but "a standard you probably use ... pretty much every day." 95 VRP at 8728. Because these explanations involve comparisons to "everyday decision making," they are improper. *Anderson*, 153 Wash.App. at 431, 220 P.3d 1273. Further, these analogies quantified the number of puzzle pieces (and the percentage of missing pieces) with a degree of certainty purporting to be equivalent to the beyond-a-reasonable-doubt standard. *See Anderson*, 153 Wash.App. at 432, 220 P.3d 1273. We conclude that the prosecutor's analogies minimized and trivialized the gravity of the standard and the jury's role.

#### 2. Declare the truth statement

[14] ¶ 40 Holmes and Lindsay also argue that

the prosecutor misstated the burden of proof by telling the jury it needed to find "the truth." Br. of Appellant (Holmes) at 47.

\*653 [15] ¶ 41 The jury's duty is to determine whether the State has met its burden, not to solve a case. *Anderson*, 153 Wash.App. at 429, 220 P.3d 1273. We have distinguished the prosecutor's statement to "return a verdict that you know speaks the truth" from the prosecutor's statements to "declare the truth" and "decide the truth of what happened." *Walker*, 164 Wash.App. at 733, 265 P.3d 191 (holding that the latter two are improper) (quoting *Curtiss*, 161 Wash.App. at 701, 250 P.3d 496).

¶ 42 Here, the prosecutor asked the jury, "[T]o do what you swore to do: Render verdicts." He argued that "verdict" is a Latin word meaning, "to speak the truth" and "voir dire" is French for "speak the truth." 95 VRP at 8730. The prosecutor explained to the jury that they started trial with "voir dire," and now the jury would end the trial with "verdictum" or verdict. 95 VRP at 8730. The prosecutor urged the jury, "[T]o do what you know is true: Speak the truth. Convict both of these defendants." 95 VRP at 8730. Finally, the prosecutor argued, "Ask yourself who wants to find the truth.... Ask yourself what the truth is. Convict them." 95 VRP at 8888. Although these statements reminded the jury to do "what you *know* is true," they also instructed the jury to "find the truth" and to "[s]peak the truth," thereby finishing the trial. As we held in *Anderson*, this was improper. *Anderson*, 153 Wash.App. at 429, 220 P.3d 1273.

#### 3. To "own" her behavior statement

[16] ¶ 43 Holmes also argues that the prosecutor misstated the burden of proof by telling the jury that Holmes needed "to 'own' " her behavior. Br. of Appellant (Holmes) at 48, 50 (quoting 95 VRP at 8715, 8883). Holmes relies on *State v. Fleming*, 83 Wash.App. 209, 213, 921 P.2d 1076 (1996), *review denied*, 131 Wash.2d 1018, 936 P.2d 417 (1997). In *Fleming*, Division One of this court held that it was misconduct for the prosecutor to argue that in order to acquit a defendant, the jury had

to find that the State's witnesses are either lying or mistaken. *Fleming*, 83 Wash.App. at 213, 921 P.2d 1076.

¶ 44 Here, the prosecutor did not suggest that to acquit Holmes, the jury must conclude that Wilkey was lying. Instead, the prosecutor told the jury:

You know what, if you had a romantic relationship with somebody while you're living with somebody, it may not be ideal. It's not criminal. But own something. When you come into a courtroom and swear under oath that you're going to tell the truth, own something.

95 VRP at 8714–15. Here, the prosecutor argued that because Holmes was not forthright in her testimony about the timing of her relationship with Lindsay, the jury should question her general credibility. Because the prosecutor based this argument on reasonable inferences from the evidence, it was not improper. *State v. Lewis*, 156 Wash.App. 230, 240, 233 P.3d 891 (2010).

#### E. Personal Opinion of Credibility or Guilt

¶ 45 Next, Holmes and Lindsay argue that the prosecutor committed misconduct by repeatedly expressing his personal opinion about the credibility of witnesses and the accused's guilt. The State responds that the prosecutor properly based his closing arguments about Holmes's credibility on evidence presented at trial. We reject Holmes and Lindsay's argument relating to Wilkey's credibility, but we conclude that the prosecutor improperly asserted his opinion about Holmes's credibility.<sup>FN15</sup>

FN15. Relying on the same facts, Holmes also argues that the prosecutor impermissibly argued "prior bad acts" that the court had not admitted into evidence. Br. of Appellant (Holmes) at 51. Although we conclude that the prosecutor improperly expressed his personal opinion, in part because he stated, "Don't get up here and sit here and lie," the record shows that the

prosecutor did not discuss prior bad acts, and we reject that argument. 95 VRP at 8882.

[17][18][19][20] ¶ 46 The State may not assert its personal opinion as to the defendant's guilt or a witness's credibility. *State v. McKenzie*, 157 Wash.2d 44, 53, 134 P.3d 221 (2006); *State v. Reed*, 102 Wash.2d 140, 145, 684 P.2d 699 (1984). But a prosecutor enjoys wide latitude in closing argument to draw reasonable inferences from the evidence and may \*654 freely comment on witness credibility based on the evidence. *Lewis*, 156 Wash.App. at 240, 233 P.3d 891. " '[T]here is a distinction between the *individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case.*' " *McKenzie*, 157 Wash.2d at 53, 134 P.3d 221 (quoting *State v. Armstrong*, 37 Wash. 51, 54–55, 79 P. 490 (1905)). To determine whether the prosecutor is expressing a personal opinion of the defendant's guilt, independent of the evidence, we view the challenged comments in context and look for "*clear and unmistakable*" expressions of personal opinion. *McKenzie*, 157 Wash.2d at 53–54, 134 P.3d 221.

¶ 47 For example, in *Anderson*, we held that the prosecutor did not express a personal opinion when, without objection, he characterized the defendant's testimony as "made up on the fly," "ridiculous," and "utterly and completely preposterous." *Anderson*, 153 Wash.App. at 430, 220 P.3d 1273. In contrast, in *State v. Reed*, our Supreme Court held that the prosecutor clearly asserted his improper personal opinion when he called the defendant witness a liar at least four separate times, stated that Reed "did not have a case," asserted that Reed was clearly a "murder two," and implied that the jury should not believe defense counsel because they drove from out of town in fancy cars. *Reed*, 102 Wash.2d at 146, 684 P.2d 699.

#### 1. Statements about Holmes's credibility

[21] ¶ 48 Here, during closing argument, the prosecutor reviewed Holmes's testimony, character-

izing various parts of it as “funny,” “disgusting,” “comical,” and “the most ridiculous thing I’ve ever heard.” 95 VRP at 8708, 8717, 8722. Taken in isolation, these comments are similar to the comments in *Anderson*, 153 Wash.App. at 430, 220 P.3d 1273. But additionally, the prosecutor told the jury that Holmes should not “get up here and sit here and lie.” 95 VRP at 8882. Further, we note with dismay that the prosecutor told the jury that Holmes and Lindsay’s portrayal of Wilkey as a bully “is a crock.... What you’ve been pitched for the last four hours is a crock.” 95 VRP at 8877. As in *Reed*, “These statements suggest not the dispassionate proceedings of an American jury trial,” and such language “cannot with propriety be used by a public prosecutor,” who is presumed to act impartially in the interests of justice. *Reed*, 102 Wash.2d at 146, 146–47, 684 P.2d 699.

¶ 49 We note that the prosecutor did not merely argue that Holmes’s and Lindsay’s versions of events seemed unreasonable, illogical, or unlikely. We do not suggest that a prosecutor does not have “wide latitude” in closing argument to draw reasonable inferences regarding the witness’s credibility from the evidence. *Lewis*, 156 Wash.App. at 240, 233 P.3d 891. Rather, we conclude that a prosecutor need not use language such as, “What you’ve been pitched for the last four hours is a crock” to express an inference from the evidence. 95 VRP at 8877. We conclude that such language is a “*clear and unmistakable*” expression of impermissible personal opinion. *McKenzie*, 157 Wash.2d at 54, 134 P.3d 221. Finally, here the prosecutor laughed while Holmes testified on the stand that Wilkey was abusive. The State does not rebut or explain this circumstance; we conclude it was improper conduct.

## 2. Statement about Wilkey

[22] ¶ 50 During a colloquy with the trial court, the prosecutor said, “The witness is under cross-examination in a criminal case doing the best he can to answer the questions one after another for the better part now of the whole day.” 33 VRP at

2461. Examined in context, the prosecutor’s statement did not refer to Wilkey’s credibility or veracity; rather, the statement referred to Wilkey’s cooperativeness responding to Holmes’s counsel. Specifically, the prosecutor made the comment while arguing to the trial court that Wilkey had not waived attorney-client privilege, despite responding to Holmes’s counsel’s surprise question, “Have you told that to your lawyer?” 33 VRP at 2460. We conclude that the prosecutor did not make an improper statement about Wilkey’s credibility.

## F. Asking the Jury To Consider All the Evidence

[23] ¶ 51 Holmes also argues that the prosecutor committed misconduct by informing\*655 the jury that the nontestifying codefendant’s confession could be used as evidence against Holmes. Br. of Appellant (Holmes) at 50. We conclude that the prosecutor did not make an improper statement.

[24] ¶ 52 Under the Sixth Amendment’s confrontation clause, an accused has a right to confront witnesses against him. U.S. CONST. amend. VI; see also *Crawford v. Washington*, 541 U.S. 36, 42, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Unless the witness is unavailable to testify and the defendant has had a prior opportunity to cross-examine the witness, the confrontation clause prohibits admission of the witness’s “testimonial” statements when that witness does not take the stand at trial. *Crawford*, 541 U.S. at 59, 124 S.Ct. 1354. Such was not the case here.

¶ 53 During rebuttal closing argument, the prosecutor told the jury:

You compare what Mr. Wilkey said with all the evidence when you’re looking at his credibility, and then you compare what Jennifer Holmes said to you for two months.

95 VRP at 8884. Holmes’s counsel immediately objected, arguing that contrary to the jury instructions, the prosecutor had asked the jury to consider Lindsay’s statement against Holmes. On appeal, Holmes supplies no authority, other than the gener-

al rule from *Crawford*, to argue that the prosecutor's statement was improper.

¶ 54 Here, the prosecutor's statement properly highlighted the jury's role to weigh Wilkey's testimony against all the evidence, including Holmes's testimony and Lindsay's police statement. Although the statement did not clarify that the jury must not consider Lindsay's testimony against Holmes, we conclude that it was not by itself improper. Further, to the extent that it may have confused the jury, the trial court properly instructed the jury not to consider Lindsay's incriminating statement against Holmes and further instructed the jury to decide the charges against each defendant separately.

#### G. Inaudible Speech

[25] ¶ 55 Holmes and Lindsay further argue that during closing argument, the prosecutor purposefully whispered so that only the jury could hear him, thereby denying their right to appeal by denying them a complete record for review.<sup>FN16</sup> The State does not respond to this argument.<sup>FN17</sup>

FN16. The dissent notes that the prosecutor's whispers in front of the jury amounts to private communication with the jury. Dissent at 663. Because private communication with the jury was not argued to the trial court or briefed on appeal, we decline to address it.

FN17. Holmes and Lindsay each make this argument regarding the prosecutor's inaudible voice in their SAGs; we consider it here.

[26] ¶ 56 A criminal defendant is constitutionally entitled to a "record of sufficient completeness" to permit effective appellate review of his or her claims. *State v. Thomas*, 70 Wash.App. 296, 298, 852 P.2d 1130 (1993) (quoting *Coppedge v. United States*, 369 U.S. 438, 446, 82 S.Ct. 917, 921, 8 L.Ed.2d 21 (1962)).

¶ 57 Here, while the prosecutor stood right next

to the jury, his voice suddenly became inaudible. The trial court ruled that the prosecutor merely needed to repeat himself, which he did. Because of the peculiar circumstances, we are not satisfied with the trial court's reasoning that the prosecutor merely needed to repeat himself; we note that a prosecutor must never whisper to the jury off the record. Nonetheless, we conclude that the record is sufficiently complete overall to allow review of Holmes and Lindsay's claims of prosecutorial misconduct.

#### H. Prejudice

¶ 58 Holmes and Lindsay argue that the prosecutor's misconduct prejudiced their trial; they also argue that the cumulative effect of the misconduct requires reversal. Although we strongly disapprove of the unprofessional behavior as well as the misconduct, we conclude that there was no substantial likelihood that the improper comments affected the jury. Regarding Lindsay, this conclusion is more easily reached because Lindsay admitted to using zip ties to restrain \*656 Wilkey so that Wilkey would not interfere as Lindsay and Holmes removed the property from Wilkey's home. Because the jury had Lindsay's admissions as evidence before it, there is only a remote chance, not a substantial likelihood, that the jury's verdict was affected by the prosecutor's misconduct.

¶ 59 Once the defendant establishes improper prosecutorial conduct, we determine prejudice under one of two standards depending on whether the defendant objected at trial. *Emery*, 174 Wash.2d at 760, 278 P.3d 653. Here, Holmes and Lindsay objected to much (but not all) of the misconduct at trial. For example, Holmes did not specifically object when the prosecutor said, "Don't get up here and sit here and lie." 95 VRP at 8882. Neither did Holmes or Lindsay object when the prosecutor asked the jury to find the truth nor when the prosecutor said the defense argument was a "crock."<sup>FN18</sup> "Where the defendant failed to object, the defendant waives errors unless he or she establishes that the misconduct was so flagrant and ill intentioned that an in-

struction would not have cured the prejudice and the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.' " *Glasmann*, 175 Wash.2d at 704, 286 P.3d 673; *Emery*, 174 Wash.2d at 761, 278 P.3d 653 (quoting *Thorgerson*, 172 Wash.2d at 455, 258 P.3d 43). Because we concluded that the prosecutor committed misconduct by impugning defense counsel, by misstating and trivializing the burden of proof, and by expressing personal opinion about Holmes's testimony, we look at the effect of each on the jury's verdict.

FN18. Neither Holmes nor Lindsay objected to the prosecutor's comparison of the reasonable doubt standard to everyday decision making. But Holmes did criticize the comparison and clarify the actual burden in her closing argument.

[27] ¶ 60 Regarding misconduct from misstating the burden of proof and misconduct from expressing personal opinion, we examine the misconduct's affect on the jury in the context of the jury instructions. *Anderson*, 153 Wash.App. at 429, 220 P.3d 1273. Here, the trial court's instructions to the jury clearly set forth both the jury's actual duties and the State's proper burden of proof. Additionally, we note that all of these improper statements occurred during closing argument. Because the trial court directed the jury to disregard any argument not supported by the law and the trial court's instructions, the prosecutor's closing arguments do not carry the " 'imprimatur of both the government and the judiciary.' " *Emery*, 174 Wash.2d at 759, 278 P.3d 653 (quoting Suppl. Br. of Pet'r Olson). As in *Anderson*, we conclude that Holmes and Lindsay do not demonstrate a substantial likelihood that the prosecutor's improper statements affected the verdict. *Anderson*, 153 Wash.App. at 429, 220 P.3d 1273.

[28][29] ¶ 61 Regarding the prosecutor's remarks denigrating Holmes's counsel, we note that the majority of remarks and the blatant remarks occurred outside the jury's presence. The State does

not deny the number and character of these remarks, but it argues that Holmes's counsel goaded the prosecutor into many of the improper statements and that, in almost every instance, the trial court instructed the jury to disregard the incidents. Although we are dismayed by the repeated rude remarks, we note that a prosecutor's improper remarks are not grounds for reversal " 'if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.' " *State v. Weber*, 159 Wash.2d 252, 276-77, 149 P.3d 646 (2006) (quoting *State v. Russell*, 125 Wash.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995)), *cert. denied*, 551 U.S. 1137, 127 S.Ct. 2986, 168 L.Ed.2d 714 (2007).

¶ 62 Additionally, the trial court stated that it was not clear what effect the prosecutor's emotional outbursts had on the jury. Contrary to Holmes's counsel's argument that the jury would think poorly of her, the trial court opined that the outburst might instead prompt the jury to think poorly of the prosecutor. Nonetheless, out of caution, the trial court issued a curative jury instruction:

\*657 [Y]ou must disregard any conduct by an attorney that you consider unprofessional. You are instructed that you must not hold the conduct of any attorney against their party in this case.

53 VRP at 4605-06. We presume the jury was able to follow the court's instruction. *Warren*, 165 Wash.2d at 28, 195 P.3d 940. Therefore, considering only those denigrating remarks made in the jury's presence, we conclude that the trial court properly instructed the jury and that the prosecutor's improper comments did not prejudice the jury.

[30][31] ¶ 63 Under the cumulative error doctrine, we may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant her right to a fair tri-

al, even if each error standing alone would be harmless. *Weber*, 159 Wash.2d at 279, 149 P.3d 646. But cumulative error does not apply where the errors are few and have little or no effect on the outcome of the trial. *Weber*, 159 Wash.2d at 279, 149 P.3d 646. Although there are multiple improper statements in this case, as we discussed above, the misconduct occurred primarily outside the jury's presence and the trial court issued curative instructions for the misconduct in the jury's presence; therefore, the misconduct had little or no effect on the jury. Holmes and Lindsay do not persuade us that the combined effect of that misconduct denied them a fair trial; thus, their cumulative error claim regarding prosecutorial misconduct fails. *Weber*, 159 Wash.2d at 279, 149 P.3d 646.

[32] ¶ 64 The dissent cites to *Glasmann*, to support its conclusion that the prosecutor's misconduct here was reversible error. But *Glasmann* is easily distinguished. There, the Supreme Court stated that, "When viewed as a whole, the prosecutor's repeated assertions of the defendant's guilt, improperly modified exhibits, and statement that jurors could acquit Glasmann only if they believed him represent the type of pronounced and persistent misconduct that cumulatively causes prejudice demanding that a defendant be granted a new trial." *Glasmann*, 175 Wash.2d at 710, 286 P.3d 673. The facts here simply do not rise to the level of prejudicial misconduct that requires reversal. The prosecutor here did not introduce altered exhibits to the jury; nor did he repeatedly assert his personal belief that the defendants here were guilty. Whether prosecutorial misconduct is so prejudicial that a new trial must be granted is necessarily fact specific, and the facts here do not support the grant of a new trial.

## II. DOUBLE JEOPARDY

¶ 65 Next, Lindsay<sup>FN19</sup> argues that the trial court violated his right to be free from double jeopardy by entering convictions against him for (1) first degree robbery and second degree kidnapping, (2) first degree robbery and second degree assault,

and (3) second degree kidnapping and second degree assault. The State responds that Lindsay's convictions for first degree robbery, second degree kidnapping, and second degree assault do not violate double jeopardy protections because each crime is different in law and fact.

FN19. At the end of this section, we consider Holmes's double jeopardy claims separately.

### A. Standard of Review

[33][34][35] ¶ 66 We review de novo double jeopardy claims. *State v. Hughes*, 166 Wash.2d 675, 681, 212 P.3d 558 (2009). Article 1, section 9 of the Washington Constitution and the Fifth Amendment to the federal constitution protect persons from a second prosecution for the same offense and from multiple punishments for the same offense imposed in the same proceeding. *State v. Turner*, 169 Wash.2d 448, 454, 238 P.3d 461 (2010). Nevertheless, the legislature may constitutionally authorize multiple punishments for a single course of conduct. *State v. Calle*, 125 Wash.2d 769, 776, 888 P.2d 155 (1995). Where the legislature has provided a statutory scheme distinguishing different degrees of a crime, we may determine that the legislature intended a single punishment for a higher degree of a single crime rather than multiple punishments for several, separate, lesser crimes. *State v. Vladovic*, 99 Wash.2d 413, 420, 662 P.2d 853 (1983). Another tool for determining legislative intent is based on \*658 the merger doctrine. *State v. Freeman*, 153 Wash.2d 765, 777, 108 P.3d 753 (2005).

[36][37][38] ¶ 67 If the evidence proving one crime is also necessary to prove a second crime or a higher degree of the same crime, we consider whether the facts show that the additional crime was committed incidental to the original crime. *State v. Johnson*, 92 Wash.2d 671, 680, 600 P.2d 1249 (1979) (*Johnson* 1). If one crime was incidental to the commission of the other, the merger doctrine precludes additional convictions; but if the offenses have independent purposes or effects, the

court may impose separate punishment. *Freeman*, 153 Wash.2d at 778, 108 P.3d 753; *Vladovic*, 99 Wash.2d at 421, 662 P.2d 853. To establish an independent purpose or effect of a particular crime, that crime must injure the person or property of the victim or others in a separate and distinct manner from the crime for which it also serves as an element. *Freeman*, 153 Wash.2d at 779, 108 P.3d 753, *Johnson I*, 92 Wash.2d at 680, 600 P.2d 1249.

¶ 68 Here, the statutes at issue do not expressly permit multiple punishments for the same act and, Lindsay concedes, “[T]he offenses do not have the same elements.” Reply Br. of Lindsay at 6. Because evidence proving one conviction was also necessary to prove a second conviction or a higher degree of the same conviction, we consider whether some of Lindsay’s convictions should have merged. *Johnson I*, 92 Wash.2d at 681, 600 P.2d 1249.

#### B. First Degree Robbery and Second Degree Kidnapping

[39] ¶ 69 Lindsay argues that the trial court’s imposition of first degree robbery and second degree kidnapping convictions violated double jeopardy protections because the kidnapping was merely incidental to the robbery. The statutes at issue are RCW 9A.40.030<sup>FN20</sup> (second degree kidnapping), and RCW 9A.56.200<sup>FN21</sup> and former RCW 9A.56.190 (1975)<sup>FN22</sup> (first degree robbery). The State responds that it presented sufficient evidence to prove that Lindsay’s second degree kidnapping conviction was distinct from his first degree robbery conviction.

FN20. RCW 9A.40.030 provides:

(1) A person is guilty of kidnapping in the second degree if he or she intentionally abducts another person under circumstances not amounting to kidnapping in the first degree.

(2) In any prosecution for kidnapping in the second degree, it is a defense if established by the defendant by a prepon-

derance of the evidence that (a) the abduction does not include the use of or intent to use or threat to use deadly force, and (b) the actor is a relative of the person abducted, and (c) the actor’s sole intent is to assume custody of that person. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, any other crime.

FN21. RCW 9A.56.200:

(1) A person is guilty of robbery in the first degree if:

(a) In the commission of a robbery or of immediate flight therefrom, he or she:

(i) Is armed with a deadly weapon; or

(ii) Displays what appears to be a firearm or other deadly weapon.

FN22. Former RCW 9A.56.190 provides:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

¶ 70 Here, Lindsay burst through Wilkey’s front door with a pipe in his raised hand. Lindsay

struck and choked Wilkey with the pipe until Wilkey lost consciousness. Wilkey awoke in the living room area, hog-tied with zip ties, a telephone cord, and a dog leash. While the zip ties, cord, and leash restrained Wilkey, Holmes and Lindsay moved substantial amounts of property from Wilkey's home into their truck. The State argues that the robbery was complete before Lindsay tied up Wilkey, thus, Lindsay's restraint of Wilkey using zip ties was a separate act. Specifically, the State argues that for the purpose of robbery, Lindsay subdued Wilkey by striking him and choking him unconscious; thus, it \*659 was only after he was subdued that Lindsay restrained him with zip ties, a telephone cord, and a dog leash. First, *State v. Manchester* directly conflicts with the State's argument that the robbery was complete before Lindsay tied up and restrained Wilkey; thus, we reject that argument. 57 Wash.App. 765, 770, 790 P.2d 217 (1990) (holding that force or fear used to retain property and effectuate escape constitutes robbery).

¶ 71 Second, we reject the State's argument that Holmes and Lindsay hog-tied Wilkey so that they could humiliate and demean him. The State argues that after Lindsay and Holmes forcibly restrained Wilkey with zip ties, they poured Wilkey's medication down the toilet, hit him, wrapped a robe around his head, and poured alcohol on him. The State's argument is that the restraint had an independent purpose or injury. Although Lindsay and Holmes certainly did demean, humiliate, and assault Wilkey while they restrained him, this does not convince us that the restraint had an independent purpose to humiliate Wilkey. These additional assaults may have caused independent injuries for which the State could have charged those acts separately; but the restraint itself did not cause an independent injury. We reject the State's argument that the purpose of the restraint was to allow Lindsay and Holmes to demean, humiliate, and assault Wilkey.

[40] ¶ 72 Furthermore, in *State v. Korum*, we held as a matter of law that kidnapping was incidental to robbery when (1) the restraint was for the

sole purpose of facilitating robbery; (2) the restraint was inherent in the robbery; (3) the victims were not transported from their home; (4) the duration of restraint was not substantially longer than necessary to complete the robbery; and (5) the restraint did not create an independent, significant danger. 120 Wash.App. 686, 707, 86 P.3d 166 (2004), *rev'd in part on other grounds and aff'd in part*, 157 Wash.2d 614, 620, 141 P.3d 13 (2006). Reversing the kidnapping convictions, we reasoned, "That all robberies necessarily involve some degree of forcible restraint, however, does not mean that the legislature intended prosecutors to charge every robber with kidnapping." *Korum*, 120 Wash.App. at 705, 86 P.3d 166. As our Supreme Court held in *State v. Green*, restraint and movement of a victim that are merely incidental and integral to commission of another crime, such as rape or murder, do not constitute the independent, separate crime of kidnapping. 94 Wash.2d 216, 226-27, 616 P.2d 628 (1980).

¶ 73 Here, Lindsay and Holmes restrained Wilkey (1) for the purpose of facilitating robbery; (2) the restraint was necessary to allow Lindsay and Holmes to take a substantial amount of property from Wilkey's home and move it into the waiting truck; (3) Lindsay and Holmes did not transport Wilkey from his home; (4) the duration of Wilkey's restraint lasted no longer than necessary for Lindsay and Holmes to complete the robbery and leave; and (5) the restraint did not create significant danger. *Korum*, 120 Wash.App. at 707, 86 P.3d 166. We conclude that Wilkey's restraint (charged as kidnapping) was incidental to the crime of first degree robbery and these convictions merge. *Freeman*, 153 Wash.2d at 778, 108 P.3d 753.

#### C. First Degree Robbery and Second Degree Assault

[41] ¶ 74 Lindsay also argues that the trial court should have merged his conviction for second degree assault with his conviction for first degree robbery because the assault was the sole evidence of the force used to elevate his robbery conviction

to first degree robbery.<sup>FN23</sup> The State responds that Lindsay committed more assaults than the one that elevated his robbery conviction to first degree robbery. We hold that Lindsay's first degree robbery and second degree assault convictions merge.

FN23. Neither Lindsay nor Holmes challenges the sufficiency of the evidence to support these convictions.

[42] ¶ 75 The statutes at issue are RCW 9A.56.200<sup>FN24</sup> and former RCW 9A.56.190<sup>FN25</sup> \*660 (first degree robbery), and former RCW 9A.36.021 (2003)<sup>FN26</sup> (second degree assault). Considering first degree robbery and second degree assault, our Supreme Court concluded, "Generally, ... these crimes will merge unless they have an independent purpose or effect." *Freeman*, 153 Wash.2d at 780, 108 P.3d 753. An exception to the merger doctrine arises when the "included" crime has an independent purpose or effect from the other crime. *Freeman*, 153 Wash.2d at 778, 108 P.3d 753. One example of an independent effect is when the crime "clearly created separate and distinct injuries." *Vladovic*, 99 Wash.2d at 421, 662 P.2d 853. The *Freeman* court noted:

FN24. RCW 9A.56.200 provides, in part:

- (1) A person is guilty of robbery in the first degree if:
- (a) In the commission of a robbery or of immediate flight therefrom, he or she:
- (i) Is armed with a deadly weapon; or
- (ii) Displays what appears to be a firearm or other deadly weapon.

FN25. Former RCW 9A.56.190 provided:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear

of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

FN26. Former RCW 9A.36.021 provided:

- (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
- (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
- (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
- (c) Assaults another with a deadly weapon; or
- (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
- (e) With intent to commit a felony, assaults another; or
- (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture.

This exception is less focused on abstract legislative intent and more focused on the facts of the individual case. For example, when the defendant struck a victim *after* completing a robbery, there was a separate injury and intent justifying a separate assault conviction, especially since the assault did not forward the robbery. However, this exception does not apply merely because the defendant used *more* violence than necessary to accomplish the crime. The test is not whether the defendant used the least amount of force to accomplish the crime. The test is whether the unnecessary force had a purpose or effect independent of the crime.

*Freeman*, 153 Wash.2d at 779, 108 P.3d 753 (internal citation omitted).

¶ 76 We agree with the State that the record supports several assaults against Wilkey, but this argument misses the question *entirely*. The precise issue here is whether the second degree assault, committed by Lindsay with the intent to commit a felony, had a purpose separate and distinct from his contemporaneous robbery of Wilkey.

¶ 77 The jury found Lindsay guilty of first degree robbery, but it also found that Lindsay did not commit first degree robbery while armed with a firearm. After finding Lindsay guilty of the lesser-included charge of second degree assault (and not first degree assault), the jury found by special verdict that Lindsay committed second degree assault with the intent to commit a felony. The jury specifically rejected that Lindsay committed second degree assault while either armed with a deadly weapon (i.e., the pipe) or by recklessly inflicting substantial bodily injury.

[43] ¶ 78 We do not know, however, to which felony the jury referred when it found Lindsay guilty of assault with the intent to commit a felony. An ambiguity in the jury's verdict under the rule of lenity must be resolved in the defendants' favor. FN27 *State v. Kier*, 164 Wash.2d 798, 814, 194 P.3d 212 (2008). Applying the rule of lenity, we conclude\*661 that the second degree assault was

committed with the intent to commit the felony of robbery. Based on the jury's special verdict finding that Lindsay committed second degree assault with the intent to commit a felony (unidentified), we conclude that under these facts the second degree assault was incidental to the robbery, that there was no distinct and separate purpose other than to commit this felony, and that there was no separate or distinct injury. We therefore conclude that Lindsay's convictions for first degree robbery and second degree assault merge.

FN27. To avoid this result, the jury instructions could have specified for the jury which felony the State must prove; alternately, the special verdict form could have instructed the jury to specify which felony Lindsay intended to commit by committing the assault.

#### D. Second Degree Kidnapping and Second Degree Assault

¶ 79 Lindsay further argues that the trial court should have merged his second degree assault conviction with his second degree kidnapping conviction because the prosecutor argued at closing that Lindsay restrained Wilkey with zip ties and also argued that Lindsay assaulted Wilkey by the use of zip ties. The State responds that after Lindsay restrained Wilkey with zip ties, he beat him and that this beating was unnecessary for the abduction. Because we find that the second degree assault merges with the first degree robbery, FN28 it is unnecessary to address whether the second degree assault merges with the second degree kidnapping and we decline to do so.

FN28. The jury found that the second degree assault was committed with intent to commit "a felony." Clerk's Papers (Lindsay) (CPL) at 394. Because the jury did not specify which felony, it is reasonable to conclude that the second degree assault was committed with the intent to commit the kidnapping. But because we conclude the kidnapping merges with the

robbery, in any event, the result remains that both the assault and the kidnapping merge with the robbery.

¶ 80 In conclusion, we hold that the second degree kidnapping was incidental to the first degree robbery and therefore, the kidnapping and robbery convictions merge; additionally, the second degree assault was committed with the intent to commit the robbery and therefore, the assault and robbery convictions merge. Accordingly, we remand for resentencing of Lindsay.

#### E. Holmes's Double Jeopardy Arguments

¶ 81 Briefly, we turn to Holmes's double jeopardy argument. Solely by adopting Lindsay's argument, Holmes argues that the trial court violated her constitutional protections against double jeopardy by convicting her for robbery, kidnapping, and assault. She asks us to strike her convictions for unlawful imprisonment and assault and to remand for resentencing. But Lindsay's double jeopardy argument involved his second degree kidnapping conviction, and Holmes was not convicted of second degree kidnapping. Because Holmes did not brief double jeopardy as it pertains to her unlawful imprisonment conviction, we decline to review that argument. RAP 10.3(6).

[44] ¶ 82 Regarding Holmes's request to strike her assault conviction, however, we consider the merits of that request in order to secure a fair and orderly review, despite her cursory double jeopardy argument. RAP 7.3. Based on the jury's special verdict finding that Holmes committed second degree assault with the intent to commit a felony (unidentified), we conclude that, under these facts, her second degree assault was incidental to the robbery, that there was no distinct and separate purpose other than to commit this felony, and that there was no separate or distinct injury. We therefore hold that Holmes's convictions for first degree robbery and second degree assault merge.

¶ 83 In conclusion, although we do not condone the prosecutor's misconduct, we hold that the

misconduct did not substantially affect the jury's verdict. We further hold that Lindsay's second degree assault and second degree kidnapping convictions merge with his first degree robbery conviction and that Holmes's second degree assault conviction merges with her first degree robbery conviction; thus, we remand for resentencing.<sup>FN29</sup>

FN29. In the unpublished portion of this opinion, we address and reject Holmes's and Lindsay's remaining arguments and conclude there was no reversible error.

¶ 84 A majority of the panel having determined that only the foregoing portion of this \*662 opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

\*\*\*\*\*UNPUBLISHED TEXT FOLLOWS\*\*\*\*\*

#### ADDITIONAL FACTS

##### I. PROFFERED EVIDENCE

¶ 85 During the trial, Holmes moved the trial court in limine to admit evidence under Evidence Rule 404(b) that Wilkey was a cocaine addict. The trial court reserved its ruling, noting that the parties must ask for a hearing outside the presence of the jury for every piece of evidence of a prior crime or wrong act. The trial court further noted that drug-use evidence was relevant only when the drug use occurred during a relevant time period. Later in the trial, Holmes asked the trial court whether she could elicit evidence of Wilkey's drug use. The trial court determined that the relevant time periods included:

[W]hen [Wilkey] and Ms. Holmes broke up and there was a division of the property and him leaving Idaho and during the time frame concerning the allegations of the home invasion robbery and also during his times on the witness stand.

34 VRP at 2503.

##### II. LINDSAY'S NOTEBOOK

¶ 86 During the course of the trial, jail staff conducted a routine search of an entire jail tier. As part of the search, jail staff disposed of old newspapers, extra clothing, food, and extra hand soap. A correctional officer threw out newspapers found in Lindsay's jail cell. The correctional officer indicated that he did not see any legal documents, notepads, or notebooks with the newspapers.

¶ 87 Lindsay told his counsel that a notebook was missing from his cell, which notebook included some of his trial notes. The correctional officer had no information regarding the missing material. Lindsay's counsel moved the court for a mistrial because the missing notes could have been in the newspapers and the notes included information about trial preparation for witnesses Lindsay had yet to call or who he expected the State to call. Lindsay's counsel told the trial court that the lost materials harmed his ability to represent Lindsay effectively. The trial court denied the mistrial motion.

### III. TAKING THE JURY VERDICT; MISTRIAL MOTION

¶ 88 On Friday evening shortly before 8 PM, the jury notified the trial court that it had reached a verdict. Holmes, Lindsay, both of their counsel, and family members were present in the courtroom. Access to the courthouse was through only the first floor doors; courthouse hours were 8:30 AM to 4:30 PM. Judicial Assistant Matson checked the first floor entrance twice in a five-minute period to see if anyone wanted courthouse access; a deputy prosecutor also checked the first floor entrance for persons wanting courthouse access. Having heard that the jury would deliver its verdict, about a dozen people entered the courtroom. All of these people appeared to be associated with the prosecutor's office (i.e., employees and employees' spouses or friends). Holmes stated she believed there were persons who came earlier in the evening who wanted to hear the verdict but who could not gain access to the after-hours courthouse.

¶ 89 The trial court recessed and instructed the

deputy prosecutor to recheck the first floor entrance and "call out" for anyone who wanted access to the courthouse, to check the inoperable second floor entrance for potential persons gathered there, and then to return a third time to check the first floor entrance. VRP (Mar. 6, 2009) at 30. After checking all entrances and checking with the security officer, the deputy prosecutor reported that the cleaning crew had just gained courthouse access but that no one else was there. Two other deputy prosecutors held the courthouse doors open throughout the trial court's taking of the jury's verdict. One deputy prosecutor reported that only cleaning staff and a Law Enforcement Support Agency employee came through the doors. The record does not show that anyone else sought entry.

¶ 90 The trial court considered sealing the jury verdict and requesting the jury to return on Monday. Holmes and Lindsay recommended that alternative and objected to the trial court's taking the jury verdict after the posted courthouse closing hours. The trial court inquired whether all of the jurors could return to give their verdict Monday. After two jurors stated that they could not return on Monday, the trial court accepted the jury's verdict on Friday evening.

¶ 91 In conjunction with the sentencing hearing a few weeks later, Holmes and Lindsay moved for a new trial on several bases, including the trial court's receiving the jury verdict after hours, the prosecutor's improper closing argument, the prosecutor's improper comments about Holmes's counsel, the trial court's refusal to admit evidence of Wilkey's prior cocaine use, and cumulative error. The trial court denied the motion for a new trial.

### IV. RESTITUTION HEARING

¶ 92 At the restitution hearing, the State offered Wilkey's declaration describing each item of damaged or stolen property and its value. Wilkey also testified at the restitution hearing; after direct examination, the State struck several items from Wilkey's list. Holmes cross-examined Wilkey. The trial court asked the State to submit a written

amended restitution request including only those items the State thought appropriate. The trial court also requested that Holmes and Lindsay provide written responses to Wilkey's restitution request. Both Holmes and Lindsay filed detailed written objections, generally refuting Wilkey's ownership claims.

¶ 93 After reviewing the materials and RCW 9.94A.750, <sup>FN30</sup> the trial court responded to each page of the amended proposed restitution request. The trial court struck several items from Wilkey's list. The trial court issued an order setting restitution in the sum of \$39,133.25. Regarding the specific amounts ordered, the trial court stated:

FN30. RCW 9.94A.750(3) provides:

[R]estitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the offense.

I felt these amounts were easily ascertainable and fit within the case law requirements and were based on actual losses that were easily ascertainable.

VRP (Nov. 13, 2009) at 6.

¶ 94 Holmes and Lindsay objected to the restitution order. Lindsay noted that he based his objections on the same arguments contained in his court memorandum. Holmes argued that "the Court is basically awarding restitution for items that we think are made up of whole cloth." VRP (Nov. 13, 2009)

at 7.

#### ANALYSIS

#### V. TRIAL COURT DECLINED TO ADMIT EVIDENCE

¶ 95 Holmes argues that the trial court erred by refusing to admit evidence alleging Wilkey's prior drug addiction because Wilkey's prior drug addiction compromised his memory. <sup>FN31</sup> We conclude that the trial court properly refused to admit evidence of alleged drug addiction occurring years before the night of the crime.

FN31. Holmes and Lindsay each make this argument and a similar argument in their Statements on Additional Grounds (SAG). Regarding the similar argument, Holmes and Lindsay argue that the trial court should have admitted evidence about Wilkey's abusive behavior to attack his credibility. But ER 404(b) explicitly prohibits admission of evidence to prove a defendant has a criminal propensity, and neither Holmes nor Lindsay argue that it should have been admitted to show other purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

#### A. Standard of Review

¶ 96 Evidence of prior crimes, wrongs, or acts is inadmissible if a party offers it to establish a person's character or to show he acted in conformity with that character. *State v. Lillard*, 122 Wash.App. 422, 431, 93 P.3d 969 (2004), review denied, 154 Wash.2d 1002, 113 P.3d 482 (2005); ER 404(b). We review the trial court's refusal to admit evidence of prior crimes or wrongs for abuse of discretion. *Lillard*, 122 Wash.App. at 431, 93 P.3d 969.

#### B. No Abuse of Discretion

¶ 97 Evidence of drug addiction is generally inadmissible because it is impermissibly prejudicial. *State v. Tigano*, 63 Wash.App. 336, 344-45, 818 P.2d 1369 (1991), review denied, 118 Wash.2d

1021, 827 P.2d 1392 (1992). “It is well settled in Washington that evidence of drug use is admissible to impeach the credibility of a witness if there is a showing that the witness was using or was influenced by the drugs at the time of the occurrence which is the subject of the testimony.” *State v. Thomas*, 150 Wash.2d 821, 863, 83 P.3d 970 (2004) (quoting *State v. Russell*, 125 Wash.2d 24, 83, 882 P.2d 747 (1994).) Evidence of drug use is also admissible to impeach, where there is a reasonable inference that the witness was under the influence of drugs at the time of testifying at trial. *Tigano*, 63 Wash.App. at 344, 818 P.2d 1369.

¶ 98 Consistent with Washington case law, the trial court stated it would allow evidence of drug use occurring during these relevant time periods:

[W]hen [Wilkey] and Ms. Holmes broke up and there was a division of the property and him leaving Idaho and during the time frame concerning the allegations of the home invasion robbery and also during his times on the witness stand.

34 VRP at 2503. Here, Holmes's sought to elicit testimony regarding Wilkey's alleged prior drug addiction generally, not Wilkey's specific use on relevant occasions. Additionally, Holmes's evidence did not involve relevant time periods, such as in 2005 when the couple separated, in 2006 when the crimes occurred, or the time period of Wilkey's trial testimony. Instead, Holmes's proffered evidence dated to the beginning of Holmes and Wilkey's relationship, which began in 1998. Washington law does not support the use of general addiction evidence occurring many years before the events in question at trial or testimony at trial. *Russell*, 125 Wash.2d at 83, 882 P.2d 747. Thus, we conclude that the trial court did not abuse its discretion by refusing Holmes's evidence alleging Wilkey's prior drug addiction.

#### VI. JAIL GUARD'S NOTEBOOK SEIZURE AND RIGHT TO COUNSEL

¶ 99 Lindsay next argues that the jail guard's seizure of his legal materials violated his constitu-

tionally protected right to counsel. We agree with the State that the seizure of Lindsay's note pad by jail staff did not violate his right to counsel.

##### A. Standard of Review

¶ 100 This court reviews a trial court's denial of a mistrial<sup>FN32</sup> motion for an abuse of discretion. *State v. Greiff*, 141 Wash.2d 910, 921, 10 P.3d 390 (2000). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Rafay*, 167 Wash.2d 644, 655, 222 P.3d 86 (2009). The reviewing court upholds a trial court's decision to deny a mistrial motion unless the irregularities, when viewed in the context of all the evidence, so tainted the entire proceeding that the defendant was denied a fair trial. *State v. Post*, 118 Wash.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992).

FN32. Lindsay moved the trial court to declare a mistrial. On appeal, Lindsay relies on case law that considers a trial court's denial of a motion to dismiss. *State v. Cory*, 62 Wash.2d 371, 373–74, 382 P.2d 1019 (1963); *State v. Garza*, 99 Wash.App. 291, 293, 994 P.2d 868, review denied, 141 Wash.2d 1014, 10 P.3d 1072 (2000). We assume, however, that unlike the case law on which he relies, Lindsay is not asking this court to dismiss his charges.

##### B. No Governmental Intrusion

¶ 101 Both the federal and our state constitutions protect a criminal defendant's right to counsel. U.S. CONST. amend. V, VI; Wash. Const. art. I § 22. The constitutional right to assistance of counsel includes the right to confer with defense counsel in private. *State v. Cory*, 62 Wash.2d 371, 374, 382 P.2d 1019 (1963). The State cannot justify spying upon or intruding into the relationship between criminal defendants and their counsel. *Cory*, 62 Wash.2d at 374–75, 382 P.2d 1019.

¶ 102 Lindsay relies on *Cory*, where jail staff surreptitiously eavesdropped and recorded consultations between Cory and his counsel. *Cory*, 62

Wash.2d at 372, 382 P.2d 1019. After Cory brought the recordings to the trial court's attention, the trial court refused to dismiss the charge's and merely excluded evidence derived from the confidential conversations. *Cory*, 62 Wash.2d at 372, 382 P.2d 1019. Disagreeing with that remedy, our Supreme Court said:

[T]he shocking and unpardonable conduct of the sheriffs officers, in eavesdropping upon the private consultations between the defendant and his attorney, and thus depriving him of his right to effective counsel, vitiates the whole proceeding. The judgment and sentence must be dismissed.

*Cory*, 62 Wash.2d at 378, 382 P.2d 1019. Additionally, Lindsay relies on *State v. Garza*, 99 Wash.App. 291, 296–97, 994 P.2d 868, review denied, 141 Wash.2d 1014, 10 P.3d 1072 (2000). In *Garza*, jail officials discovered evidence of a possible escape attempt. In response, jail officials searched and examined the inmates' personal property, including legal documents containing private communications with their attorneys. *Garza*, 99 Wash.App. at 293, 994 P.2d 868. Division Three of this court held that officials' actions were purposeful and remanded for a hearing to determine whether the actions were justified, noting:

If on remand, the superior court finds the jail's security concerns did not justify the specific level of intrusion here, there should be a presumption of prejudice, establishing a constitutional violation.

*Garza*, 99 Wash.App. at 301, 994 P.2d 868.

¶ 103 Lindsay's reliance on this case law ignores the factual differences. In *Cory* and *Garza*, the government purposefully intruded into defendants' interactions with their counsel; in contrast, it is conjecture that Lindsay's notebook was among the newspapers of which jail staff disposed. Here, although the jail official purposefully cleared jail cells of "nuisance contraband," nothing in the record supports a finding that jail officials engaged in

any other purposeful conduct. 60 VRP at 5190. Because no facts in the record support Lindsay's argument regarding governmental intrusion or denial of a fair trial, we uphold the trial court's denial of Lindsay's mistrial motion. *Post*, 118 Wash.2d at 620, 826 P.2d 172, 837 P.2d 599.

## VII. RIGHT TO A PUBLIC TRIAL

¶ 104 Lindsay and Holmes also argue that the trial court violated their right to a public trial and the public's right to an open courtroom by accepting their jury verdicts after the courthouse's posted business hours without first conducting a courtroom-closure analysis under *State v. Bone-Club*, 128 Wash.2d 254, 906 P.2d 325 (1995). We agree with the State that because the trial court neither held a hearing outside of the courtroom nor denied courtroom access to anyone in the building, the courtroom was not closed.

### A. Standard of Review

¶ 105 We review de novo whether the trial court violated a defendant's right to a public trial. *State v. Strobe*, 167 Wash.2d 222, 225, 217 P.3d 310 (2009). There is a strong presumption that courts are to be open at all trial stages. *State v. Momah*, 167 Wash.2d 140, 148, 217 P.3d 321 (2009), cert. denied, — U.S. —, 131 S.Ct. 160, 178 L.Ed.2d 40 (2010). Article I, section 22 of our state constitution and the Sixth Amendment to the United States Constitution provide a criminal defendant with the right to a "public trial by an impartial jury." Additionally, article I, section 10 of our constitution provides that "[j]ustice in all cases shall be administered openly," granting the public an interest in open, accessible proceedings. *State v. Lormor*, 172 Wash.2d 85, 91, 257 P.3d 624 (2011) (quoting *Seattle Times Co. v. Ishikawa*, 97 Wash.2d 30, 36, 640 P.2d 716 (1982).)

### B. No Closure

¶ 106 A courtroom closure occurs during trial when the trial court "completely and purposefully" closes the courtroom to spectators so that no one may enter or leave. *Lormor*, 172 Wash.2d at 93, 257 P.3d 624. The *Bone-Club* analysis<sup>FN33</sup> comes

into play when the trial court fully excludes the public from proceedings within a courtroom. *Lormor*, 172 Wash.2d at 92, 257 P.3d 624. Examples of fully excluding the public from the courtroom include the trial court's (1) not allowing spectators in the courtroom during a suppression hearing (*Bone-Club*, 128 Wash.2d at 257, 906 P.2d 325); (2) conducting the entire voir dire closed to all spectators (*In re Pers. Restraint of Orange*, 152 Wash.2d 795, 807-08, 100 P.3d 291 (2004)); (3) excluding all spectators, including codefendant and his counsel, from the courtroom while codefendant plea-bargained (*State v. Easterling*, 157 Wash.2d 167, 172, 137 P.3d 825 (2006)). Additionally, our Supreme Court has found the public trial right implicated when the trial court privately questioned individual jurors in chambers. *Momah*, 167 Wash.2d at 146, 217 P.3d 321.

FN33. To determine if closure is appropriate, the trial court is required to consider the following factors (or *Bone-Club* analysis) and enter specific findings on the record to justify any ensuing closure: (1) The proponent of closure must show a compelling interest and, if based on anything other than defendant's right to a fair trial, must show serious and imminent threat to that right; (2) anyone present when the motion is made must be given an opportunity to object; (3) the least restrictive means must be used; (4) the court must weigh the competing interests; and (5) the order must be no broader in application or duration than necessary. *Bone-Club*, 128 Wash.2d at 258-59, 906 P.2d 325.

¶ 107 Holmes argues that "[b]ecause the courtroom was closed, the courtrooms inside were de facto closed." Br. of Appellant (Holmes) at 35-36. But there is no evidence that the trial court here "completely and purposefully" closed the courtroom to spectators so that no one may enter or leave. *Lormor*, 172 Wash.2d at 93, 257 P.3d 624. In fact, the trial court went to great lengths to ensure

no one was excluded from the proceeding.

¶ 108 Here, the trial court received the jury verdict in an after-hours courthouse but an open courtroom. Instead of prohibiting or excluding the public from the courtroom, the trial court directed its assistant to make multiple door checks so that the public could enter. Additionally, after learning that Holmes had people who wanted to hear the verdict, the trial court ordered a recess, instructed officers of the court to recheck the doors and "call out" for anyone who wanted access to the courthouse. VRP (Mar. 6, 2009) at 30. Finally, court officers physically held the courthouse doors open throughout the trial court's taking of the jury's verdict. VRP (Mar. 6, 2009) at 79-80. Because nothing in the record supports that a court closure occurred, we conclude that no *Bone-Club* analysis was necessary. *Lormor*, 172 Wash.2d at 92, 257 P.3d 624.

¶ 109 Next, we consider whether, as a matter of courtroom operations, the trial court acted within its discretion to accept the jury's verdict after the posted courtroom hours. The trial court possesses broad discretion and inherent and statutory authority to direct courtroom operations. *Lormor*, 172 Wash.2d at 93-94, 257 P.3d 624; RCW 2.28.010. A trial court should exercise caution in conducting court proceedings and supply adequate explanation that the appellate courts can review. *See Lormor*, 172 Wash.2d at 94-95, 257 P.3d 624 (discussing the trial court's authority to remove a spectator). Here, the trial court accepted the jury's verdict after posted hours on Friday evening because two jurors stated that they could not return on Monday. The trial court heard from all parties before receiving the verdict at this hour and took every step to protect the parties' and the public's rights to open proceedings. We conclude that the trial court has discretion to conduct courtroom operations effectively and that here, it acted within that discretion.

#### VIII. DUE PROCESS AT RESTITUTION HEARING

¶ 110 Holmes argues that the trial court violated her due process rights at the restitution hearing

by its reliance on Wilkey's list of items, which were "unsupported by affidavit and also were contrary to the evidence at trial." FN34, FN35 Br. of Appellant (Holmes) at 59. We conclude that the trial court did not violate her due process rights because she had the opportunity to rebut the evidence presented.

FN34. Lindsay raises this same issue in his SAG; we consider it here. In her SAG, Holmes also raises an issue regarding Wilkey's testimony and the restitution hearing, again, we consider it here.

FN35. Holmes's restitution hearing argument contains assertions but no citations to the record. Although, we may decline to consider the merits of insufficient argument, we elect to consider her arguments briefly. RAP 10.3(6).

#### A. Standard of Review

¶ 111 The trial court has discretion to determine the size of a restitution award and we will not disturb that determination absent an abuse of that discretion. *State v. Pollard*, 66 Wash.App. 779, 785, 834 P.2d 51, review denied, 120 Wash.2d 1015, 844 P.2d 436 (1992). We will find abuse of that discretion only where its exercise is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Pollard*, 66 Wash.App. at 785, 834 P.2d 51 (quoting *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971)). If substantial evidence supports the amount of restitution ordered, there is no abuse of discretion. *Pollard*, 66 Wash.App. at 785, 834 P.2d 51.

#### B. No Abuse of Discretion

¶ 112 The trial court must base its restitution determination "on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury." RCW 9.94A.753(3). Easily ascertainable damages are those tangible

damages that the State proves by sufficient evidence. *State v. Tobin*, 132 Wash.App. 161, 173, 130 P.3d 426 (2006), *aff'd*, 161 Wash.2d 517, 166 P.3d 1167 (2007). " 'Evidence of damage is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.' " *Pollard*, 66 Wash.App. at 785, 834 P.2d 51 (quoting *State v. Mark*, 36 Wash.App. 428, 434, 675 P.2d 1250 (1984)).

¶ 113 Although the rules of evidence do not apply at a restitution hearing, due process requires that the evidence be reliable and that the defendant have an opportunity to refute the evidence presented. *Pollard*, 66 Wash.App. at 784-85, 834 P.2d 51. The owner is always qualified to provide information about the amount of loss. *McCurdy v. Union Pac. RR.*, 68 Wash.2d 457, 468-69, 413 P.2d 617 (1966). The party seeking restitution need not prove the certainty of damages with specific accuracy. *Pollard*, 66 Wash.App. at 785, 834 P.2d 51. When evidence is comprised of hearsay, due process requires corroborative evidence sufficient to give the defendant a basis for rebuttal. *State v. Kisor*, 68 Wash.App. 610, 620, 844 P.2d 1038, review denied, 121 Wash.2d 1023, 854 P.2d 1084 (1993).

¶ 114 Here, Holmes cross-examined Wilkey at the restitution hearing and also filed a memorandum response to the State's restitution request. Before announcing its decision, the trial court stated that it reviewed and "took into account all the information" relating to restitution, including Holmes's memorandum. VRP (Nov. 13, 2009) at 3. Holmes's restitution memorandum referred to the "considerable testimony" and physical evidence she presented at trial. CPH at 867. Thus, the record does not support her claim that the trial court denied her an opportunity or basis for rebuttal regarding restitution. Nothing about the trial court's restitution decision, which considered the request page by page in careful detail, shows the trial court abused its discretion to determine the restitution sum of \$39,133.25. Because the trial court acted within its discretion, we reject Holmes's argument

that due process requires a new restitution hearing. *State v. Mead*, 67 Wash.App. 486, 490, 836 P.2d 257 (1992).

#### IX. CUMULATIVE ERROR

¶ 115 Without specifying any specific errors, or explaining her argument, Holmes argues she is entitled to relief under the doctrine of cumulative error. We may reverse based on the cumulative effects of the trial court's errors, even if considered separately, it would conclude that each error was harmless. *Russell*, 125 Wash.2d at 93, 882 P.2d 747. Here, neither Holmes nor Lindsay show the trial court erred. Thus, there is no cumulative effect requiring our consideration. We conclude that Holmes fails to establish prejudicial error or fails to establish that her trial was so flawed with prejudicial error to warrant relief.

#### VI. STATEMENT OF ADDITIONAL GROUNDS (SAG)

##### A. Effective Assistance of Counsel

¶ 116 In their SAGs, Holmes and Lindsay argue that their attorneys provided ineffective assistance of counsel because they received no payment for the last part of trial. Holmes also argues ineffective assistance of counsel because her attorney made fun of the victim at closing.

¶ 117 To prevail on a claim of ineffective assistance of counsel, defendants must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995). If the defendants fail to satisfy either part of the test, the court need not inquire further. *State v. Hendrickson*, 129 Wash.2d 61, 78, 917 P.2d 563 (1996). The defendants are prejudiced if it is reasonably probable that, if not for counsel's deficient performance, the outcome would have differed. *In re Pers. Restraint of Pirtle*, 136 Wash.2d 467, 487, 965 P.2d 593 (1998). A defendant cannot base a claim for ineffective assistance of counsel on conduct that can be fairly characterized as legitimate trial strategy or tactics. *McFarland*, 127 Wash.2d at 336, 899 P.2d 1251.

¶ 118 The record does not support Holmes's and Lindsay's arguments that their counsel performed deficiently because the attorneys reached the maximum payment for class A felonies. Instead, the record demonstrates that counsel for both Holmes and Lindsay zealously advocated for their clients. Additionally, Lindsay attaches a letter to his SAG from his trial counsel, which states, "I did not find out until after the trial was over that I was not going to be paid the other amount [the amount he had billed for his time]." Because this letter indicates that counsel did not know he would receive limited payment, it does not support the argument that counsel's performance diminished in response to limited payment. Finally, Holmes's attorney's attack of Wilkey's credibility during closing is a legitimate trial strategy or tactic. Thus, we conclude that Holmes's and Lindsay's claims of ineffective assistance of counsel fails.

##### B. Speedy Trial

¶ 119 Lindsay also argues that the trial court violated his constitutional speedy trial rights because he never requested or signed a request for delay. Holmes similarly argues that because of trial interruptions, her trial spanned almost two years. CrR 3.3(b)(1)(i) requires trial to begin within 60 days of arraignment if the defendant is in custody. The record shows, however, that the trial court validly ordered the continuances for appropriate reasons at the request of various parties. A motion for a continuance "by or on behalf of any party waives that party's objection to the requested delay." CrR 3.3(f)(2). The trial court does not necessarily abuse its discretion by granting defense counsel's request for more time to prepare for trial, even " 'over defendant's objection, to ensure effective representation and a fair trial.' " *State v. Saunders*, 153 Wash.App. 209, 220 P.3d 1238 (2009) (quoting *State v. Campbell*, 103 Wash.2d 1, 15, 691 P.2d 929 (1984)). Thus, we conclude that Holmes's and Lindsay's claims of violation of speedy trial rights fail.

##### C. Admission of Wilkey's Clothes as Evidence

¶ 120 Holmes also argues that the trial court erred by admitting into evidence items of Wilkey's clothing because investigators had not taken those clothing items as inventory after the crime. We review a trial court's admission of evidence for abuse of discretion. *State v. Stubsjoen*, 48 Wash.App. 139, 147, 738 P.2d 306, review denied, 108 Wash.2d 1033, 1987 WL 503425 (1987). A trial court abuses its discretion when it exercises it on untenable grounds or for untenable reasons. *State v. Stenson*, 132 Wash.2d 668, 701, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998). The record indicates that after Wilkey mentioned this clothing in his testimony, he brought it to court with him. The trial court appears to have admitted the evidence because Wilkey had already mentioned it in his earlier testimony and Holmes or Lindsay could later cross-examine him about that testimony. Holmes does not argue that any party actually used or relied on this evidence, or that it later became significant or prejudicial. Therefore, Holmes presents no reason to conclude that the trial court abused its discretion and we conclude that it did not.

#### D. Amended Information

¶ 121 In his SAG, Lindsay argues that the State abused its authority by twice amending the charges against him, adding theft of a firearm charges in the amended charges, despite being in the position to include firearm charges from the beginning. Under CrR 2.1(d), “[t]he court may permit any information to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.” The defendant bears the burden of showing prejudice. *State v. Gutierrez*, 92 Wash.App. 343, 346, 961 P.2d 974 (1998). Here, the State amended information adding alternative means of committing the crimes and adding four counts of theft of a firearm. Lindsay does not explain how the State's delay in adding the firearm charges unfairly prejudiced him or why his convictions might be different had the State included those charges in the original charging information. Thus, we conclude that Lindsay's claim fails.

#### E. Motion to Dismiss

¶ 122 In his SAG, Lindsay argues that the trial court erred in denying his pro se motion to dismiss. Shortly before trial commenced, Lindsay brought a motion to dismiss with prejudice based on abuse of discovery. “A decision denying a motion to dismiss under [CrR 8.3(c)] is not subject to appeal under RAP 2.2.” CrR 8.3(c)(3). Rather, the defendant may only challenge the sufficiency of the evidence produced at trial. *State v. Richards*, 109 Wash.App. 648, 653, 36 P.3d 1119 (2001). Lindsay does not argue that the State produced insufficient evidence at trial; he merely restates the reasons for his motion to dismiss. Accordingly, we conclude that his challenge of the trial court's denial of his dismissal motion fails.

#### F. Facts Outside The Record

¶ 123 Both Holmes and Lindsay make several arguments in their respective SAGs that involve facts outside of the record. Holmes and Lindsay argue that the prosecutor released Holmes's truck and horse trailer without notifying the defense or inventorying and photographing the contents. Holmes and Lindsay also state that evidence photographed at the scene was not the same as evidence produced at trial. Holmes states that “photos taken of the scene changed from one photo to the next even though the photos were of the same ‘evidence/scene.’ ” SAG (Holmes) Add'l Ground 20 (capitalization omitted). She also states that “photos taken showing evidence [were] not [the] exact same as produced from Pierce County evidence holding facilities at trial.” SAG (Holmes) Add'l Ground 21 (capitalization omitted). Holmes states that Wilkey stole a vehicle licensed and registered to her but the State never charged him with possession of stolen property.

¶ 124 Additionally, Lindsay states that Pierce County deputies retrieved evidence from a location different from the one in which the Idaho police stored it. Finally, Lindsay also argues that “the door security stated that [Wilkey's nephew and father] ... were both in the courtroom using a tape recorder”

but no party moved to obtain the tape recorder. SAG (Lindsay) Add'l Ground 12. Because these issues rely on information, records, and photographs outside the record, we cannot review these claims; a personal restraint petition is the appropriate means to raise such issues. *McFarland*, 127 Wash.2d at 338, 899 P.2d 1251.

#### G. Issues Decided by the Jury

¶ 125 Holmes and Lindsay raise several claims regarding evidence considered by their jury. The reviewing court defers to the fact finder's credibility determinations, resolution of conflicting testimony, and persuasiveness of the evidence. *Thomas*, 150 Wash.2d at 874-75, 83 P.3d 970.

¶ 126 Holmes states that a failure on Wilkey's part to care for his own diabetes could explain Wilkey's "injuries." SAG (Holmes) Add'l Ground 9 (capitalization omitted). Holmes and Lindsay also state that Wilkey wanted only money or retribution so he was not an innocent victim. Next, Holmes states that police and crime scene investigators found that Wilkey's house looked like sloppy housecleaning not burglary. Holmes and Lindsay both state that police did not secure Wilkey's house for over 12 hours and that Wilkey's good friend was there when police arrived. Holmes states that Wilkey's claim of Post Traumatic Stress Disorder could have been stage fright. She also states that other evidence could refute the prosecutor's inference during closing that Wilkey's abrasions were consistent with rug burns. Holmes also states that the prosecutor's arguments included many inferences outside the scope of the testimony.

¶ 127 But Wilkey's credibility was an issue decided by the jury and we will not disturb its findings on appeal. Similarly, Holmes and Lindsay presented their theories and evidence to the jury and the jury weighed their testimony. Again, we will not disturb the jury's findings regarding credibility determinations, resolution of conflicting testimony, and persuasiveness of the evidence.

#### H. Issues Too Vague To Address

¶ 128 In her SAG, Holmes states, "Only the bathroom and living[ ]room/kitchen areas and the hallway and parts of two of the three bedrooms on one end of the house were photographed leaving the rest of the house undocumented." SAG (Holmes) Add'l Ground 11 (capitalization omitted). She implies, but does not explain, why photographs of the third bedroom may have been important. Additionally, Holmes states that a Del's Farm and Feed official stated they do not have a store in Hawaii but the trial court admitted as evidence a receipt for metal tube gates from Del's Farm and Feed. Although Holmes does not have to cite to the record in her SAG, she must inform us of the "nature and occurrence of alleged errors." RAP 10.10(c). We are unable to address Holmes's vague arguments.

¶ 129 We affirm Holmes's and Lindsay's convictions and remand for resentencing.

\*\*\*\*\*END OF UNPUBLISHED TEXT\*\*\*\*\*  
I concur: HUNT, J.

ARMSTRONG, J. (dissenting).

¶ 130 I agree with the majority that the prosecutor engaged in misconduct throughout the trial, culminating in further personal attacks on defense counsel during closing argument; an argument in which the prosecutor also misstated the State's burden of proof, characterized the defense argument as a "crock," and spoke so softly to the jurors that neither the defense attorneys, the court reporter, nor the trial court could hear what he said. I disagree with the majority that we should conclude that this pervasive and serious misconduct was harmless.

#### A. MISCONDUCT OUTSIDE THE JURY'S PRESENCE

¶ 131 The majority assumes that misconduct or unprofessional behavior occurring outside the jury's presence could not affect the jury's verdict. But the misconduct in the jury's presence does not show the extent to which the attorneys' unrelenting misconduct and disrespect for the trial court permeated the trial. Accordingly, I set forth some samples of misconduct committed outside the jury's presence to

demonstrate how it infected the whole trial, engendering “ ‘a feeling of prejudice,’ ” and undermining the sense of fairness. *State v. Emery*, 174 Wash.2d 741, 762, 278 P.3d 653 (2012) (quoting *Slattery v. City of Seattle*, 169 Wash. 144, 148, 13 P.2d 464 (1932)).

#### 1. Acrimony and Examining Witnesses

¶ 132 Both Jennifer Holmes's counsel and the prosecutor complained that the other party inappropriately interrupted when they questioned a witness, including questioning occurring in the jury's presence. On one occasion, the prosecutor asked Holmes's counsel not to yell as she questioned a witness; she responded that she “can yell and it's a lot louder” and resumed her questioning. 19 Report of Proceedings (RP) at 1223. On another occasion, when Holmes's counsel questioned a witness, the prosecutor said that Holmes's counsel should ask her questions without badgering or assaulting the witness. Holmes's counsel responded that she did not like “being screamed at and berated” by the prosecutor; she added that the prosecutor was “pissed off.” 20 RP at 1338. The prosecutor described Holmes's counsel's witness examination saying:

This is silly. You want to ask stupid questions for four flippin' weeks, you're going to get a reaction from me, I'll grant you that. I mean, this is the most ridiculous, pathetic, long-ranging cross-examination of a witness in history.

51 RP at 4307.

#### 2. Acrimony and Disrespecting the Trial Court

¶ 133 The open hostility between the prosecutor and Holmes's counsel displayed disrespect for the trial court and for the law itself. For example, not only did the prosecutor and Holmes's counsel interrupt each other, they interrupted the trial court, at one point causing the trial court to ask, “Can I finish for once?” 42 RP at 3569. Other examples of disrespect to the trial court include the prosecutor telling the trial court that Holmes's counsel's request to interrupt the trial was “a joke” and

“ridiculous” and that Holmes's counsel wanted a “Burger King trial ... [h]ave it my way.” 34 RP at 2557. At another point, the prosecutor told the trial court, “I didn't object [earlier] because I was laughing so hard it was so stupid.” 53 RP at 4572–73. Later, the prosecutor told Holmes's counsel that she was repeating herself, she replied by telling him to “kindly shut up.” 51 RP at 4309. The prosecutor then asked the trial court to instruct Holmes's counsel not to repeat herself; Holmes's counsel replied, “Maybe [the prosecutor] could borrow Your Honor's gown and tell us all how to run this trial.” 51 RP at 4309.

¶ 134 In another instance, Holmes's counsel told the trial court that the prosecutor's comments were “obnoxious.” 44 RP at 3831. In response, the prosecutor said, “This is the same garbage that I was talking about days \*663 ago when I lost my temper in this courtroom, because it's what she does.” 44 RP at 3833.

¶ 135 After another altercation between the prosecutor and Holmes's counsel, the prosecutor told the trial court:

If I get one more comment out of counsel that I'm being rude in front of the jury, I'm going to friggin pop a gasket. It's the most—and I know she's smiling, she's laughing, and she's snotty, but it is the most unprofessional, unreasonable thing to do in a courtroom, and she knows it.

87 RP at 8100–01. Holmes's counsel told the trial court that she believed the prosecutor was rude. The prosecutor responded, “I'm telling the Court right now, I'm going to ...” 87 RP at 8101. The trial court asked the prosecutor, “Going to bring your checkbook with you, too?” <sup>FN37</sup> 87 RP at 8101. The prosecutor told the trial court, “No, I'm going to ask the Court why a checkbook hasn't already been produced because that was exactly what the Court was talking about.” 87 RP at 8101. These samples of misconduct, committed outside the jury's presence, demonstrate more than the prosecutor's and Holmes's counsel's treatment of each

other, they show an unthinkable disrespect for the trial court and the whole trial process.

FN37. After considerable unprofessional conduct, the trial court warned the parties if the behavior resumed, it would impose a \$1,000 sanction, paid from the offending attorney's personal funds and payable to a charitable legal assistance foundation. Yet the trial court never imposed sanctions.

#### B. MISCONDUCT DURING CLOSING ARGUMENT

¶ 136 Finally, the prosecutor capped his performance by whispering to the jury three times during his closing. After the court reporter stated she could not hear the prosecutor, the prosecutor commented only that the problem was defense counsel's for talking to her client. In a post-trial motion for a new trial, the defendants raised the issue and both defense counsels filed supporting declarations. The declarations reported that after the trial court advised the prosecutor to keep his voice up, the prosecutor moved behind counsel's table and shouted his next lines to the jury, which prompted the jurors to laugh. The prosecutor did not contradict this with an affidavit. Instead, he merely argued to the trial court that "it happens" during trials. 97 RP at 8985.

¶ 137 "In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed ... prejudicial." *Remmer v. U.S.*, 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed. 654 (1954). Once private communication with the jury is established, the party making the communication can overcome the presumed prejudice by showing that the misconduct was harmless beyond a reasonable doubt. *State v. Kell*, 101 Wash.App. 619, 621, 5 P.3d 47 (2000); *State v. Murphy*, 44 Wash.App. 290, 296, 721 P.2d 30, review denied, 107 Wash.2d 1002 (1986). Thus, the State had the burden to overcome the prejudice. *Kell*, 101 Wash.App. at 621, 5 P.3d 47. Yet, the State did not offer an innocent explanation to the trial court and, on appeal, the State does

not address the issue. Accordingly, our record still contains no information as to what the prosecutor whispered. And, we should presume prejudice. *Remmer*, 347 U.S. at 229, 74 S.Ct. 450. The majority concludes that the "record is sufficiently complete overall to allow review of Holmes and Lindsay's claims of prosecutorial misconduct." Majority at 655. But without knowing what the prosecutor said to the jury, I am unable to agree.

#### C. PREJUDICE

¶ 138 The majority finds that the prosecutor committed misconduct by denigrating defense counsel. It also finds that the prosecutor minimized and trivialized the State's burden of proof by using the puzzle analogy, comparing the reasonable doubt standard to everyday decisions, telling the jury it had to find the truth, and commenting on Holmes's testimony. Majority at 656. We have previously reversed convictions where the same prosecutor's office employed the same arguments. *See State v. Walker*, 164 Wash.App. 724, 726, 265 P.3d 191 (2011).

\*664 ¶ 139 Nonetheless, the majority reasons that regarding Lindsay, his admission to using zip ties to restrain Wilkey leaves only a "remote chance" the jury's verdict was affected by the prosecutor's misconduct. Majority at 656-57. Finally, despite acknowledging that there were "multiple improper comments," the majority rejects the cumulative error doctrine relying on the reasoning that "cumulative error does not apply where the errors are few and have little or no effect on the outcome of the trial." Majority at 656-57. I cannot agree.

¶ 140 Our Supreme Court recently stated that "deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts." Rather, the question is whether there is a substantial likelihood that the instances of misconduct affect the jury's verdict. *In re Pers. Restraint of Glasmann*, 175 Wash.2d 696, 711, 286 P.3d 673 (2012). Thus, the "focus must be on the misconduct and its impact, not on the evid-

ence that [was] properly admitted.” *Glasmann*, 175 Wash.2d at 711, 286 P.3d 673. Here, focusing on misconduct as in *Glasmann*, the impact of “powerful but unquantifiable material on the jury is exceedingly difficult to assess but substantially likely to have affected the *entirety* of the jury’s deliberations and its verdicts.” *Glasmann*, 175 Wash.2d at 711, 286 P.3d 673.

¶ 141 In addition, the majority concludes the prosecutor’s misconduct was harmless because the court instructed the jury to “disregard any argument not supported by the law” and to “disregard any conduct by an attorney that you consider unprofessional.” Majority at 656–57. Generally, we presume the jury will follow the court’s instructions, but we analyze possible prejudice from misconduct in the context of the whole argument, the issues in the case, the evidence, and the instructions. *State v. Warren*, 165 Wash.2d 17, 28, 195 P.3d 940 (2008).

¶ 142 The cumulative effect of repetitive prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.<sup>FN38</sup> *State v. Case*, 49 Wash.2d 66, 73, 298 P.2d 500 (1956). Under the cumulative error doctrine, we may reverse a defendant’s conviction when the combined trial errors effectively denied the defendant her right to a fair trial, even if each error standing alone would be harmless. *State v. Weber*, 159 Wash.2d 252, 279, 149 P.3d 646 (2006); *State v. Hodges*, 118 Wash.App. 668, 673–74, 77 P.3d 375 (2003). In *Walker*, 164 Wash.App. at 739, 265 P.3d 191, we held that the prosecutor’s improper comments regarding (1) the fill-in-the blank argument, (2) comparing the reasonable doubt standard to everyday decision making, (3) telling the jury that its job was to declare the truth, and (4) misstating the law of defense of others had a cumulative effect warranting reversal.

FN38. For the most part, the trial court did not intervene to stop the behavior.

¶ 143 Like *Walker*, this case “ ‘turned largely

on witness credibility.’ ” *Walker*, 164 Wash.App. at 738, 265 P.3d 191 (quoting *State v. Venegas*, 155 Wash.App. 507, 526, 228 P.3d 813, *review denied*, 170 Wash.2d 1003, 245 P.3d 226 (2010)). Holmes testified that Wilkey did not protest her entering his home and he did not object to her taking her property. She also testified that she had contacted the Idaho police to pursue recovering her property. Lindsay’s statement to the police followed the same theme. He told police that he entered the victim’s home to help Holmes retrieve her own property. The majority mischaracterizes Lindsay’s zip-tie statement as an “admission.” Majority at 655–56. But because Lindsay denied taking any property that did not belong to Holmes, his statement is not an admission of a crime. Although Lindsay acknowledged he “wrestled around” and “held” Wilkey, he explained that he did so because he believed that Wilkey was “going for the pistol” to stop Holmes and Lindsay from retrieving Holmes’s property. Clerk’s Papers (Holmes) at 88–89. The majority does not explain what crime, or element of a crime, Lindsay admitted with his zip-tie statement.

¶ 144 The State charged Holmes and Lindsay with burglary and robbery, alleging that the predicate crime for the robbery was theft of the victim’s property. During closing argument, the State argued that the predicate \*665 crime for the burglary “could be theft.” 95 RP at 8688. Instruction 40 told the jury that a good faith claim of property title is a defense to theft. Thus, if the jury had a reasonable doubt as to whether Lindsay and Holmes intended to commit theft during the incident, it should have acquitted them. Additionally, even if we consider Lindsay’s statement to be a confession, the jury could not consider it against Holmes. *Crawford v. Washington*, 541 U.S. 36, 54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

¶ 145 Here, as in *Glasmann*, the jury needed to determine the intent of the defendant, thereby determining whether lesser included crimes were the appropriate conviction. *Glasmann*, WL 4944549, at

\*2. The *Glasmann* court found an “especially serious danger” that the misconduct affected the jury’s verdict because “nuanced distinctions often separate the degrees of a crime.” *Glasmann*, 175 Wash.2d at 710, 286 P.3d 673. Here, as in *Glasmann*, the defendants conceded much of the conduct but denied the intent elements of the more serious crimes. Based on the prosecutorial misconduct here, I cannot say that “the jury would not have returned verdicts for lesser offenses.” *Glasmann*, 175 Wash.2d at 712, 286 P.3d 673.

State v. Lindsay  
171 Wash.App. 808, 288 P.3d 641

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¶ 146 Prosecutors are more than mere advocates or partisans; they represent the people and act in the interest of justice. *State v. Fisher*, 165 Wash.2d 727, 746, 202 P.3d 937 (2009). Although a prosecutor may act with a “fearless, impartial discharge of public duty,” it must be “accompanied by a spirit of fairness toward the accused.”<sup>FN39</sup> *Warren*, 165 Wash.2d at 27, 195 P.3d 940. That spirit of fairness is missing here. I agree with the majority that this case is similar to *Steinhardt*, where the trial took on a circus atmosphere and the court gave mild reproofs from which the jury may have believed that the trial court considered the prosecution’s tactics to be necessary and proper. *People v. Steinhardt*, 9 N.Y.2d 267, 271, 213 N.Y.S.2d 434, 173 N.E.2d 871 (1961). I am satisfied that the prosecutor’s personal attacks on defense counsel, labeling counsel’s closing argument a “crock,” and his characterization of Holmes and her testimony (“funny,” “disgusting,” and “comical”) engendered prejudice which infected the whole trial. *Emery*, 174 Wash.2d at 762, 278 P.3d 653. I am also unwilling to gloss over the prosecutor’s improper discussion of the burden of proof and reasonable doubt in closing, and his whispered comments to the jury. I would reverse and remand for new trials for both Holmes and Lindsay.

FN39. Unfortunately for the State, defense counsel has no comparable obligation to ensure that the State receives a fair trial.

Wash.App. Div. 2,2012.

## **APPENDIX “B”**

*State’s Response to Joinder*

**PIERCE COUNTY PROSECUTOR**

**February 14, 2012 - 10:32 AM**

**Transmittal Letter**

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Case Name: St. v. Lindsay and Holmes

Court of Appeals Case Number: 39103-1

Is this a Personal Restraint Petition?  Yes  No

**The document being Filed is:**

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES LEROY LINDSAY AND  
JENNIFER HOLMES,

Appellant.

NO. 39103-1

STATE'S MOTION TO STRIKE  
PORTIONS OF THE SUPPLEMENTAL  
BRIEF OF APPELLANT (HOLMES)

I. IDENTITY OF MOVING PARTY:

Respondent, State of Washington, requests the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT:

The State requests that this Court strike portions of the supplemental brief of appellant submitted by defendant Holmes which 1) exceed the scope of the court's directive, and 2) an improper reply to the State's response and supplemental briefs. Specifically, the State moves to strike section A, B3, B4, B6, and pages 31-33 of B8.

1  
2 III. FACTS RELEVANT TO MOTION

3 Defendants Lindsay and Holmes were jointly tried for first degree burglary, first  
4 degree robbery, second degree assault, first degree kidnapping, and five counts of theft of a  
5 firearm in Pierce County Superior Court. After hearing the evidence, the jury convicted  
6 defendant Lindsay of first degree burglary, first degree robbery, second degree assault,  
7 second degree kidnapping, and one count of theft of a firearm. Defendant Holmes was  
8 convicted of the same crimes, except she was convicted of unlawful imprisonment rather  
9 than kidnapping.  
10

11 Both defendants appealed and their appeals were consolidated. At oral argument,  
12 the court indicated its interest in the prosecutorial misconduct issues which were raised by  
13 defendant Holmes and later joined by defendant Lindsay. Following oral argument, the  
14 court ordered all parties to provide additional briefing on the application of *State v.*  
15 *Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011), and any other additional authority or  
16 argument, on the issue of prosecutorial misconduct and constitutional harmless error. The  
17 parties' supplemental briefs were due January 19, 2012.  
18

19 The State filed its supplemental brief on January 6, 2012. Both defendants  
20 requested an extension of time for filing their briefs, which was granted by the court.  
21 Defendant Lindsay filed his brief on January 20, 2012. Defendant Holmes filed her brief  
22 on February 6, 2012.  
23  
24  
25

1  
2 IV.   GROUNDS FOR RELIEF AND ARGUMENT:

3       THE MAJORITY OF DEFENDANT HOLMES' SUPPLEMENTAL BRIEF IS  
4       IMPROPER AS IT EXCEEDS THE SCOPE OF THE COURT'S DIRECTIVE,  
5       CONTAINS FACTUAL DISPUTES RATHER THAN LEGAL ARGUMENT,  
6       AND APPEARS TO BE A REPLY TO THE STATE'S BRIEFS.

7       The rules of appellate procedure were designed to promote an orderly review of  
8       cases on appeal. Generally, the scope of the review of a trial court decision is determined  
9       by the content of the notice of appeal (and notice of cross appeal) and by the assignments  
10      of error in the opening brief(s). RAP 2.4(a); RAP 10.3(a)(4). The court may, on its own  
11      motion, direct the filing of supplemental briefs. See RAP 10.1(h), 12.1(b). The parties'  
12      supplemental briefing should be limited to the issues explicitly expressed in the court's  
13      request. See *State v. Clark*, 139 Wn.2d 152, 157, 985 P.2d 377 (1999). RAP 10.7  
14      authorizes a party to move to strike a brief that fails to comply with the requirements of  
15      Title 10 RAP. The State files the instant motion pursuant to that rule.

16      Here, the court's request for supplemental briefing is limited to the issue of  
17      prosecutorial misconduct and constitutional harmless error, and to the application of *State*  
18      *v. Monday* to the facts of this case. Defendant Holmes' sections B4, B6, and pages 31-33  
19      of section B8 contain no legal argument regarding *State v. Monday* or any discussion of  
20      harmless error. See Supplemental Brief of Appellant (Holmes) at 6-13. Rather, these  
21      sections merely expand on defendant Holmes' original argument that prosecutorial  
22      misconduct exists. Defendant Holmes' subsections B4, B6, and pages 31-33 of B8 do not  
23      address the applicability of *State v. Monday*, nor do they discuss which standard of  
24      harmless error is appropriate in this case. As such, they are entirely outside the scope of  
25      the requested supplemental briefing and should be stricken.

1           Also, the court ordered all parties to submit their supplemental briefs at the same  
2 time. It is clear the Court did not intend for any party's supplemental brief to be a response  
3 to another party's brief. Yet section A of defendant Holmes' supplemental brief indicates  
4 it is in response to, and to correct, factual misstatements in the State's supplemental<sup>1</sup> brief.  
5 While it is clear that the State and the defendants disagree on the representations of the  
6 prosecutor's behavior in the record, any argument to that effect should have been  
7 addressed in the appellant's opening brief or reply brief.

8           Similarly, section B3 is a response to the State's supplemental brief addressing the  
9 applicability of *State v. Monday* to the current case. Supplemental briefing is neither a  
10 response brief nor a reply brief. See RAP 10.3(b), (c). To utilize the supplemental brief as  
11 an opportunity to address the State's arguments is inappropriate. Defendant Holmes' brief  
12 should address the issue as directed by the court, not the State's supplemental brief to the  
13 Court. As these sections of defendant Holmes' brief do not address the Court's directive,  
14 they should be stricken.

15           The Court's request for supplemental briefing was limited to a narrow issue relating  
16 to the appropriate standard of review for harmless error in cases of prosecutorial  
17 misconduct under the facts of this case and *State v. Monday*. Defendant Holmes'  
18 supplemental brief exceeded the scope of this limited issue, which resulted in a lengthy<sup>2</sup>  
19 supplemental brief containing argument which should have been included in defendant  
20 Holmes' reply brief.

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24 <sup>1</sup> In addition, it appears that the "factual misstatements" that defendant Holmes is attempting to "correct" are  
25 not from the State's supplemental brief. The State's assertion that the defense counsel was attempting to  
force a mistrial was suggested in the State's response brief and expanded upon at oral argument, to which  
defendant Holmes had the opportunity to file a reply brief and rebut at argument.

<sup>2</sup> While this Court did not set a page limit for the parties' responses, RAP 13.7(e)(2) limits supplemental  
briefs to the Supreme Court to 20 pages.

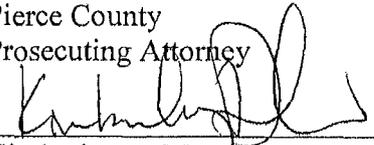
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V. CONCLUSION:

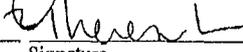
For the reasons stated above, the State respectfully requests this Court to strike sections A, B3, B4, B6, and pages 31-33 of B8 of the Supplemental Brief of Appellant (Holmes).

DATED: February 14, 2012.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
\_\_\_\_\_  
Kimberley DeMarco  
Deputy Prosecuting Attorney  
WSB # 39218

Certificate of Service:  
The undersigned certifies that on this day she delivered by <sup>2</sup>U.S. mail and/or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his or her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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Date Signature

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Attached is the Respondent's Supplemental Brief