

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2013 JUL 26 P 5:00^{SC}

BY RONALD R. CARPENTER

SUPREME COURT OF THE STATE OF WASHINGTON
88913-9

CLERK *R/C*

STATE OF WASHINGTON,

Respondent,

v.

EDWARD GLASMANN,

Petitioner.

THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Katherine Stolz, Judge
No. 04-1-04983-2

MOTION FOR DISCRETIONARY REVIEW

MARY K. HIGH
WSBA# 20123
Attorney for Petitioner Glasmann

 ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

	<u>Page</u>
A. IDENTITY OF RESPONDENT.....	1
B. SUPERIOR COURT’S DECISION.....	1
C. ISSUES PRESENTED FOR REVIEW.....	2
D. STATEMENT OF THE CASE.....	2
E. ARGUMENT.....	3
1. <u>Review Should be Accepted Under RAP 2.3(b)(1)(2)&(3)</u>	
2. <u>This Court Should Reconsider Its Holding State v. Daniels Because Washington State Case Law Interpreting The Double Jeopardy Clause Of The Fifth Amendment Is Irreconcilably Inconsistent With Federal Case Interpreting The Federal Double Jeopardy Clause.</u>	
a. Double Jeopardy	
b. Implied Acquittal	

F.	CONCLUSION.	20
G.	APPENDICES	
A.	Amended Information 5-3-13	
B.	Amended Information 7-2-05	
C.	Jury Instructions	
D.	Verdict Forms	
E.	Verdict Chart	
F.	Supreme Court Decision	
G.	Order Denying	
H.	Transcript of Rearraignment	
I.	Transcript of Verdict	
J.	Daniels v. Pastor	

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Washington Cases</u>	
<u>In re Pers. Restraint of Davis</u> , 142 Wn.2d 165, 171, 12 P.3d 603 (2000).....	8
<u>In Re Andress</u> , 147 Wn.2d 602, 56 P.3d 981 (2002).....	16
<u>State v. Corrado</u> , 81 Wn. App. 640, 645, 915 P.2d 1121 (1996).....	9
<u>State v. Daniels</u> , 165 Wn.2d 627, 200 P.3d 711 (2009) (Daniels II)	1,9 , 11, 14, 15, 17, 18, 22-26
<u>State v. Daniels</u> 160 Wn.2d 256, 156 P.3d 905 (2007)	

(Daniels I) 8, 11, 12, 14, 17, 18, 21, 26

State v. Daniels, 124 Wn.App 830, 103 P.3d 249 (2004) 14, 16

State v. Ervin, 158 Wn.2d 746, 752, 147 P.3d 567 (2006) ..8, 9, 13, 17, 21, 22

State v. Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267
(1995)..... 8, 18

State v. Linton, 156 Wn.2d 777, 132 P.3d 127 (2006) 13, 17

State v. Wright, 165 Wn.2d 783, 203 P.3d 1027 (2009) ... 26

Federal Cases

North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072,
23 L.Ed.2d 656 (1969), overruled on other grounds by
Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104
L.Ed.2d 865 (1989)) 8

Crist v. Bretz, 437 U.S. 28, 38, 98 S.Ct. 2156, 57 L.Ed.2d
24 (1978)..... 9

Brazzel v. Washington, 491 F.3d 976, 978 -979(9th
Cir.2007)..... 10-14, 17, 18, 23, 24

United States v. Perez, 9 Wheat. 579, 22 U.S. 579, 580, 6
L.Ed. 165 (1824)..... 10, 21

Arizona v. Washington, 434 U.S. 497, 506, 98 S.Ct. 824,
54 L.Ed.2d 717 (1978)..... 10, 14, 22

Richardson v. United States, 468 U.S. 317, 324-25, 104
S.Ct. 3081, 82 L.Ed.2d 242 (1984)..... 10, 21

Selvester v. U.S., 170 U.S. 262, 18 S.Ct. 580 (1898)..... 11

Daniels v. Pastor, 2010 WL 56041
(W.D. Wash. 2010)..... 12, 24

Green v. United States, 355 U.S. 184, 190, 78 S.Ct. 221, 2
L.Ed.2d 199 (1957)..... 9, 19, 20, 21, 23, 27

Price v. Georgia, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d
300 (1970)..... 10, 20, 21

Logan v. United States, 144 U.S. 263, 297-98, 12 S.Ct.
617, 36 L.Ed. 429 (1892)..... 21

Wade v. Hunter, 336 U.S. 684, 689, 69 S.Ct. 834, 93 L.Ed.
974 (1949)..... 22

Constitution

Const. Art. 1 § 9 (Wash.)..... 7, 2, 5

U.S. Constitution Amend. V..... 7, 2, 5

Rules

FRAP 32.1..... 12

RAP 2.2 5, 6

RAP 2.3..... 5, 6, 7

A. IDENTITY OF RESPONDENT

Defendant/Petitioner Edward Glasmann requests this court reconsider its decision in State v. Daniels, 165 Wn.2d 627, 200 P.3d 711 (2009) and find that jeopardy terminated at his first trial such that the State is precluded from trying him on more serious offenses charged in Counts I and II for which the jury left blank verdict forms.

B. SUPERIOR COURT'S DECISION

Defendant/Petitioner, Edward Glasmann, asks this Court to reverse the decision of the Honorable Kathryn Stolz rendered on May 3, 2013, rearraigning him on the charges he faced at his first trial after the case was overturned on appeal (See Appendix _____) .

C. ISSUES PRESENTED FOR REVIEW

1. Did the trial court deprive Mr. Glasmann of his Fifth Amendment right to avoid double jeopardy by allowing the State to rearraign Mr. Glasmann on the charges of Assault in the First Degree, Attempted Robbery in the First Degree when the jury returned verdicts at his first trial on Assault in the Second Degree and Attempted Robbery in the Second Degree?

D. STATEMENT OF THE CASE

Defendant Edward Glasmann is currently charged by Information in Pierce County Superior Court under Cause No. 04-1-04983-2 with Assault in the First Degree, Attempted Robbery in the First Degree, Kidnapping in the First Degree and Obstructing a Law Enforcement Officer. See Appendix A Amended Information dated 5/3/13. These charges were brought against Mr. Glasmann on May 3, 2013, by the Pierce County Prosecuting Attorney's Office and allowed by Judge Katherine Stolz and mirror the charges he faced at his first trial. (See Appendix B Amended Information dated 7/21/05)

On May 9, 2006, Edward Michael Glasmann was convicted at trial of Obstructing a Law Enforcement Officer, Kidnapping in the

First Degree, Attempted Robbery in the Second Degree, and Assault in the Second Degree. During trial, the Court allowed several verdict forms delineating the crimes charged and several lesser included offenses in conjunction with a packet of jury instructions. See Appendix D, including Instructions directing the jurors to consider lesser included/lesser degree crimes and what to do if they found a defendant not guilty or could not agree as to which charge was proved. 1. See Appendix E for a chart delineating the verdict forms and the jury's entries. Jury instructions included the pattern instruction WPIC 155.00 which reads in relevant part "If you unanimously agree on a verdict, you must fill in the blank provided in

1 Instruction No. 12: If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of Assault in the First Degree necessarily includes the lesser crime of Assault in the Second Degree, Assault in the Third Degree, and Assault in the Fourth Degree.

The crime of Attempted Robbery in the First Degree necessarily includes the lesser crime of Attempted Robbery in the Second Degree.

The crime of Kidnapping in the First Degree necessarily includes the lesser crimes of Kidnapping in the Second Degree and Unlawful Imprisonment.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he shall be convicted only of the lowest crime.

verdict form 1A the words “not guilty” or “guilty,” according to the decision you reach. **If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form 1B.**” This same language was used in counts I through IV.

On May 26, 2006, Edward Glasmann timely filed a direct appeal to the Court of Appeals, Division II which was denied and the mandate filed on September 19th, 2008. August 25, 2009, Mr. Glasmann filed a Personal Restraint Petition that was denied by the Court of Appeals Division II on April 6, 2010. On April 22, 2010, A Notice for Discretionary Review by the Supreme Court was filed and the Court accepted limited review based on the issues of prosecutorial misconduct and ineffective assistance of counsel as it related to the prosecutorial misconduct issue. The Supreme Court denied review regarding ineffective assistance of counsel pertaining to the issue of involuntary intoxication.

On October 18, 2012, the Supreme Court reversed Mr. Glasmann’s convictions for flagrant and ill intentioned prosecutorial

misconduct that denied him a fair trial and remanded for a new trial. The State exercised its right to reconsideration by filing a Motion for Reconsideration on November 7, 2012. The State's Motion for Reconsideration was denied on December 19, 2012 and the case was remanded to the Pierce County Superior Court for a new trial.

E. ARGUMENT

1. Review Should be Accepted Because This Case Meets the Criteria of RAP 2.3(b)(1),(2)&(3).

There is a limited right to appeal decisions made in Superior Court. RAP 2.2.² The arraignment on original charges does not fall

² RAP 2.2(a) provides: Unless otherwise prohibited by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions:

(1) Final Judgment. The final judgment entered in any action or proceeding, regardless of whether the judgment reserves for future determination an award of attorney fees or costs.

(2) (Reserved.)

(3) Decision Determining Action. Any written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action.

(4) Order of Public Use and Necessity. An order of public use and necessity in a condemnation case.

into any of the categories set forth in RAP 2.2(a), which means that the only opportunity for Defendant Glasmann to obtain review of this decision is by discretionary review. As Mr. Glasmann is seeking review of an order not subject to direct review under RAP 2.2, he must meet the criteria of set forth in RAP 2.3.

Review should be granted at this time because the trial court, in finding that the State can retry Mr. Glasann for offenses for which jeopardy terminated, committed both obvious and probable error

(5) Juvenile Court Disposition. The disposition decision following a finding of dependency by a juvenile court, or a disposition decision following a finding of guilt in a juvenile offense proceeding.

(6) Termination of All Parental Rights. A decision depriving a person of all parental rights with respect to a child.

(7) Order of Incompetency. A decision declaring an adult legally incompetent, or an order establishing a conservatorship or guardianship for an adult.

(8) Order of Commitment. A decision ordering commitment, entered after a sanity hearing or after a sexual predator hearing.

(9) Order on Motion for New Trial or Amendment of Judgment. An order granting or denying a motion for new trial or amendment of judgment.

(10) Order on Motion for Vacation of Judgment. An order granting or denying a motion to vacate a judgment.

(11) Order on Motion for Arrest of Judgment. An order arresting or denying arrest of a judgment in a criminal case.

(12) Order Denying Motion To Vacate Order of Arrest of a Person. An order denying a motion to vacate an order of arrest of a person in a civil case.

(13) Final Order After Judgment. Any final order made after judgment that affects a substantial right.

which substantially alters the status quo or substantially limits the freedom of the parties to act as to call for review by this Court. RAP 2.3(b)(1) and (2).³

Review should be granted now. Further actions in this case will be seriously undermined because they will be tainted by the trial court's decision.

2. This Court Should Reconsider Its Holding State v. Daniels Because Washington State Case Law Interpreting The Double Jeopardy Clause Of The Fifth Amendment Is Irreconcilably Inconsistent With Federal Case Interpreting The Federal Double Jeopardy Clause.

a. Double Jeopardy.

The Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or

³ RAP 2.3(b) Considerations governing acceptance of review except as provided in section (d), discretionary review may be accepted only in the following circumstances:

(1) The superior court has committed an obvious error which would render further proceedings useless; or

(2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;

(3) The superior court has so far departed from the accepted and unusual court of judicial proceedings or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate

limb." U.S. Const. amend. V. Article I, section 9 of the Washington Constitution similarly provides, "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense." These provisions are " 'identical in thought, substance, and purpose.' " State v. Ervin, 158 Wn.2d 746, 752, 147 P.3d 567 (2006) (internal quotation marks omitted) (*quoting In re Pers. Restraint of Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000)). The double jeopardy clause protects individuals from three distinct governmental abuses: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. State v. Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995) (*quoting North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989)).

Three elements must be met for a defendant's double jeopardy rights to be violated: (1) jeopardy must have previously

court.

attached, (2) jeopardy must have previously terminated, and (3) the defendant is again being put in jeopardy for the same offense.

State v. Daniels, 160 Wn.2d 256, 261–62, 156 P.3d 905 (2007),
adhered to on reconsideration, 165 Wn.2d 627, 200 P.3d 711
(2009), *citing* State v. Corrado, 81 Wn. App. 640, 645, 915 P.2d
1121 (1996). In a jury trial, jeopardy attaches “when the jury is
empaneled and sworn.” Crist v. Bretz, 437 U.S. 28, 38, 98 S.Ct.
2156, 57 L.Ed.2d 24 (1978). Jeopardy may be terminated in one of
three ways:

- (1) when the defendant is acquitted, or
- (2) when the defendant is convicted and that conviction is final, or
- (3) when the court dismisses the jury without the defendant’s consent and the dismissal is not in the interest of justice.

State v. Ervin, 158 Wn.2d at 752–53.

b. Implied Acquittal

In Green, the Supreme Court explained the doctrine of implied acquittal: when a jury convicts on a lesser alternate charge and fails to reach a verdict on the greater charge—without announcing any splits or divisions

and having had a full and fair opportunity to do so-the jury's silence on the second charge is an implied acquittal. 355 U.S. at 191, 78 S.Ct. 221. A verdict of implied acquittal is final and bars a subsequent prosecution for the same offense. *See id.* Under Price, putting the defendant in jeopardy a second time is not necessarily harmless error or moot, even if the defendant is only convicted of the lesser crime, because “[t]he Double Jeopardy Clause ... is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict.” 398 U.S. at 331, 90 S.Ct. 1757.

Brazzel v. Washington, 491 F.3d 976, 978 -979(9th Cir.2007).

In contrast to an implied acquittal, retrial is permitted where there is a mistrial declared due to the “manifest necessity” presented by a hung jury. *See United States v. Perez*, 9 Wheat. 579, 22 U.S. 579, 580, 6 L.Ed. 165 (1824). A hung jury occurs when there is an irreconcilable disagreement among the jury members. A “high degree” of necessity is required to establish a mistrial due to the hopeless deadlock of jury members. *See Arizona v. Washington*, 434 U.S. 497, 506, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). The record should reflect that the jury is “genuinely deadlocked.” Richardson v.

United States, 468 U.S. 317, 324-25, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984) (explaining that when a jury is genuinely deadlocked, the trial judge may declare a mistrial and require the defendant to submit to a second trial); see also Selvester, 170 U.S. at 270, 18 S.Ct. 580 (“But if, on the other hand, after the case had been submitted to the jury they reported their inability to agree, and the court made record of it and discharged them, such discharge would not be equivalent to an acquittal, since it would not bar the further prosecution.”). Brazzel v. Washington, 491 F.3d 976, 981 -982 (9th Cir. 2007)

In State v. Daniels, 160 Wn.2d 256, 261-62, 156 P.3d 905 (2007), *adhered to on reconsideration*, 165 Wn.2d 627, 200 P.3d 711 (2009) the court held that jeopardy was not terminated as to a greater offense where “unable to agree” instructions were given and the jury left the verdict form for the greater offense blank. In Daniels, the jury was given two verdict forms. The jury was instructed to fill in not guilty or guilty on form A if it unanimously agreed on a verdict as to the homicide by abuse charge, otherwise it

should leave it blank. If the jury either found Daniels not guilty of homicide by abuse or could not agree as to that charge, the jury was then instructed to consider the second degree felony murder charge. The jury left form A blank and found Daniels guilty of murder in the second degree. Daniels, 160 Wn.2d at 260.

The Washington Supreme Court held an “unable to agree” jury instruction prevented a presumption of acquittal on the greater included offense. Daniels, 160 Wn.2d at 264. The court claimed that the “unable to agree” instruction implicitly operated as a statement of disagreement by the jury as to Daniels’ guilt or innocence and concluded that the disagreement prevented an acquittal from being implied. Id. Because there was no acquittal, jeopardy did not terminate. Id. at 264–65.4 The reasoning of the Daniels decision is

4 Subsequent to Daniels II, Ms. Daniels secured federal review under a writ of habeas. Daniels v. Pastor, not reported in F. Supp 2d, 2010 WL 56041 (W.D. Wash. C09-5711BHS Jan 6, 2010),citing to Brazzel v. Washington, the federal court granted Daniel’s relief finding that the State court interpretation of the double jeopardy clause of the Fifth Amendment was in error when it concluded that a blank verdict form should be construed as a hopeless deadlock. FRAP 32.1 permits citation of judicial opinions, orders, judgments or other written dispositions that have been designated unpublished.

that the presence of a blank verdict form, in a case where the jury has been given an “unable to agree” instructions does not amount to an implied acquittal *and that this analysis ends the inquiry into whether jeopardy has terminated* was based on the Court’s earlier case of State v. Ervin, 158 Wn.2d 746, 147 P.3d 567 (2006)(Note in Ervin the jury deliberated for 5 weeks and sent out numerous notes concerning their inability to reach an unanimous verdict). These two cases departure from the previously decided case of Linton, and has been criticized by the Ninth Circuit Court of Appeals. In Brazzel v. Washington, 491 F.3d 976 (9th Cir. 2007) the Ninth Circuit stated that even if a blank verdict form in a case where the jury was instructed to leave such form blank if “unable to agree” on a charge does not constitute an implied acquittal so as to terminate jeopardy, the mere inability of the jury to agree on a verdict to a particular offense charged expressed by a blank verdict form does not meet the high threshold of disagreement required for a hung jury. Brazzel v. Washington, 491 F.3d at 984. Accordingly, the Brazell court

rejected the State's argument that a blank verdict form "should be construed as a hopeless deadlock. Id. The Brazzel court interpreted the law regarding the levels of jury disagreement as follows:

Under federal law, an inability to agree with the option of compromise on a lesser alternate offense does not satisfy the high threshold of disagreement required for a hung jury and mistrial to be declared. *See, e.g., Arizona v. Washington*, 434 U.S. at 509, 98 S.Ct. 824. The Supreme Court has characterized disagreement sufficient to warrant a mistrial as "hopeless" or "genuine" "deadlock." *Id.* ("[T]he trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial."). Genuine deadlock is fundamentally different from a situation in which jurors are instructed that if they "cannot agree," they may compromise by convicting of a lesser alternative crime, and they then elect to do so without reporting any splits or divisions when asked about their unanimity.

Brazzel v. Washington, 491 F.3d 976, 984(9th Cir. 2007)

As recounted by Justice Sanders in his dissent in Daniel II, Daniels remained in custody from October 31, 2000 while her case was tried by the trial court, reviewed by the Washington State Court of Appeals (State v. Daniels, 124 Wn.App. 830, 103 P.3d 249

(2004)), and reviewed twice by the Washington State Supreme Court (State v. Daniels, 160 Wn.2d 256, 156 P.3d 905 (2007) ("Daniels I") and State v. Daniels, 165 Wn.2d 627, 200 P.3d 711 (2009), *cert. denied*, --- U.S. ----, 130 S.Ct. 85, 175 L.Ed.2d 28 (2009) ("Daniels II")). Justice Sanders of the Washington State Supreme Court wrote the original majority opinion in *Daniels I* and also wrote the dissenting opinion in the subsequent *Daniels II*. In that dissenting opinion, Justice Sanders recited the facts as follows:

On July 9, 2000, 17-year-old Carissa Daniels gave birth to her son, Damon. Nine weeks later Damon was dead. Daniels was subsequently charged with homicide by abuse and felony murder in the second degree-domestic violence. The second degree felony murder charge was predicated on either second degree assault or first degree criminal mistreatment. Daniels faced a jury trial on these charges.

At the close of evidence the jury was given two verdict forms: form A pertained to the homicide by abuse charge and form B pertained to the second degree felony murder charge. The jury was instructed to fill in guilty or not guilty on form A if it unanimously agreed to the charge of homicide by abuse, otherwise it should leave this form blank. The jury was instructed to

consider the second degree felony murder charge and use form B, if it found Daniels not guilty of homicide by abuse or could not agree on that charge. FN2

FN2. Jury instruction 23 reads in part:

When completing the verdict forms, you will first consider the crime of homicide by abuse as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on verdict form A, do not use verdict form B. If you find the defendant not guilty of the crime of homicide by abuse, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the alternatively charged crime of murder in the second degree....

The jury left form A blank and used form B to find Daniels guilty of murder in the second degree. Daniels appealed, arguing our decision in *Andress* precluded use of assault as a predicate offense for second degree felony murder. *State v. Daniels*, 124 Wn.App. 830, 844, 103 P.3d 249 (2004) (citing *In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002)). The Court of Appeals reversed Daniels's conviction for felony murder as it may

have been predicated on assault and remanded for a new trial. The Court of Appeals also held the State could not retry her for homicide by abuse because the jury's silence on that charge acted as an implied acquittal. After the Court of Appeals published its opinion, we decided both [State v. Linton, 156 Wn.2d 777, 132 P.3d 127 (2006)] and [State v. Ervin, 158 Wn.2d 746, 147 P.3d 567 (2007)], further elaborating on this issue.

The State petitioned this court for review, seeking to retry Daniels on homicide by abuse. Daniels cross-petitioned, asking this court to determine whether she may be retried for second degree felony murder predicated on criminal mistreatment. We accepted review, heard argument, and published an opinion allowing for retrial on homicide by abuse and second degree murder predicated on criminal mistreatment. Daniels, 160 Wn.2d 256, 156 P.3d 905 (2007). Shortly thereafter, the Ninth Circuit Court of Appeals published Brazzel v. Washington, 491 F.3d 976 (9th Cir.2007), which considered the same question but reached the opposite conclusion. Based in part on the Ninth Circuit's reasoning in Brazzel, Daniels filed a motion for reconsideration, which we granted.

Daniels II, 200 P.3d at 712-713 (some footnotes omitted).

The majority opinion in Daniels II, was as follows:

An opinion in this case was reported in State v. Daniels, 160 Wn.2d 256, 156 P.3d 905 (2007). We granted a motion for reconsideration, heard oral argument, and now adhere to our prior published opinion.

Daniels II, 200 P.2d at 711.

Upon reconsideration of the decision in Daniels I, and in light of the compelling rationale of Brazzel, four justices dissented, finding that the State double jeopardy clause “is given the same interpretation the Supreme Court gives the Fifth Amendment and would have reversed. State v. Daniels, 165 Wn.2d at 631, citing State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

Justice Chambers dissented, writing that regretted the majority opinion in Daniels I. State v. Daniels, 165 Wn. 2d at 641. Writing the dissent joined by Justices Alexander and Stephens, Justice Sanders acknowledged the flaws in his original opinion and reasoning as follows:

The original majority opinion erred by focusing too squarely on whether Daniels's jeopardy terminated on the homicide by abuse charge through an implied acquittal. It reasoned that an acquittal could not be implied because the jury

was specifically instructed that it need not return a verdict on homicide by abuse if it was in disagreement; rather, it could proceed to return a verdict on the lesser offense of second degree felony murder. Daniels, 160 Wn.2d at 262-65, 156 P.3d 905.

The primary flaw in the original majority's analysis was its failure to perceive that under United States Supreme Court precedent, when an individual is forced to "run the gantlet" on a charge and the jury fails to convict, double jeopardy prohibits retrial on that charge. Green v. United States, 355 U.S. 184, 190, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). Here Daniels "ran the gantlet" when she "was in direct peril of being convicted and punished" for homicide by abuse at her first trial, but "the jury refused to convict" her. Id. And because she "ran the gantlet" on homicide by abuse, the State may not place her in jeopardy for that crime again. Id. This failure in analysis led to a dual flaw in the original majority opinion. First it failed to recognize that jeopardy may terminate for reasons other than an implied acquittal. Second it failed to recognize the use of an "unable to agree" instruction standing alone is insufficient to distinguish this case from other lesser included offense cases.

I. Jeopardy terminated when the jury was dismissed without returning a verdict on the greater offense despite having the opportunity to do so

Jeopardy terminates when the jury is dismissed without returning a verdict despite having a full opportunity to do so. *Id.* at 184, 78 S.Ct. 221. In Green the Court found the Fifth Amendment prohibits a second trial on a charge where the jury fails to “return[] any express verdict on that charge.” *Id.* at 191, 78 S.Ct. 221. The Court provided two rationales for this holding. It first applied the doctrine of implied acquittal but also enunciated a second rationale:

Yet [the jury] was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense. *Id.* Therefore under Green jeopardy terminates either when a jury implies an acquittal by its actions OR when a jury is dismissed without returning an express verdict on the charge.

In Price, 398 U.S. 323, 90 S.Ct. 1757, the United States Supreme Court reiterated the validity of these two methods of terminating jeopardy. The Court described Green's two methods of terminating jeopardy.

First, the Court considered the first jury's verdict of guilty on the second-degree murder charge to be an “implicit acquittal” on the charge of first-degree murder. Second, and more broadly, the Court reasoned that

petitioner's jeopardy on the greater charge had ended when the first jury "was given a full opportunity to return a verdict" on that charge and instead reached a verdict on the lesser charge. Price, 398 U.S. at 328-29, 90 S.Ct. 1757 (quoting Green, 355 U.S. at 191, 78 S.Ct. 221). By reiterating both of Green's rationales, the Supreme Court in Price firmly reaffirmed that jeopardy for an offense may terminate under either.

Here the jury *was* given a full and fair opportunity to convict Daniels of homicide by abuse in the first trial but failed to do so. Retrial on this count is therefore barred by double jeopardy,^{FN8} absent "manifest necessity." United States v. Perez, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824). The most common example of "manifest necessity" to allow retrial is a mistrial based on a hung jury. Richardson v. United States, 468 U.S. 317, 324, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984) ("[W]e have constantly adhered to the rule that a retrial following a 'hung jury' does not violate the Double Jeopardy Clause.") (citing Logan v. United States, 144 U.S. 263, 297-98, 12 S.Ct. 617, 36 L.Ed. 429 (1892)).

FN8. The majority incorrectly asserts Ervin, 158 Wash.2d 746, 147 P.3d 567, controls in this case. See Daniels, 160 Wn.2d at 264, 156 P.3d 905. However Ervin never considered, and therefore never decided, whether jeopardy terminates when a jury is dismissed without reaching a verdict. Ervin is neither controlling

nor instructive on this issue.

However, a mistrial because of a hung jury is limited to situations where the jury is “genuinely deadlocked” and requires the trial court to use its discretion to balance competing rights of the defendant before declaring such. Arizona v. Washington, 434 U.S. 497, 509, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). In the view of the Supreme Court, the *634 trial judge's intervention and discretion to declare a mistrial based on a hung jury is required to protect two competing rights of the defendant. *Id.* First, the defendant is deprived of his “ ‘valued right to have his trial completed by a particular tribunal’ ” if the jury is dismissed before reaching a genuine deadlock. *Id.* (quoting Wade v. Hunter, 336 U.S. 684, 689, 69 S.Ct. 834, 93 L.Ed. 974 (1949)).^{FN9} If a jury is not discharged after “protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.” *Id.*

State v. Daniels, 165 Wn.2d 627, 631-634, 200 P.3d 711

(2009)(Footnote 9 omitted)

Even if this court declines to reconsider its holding in State v. Daniels, *supra*, following State v. Ervin, *supra*, in its rejection of the doctrine of implied acquittal in cases where an “unable to agree”

instruction is given, the Daniels re-affirms that re-prosecution for the same offense is barred whenever jeopardy has previously terminated, as here because jeopardy terminates when the jury is dismissed without returning a verdict despite having a full opportunity to do so. Green v. United States, 355 U.S. at 184, 78 S.Ct. 221, 2 L.Ed.2d 199.

In Green the Court found the Fifth Amendment prohibits a second trial on a charge where the jury fails to "return[] any express verdict on that charge." Id. at 191, 78 S.Ct. 221. The Court provided two rationales for this holding. In addition to applying the doctrine of implied acquittal, the Court enunciated a second rationale:

Yet [the jury] was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense.

Id. Therefore under Green jeopardy terminates either when a jury implies an acquittal by its actions *or* when a jury is dismissed without returning an express verdict on the charge.

Just as Ms. Daniels asked, via a petition for writ of habeas

corpus, to apply *Brazzel* and, as Justice Sanders wrote in the Daniels II dissent, Mr. Glasmann asks this court to grant him the “relief otherwise available by walking across the street to the federal courts.” *Daniels II*, 200 P.3d at 714 n. 10. Mr. Glasmann has likewise already been forced to run “the gantlet” by a jury that was given a full and fair opportunity to convict of the assault in the first degree charge in Count I and the attempted robbery in the first degree charge in Count II, and did not. Moreover, there was no showing of the manifest necessity of a retrial after a showing that the jury was genuinely deadlocked.

As a public policy matter, State v. Daniels creates inequitable results and interposes an unnecessary and burdensome step on defendants. Defendants with the resources to secure federal review will receive relief and not have to run the gantlet a second time on charges they where juries left verdict forms blank after being instructed to do so if they could not agree, while defendants who do not have the same resources will not receive relief. See Brazzell v.

Washington, 491 F.3d 976 (9th Cir. 2007)(relief granted); Daniels v. Pastor, 2010 WL 56041 (W.D. Wash. 2010)(relief granted).

A defendant does not receive a windfall if this court adopts the federal framework and interpretation of the double jeopardy clause and the reasoning of the dissents in Daniels II. A defendant who has his convictions reversed and remanded for a new trial will face a trial on the charges that the State was able to prove beyond a reasonable doubt. On the other hand, as matters stand under Daniels II, it is the State that receives a windfall – the State may engage in misconduct that deprives a defendant of a fair trial, they State does not have to give notice of its intent to seek lesser included or lesser degree crimes and then gets the benefit of the standard pattern jury instruction that this court interprets in a manner that deprives a defendant of a double jeopardy claim. 5

5 Ironically the “unable to agree” instruction was first adopted in part to avoid problems attendant with hung juries. As the court has stated, the “unable to agree” instruction “promotes the efficient use of judicial resources....” *State v. Labanowski*, 117 Wash.2d 405, 420, 816 P.2d 26 (1991). “Retrials, necessitated by hung juries, are burdensome to defendants, victims, witnesses and the court system itself.” *Id.* Because a hung jury is so burdensome to the system, the court in *Labanowski* approved use of the “unable to agree” instruction in an effort to avoid the spectre of

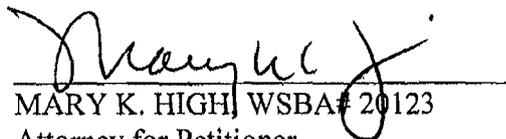
F. CONCLUSION

The double jeopardy clause guarantees that no person will be retried for the same offense following an acquittal. State v. Wright, 165 Wn.2d 783, 791, 203 P.3d 1027 (2009) (quoting U.S. CONST. amend. V; CONST. art. I, § 9). Defendant Glasmann was charged with 4 crimes, including assault in the first degree charged in Count I and attempted robbery in the first degree charged in Count II. A jury convicted him of several charges and several lesser included offenses. Glasmann contends the double jeopardy clause precluded retrial of those charges for which he was expressly or impliedly acquitted in the first trial. Our Supreme Court holding in State v. Daniels, 160 Wn.2d 256, 156 P.3d 905 (2007) should be re-examined, especially in light of the federal action in that very case in which the federal court

a hung jury. Under this understanding, it seems nonsensical to equate the judicially efficient "unable to agree" instruction to the hopeless deadlock required by the Supreme Court to declare a mistrial. "Genuine deadlock is fundamentally different from a situation in which jurors are instructed that if they 'cannot agree,' they may compromise by convicting of a lesser alternative crime, and they then elect to do so without reporting any splits or divisions when asked about their unanimity." Brazzel, 491 F.3d at 984. State v. Daniels 165 Wn.2d 627, 634-635, 200 P.3d 711, 714 - 715 (2009)

granted habeas relief and found that the federal double jeopardy clause precluded retrial on greater charges after a finding of guilt on lesser included offenses when the verdict form on the greater charge was merely left blank and there was no other indicia of jury disagreement. Alternatively, under Green, Mr. Glasmann should not have to run the gantlet twice when his original jury had a full and fair opportunity to convict him of the more serious offenses charged in Counts I and II.

Respectfully submitted this 26 day of July, 2013.



MARY K. HIGH, WSBA# 20123
Attorney for Petitioner
949 Market Street, Ste 334
Tacoma, WA 98402
(253) 798-6062

OFFICE RECEPTIONIST, CLERK

From: Mary Benton [mbenton@co.pierce.wa.us]
Sent: Friday, July 26, 2013 5:00 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Mary Kay High
Attachments: Motion for Discretionary Rvw No Appendix.pdf

Attached is an Motion for Discretionary Review.

State v. Edward Glasmann PC# 04-1-04983-2, Supreme Court #88913-9
Mary K. High, WSBA# 20123
(253) 798-7857
mhigh@co.pierce.wa.us

Mary E. Benton
Legal Assistant III
Department of Assigned Counsel
(253) 798-7834
mbenton@co.pierce.wa.us

Notice: This email is confidential and intended only for the person or entity to whom it is addressed, and may contain confidential, proprietary, and/or privileged information. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon this information by persons or entities other than the intended recipient is prohibited. If you received this in error, please contact the sender and destroy this message and any copies of this message, along with any attachments.

SUPREME COURT OF THE STATE OF WASHINGTON
88913-9

STATE OF WASHINGTON,

Respondent,

v.

EDWARD GLASMANN,

Petitioner.

13 JUL 30 AM 8:27
BY RONALD R. CARPENTER
CLERK
SUPREME COURT
STATE OF WASHINGTON

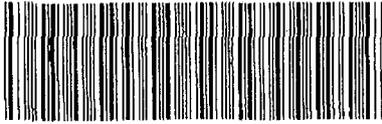
THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Katherine Stolz, Judge
No. 04-1-04983-2

APPENDICES TO MOTION FOR DISCRETIONARY REVIEW

MARY K. HIGH
WSBA# 20123
Attorney for Petitioner Glasmann

APPENDIX A



04-1-04983-2 40466048 CP 05-03-13

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff

vs

GLASMANN, EDWARD MICHAEL,

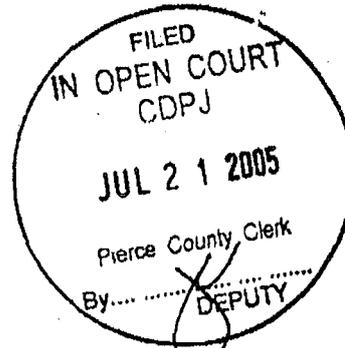
Defendant

Cause No 04-1-04983-2

CERTIFIED COPY OF THE
AMENDED INFORMATION
PROVIDED TO THE COURT AT THE
RE-ARRAIGNMENT HEARING/
ARGUMENT ON 5/3/13



Case Number 04-1-04983-2 Date May 2, 2013
SerialID: 674182A0-F20D-AA3E-527161CAB4A42848
Certified By Kevin Stock Pierce County Clerk, Washington



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-04983-2

vs.

EDWARD MICHAEL GLASMANN,

AMENDED INFORMATION

Defendant.

JUL 21 2005

DOB: 10/22/1964
PCN#: 538245330

SEX : MALE
SID#: 12234147

RACE: WHITE
DOL#: WA GLASMEM364PZ

COUNT I

I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse EDWARD MICHAEL GLASMANN of the crime of ASSAULT IN THE FIRST DEGREE, committed as follows:

That EDWARD MICHAEL GLASMANN, in the State of Washington, on or about the 23rd day of October, 2004, did unlawfully and feloniously, with intent to inflict great bodily harm, intentionally assault Angela Benson by any force or means likely to produce great bodily harm or death, contrary to RCW 9A.36.011(1)(a), a domestic violence incident as defined in RCW 10 99.020, and against the peace and dignity of the State of Washington.

COUNT II

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse EDWARD MICHAEL GLASMANN of the crime of ATTEMPTED ROBBERY IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That EDWARD MICHAEL GLASMANN, in Pierce County, Washington, on or about the 23rd day of October, 2004, did unlawfully and feloniously with intent to commit the crime of ROBBERY IN

AMENDED INFORMATION- 1

ORIGINAL

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office (253) 798-7400

ORIGINAL

1 THE FIRST DEGREE, as prohibited by RCW 9A.56.190 and 9A.56.200(1)(a)(ii), take a substantial step
2 toward the commission of that crime, contrary to RCW 9A.28.020, and against the peace and dignity of
the State of Washington.

3 The elements of the complete crime of ROBBERY IN THE FIRST DEGREE are:

4 Feloniously, take personal property belonging to another with intent to steal from the person or in
5 the presence of another, the owner thereof or a person having dominion and control over said property,
6 against such person's will by use or threatened use of immediate force, violence, or fear of injury to the
7 person, said force or fear being used to obtain or retain possession of the property or to overcome
8 resistance to the taking, and in the commission thereof, or in immediate flight therefrom, the defendant
displayed what appeared to be a firearm or other deadly weapon, contrary to RCW 9A.56.190 and
9A.56.200(1)(a)(ii).

9 COUNT III

10 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
11 authority of the State of Washington, do accuse EDWARD MICHAEL GLASMANN of the crime of
12 KIDNAPPING IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based
13 on the same conduct or on a series of acts connected together or constituting parts of a single scheme or
14 plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to
15 separate proof of one charge from proof of the others, committed as follows.

16 That EDWARD MICHAEL GLASMANN, in the State of Washington, on or about the 23rd day
17 of October, 2004, did unlawfully and feloniously, with intent to hold Angela Benson, as a shield or
18 hostage, intentionally abduct such person, contrary to RCW 9A.40.020(1)(a), and against the peace and
19 dignity of the State of Washington.

20 COUNT IV

21 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
22 authority of the State of Washington, do accuse EDWARD MICHAEL GLASMANN of the crime of
23 OBSTRUCTING A LAW ENFORCEMENT OFFICER, a crime of the same or similar character, and/or
24 a crime based on the same conduct or on a series of acts connected together or constituting parts of a
single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be
difficult to separate proof of one charge from proof of the others, committed as follows:

That EDWARD MICHAEL GLASMANN, in the State of Washington, on or about the 23rd day
of October, 2004, did unlawfully, willfully hinder, delay, or obstruct any law enforcement officer in the
discharge of his or her official powers or duties; with knowledge that the law enforcement officer was
discharging official duties at the time, contrary to RCW 9A.76.020(1), and against the peace and dignity
of the State of Washington.

Case Number 04-1-04983-2 Date May 2, 2013

04-1-04983-2

SerialID: 674182A0-F20D-AA3E-527161CAB4A42848

Certified By Kevin Stock Pierce County Clerk, Washington

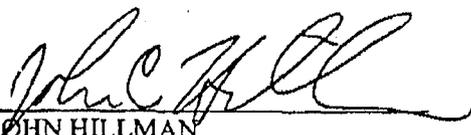
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

DATED this 21st day of July, 2005.

LAKWOOD POLICE DEPARTMENT
WA02723

GERALD A. HORNE
Pierce County Prosecuting Attorney

jch

By: 
JOHN HILLMAN
Deputy Prosecuting Attorney
WSB#: 25071

Case Number 04-1-04983-2 Date May 2, 2013
SerialID: 674182A0-F20D-AA3E-527161CAB4A42848
Certified By Kevin Stock Pierce County Clerk, Washington

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 02 day of May, 2013



Kevin Stock, Pierce County Clerk

By /S/Chris Hutton, Deputy.

Dated: May 2, 2013 2:59 PM



Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to

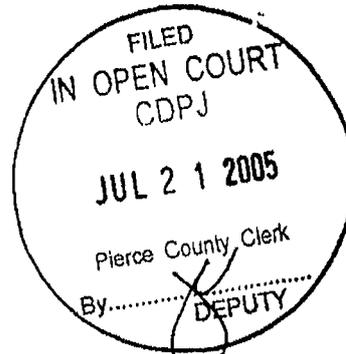
<https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm>,
enter SerialID: 674182A0-F20D-AA3E-527161CAB4A42848.

This document contains 3 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

APPENDIX B



04-1-04983-2 23418101 AMINF 07-22-05



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-04983-2

vs.

EDWARD MICHAEL GLASMANN,

AMENDED INFORMATION

Defendant.

JUL 21 2005

DOB: 10/22/1964

SEX : MALE

RACE: WHITE

PCN#: 538245330

SID#: 12234147

DOL#: WA GLASMEM364PZ

COUNT I

I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse EDWARD MICHAEL GLASMANN of the crime of ASSAULT IN THE FIRST DEGREE, committed as follows:

That EDWARD MICHAEL GLASMANN, in the State of Washington, on or about the 23rd day of October, 2004, did unlawfully and feloniously, with intent to inflict great bodily harm, intentionally assault Angela Benson by any force or means likely to produce great bodily harm or death, contrary to RCW 9A.36.011(1)(a), a domestic violence incident as defined in RCW 10.99.020, and against the peace and dignity of the State of Washington.

COUNT II

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse EDWARD MICHAEL GLASMANN of the crime of ATTEMPTED ROBBERY IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That EDWARD MICHAEL GLASMANN, in Pierce County, Washington, on or about the 23rd day of October, 2004, did unlawfully and feloniously with intent to commit the crime of ROBBERY IN

AMENDED INFORMATION- 1

ORIGINAL

1 THE FIRST DEGREE, as prohibited by RCW 9A.56.190 and 9A.56.200(1)(a)(ii), take a substantial step
2 toward the commission of that crime, contrary to RCW 9A.28.020, and against the peace and dignity of
the State of Washington.

3 The elements of the complete crime of ROBBERY IN THE FIRST DEGREE are:

4 Feloniously, take personal property belonging to another with intent to steal from the person or in
the presence of another, the owner thereof or a person having dominion and control over said property,
5 against such person's will by use or threatened use of immediate force, violence, or fear of injury to the
6 person, said force or fear being used to obtain or retain possession of the property or to overcome
7 resistance to the taking, and in the commission thereof, or in immediate flight therefrom, the defendant
8 displayed what appeared to be a firearm or other deadly weapon, contrary to RCW 9A.56.190 and
9A.56.200(1)(a)(ii).

9 COUNT III

10 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
authority of the State of Washington, do accuse EDWARD MICHAEL GLASMANN of the crime of
11 KIDNAPPING IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based
on the same conduct or on a series of acts connected together or constituting parts of a single scheme or
12 plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to
separate proof of one charge from proof of the others, committed as follows:

13 That EDWARD MICHAEL GLASMANN, in the State of Washington, on or about the 23rd day
14 of October, 2004, did unlawfully and feloniously, with intent to hold Angela Benson, as a shield or
15 hostage, intentionally abduct such person, contrary to RCW 9A.40.020(1)(a), and against the peace and
dignity of the State of Washington.

16 COUNT IV

17 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
authority of the State of Washington, do accuse EDWARD MICHAEL GLASMANN of the crime of
18 OBSTRUCTING A LAW ENFORCEMENT OFFICER, a crime of the same or similar character, and/or
19 a crime based on the same conduct or on a series of acts connected together or constituting parts of a
single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be
20 difficult to separate proof of one charge from proof of the others, committed as follows:

21 That EDWARD MICHAEL GLASMANN, in the State of Washington, on or about the 23rd day
of October, 2004, did unlawfully, willfully hinder, delay, or obstruct any law enforcement officer in the
22 discharge of his or her official powers or duties; with knowledge that the law enforcement officer was
23 discharging official duties at the time, contrary to RCW 9A.76.020(1), and against the peace and dignity
of the State of Washington.

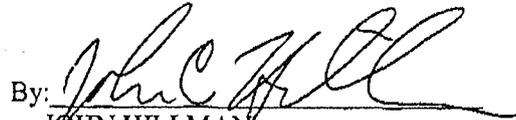
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

DATED this 21st day of July, 2005.

LAKWOOD POLICE DEPARTMENT
WA02723

GERALD A. HORNE
Pierce County Prosecuting Attorney

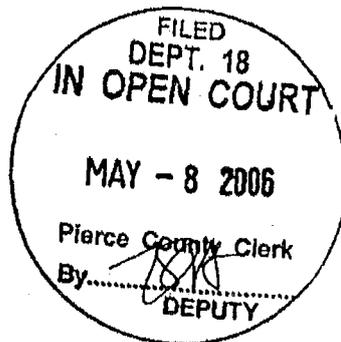
jch

By: 
JOHN HILLMAN
Deputy Prosecuting Attorney
WSB#: 25071

APPENDIX C



04-1-04983-2 25435258 CTINJY 05-10-08



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-04983-2

vs.

EDWARD MICHAEL GLASMANN,

Defendant.

COURT'S INSTRUCTIONS TO THE JURY

DATED this 8th day of May, 2006.

Beverly K. Grant
JUDGE

ORIGINAL

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff, and has the burden of proving each element of the crime beyond a reasonable doubt.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 3

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 4

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 5

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 6

Evidence that the defendant has previously been convicted of a crime is not evidence of the defendant's guilt. Such evidence may be considered by you in deciding what weight or credibility should be given to the testimony of the defendant and for no other purpose.

INSTRUCTION NO. 7

A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he assaults another by any force or means likely to produce great bodily harm or death.

INSTRUCTION NO. 8

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

INSTRUCTION NO. 9

An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

INSTRUCTION NO. 10

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

INSTRUCTION NO. 11

To convict the defendant of the crime of assault in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of October, 2004, the defendant assaulted Angel Benson in the Budget Inn parking lot;

(2) That the assault was committed by a force or means likely to produce great bodily harm or death;

(3) That the defendant acted with intent to inflict great bodily harm; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 12

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of Assault in the First Degree necessarily includes the lesser crimes of Assault in the Second Degree, Assault in the Third Degree, and Assault in the Fourth Degree.

The crime of Attempted Robbery in the First Degree necessarily includes the lesser crime of Attempted Robbery in the Second Degree.

The crime of Kidnapping in the First Degree necessarily includes the lesser crimes of Kidnapping in the Second Degree and Unlawful Imprisonment.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he shall be convicted only of the lowest crime.

INSTRUCTION NO. 13

A person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm.

INSTRUCTION NO. 14

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Recklessness also is established if a person acts intentionally or knowingly.

INSTRUCTION NO. 15

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

INSTRUCTION NO. 16

To convict the defendant of the crime of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 23rd day of October, 2004, the defendant intentionally assaulted Angel Benson in the Budget Inn parking lot;
- (2) That the defendant thereby recklessly inflicted substantial bodily harm on Angel Benson, and
- ② That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 17

A person commits the crime of assault in the third degree when under circumstances not amounting to assault in either the first or second degree he or she

(1) with criminal negligence causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm, or

(2) with criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.

INSTRUCTION NO. 18

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and the failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

Criminal negligence is also established if a person acts intentionally or knowingly or recklessly.

INSTRUCTION NO. 19

To convict the defendant of the crime of assault in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of October, 2004, the defendant caused bodily harm to Angel Benson in the Budget Inn parking lot;

(2) That the bodily harm was either (a) caused by a weapon or other instrument or thing likely to produce bodily harm or (b) was accompanied by substantial pain that extended for a period of time sufficient to cause considerable suffering;

(3) That the defendant acted with criminal negligence; and

~~(4)~~ That the acts occurred in the State of Washington.

If you find from the evidence that elements(1), (3), and (4) and either (2)(a) or (2)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

Elements (2)(a) and (2)(b) are alternatives and only one need be proved. You must unanimously agree that (2)(a) has been proved, or that (2)(b) has been proved.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 20

A person commits the crime of assault in the fourth degree when he or she commits an assault not amounting to assault in the first, second, or third degree.

INSTRUCTION NO. 21

To convict the defendant of the crime of assault in the fourth degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 23rd day of October, 2004, the defendant assaulted Angel Benson in the Budget Inn parking lot; and
- (2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 22

A person commits the crime of attempted robbery in the first degree when, with intent to commit that crime, he does any act which is a substantial step toward the commission of that crime.

INSTRUCTION NO. 23

A person commits the crime of robbery in the first degree when in the commission of a robbery or in immediate flight therefrom he displays what appears to be a firearm or other deadly weapon.

INSTRUCTION NO. 24

A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property, not belonging to the defendant, from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or to the person or property of anyone. The 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. The taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom it was taken, such knowledge was prevented by the use of force or fear.

INSTRUCTION NO. 25

Deadly weapon means any firearm, whether loaded or unloaded, weapon, device, or instrument, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily injury.

INSTRUCTION NO. 26

A substantial step is conduct which strongly indicates a criminal purpose and which is more than mere preparation.

INSTRUCTION NO. 28

A person commits the crime of robbery in the second degree when he or she commits robbery.

INSTRUCTION NO. 27

To convict the defendant of the crime of attempted robbery in the first degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 23rd day of October, 2004, the defendant did an act which was a substantial step toward the commission of robbery in the first degree;
- (2) That the act was done with the intent to commit robbery in the first degree; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 29

To convict the defendant of the crime of attempted robbery in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of October, 2004, the defendant did an act which was a substantial step toward the commission of robbery in the second degree;

(2) That the act was done with the intent to commit robbery in the second degree;

and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 30

A person commits the crime of kidnapping in the first degree when he or she intentionally abducts another person with intent to hold the person as a shield or hostage.

INSTRUCTION NO. 31

Abduct means to restrain a person by using or threatening to use deadly force.

INSTRUCTION NO. 32

Restraint or restrain means to restrict another person's movements without consent and without legal authority in a manner which interferes substantially with that person's liberty.

Restraint is without consent if it is accomplished by physical force, intimidation or deception.

INSTRUCTION NO. 33

To convict the defendant of the crime of kidnapping in the first degree as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 23rd day of October, 2004, the defendant intentionally abducted another person;
- (2) That the defendant abducted Angel Benson with intent to hold the person as a shield or hostage; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 34

A person commits the crime of kidnapping in the second degree when he or she intentionally abducts another person.

INSTRUCTION NO. 35

To convict the defendant of the crime of kidnapping in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 23rd day of October, 2004, the defendant intentionally abducted Angel Benson; and
- (2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 36

A person commits the crime of unlawful imprisonment when he or she knowingly restrains another person.

INSTRUCTION NO. 37

To convict the defendant of the crime of unlawful imprisonment, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 23rd day of October, 2004, the defendant knowingly restrained Angel Benson;
- (2) that such restraint was without Angel Benson's consent;
- (3) That such restraint was without legal authority; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 38

A person commits the crime of obstructing a law enforcement officer when he willfully hinders, delays, or obstructs any law enforcement officer in the discharge of the law enforcement officer's official powers or duties.

INSTRUCTION NO. 39

A person acts willfully when he or she acts knowingly.

INSTRUCTION NO. 40

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION NO. 41

To convict the defendant of the crime of obstructing a law enforcement officer as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of October, 2004, the defendant wilfully hindered, delayed, or obstructed a law enforcement officer in the discharge of the law enforcement officer's official powers or duties;

(2) That the defendant knew that the law enforcement officer was discharging official duties at the time;

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 42

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

INSTRUCTION NO. 43

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a presiding juror. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted in evidence, these instructions, and ten verdict forms: 1A, 1B, 1C, 1D, 2A, 2B, 3A, 3B, 3C, and 4A.

When completing the verdict forms, you will first consider the crime of assault in the first degree as charged in Count I. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 1A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form 1A.

If you find the defendant guilty on verdict form 1A, do not use verdict forms 1B or 1C or 1D. If you find the defendant not guilty of the crime of assault in the first degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of assault in the second degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 1B the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form 1B.

If you find the defendant guilty on verdict form 1B, do not use verdict form 1C. If you find the defendant not guilty of the crime of assault in the second degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser

crime of assault in the third degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 1C the words "not guilty" or the word "guilty," according to the decision you reach.

If you find the defendant guilty on verdict form 1C, do not use verdict form 1D. If you find the defendant not guilty of the crime of assault in the third degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of assault in the fourth degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 1D the words "not guilty" or the word "guilty," according to the decision you reach.

If you find the defendant guilty of the crime of assault but have a reasonable doubt as to which of two or more degrees of that crime the defendant is guilty, it is your duty to find the defendant not guilty on verdict form 1A and to find the defendant guilty of the lowest degree of assault for which you unanimously agree that the defendant is guilty.

You will next consider the crime of attempted robbery in the first degree as charged in Count II. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 2A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form 2A.

If you find the defendant guilty on verdict form 2A, do not use verdict form 2B. If you find the defendant not guilty of the crime of attempted robbery in the first degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of attempted robbery in the second degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 2B the words "not guilty" or the word

"guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form 2B.

If you find the defendant guilty of the crime of attempted robbery but have a reasonable doubt as to which of two or more degrees of that crime the defendant is guilty, it is your duty to find the defendant not guilty on verdict form 1A and to find the defendant guilty on verdict form 2B.

You will first consider the crime of kidnapping in the first degree as charged in Count III. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 3A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form 3A.

If you find the defendant guilty on verdict form 3A, do not use verdict forms 3B or 3C. If you find the defendant not guilty of the crime of kidnapping in the first degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of kidnapping in the second degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 3B the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form 3B.

If you find the defendant guilty on verdict form 3B, do not use verdict form 3C. If you find the defendant not guilty of the crime of unlawful imprisonment, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of unlawful imprisonment. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 3C the words "not guilty" or the word "guilty," according to the decision you reach.

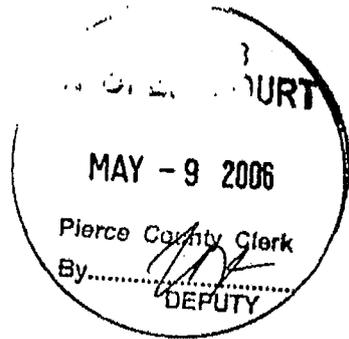
You will next consider the crime of obstructing a law enforcement officer as charged in Count IV. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 4A the words "not guilty" or the word "guilty," according to the decision you reach.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror will sign it and notify the judicial assistant, who will conduct you into court to declare your verdict.

APPENDIX D



04-1-04983-2 25435282 VRD 05-10-08



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

EDWARD MICHAEL GLASMANN,

Defendant.

CAUSE NO. 04-1-04983-2

VERDICT FORM 4A
(Obstructing a Law Enforcement Officer)

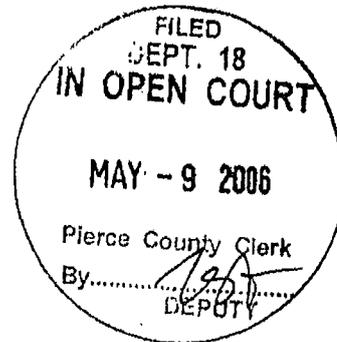
We, the jury, find the defendant Guilty (Not Guilty or Guilty) of the crime of OBSTRUCTING A LAW ENFORCEMENT OFFICER as charged in Count IV.

[Signature]
PRESIDING JUROR

ORIGINAL



04-1-04983-2 25435281 VRD 05-10-08



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
EDWARD MICHAEL GLASMANN,
Defendant.

CAUSE NO. 04-1-04983-2

VERDICT FORM 3C
(Unlawful Imprisonment)

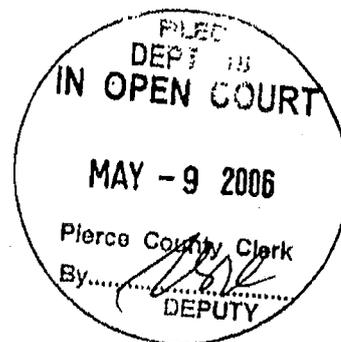
We, the jury, having found the defendant EDWARD MICHAEL GLASMANN not guilty of the crimes of kidnapping in the first degree and kidnapping in the second degree, find the defendant _____ (Not Guilty or Guilty) of the lesser included crime of UNLAWFUL IMPRISONMENT.

PRESIDING JUROR

ORIGINAL



04-1-04983-2 25435278 VRD 05-10-06



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,

vs.

EDWARD MICHAEL GLASMANN,
Defendant.

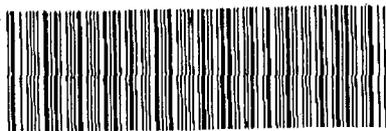
CAUSE NO. 04-1-04983-2

VERDICT FORM 3B
(Kidnapping in the Second Degree)

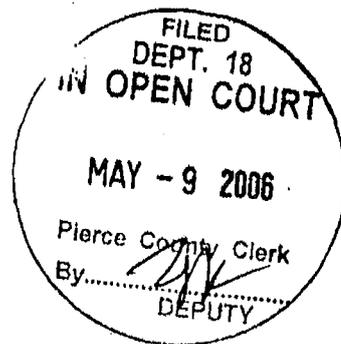
We, the jury, having found the defendant EDWARD MICHAEL GLASMANN not guilty of the crimes of kidnapping in the first degree as charged in Count III, or being unable to unanimously agree as to that charge, find the defendant _____ (Not Guilty or Guilty) of the lesser degree crime of KIDNAPPING IN THE SECOND DEGREE.

PRESIDING JUROR

ORIGINAL



04-1-04983-2 25435275 VRD 05-10-06



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

EDWARD MICHAEL GLASMANN,

Defendant.

CAUSE NO. 04-1-04983-2

VERDICT FORM 3A
(Kidnapping in the First Degree)

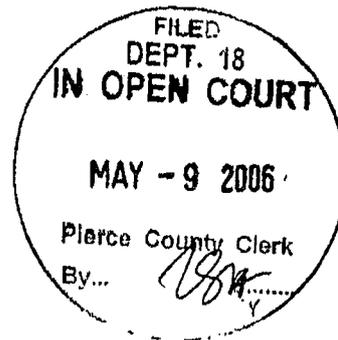
We, the jury, find the defendant Guilty (Not Guilty or Guilty) of the
crime of KIDNAPPING IN THE FIRST DEGREE as charged in Count III.

Dustin Jay
PRESIDING JUROR

ORIGINAL



04-1-04983-2 25435271 VRD 05-10-06



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
EDWARD MICHAEL GLASMANN,
Defendant.

CAUSE NO. 04-1-04983-2

VERDICT FORM 2B
(Attempted Robbery in the 2nd Degree)

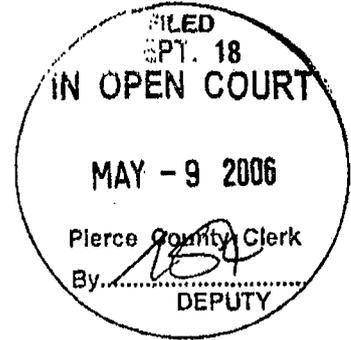
We, the jury, having found the defendant EDWARD MICHAEL GLASMANN not guilty of the attempted robbery in the first degree as charged in Count II, or being unable to unanimously agree as to that charge, find the defendant Guilty (Not Guilty or Guilty) of the lesser degree crime of ATTEMPTED ROBBERY IN THE SECOND DEGREE.

Dustin Day
PRESIDING JUROR

ORIGINAL



04-1-04983-2 25435268 VRD 05-10-06



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

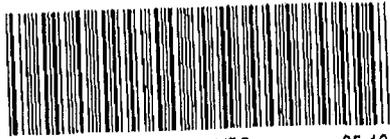
STATE OF WASHINGTON,
Plaintiff,
vs.
EDWARD MICHAEL GLASMANN,
Defendant.

CAUSE NO. 04-1-04983-2
VERDICT FORM 2A
(Attempted Robbery in the First Degree)

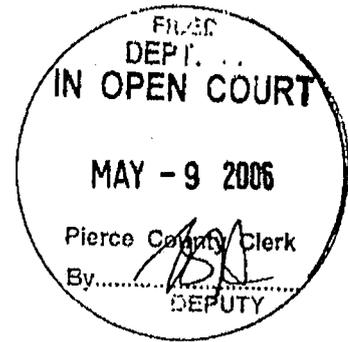
We, the jury, find the defendant _____ (Not Guilty or Guilty) of the
crime of ATTEMPTED ROBBERY IN THE FIRST DEGREE as charged in Count II.

PRESIDING JUROR

ORIGINAL



04-1-04983-2 25435267 VRD 05-10-06



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
EDWARD MICHAEL GLASMANN
Defendant.

CAUSE NO. 04-1-04983-2

VERDICT FORM 1D
(Assault in the Fourth Degree)

We, the jury, having found the defendant EDWARD MICHAEL GLASMANN not guilty of the crimes of assault in the first degree and assault in the second degree and assault in the third degree, or being unable to unanimously agree as to those charges, find the defendant

_____ (Not Guilty or Guilty) of the crime of ASSAULT IN THE FOURTH DEGREE.

PRESIDING JUROR



04-1-04983-2 25435268 VRD 05-10-08



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-04983-2

vs.

EDWARD MICHAEL GLASMANN,

VERDICT FORM 1C
(Assault in the Third Degree)

Defendant.

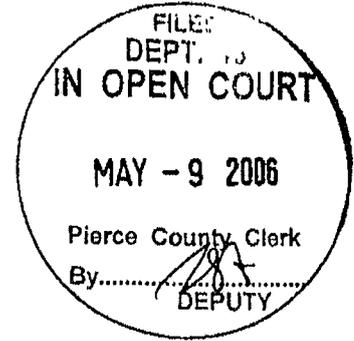
We, the jury, having found the defendant EDWARD MICHAEL GLASMANN not guilty of the crimes of assault in the first degree and assault in the second degree, or being unable to unanimously agree as to those charges, find the defendant _____ (Not Guilty or Guilty) of the crime of ASSAULT IN THE THIRD DEGREE.

PRESIDING JUROR

ORIGINAL



04-1-04983-2 25435263 VRD 05-10-06



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
EDWARD MICHAEL GLASMANN,
Defendant.

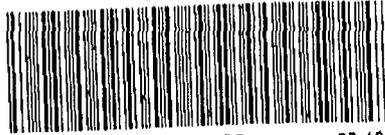
CAUSE NO. 04-1-04983-2

VERDICT FORM 1B
(Assault in the Second Degree)

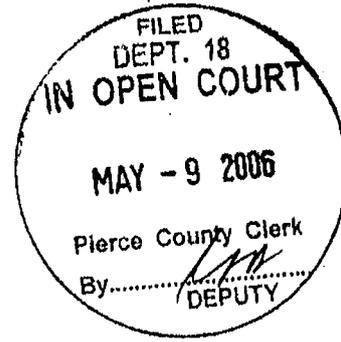
We, the jury, having found the defendant EDWARD MICHAEL GLASMANN not guilty of the crime of assault in the first degree as charged, or being unable to unanimously agree as to that charge, find the defendant Guilty (Not Guilty or Guilty) of the lesser degree crime of ASSAULT IN THE SECOND DEGREE.

Dustin Jay
PRESIDING JUROR

ORIGINAL



04-1-04983-2 25435259 VRD 05-10-06



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
EDWARD MICHAEL GLASMANN,
Defendant.

CAUSE NO. 04-1-04983-2
VERDICT FORM 1A
(Assault in the First Degree)

We, the jury, find the defendant _____ (Not Guilty or Guilty) of the
crime of ASSAULT IN THE FIRST DEGREE as charged in Count I.

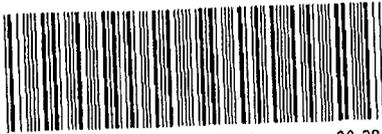
PRESIDING JUROR

ORIGINAL

APPENDIX E

Count	Original	Lesser	Verdict Form	Decision
I	Assault in the First Degree		1A	Blank
		Assault in the Second Degree	1B	Guilty
		Assault in the Third Degree	1C	Blank
		Assault in the Fourth Degree	1D	Blank
II	Attempted Robbery in the First Degree		2A	Blank
		Attempted Robbery in the Second Degree	2B	Guilty
III	Kidnapping in the First Degree		3A	Guilty
	Kidnapping in the Second Degree		3B	Blank
IV	Obstructing a Law Enforcement Officer		4A	Guilty

APPENDIX F



04-1-04983-2 40781403 CPRM 06-28-13



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff

vs.

GLASMANN, EDWARD MICHAEL,

Defendant

Cause No. 04-1-04983-2

Supreme Court Decision

Westlaw.

286 P.3d 673
175 Wash.2d 696, 286 P.3d 673
(Cite as: 175 Wash.2d 696, 286 P.3d 673)

Page 1



Supreme Court of Washington,
En Banc.
In the Matter of the Personal Restraint of Edward
Michael GLASMANN, Petitioner.

No. 84475-5.
Oct. 18, 2012.

Background: Defendant filed a personal restraint petition after his convictions in the Superior Court, Pierce County, Beverly G. Grant, J., for first-degree kidnapping, first-degree obstruction, second-degree assault, and attempted second-degree robbery were affirmed, 2008 WL 186783. The Supreme Court granted limited review.

Holdings: The Supreme Court, Madsen, C.J., held that:

- (1) prosecutor engaged in misconduct by expressing his personal opinion of defendant's guilt through an electronic slide-show presentation and his closing argument;
- (2) the misconduct was flagrant and ill intentioned;
- (3) the misconduct was so pervasive that it could not have been cured by a jury instruction;
- (4) a substantial likelihood existed that the jury's verdicts were influenced by the misconduct; and
- (5) prosecutor engaged in misconduct by informing the jury that, to reach a verdict, it had to decide whether defendant told the truth when he testified.

Convictions reversed and case remanded for a new trial.

Chambers, J., concurred and filed opinion.

Wiggins, J., dissented and filed opinion in which James M. Johnson, Susan Owens, and Mary E. Fairhurst, JJ., concurred.

West Headnotes

[1] Constitutional Law 92 ⇨4600

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4598 Trial in General
92k4600 k. Right to fair trial in general. Most Cited Cases

Right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and the rights-of-the-accused section of the Washington State Constitution. (Per Madsen, C.J., with three justices concurring and one justice concurring separately.) U.S.C.A. Const.Amends. 6, 14; West's RCWA Const. Art. 1, § 22.

[2] Criminal Law 110 ⇨1982

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)1 In General
110k1982 k. Prejudice resulting from improper conduct; unfairness or miscarriage of justice. Most Cited Cases

Prosecutorial misconduct may deprive a defendant of his constitutional rights to a fair trial. (Per Madsen, C.J., with three justices concurring and one justice concurring separately.) U.S.C.A. Const.Amends. 6, 14; West's RCWA Const. Art. 1, § 22.

[3] Criminal Law 110 ⇨2094

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

286 P.3d 673
 175 Wash.2d 696, 286 P.3d 673
 (Cite as: 175 Wash.2d 696, 286 P.3d 673)

Page 2

110k2094 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

Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, a prosecutor must seek convictions based only on probative evidence and sound reason. (Per Madsen, C.J., with three justices concurring and one justice concurring separately.)

[4] 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

Criminal Law 110 ↪1982

110 Criminal Law
 110XXXI Counsel
 110XXXI(D) Duties and Obligations of Prosecuting Attorneys
 110XXXI(D)1 In General
 110k1982 k. Prejudice resulting from improper conduct; unfairness or miscarriage of justice. Most Cited Cases

To prevail on a claim of prosecutorial misconduct, a defendant is required to show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial; to show prejudice, the defendant

show a substantial likelihood that the misconduct affected the jury verdict. (Per Madsen, C.J., with three justices concurring and one justice concurring separately.)

[5] Criminal Law 110 ↪1174(1)

110 Criminal Law
 110XXIV Review
 110XXIV(Q) Harmless and Reversible Error
 110k1174 Conduct and Deliberations of Jury
 110k1174(1) k. In general. Most Cited Cases

Consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced. (Per Madsen, C.J., with three justices concurring and one justice concurring separately.)

[6] Criminal Law 110 ↪2079

110 Criminal Law
 110XXXI Counsel
 110XXXI(F) Arguments and Statements by Counsel
 110k2076 Statements as to Facts and Arguments
 110k2079 k. Exhibits and illustrations. 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

Prosecutor engaged in misconduct at a trial for kidnapping and other offenses by expressing his personal opinion of defendant's guilt through an electronic slide-show presentation and his closing argument; prosecutor presented the jury with copies

286 P.3d 673
 175 Wash.2d 696, 286 P.3d 673
 (Cite as: 175 Wash.2d 696, 286 P.3d 673)

Page 3

of defendant's booking photograph altered by the addition of captions such as "DO YOU BELIEVE HIM?" and, near the end of the presentation, "GUILTY" superimposed three times in an X shape over defendant's face in red letters, the captions challenged the jury to question the truthfulness of defendant's testimony, and defendant appeared unkempt and bloody in the booking photograph, a condition likely to have resulted in even greater impact because of the captions. (Per Madsen, C.J., with three justices concurring and one justice concurring separately.)

[7] Criminal Law 110 ⇨ 2031

110 Criminal Law
 110XXXI Counsel
 110XXXI(D) Duties and Obligations of Prosecuting Attorneys
 110XXXI(D)5 Presentation of Evidence
 110k2031 k. Use of improper evidence. Most Cited Cases

In the context of a claim of prosecutorial misconduct, a prosecutor must be held to know that it is improper to present evidence that has been deliberately altered to influence a jury's deliberations. (Per Madsen, C.J., with three justices concurring and one justice concurring separately.)

[8] 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

Criminal Law 110 ⇨ 2146

110 Criminal Law
 110XXXI Counsel
 110XXXI(F) Arguments and Statements by Counsel
 110k2145 Appeals to Sympathy or Prejudice

110k2146 k. In general. Most Cited Cases

A prosecutor cannot use his or her position of power and prestige to sway the jury and may not express an individual opinion of the defendant's guilt, independent of the evidence actually in the case. (Per Madsen, C.J., with three justices concurring and one justice concurring separately.)

[9] Criminal Law 110 ⇨ 1037.1(2)

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(2) k. Particular statements, arguments, and comments. Most Cited Cases

Misconduct of prosecutor in expressing his personal opinion of defendant's guilt through an electronic slide-show presentation and his closing argument was flagrant and ill intentioned at a trial for kidnapping and other offenses, as required for defendant, who did not object to the misconduct at trial, to prevail on a claim of prosecutorial misconduct; prosecutor intentionally presented the jury with copies of defendant's booking photograph altered by the addition of phrases, such as "GUILTY" superimposed three times in an X shape over defendant's face in red letters, calculated to influence the jury's assessment of defendant's guilt and veracity, and case law and professional standards clearly warned prosecutor against such conduct. (Per Madsen, C.J., with three justices concurring and one justice concurring separately.)

[10] Criminal Law 110 ⇨ 1037.1(2)

110 Criminal Law
 110XXIV Review

286 P.3d 673
175 Wash.2d 696, 286 P.3d 673
(Cite as: 175 Wash.2d 696, 286 P.3d 673)

Page 4

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(2) k. Particular
statements, arguments, and comments. Most Cited
Cases

Criminal Law 110 ⇨ 2204

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by
Counsel
110k2191 Action of Court in Response to
Comments or Conduct
110k2204 k. Expressions as to guilt of
accused. Most Cited Cases

Flagrant and ill-intentioned misconduct of pro-
secutor in expressing his personal opinion of de-
fendant's guilt through an electronic slide-show
presentation and his closing argument was so per-
vasive that it could not have been cured by a jury
instruction at a trial for kidnapping and other of-
fenses, as required for defendant, who did not ob-
ject to the misconduct at trial, to prevail on a claim
of prosecutorial misconduct; prosecutor, who
presented the jury with copies of defendant's book-
ing photograph altered by the addition of phrases,
such as "GUILTY" superimposed three times in an
X shape over defendant's face in red letters, essen-
tially produced a media event with the deliberate
goal of influencing the jury to return guilty ver-
dicts. (Per Madsen, C.J., with three justices concur-
ring and one justice concurring separately.)

[11] Criminal Law 110 ⇨ 1037.1(2)

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(2) k. Particular
statements, arguments, and comments. Most Cited
Cases

Substantial likelihood existed that the jury's
verdicts at a trial for first-degree assault, attempted
first-degree robbery, first-degree kidnapping, and
obstruction were influenced by flagrant and ill-
intentioned misconduct of prosecutor, to which no
objection was raised, in expressing his personal
opinion of defendant's guilt through an electronic
slide-show presentation and his closing argument;
defendant presented evidence that he lacked both
the opportunity and capacity to form the intent ne-
cessary to commit the charged offenses, defendant
asserted that he was guilty of only lesser offenses,
the jury found defendant guilty of second-degree
assault, attempted second-degree robbery, first-
degree kidnapping, and obstruction, and prosecu-
tor's misconduct meant that one of the last things
seen by the jury before deliberations was the rep-
resentative of the state impermissibly flashing the
word "GUILTY" across an image of defendant's
face three times, predisposing the jury to return a
harsh verdict. (Per Madsen, C.J., with three justices
concurring and one justice concurring separately.)

[12] 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 coun-
sel in general. Most Cited Cases

Deciding whether reversal for prosecutorial
misconduct 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 miscon-

286 P.3d 673
175 Wash.2d 696, 286 P.3d 673
(Cite as: 175 Wash.2d 696, 286 P.3d 673)

duct affected the jury's verdict. (Per Madsen, C.J., with three justices concurring and one justice concurring separately.)

[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

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

Prosecutor engaged in misconduct at a trial for kidnapping and other offenses by informing the jury that, to reach a verdict, it had to decide whether defendant told the truth when he testified; proper standard was whether the evidence established that defendant was guilty of the charges beyond a reasonable doubt. (Per Madsen, C.J., with three justices concurring and one justice concurring separately.)

[14] Criminal Law 110 ↪ 2100

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2099 Comments Shifting or Misstating Burden of Proof
110k2100 k. In general. Most Cited Cases

Shifting the burden of proof to a defendant is

improper prosecutorial argument, and ignoring this prohibition amounts to flagrant and ill intentioned misconduct. (Per Madsen, C.J., with three justices concurring and one justice concurring separately.)

[15] Constitutional Law 92 ↪ 4694

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)5 Evidence and Witnesses
92k4694 k. Degree of proof; reasonable doubt. Most Cited Cases

Due process requires the prosecution to prove, beyond a reasonable doubt, every element necessary to constitute the crime with which the defendant is charged; misstating the basis on which a jury can acquit insidiously shifts the requirement that the state prove the defendant's guilt beyond a reasonable doubt. (Per Madsen, C.J., with three justices concurring and one justice concurring separately.) U.S.C.A. Const.Amend. 14; West's RCWA Const. Art. 1, § 3.

**675 Jeffrey Erwin Ellis, Oregon Capital Resource Center, Portland, OR, for Petitioner.

Thomas Charles Roberts, Pierce County Prosecuting Attorney, Tacoma, WA, for Respondent.

MADSEN, C.J.

*699 ¶ 1 Edward M. Glasmann was convicted of second degree assault, attempted second degree robbery, first degree kidnapping, and obstruction arising from incidents that occurred while he was intoxicated. During closing argument, the prosecuting attorney made an electronic presentation to the jury that graphically displayed his personal opinion that Glasmann was "guilty, guilty, guilty" of the crimes charged by the State. The prosecutor's misconduct was flagrant, ill intentioned, and we cannot conclude with any confidence that it did not to have an effect on the outcome of the trial. We reverse the defendant's convictions and remand for a new trial.

286 P.3d 673
 175 Wash.2d 696, 286 P.3d 673
 (Cite as: 175 Wash.2d 696, 286 P.3d 673)

Page 6

FACTS AND PROCEDURAL HISTORY

¶ 2 In celebration of his October 2004 birthday, Edward Glasmann and his fiancée, Angel Benson, rented a motel room in Lakewood, Washington. Over the course of the evening, the two ingested methamphetamine, ecstasy, and alcohol. Glasmann and Benson had been arguing throughout that day and evening and around midnight, their argument escalated. Glasmann started punching and kicking Benson. He told Benson he wanted to go for a ride and then dragged her out of the motel room. Outside the motel room, another motel guest witnessed Glasmann punch and kick Benson before dragging her to the passenger side of his Corvette. This witness called 911 and provided an account of the events.

¶ 3 From the driver's seat, Glasmann reached over to open the passenger door and attempted to pull Benson into *700 the car by her hair. Benson testified that she was partially in the car and stumbled when Glasmann ran the car up her leg, backed off of her leg, pulled her into the car, and drove out of the parking lot. Benson was then able to get the car into park. She next grabbed the car keys and ran into a minimart adjacent to the motel.

¶ 4 Inside the minimart, she hid on the floor behind the cashier's counter. Police soon arrived and attempted without success to apprehend Glasmann. Shouting at the officers to shoot him and claiming to possess a firearm, Glasmann ran into the convenience store. He ran behind the counter, held Benson in a choke hold, and threatened to kill her. As officers approached, Glasmann held Benson between himself and the officers. Benson was able to wiggle free enough to **676 allow an officer to use a stun gun on Glasmann.

¶ 5 The officers subdued and arrested Glasmann. In the process, Glasmann was held down by one officer while another officer stomped on his head approximately five times. Glasmann continued to struggle as he was dragged out of the minimart. His booking photograph shows extensive facial bruising. The incident inside the minimart was re-

corded on the store's security camera.

¶ 6 The State charged Glasmann with first degree assault, attempted first degree robbery, first degree kidnapping, and obstruction. Exhibits admitted into evidence included the minimart security video, photographs of Benson's injuries, the 911 recording, recordings of telephone calls between Glasmann and Benson, and Glasmann's booking photo. The defense offered Glasmann's booking photo to display Glasmann's facial injuries sustained during arrest.

¶ 7 At trial, Glasmann did not deny culpability. Rather, he disputed the degree of the crimes charged. He argued the jury should convict only on lesser included offenses. The prosecution sought to establish that Glasmann acted with intent, a necessary element of all the crimes charged.

*701 ¶ 8 In closing argument, the State used an extensive PowerPoint ^{FN1} presentation that included numerous slides incorporating the security camera video, audio recordings, photographs of Benson's injuries, and Glasmann's booking photograph. Each of the slides containing a video shot or photograph included a caption consisting of testimony, recorded statements, or the prosecutor's commentary.^{FN2}

FN1. "PowerPoint" is a registered trademark of a Microsoft graphics presentation software program.

FN2. Having been obtained by public disclosure request, most of the prosecution's closing argument PowerPoint slides are attached to State's Response to Personal Restraint Petition, Appendix G (Wash.Ct.App. No. 39700-5-II). Although appendix G includes two versions of the presentation, we cite only to the shorter version, appearing second in the appendix. Three of the closing argument slides are attached to the Personal Restraint Petition, Appendix H at 8-10. None of the original

286 P.3d 673
175 Wash.2d 696, 286 P.3d 673
(Cite as: 175 Wash.2d 696, 286 P.3d 673)

Page 7

slides are in the record.

¶ 9 One slide showed Glasmann crouched behind the minimart counter with a choke hold on Benson and a caption reading, "YOU JUST BROKE OUR LOVE." State's Resp. to Pers. Restraint Pet. (PRP), App. G at 1. Another slide featuring a photograph of Benson's back injuries appeared with the captions, "What was happening right before defendant drove over Angel ...," and "... you were beating the crap out of me!" *Id.* at 2. This slide also featured accompanying audio.

¶ 10 In addition, the prosecutor argued that jurors should not believe Glasmann's testimony. He told the jurors that the law required them to "[c]ompare Angel Benson's testimony and the testimony of the remainder of the State's witnesses to the defendant's." 8 Verbatim Report of Proceedings (VRP) at 458. The prosecutor then told jurors that in order to reach a verdict they must determine: "Did the defendant tell the truth when he testified?" *Id.*

¶ 11 At least five slides featured Glasmann's booking photograph and a caption. In one slide, the booking photo appeared above the caption, "DO YOU BELIEVE HIM?" State's Resp. to PRP, App. G at 5. In another booking photo slide the caption read, "WHY SHOULD YOU BELIEVE *702 ANYTHING HE SAYS ABOUT THE ASSAULT?" *Id.* Near the end of the presentation, the booking photo appeared three more times: first with the word "GUILTY" superimposed diagonally in red letters across Glasmann's battered face. PRP, App. H at 8. In the second slide the word "GUILTY" was superimposed in red letters again in the opposite direction, forming an "X" shape across Glasmann's face. *Id.* at 9. In the third slide, the word "GUILTY," again in red letters, was superimposed horizontally over the previously superimposed words. *Id.* at 10. As best as we can determine, the prosecutor stated the following while the "GUILTY" slides were being displayed:

You've been provided with a number of lesser

crimes if you believe the defendant is not guilty of the crimes for which the State has charged him, but the evidence in this case proves overwhelmingly that he is guilty as charged, and that's what the **677 State asks you to return in this case: Guilty of assault in the first degree; guilty of attempted robbery in the first degree; guilty of kidnapping in the first degree; and guilty of obstructing a police officer. Hold him accountable for what he did on October 23rd, 2004, by finding him guilty as charged. Thank you.

8 VRP at 465-66. Defense counsel did not object to these slides.

¶ 12 In closing argument, defense counsel emphasized the governing standard, proof beyond a reasonable doubt. He asked the jurors to focus on the actual charges, not Glasmann's drug use, reckless driving, or "hitting Angel Benson in the motel room." *Id.* at 470. Counsel reviewed the elements of each charge and argued that Glasmann's conduct did not meet the definition of the charged crimes:

The issue for you to decide is[,] is there proof beyond a reasonable doubt that Mike Glasmann committed any crimes that night, and the answer to that is yes, but this case is overcharged.

What do I mean by that? I mean that the charges that the State has leveled against Mr. Glasmann are not reflective of *703 what, in reality, happened that night or reflective of what has been proven beyond a reasonable doubt happened that night. He's charged with Assault I when only assault in the third degree or assault in the fourth degree reasonably fit these facts, arguably, beyond a reasonable doubt. He's charged with attempted robbery in the first degree when only attempted robbery in the second degree fits these facts beyond a reasonable doubt. He's charged with kidnapping in the first degree when only unlawful imprisonment fits these facts beyond a reasonable doubt. Obstructing a law enforcement officer is, I said, a proper charge.

286 P.3d 673
175 Wash.2d 696, 286 P.3d 673
(Cite as: 175 Wash.2d 696, 286 P.3d 673)

Page 8

Id. at 494.

¶ 13 The jury convicted Glasmann of first degree kidnapping and obstruction, and the lesser included offenses of second degree assault and attempted second degree robbery. Glasmann appealed. He was sentenced to 210 months in prison. The Court of Appeals affirmed in an unpublished decision. *State v. Glasmann*, noted at 142 Wash.App. 1041, 2008 WL 186783. Thereafter, Glasmann filed a personal restraint petition and we granted review limited to whether the prosecutor's closing argument deprived Glasmann of a fair trial and whether assistance of Glasmann's trial counsel was ineffective.^{FN3} *In re Pers. Restraint of Glasmann*, 170 Wash.2d 1009, 245 P.3d 226 (2010).

FN3. We need not reach the ineffective assistance of trial counsel claim because we remand for a new trial based on the prosecutorial misconduct claim.

ANALYSIS

[1][2] ¶ 14 The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *State v. Finch*, 137 Wash.2d 792, 843, 975 P.2d 967 (1999). Prosecutorial misconduct may deprive a defendant of his *704 constitutional right to a fair trial. *State v. Davenport*, 100 Wash.2d 757, 762, 675 P.2d 1213 (1984). "A '[f]air trial' certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused." *State v. Monday*, 171 Wash.2d 667, 677, 257 P.3d 551 (2011) (alteration in original) (quoting *State v. Case*, 49 Wash.2d 66, 71, 298 P.2d 500 (1956); see *State v. Reed*, 102 Wash.2d 140, 145-47, 684 P.2d 699 (1984)).

[3] ¶ 15 Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, *State v. Thorgerson*, 172 Wash.2d 438, 448,

258 P.3d 43 (2011), a prosecutor must "seek convictions based only on probative evidence and sound reason," *State v. Casteneda-Perez*, 61 Wash.App. 354, 363, 810 P.2d 74 (1991); *State v. Huson*, 73 Wash.2d 660, 663, 440 P.2d 192 (1968). "The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." American Bar Association, Standards for Criminal Justice std. 3-5.8(c) (2d ed. 1980); *State v. Brett*, 126 Wash.2d 136, **678 179, 892 P.2d 29 (1995); *State v. Belgarde*, 110 Wash.2d 504, 755 P.2d 174 (1988).

[4] ¶ 16 In order to prevail on a claim of prosecutorial misconduct, a defendant is required to show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *Thorgerson*, 172 Wash.2d at 442, 258 P.3d 43. To show prejudice requires that the defendant show a substantial likelihood that the misconduct affected the jury verdict. *Id.*; *State v. Ish*, 170 Wash.2d 189, 195, 241 P.3d 389 (2010); *State v. Dhaliwal*, 150 Wash.2d 559, 578, 79 P.3d 432 (2003). Because Mr. Glasmann failed to object at trial, the errors he complains of are waived unless he establishes that the misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice. *Thorgerson*, 172 Wash.2d at 443, 258 P.3d 43; *State v. Russell*, 125 Wash.2d 24, 86, 882 P.2d 747 (1994).

[5] ¶ 17 Our courts have repeatedly and unequivocally denounced the type of conduct that occurred in this case. *705 First, we have held that it is error to submit evidence to the jury that has not been admitted at trial. *State v. Pete*, 152 Wash.2d 546, 553-55, 98 P.3d 803 (2004). The "long-standing rule" is that " 'consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.' " *Id.* at 555 n. 4, 98 P.3d 803 (quoting *State v. Rinkes*, 70 Wash.2d 854, 862, 425 P.2d 658 (1967) (emphasis omitted)); see also, e.g., *State v. Boggs*, 33 Wash.2d 921, 207 P.2d 743 (1949), over-

286 P.3d 673
175 Wash.2d 696, 286 P.3d 673
(Cite as: 175 Wash.2d 696, 286 P.3d 673)

Page 9

ruled on other grounds by *State v. Parr*, 93 Wash.2d 95, 606 P.2d 263 (1980).

¶ 18 In *Rinkes*, 70 Wash.2d at 855, 425 P.2d 658, for example, a newspaper editorial and cartoon highly critical of what it claimed was lenient court decisions and liberal probation policies was inadvertently sent to the jury room. The court stated that the material in the newspaper should not have gone to the jury and observed that the article was "clearly intended to influence the readers of it [(the newspaper)] to be concerned about the purported leniency" of area judges and "may well have evoked a jury members feelings or convictions of the necessity for being stricter and less careful about observing legal principles and procedure in dealing with defendants accused of crime." *Id.* at 862-63, 425 P.2d 658. The court said the material was "very likely indeed" to be prejudicial and assumed that "the requisite balance of impartiality was upset." *Id.* at 863, 425 P.2d 658.

[6] ¶ 19 Here, the prosecutor intentionally presented the jury with copies of Glasmann's booking photograph altered by the addition of phrases calculated to influence the jury's assessment of Glasmann's guilt and veracity. In the photograph, Glasmann is unkempt and bloody, a condition likely to have resulted in even greater impact because of captions that challenged the jury to question the truthfulness of his testimony. While the State argues that it merely combined the booking photograph, admitted as exhibit 89, with the court's instructions and argument of the law and facts, the prosecutor's conduct went well *706 beyond this. Indeed, here the prosecutor's modification of photographs by adding captions was the equivalent of unadmitted evidence. There certainly was no photograph in evidence that asked "DO YOU BELIEVE HIM?" See State's Resp. to PRP, App. G at 5. There was nothing that said, "WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?" See *id.* And there were no sequence of photographs in evidence with "GUILTY" on the face or "GUILTY, GUILTY, GUILTY." See *id.* Yet

this "evidence" was made a part of the trial by the prosecutor during closing argument.

[7] ¶ 20 Although this is not a case where unadmitted evidence was sent to the jury room, as in *Pete* and *Rinkes*, these cases nevertheless establish that a prosecutor must be held to know that it is improper to present evidence that has been deliberately altered in order to influence the jury's deliberations. As in *Rinkes*, the multiple altered photographs here may well have affected the jurors' feelings about the need to strictly observe legal principles and the care it must take in determining Glasmann's guilt.

**679 [8] ¶ 21 It is also well established that a prosecutor cannot use his or her position of power and prestige to sway the jury and may not express an individual opinion of the defendant's guilt, independent of the evidence actually in the case. The commentary on *American Bar Association Standards for Criminal Justice* std. 3-5.8 emphasizes:

The prosecutor's argument is likely to have significant persuasive force with the jury. Accordingly, the scope of argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor's conduct. Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.

¶ 22 Likewise, many cases warn of the need for a prosecutor to avoid expressing a personal opinion of guilt. *E.g.*, *707 *State v. McKenzie*, 157 Wash.2d 44, 53, 134 P.3d 221 (2006) (finding it improper for a prosecuting attorney to express his individual opinion that the accused is guilty, independent of the testimony in the case (citing *State v. Armstrong*, 37 Wash. 51, 79 P. 490 (1905))); *Dhaliwal*, 150 Wash.2d at 577, 79 P.3d 432 (permitting latitude to attorneys to argue the facts in evidence and reason-

286 P.3d 673
175 Wash.2d 696, 286 P.3d 673
(Cite as: 175 Wash.2d 696, 286 P.3d 673)

Page 10

able inferences therefrom, but prohibiting statements of personal belief of a defendant's guilt or innocence); *State v. Stith*, 71 Wash.App. 14, 21–22, 856 P.2d 415 (1993) (deeming a prosecutor's comment in closing argument that the appellant "was just coming back and he was dealing [drugs] again" impermissible opinion "testimony"); *State v. Traweek*, 43 Wash.App. 99, 107, 715 P.2d 1148 (1986) (concluding it was error for a prosecutor to tell the jury he "knew" the defendant committed the crime). By expressing his personal opinion of Glasmann's guilt through both his slide show and his closing arguments, the prosecutor engaged in misconduct.

[9] ¶ 23 The case law and professional standards described above were available to the prosecutor and clearly warned against the conduct here. We hold that the prosecutor's misconduct, which permeated the state's closing argument, was flagrant and ill intentioned.

[10] ¶ 24 Moreover, the misconduct here was so pervasive that it could not have been cured by an instruction. "[T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *State v. Walker*, 164 Wash.App. 724, 737, 265 P.3d 191 (2011) (citing *Case*, 49 Wash.2d at 73, 298 P.2d 500).

¶ 25 Highly prejudicial images may sway a jury in ways that words cannot. See *State v. Gregory*, 158 Wash.2d 759, 866–67, 147 P.3d 1201 (2006). Such imagery, then, may be very difficult to overcome with an instruction. *Id.* Prejudicial imagery may become all the more problematic when displayed in the closing arguments of a trial, when the jury members may be particularly aware of, and susceptible to, *708 the arguments being presented. Given the multiple ways in which the prosecutor attempted to improperly sway the jury and the powerful visual medium he employed, no instruction could erase the cumulative effect of the misconduct in this case. The prosecutor essentially produced a

media event with the deliberate goal of influencing the jury to return guilty verdicts on the counts against Glasmann.

[11] ¶ 26 We also believe there is a substantial likelihood that the misconduct affected the jury verdict. As noted earlier, the State charged Glasmann with first degree assault, attempted first degree robbery, first degree kidnapping, and obstruction. The mental state required for the charged offenses, specifically intent, was critically important. Glasmann presented evidence that he lacked both the opportunity and capacity to form the intent necessary to commit the charged crimes. There was evidence that he consumed alcohol, methamphetamine, and ecstasy the night of the offenses and evidence that the events involving Glasmann, Benson, and law enforcement unfolded rapidly. Glasmann defended on the basis that the facts only supported a guilty verdict as to third or **680 fourth degree assault, attempted robbery in the second degree, unlawful imprisonment, and obstruction. The jury convicted Glasmann of second degree assault, attempted second degree robbery, first degree kidnapping, and obstruction.

¶ 27 A prosecutor could never shout in closing argument that "Glasmann is guilty, guilty, guilty!" and it would be highly prejudicial to do so. Doing this visually through use of slides showing Glasmann's battered face and superimposing red capital letters (red, the color of blood and the color used to denote losses) is even more prejudicial. See *Gregory*, 158 Wash.2d at 866–67, 147 P.3d 1201. "[V]isual arguments manipulate audiences by harnessing rapid unconscious or emotional reasoning processes and by exploiting the fact that we do not generally question the rapid conclusions we reach based on visually presented information." Lucille A. Jewel, *Through a Glass Darkly: Using Brain and Visual Rhetoric *709 to Gain a Professional Perspective on Visual Advocacy*, 19 S. Cal. Interdisc. L.J. 237, 289 (2010). Further,

[w]ith visual information, people believe what they see and will not step back and critically ex-

286 P.3d 673
175 Wash.2d 696, 286 P.3d 673
(Cite as: 175 Wash.2d 696, 286 P.3d 673)

Page 11

amine the conclusions they reach, unless they are explicitly motivated to do so. Thus, the alacrity by which we process and make decisions based on visual information conflicts with a bedrock principle of our legal system—that reasoned deliberation is necessary for a fair justice system.

Id. at 293 (footnote omitted) (citing William J. Bowers, Benjamin D. Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171, 261 (2001) (citing Jeffrey Ambramson, We, The Jury: The Jury System and the Ideal of Democracy (1994) (generally discussing the basic democratic principle for jury trials is that deliberations should be a rational and reasoned process))).

¶ 28 During the critical closing moments of trial, one of the last things the jury saw before it began its deliberations was the representative of the State of Washington impermissibly flashing the word "GUILTY" across an image of Glasmann's face three times, predisposing the jury to return a harsh verdict. Indeed, the entire 50-plus slide presentation used during closing argument was full of imagery that likely inflamed the jury.^{FN4} The prosecutor's *710 improper visual "shouts" of GUILTY urged the jury to find Glasmann guilty as charged, and without them, the jury might have returned verdicts on the offenses Glasmann agreed he had committed.^{FN5} Because Glasmann defended by asserting he was guilty only of lesser offenses, and nuanced distinctions often separate degrees of a crime, there is an especially serious danger that the nature and scope of the misconduct here may have affected the jury.

FN4. "Sometimes, we are unable to rationally consider how images affect our emotions or our decision-making process. As we are processing an image in our pre-conscious sensory system, that image can activate an emotional reaction in our mind without us even knowing about it." Jewel, *supra*, 19 S. Cal. Interdisc. L.J. at 263

(citing Ann Marie Seward Barry, *Visual Intelligence: Perception, Image, and Manipulation in Visual Communication* 18 (1997); Joseph LeDoux, *The Emotional Brain* 165 (1996)). "[T]he danger in using emotionally vivid imagery is not that it is subliminally persuasive, but that it tends to generate emotionally driven reactions that can unconsciously affect a decision-maker's thought process." *Id.* at 254. "[T]here is evidence that gruesome photographs cause unconscious emotional reactions—reactions that may not be curable with a limiting instruction." *Id.* at 268–69 (citing Kevin S. Oglous, David R. Lyon & James R.P. Ogloff, *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?*, 21 Law & Hum. Behav. 485, 499 (1997) ("[I]f jurors cannot even recognize the extent to which [graphic] evidence affects them, it will be impossible for them to reduce or control the impact of the evidence when instructed to do so by a judge.")).

FN5. It is also possible that the jury might have acquitted Glasmann on a charge.

¶ 29 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. **681 See *Berger v. U.S.*, 295 U.S. at 89, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); *Thomas v. Hubbard*, 273 F.3d 1164, 1179–80 (9th Cir.2001), *overruled on other grounds by Payton v. Woodford*, 299 F.3d 815 (2002); *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir.1996); *see also Matlock v. Rose*, 731 F.2d 1236, 1244 (6th Cir.1984).

¶ 30 The dissent, however, believes that reversal is not required with regard to three of the

286 P.3d 673
175 Wash.2d 696, 286 P.3d 673
(Cite as: 175 Wash.2d 696, 286 P.3d 673)

Page 12

four crimes found by the jury and only the conviction for second degree assault should be reversed. The dissent says that Glasmann conceded the crimes of obstructing a law enforcement officer and second degree attempted robbery, and the jury accordingly convicted him of these crimes. With respect to the first degree kidnapping charge, the dissent maintains the evidence is overwhelming that this conviction must be upheld.

¶ 31 We have on a number of occasions established that reviewing claims of prosecutorial misconduct is not a matter of determining whether there is sufficient evidence to convict the defendant. In *State v. Charlton*, 90 Wash.2d *711 657, 665, 585 P.2d 142 (1978), we concluded the discussion of prosecutorial misconduct in that case, which required reversal, by noting that “[i]n spite of our frequent warnings that prejudicial prosecutorial tactics will not be permitted, we find that some prosecutors continue to use improper, sometimes prejudicial means in an effort to obtain convictions. In most of these instances, competent evidence fully sustains a conviction.” (Emphasis added.) The issue is whether the comments deliberately appealed to the jury’s passion and prejudice and encouraged the jury to base the verdict on the improper argument “rather than properly admitted evidence.” *State v. Furman*, 122 Wash.2d 440, 468–69, 858 P.2d 1092 (1993) (quoting and discussing *Belgarde*, 110 Wash.2d at 507–08, 755 P.2d 174). The focus must be on the misconduct and its impact, not on the evidence that was properly admitted.

[12] ¶ 32 Thus, 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 affected the jury’s verdict. *Dhaliwal*, 150 Wash.2d at 578, 79 P.3d 432. We do not decide whether reversal is required by deciding whether, in our view, the evidence is sufficient. See *Monday*, 171 Wash.2d at 678–80, 257 P.3d 551 (racist arguments required reversal; no weighing of evidence by the court);

Belgarde, 110 Wash.2d at 507–10, 755 P.2d 174 (inflammatory remarks associating defendant with an organization the prosecutor described as “deadly group of madmen”; misconduct required reversal; no weighing of evidence by the court); *Charlton*, 90 Wash.2d at 664, 585 P.2d 142 (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; reversal required—jury might have been inclined to believe the defendant’s version in the absence of the improper argument).

¶ 33 The dissent says it agrees that whether the error requires reversal is not a matter of whether there is *712 sufficient evidence to uphold the verdicts. Dissent at 685 n. 3. But weighing the evidence is in fact what the dissent does. We do not believe this analysis is appropriate and it is contrary to our precedent, as explained. If the misconduct cannot be linked to a specific count, and the misconduct is so egregious that we must conclude reversal is required on one charge, then how can we conclude the misconduct did not sway the jury on another charged crime without engaging in an inappropriate sufficiency of the evidence analysis, like the dissent has done?

¶ 34 In this case, the use of highly inflammatory images unrelated to any specific count was misconduct that contaminated the entire proceedings. The prosecutor’s unacceptable argument announced to the jury that the defendant was intrinsically GUILTY GUILTY GUILTY. The misconduct distracted the jury from its duty to consider the evidence unaffected by the overlaid message that emphatically and repeatedly conveyed the prosecutor’s belief to the jury that Glasmann is “absolutely guilty!”, and which constituted an appeal to passion and prejudice on all counts.

**682 ¶ 35 There is a substantial likelihood here that the jury returned guilty verdicts for the offenses the jurors found because they were influenced by the prosecutor’s improper closing argument and the altered “evidence” presented during

286 P.3d 673
 175 Wash.2d 696, 286 P.3d 673
 (Cite as: 175 Wash.2d 696, 286 P.3d 673)

Page 13

argument. We cannot say that the jury would not have returned verdicts for lesser offenses, or even acquittal, i.e., we cannot even presume the jury would have accepted defense counsel's concessions even as to the obstruction charged. The impact of such powerful but unquantifiable material on the jury is exceedingly difficult to assess but substantially likely to have affected the *entirety* of the jury deliberations and its verdicts. Even the dissent agrees that the misconduct mandates reversal of the assault conviction. The requisite balance of impartiality was upset. Mr. Glasmann's right to a fair trial must be granted in full. In this way, we give substance to our message that "prejudicial prosecutorial tactics will not be permitted," and our warnings *713 that prosecutors must avoid improper, prejudicial means of obtaining convictions will not be empty words. *Charlton*, 90 Wash.2d at 665, 585 P.2d 142.

[13] ¶ 36 Next, we turn briefly to Mr. Glasmann's claim that the prosecutor improperly misstated the burden of proof. Because we reverse Glasmann's conviction based on the misconduct addressed above, we need not reach this issue, but do so in the interest of fully discussing the prosecutor's conduct.

[14][15] ¶ 37 Shifting the burden of proof to the defendant is improper argument, and ignoring this prohibition amounts to flagrant and ill intentioned misconduct. *E.g.*, *State v. Fleming*, 83 Wash.App. 209, 213-14, 921 P.2d 1076 (1996); *Casteneda-Perez*, 61 Wash.App. at 362-63, 810 P.2d 74. Due process requires the prosecution to prove, beyond a reasonable doubt, every element necessary to constitute the crime with which the defendant is charged. *In re Winship*, 397 U.S. 358, 361, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Misstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant's guilt beyond a reasonable doubt. *Fleming*, 83 Wash.App. at 213, 921 P.2d 1076.^{FN6}

FN6. During the State's closing argument in *Fleming*, the prosecutor stated, "for

you to find the defendants ... not guilty of the crime of rape in the second degree, ... you would have to find either that [the victim] has lied about what occurred ... or that she was confused." *Fleming*, 83 Wash.App. at 213, 921 P.2d 1076 (emphasis omitted) (quoting court proceedings). This was error because it misstated the basis upon which the jury could acquit and shifted the burden to the defendant to disprove the State's case. *Id.* at 214, 921 P.2d 1076. A prosecutor who argues that to acquit the defendant the jury must find that the State's witnesses are lying or mistaken commits misconduct. *Id.*

¶ 38 Similarly, in this case the prosecutor informed the jury that in order to reach a verdict, it must decide whether the defendant told the truth when he testified. Thus, the prosecutor strongly insinuated that the jury could only acquit (or find him guilty of lesser charges) if it believed Glasmann, when the proper standard is whether the evidence established that he was guilty of the State's charges beyond a reasonable doubt. This misconduct was not as egregious as the conduct in *Fleming*, however, and in and of *714 itself would probably not justify reversal. However, it was clearly misconduct for the prosecutor to inform the jury that acquittal was only appropriate if the jury believed Glasmann, and shows the prosecutor's failure to prosecute this case as an impartial officer of the court.

CONCLUSION

¶ 39 The prosecutor's presentation of a slide show including alterations of Glasmann's booking photograph by addition of highly inflammatory and prejudicial captions constituted flagrant and ill intentioned misconduct that requires reversal of his convictions and a new trial, notwithstanding his failure to object at trial. Considering the entire record and circumstances of this case, there is a substantial likelihood that this misconduct affected the jury verdict. The principal disputed matter at trial

286 P.3d 673
 175 Wash.2d 696, 286 P.3d 673
 (Cite as: 175 Wash.2d 696, 286 P.3d 673)

Page 14

was whether Glasmann was guilty of lesser offenses rather than those charged, and this largely turned on whether the requisite mental element was established for each offense. More fundamentally, the jury was required to conclude**683 that the evidence established Glasmann's guilt of each offense beyond a reasonable doubt.

¶ 40 It is substantially likely that the jury's verdict were affected by the prosecutor's improper declarations that the defendant was "GUILTY, GUILTY, GUILTY!", together with the prosecutor's challenges to Glasmann's veracity improperly expressed as superimposed messages over the defendant's bloodied face in a jail booking photograph.

¶ 41 We reverse the defendant's convictions and remand for a new trial.

WE CONCUR: CHARLES W. JOHNSON and DEBRA L. STEPHENS, Justices and GERRY L. ALEXANDER, Justice Pro Tem. CHAMBERS, J., (concurring).

¶ 42 I agree with the lead opinion that the prosecutor's misconduct in this case *715 was so flagrant and ill intentioned that a curative instruction would not have cured the error and that the defendant was prejudiced as a result of the misconduct. See *State v. Stenson*, 132 Wash.2d 668, 719, 940 P.2d 1239 (1997). I write separately because I was stunned that the State argued to this court there was nothing improper with the prosecutor showing the jury a photo of the defendant digitally altered to look more like a wanted poster than properly admitted evidence. It was the State's view in oral argument that the PowerPoint slide in question was merely an instance of using modern techniques to present stimulating closing arguments. It was the State's position that the State may add "guilty" to the text of a PowerPoint presentation and therefore that it does not cross the line to add the text "guilty" to the photograph itself.

¶ 43 Under the State's logic, in a shooting case, there would be nothing improper with the State al-

tering an image of the accused by photoshopping a gun into his hand to illustrate the State's version of how the shooting must have occurred. In my view, the State in this case does not understand its role in ensuring a fair trial and the courts must establish the boundary lines. See *State v. Monday*, 171 Wash.2d 667, 676, 257 P.3d 551 (2011) ("The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated."); *State v. Thorgerson*, 172 Wash.2d 438, 462, 258 P.3d 43 (2011) (Chambers, J., dissenting) ("The proper measure of the success of any prosecutor is the prosecutor's devotion to the law, fidelity to the rules of the court and rules of evidence, and dedication to guarding the protections our constitutions and laws afford every person, including the accused."). Adding the word "guilty" to the PowerPoint slide was improper, whether in the text or splashed across the defendant's photo.

¶ 44 Certainly, lawyers may and should use technology to advance advocacy and judges should permit and even encourage new techniques. But we must all remember the *716 only purpose of visual aids of any kind is to enhance and assist the jury's understanding of the evidence. Technology should never be permitted to dazzle, confuse, or obfuscate the truth. The jury's deliberations must be based solely upon the evidence admitted and the court's instructions, not upon whose lawyer does the best job of manipulating, altering, shuffling, or distorting the evidence into some persuasive visual kalidoscope experience for the jury.

¶ 45 This was not a "he said, she said" case. Edward Glasmann's actions were captured on videotape by the security camera of the minimart. The State also had the testimony of five police officers, the witness who called 911, the 911 tape itself, and the victim, which altogether gave a real time account of the entire incident. There was absolutely no need for the prosecutor to alter an exhibit to demonize the defendant. I can only conclude the prosecutor's misconduct was flagrant and ill intentioned and designed to inflame the passions of the

286 P.3d 673
175 Wash.2d 696, 286 P.3d 673
(Cite as: 175 Wash.2d 696, 286 P.3d 673)

jury. See *Stenson*, 132 Wash.2d at 719, 940 P.2d 1239. Turning Glasmann's photo into a poster one might expect to see on the wall of an Old West saloon was completely unnecessary, and I cannot say the misconduct did not affect the verdict in this case. See *State v. Pirtle*, 127 Wash.2d 628, 672, 904 P.2d 245 (1995). I agree with the lead opinion that Glasmann's conviction should be reversed and the case remanded for a new trial.

**684 WIGGINS, J., (dissenting).

¶ 46 I agree with the lead opinion that the prosecutor in this case improperly expressed a personal opinion about Edward Glasmann's guilt when he superimposed the words "guilty, guilty, guilty" over Glasmann's mug shot in a PowerPoint display. But I disagree that all of Glasmann's convictions should be overturned as a result. While it may appear at first glance that the prosecutor's error is grave enough to warrant a new trial on all of Glasmann's convictions, a closer examination of the facts reveals a different story.

*717 ¶ 47 During closing arguments, Glasmann's attorney stated, "You have basically four trials here. You have four counts, four accusations, if you will. Each one of those is a separate trial. Each one of those must be decided separately from the other and we rely on you to do the necessary mental gymnastics to accomplish that." 8 Verbatim Report of Proceedings (VRP) at 471. Glasmann's attorney's advice to the jury is equally applicable to our review. After engaging in the "mental gymnastics" urged by Glasmann's attorney, I cannot agree that we should reverse his convictions for obstruction of a law enforcement officer, attempted second degree robbery, and first degree kidnapping. For each of these convictions, either Glasmann admitted to the crime or the evidence was so overwhelming that the jury would have convicted him regardless of the prosecutor's improper conduct. Nor can I agree that the prosecutor's statements during closing argument shifted the burden of proof to Glasmann. For these reasons, I respectfully dissent.

I. Prosecutorial Misconduct

¶ 48 To prevail on a prosecutorial misconduct claim, a defendant must show not only that the prosecutor's conduct was improper but also that it was prejudicial. *State v. Thorgerson*, 172 Wash.2d 438, 443, 258 P.3d 43 (2011). " 'Prejudice is established only if there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict.' " *State v. Magers*, 164 Wash.2d 174, 191, 189 P.3d 126 (2008) (alteration in original) (quoting *State v. Pirtle*, 127 Wash.2d 628, 672, 904 P.2d 245 (1995) and citing *State v. Evans*, 96 Wash.2d 1, 5, 633 P.2d 83 (1981)). "If the prejudice could have been cured by a jury instruction, but the defense did not request one, reversal is not required." *State v. Dhaliwal*, 150 Wash.2d 559, 578, 79 P.3d 432 (2003); *State v. Russell*, 125 Wash.2d 24, 85, 882 P.2d 747 (1994). Here, because Glasmann's attorney did not object to the prosecution's slides or request a curative instruction at *718 trial, Glasmann must show that the prejudice ^{FN1} was so inflammatory that it could not have been defused by an instruction. *State v. Coleman*, 152 Wash.App. 552, 570, 216 P.3d 479 (2009).

FN1. "[T]he inherent prejudice standard does not require us to know how jurors reacted to [the PowerPoint slides]. A defendant need not show that jurors 'actually articulated a consciousness of some prejudicial effect.' " *State v. Jaime*, 168 Wash.2d 857, 864 n. 4, 233 P.3d 554 (2010) (quoting *Holbrook v. Flynn*, 475 U.S. 560, 570, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986)).

A. Prejudice

¶ 49 Glasmann was convicted of four separate crimes, and factually, each conviction is different. It is a mistake to bunch all four convictions together and conclude that the prosecutor's improper conduct prejudiced each conviction the same. After analyzing Glasmann's four convictions separately, it is clear that three of them should stand and only one should be reversed.

1. Obstructing a Law Enforcement Officer

286 P.3d 673
175 Wash.2d 696, 286 P.3d 673
(Cite as: 175 Wash.2d 696, 286 P.3d 673)

Page 16

¶ 50 During closing arguments, Glasmann's attorney conceded that Glasmann "clearly obstructed a law enforcement officer in the exercise of their official duties," 8 VRP at 472-73 and admitted, "I'll be the most surprised person in this courtroom if you don't convict Mr. Glasmann of obstructing a law enforcement officer." *Id.* at 472. Not surprisingly, the jury found Glasmann guilty of obstructing a law enforcement officer. In light of his concession, Glasmann cannot seriously contend that he was prejudiced by the prosecutor's actions during closing argument. The jury found Glasmann guilty because he admitted he was guilty, not because of the prosecutor's improper conduct. The lead opinion is wrong to conclude the prosecutor's **685 conduct prejudiced Glasmann on his obstruction charge; I would uphold that conviction.^{FN2}

FN2. The lead opinion appears to misunderstand our posture on review when it says, "We cannot say that the jury would not have returned verdicts for lesser offense, or even acquittal, i.e., we cannot even presume the jury would have accepted defense counsel's concessions even as to the obstruction charged." Lead opinion at 682. This seems to assume that the burden is on the State to show harmlessness, perhaps even beyond a reasonable doubt. This assumption is incorrect. A defendant making a claim of prosecutorial misconduct carries the burden of showing a "substantial likelihood [that] the instances of misconduct affected the jury's verdict." *Magers*, 164 Wash.2d at 191, 189 P.3d 126 (alteration in original) (quoting *State v. Pirtle*, 127 Wash.2d 628, 672, 904 P.2d 245 (1996)). Thus, we are not required to reverse based on unlikely hypotheticals such as the jury acquitting where defense counsel did not even ask for acquittal, saying, for example, that he would be "the most surprised person in the courtroom" if the jury acquitted. 8 VRP at 472. It is, of course, *possible* that the jury would have

reached a different outcome absent the misconduct, but that does not equate to a substantial likelihood.

*719 2. Attempted Second Degree Robbery

¶ 51 Glasmann also conceded attempted second degree robbery. The State charged him with attempted *first degree* robbery, and he defended by arguing that the facts supported only attempted *second degree* robbery. Glasmann's attorney argued in closing that "Mr. Glasmann admits 'I was trying to steal his car,' and that's attempted robbery. The only issue is attempted first degree robbery or attempted second degree robbery. Clearly what Mr. Glasmann admitted to was attempted robbery in the second degree." *Id.* at 488-89. This was a strategic decision by Glasmann; he admitted to committing attempted second degree robbery because he *wanted* the jury to find him guilty of that crime, which the evidence plainly supported, and not of first degree robbery. Glasmann's gambit worked and the jury found him guilty of attempted second degree robbery.

¶ 52 Glasmann cannot reasonably claim the prosecutor's conduct resulted in any prejudice when the jury returned the same verdict Glasmann sought. Just like with the obstruction charge, the lead opinion is wrong to reverse his conviction. Recognizing this, I would uphold Glasmann's attempted second degree robbery conviction.

3. First Degree Kidnapping

¶ 53 Although Glasmann did not concede he was guilty of first degree kidnapping, the evidence of his guilt is so *720 overwhelming that there is no way the prosecutor's improper conduct prejudiced the jury's guilty verdict.^{FN3} Glasmann defended the first degree kidnapping charge by arguing that his actions inside the minimart only amounted to unlawful imprisonment. The jury disagreed and convicted him of first degree kidnapping.

FN3. The lead opinion is correct that "deciding whether reversal is required is not a matter of whether there is sufficient

286 P.3d 673
175 Wash.2d 696, 286 P.3d 673
(Cite as: 175 Wash.2d 696, 286 P.3d 673)

Page 17

evidence to justify upholding the verdicts." Lead opinion at 681. I agree there is more to the analysis than that. But the quantity and quality of evidence will often factor into our analysis of whether a verdict would have been different absent an error. For example, where the evidence of guilt is overwhelming, it is less likely that an error affected the outcome of the trial than where evidence of guilt is slight. See *In re Pers. Restraint of Davis*, 152 Wash.2d 647, 698-701, 101 P.3d 1 (2004).

¶ 54 "A person commits the crime of kidnapping in the first degree when he or she intentionally abducts another person with intent to hold the person as a shield or hostage." Jury Instruction 30. "Abduct means to restrain a person by using or threatening to use deadly force." Jury Instruction 31. "Restraint or restrain means to restrict another person's movements without consent and without legal authority in a manner which interferes substantially with that person's liberty. Restraint is without consent if it is accomplished by physical force, intimidation or deception." Jury Instruction 32.

¶ 55 The record is replete with video evidence and multiple-eyewitness testimony establishing that Glasmann was guilty of first degree kidnapping. Angel Benson testified that while in the minimart, Glasmann held her around the neck so that she could not breathe, that she was not there willingly, and that she struggled to try and get away. 4 VRP 95, 100, 111. Three officers also testified that Glasmann held Benson in a choke hold, and minimart surveillance tapes confirmed this testimony. 4 VRP at 118-19; 5 **686 VRP at 261; 6 VRP at 302. Officers Borchardt and Butts both testified to hearing Glasmann threaten to kill Benson. 4 VRP at 71; 5 VRP at 246. Further, Dr. Eggebrotten testified that application of pressure to someone's neck *721 could be life threatening. 5 VRP at 207. In short, the evidence at trial clearly established that Glasmann abducted Benson.

¶ 56 Additionally, the evidence that Glasmann intended to use Benson as a shield was overwhelming. Several officers testified that Glasmann positioned Benson between himself and the officers who had their guns drawn, 4 VRP at 119; 5 VRP at 248; 6 VRP at 305, with Officer Hamilton stating Glasmann positioned Benson "directly in front of him so that she was a physical barrier like a shield." 6 VRP at 305. The surveillance tape captured this scene, confirming the officers' testimony. This tape was played several times for the jurors. Given the abundance of evidence proving Glasmann guilty of first degree kidnapping, there is no question that the jury would have found Glasmann guilty even absent the prosecutor's improper conduct. Therefore, Glasmann was not prejudiced, and we should uphold his first degree kidnapping conviction.

4. Second Degree Assault

¶ 57 In contrast, it does appear that Glasmann was prejudiced on his second degree assault conviction, and I agree with the lead opinion that we should reverse that conviction. Glasmann defended the first degree assault charge by arguing that he did not intentionally assault Benson, a required element of first degree assault,^{FN4} and that running over Benson with his car amounted only to third^{FN5} or fourth^{FN6} degree assault.^{FN6} The jury convicted Glasmann of second degree assault, a lesser included offense also requiring proof of intent.^{FN7}

FN4. "A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he assaults another by any force or means likely to produce great bodily harm or death." Jury Instruction 7.

FN5. A person commits the crime of assault in the third degree when under circumstances not amounting to assault in either the first or second degree he or she

(1) with criminal negligence causes bodily harm to another person by means of a

286 P.3d 673
175 Wash.2d 696, 286 P.3d 673
(Cite as: 175 Wash.2d 696, 286 P.3d 673)

Page 18

weapon or other instrument or thing likely to produce bodily harm, or

(2) with criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.

Jury Instruction 17.

FN6. "A person commits the crime of assault in the fourth degree when he or she commits an assault not amounting to assault in the first, second, or third degree." Jury Instruction 20.

FN7. "A person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm." Jury Instruction 13.

¶ 58 At trial, the evidence that Glasmann intended to run over Benson was limited. Benson admitted to falling down while trying to escape the moving car before being run over. 4 VRP at 82. Additionally, Erika Rusk, the State's witness who called 911, testified that she did not know if Glasmann knew Benson was under the car when he ran her over. 2 VRP at 21. Yet the jury still found that Glasmann intentionally assaulted Benson. Given the limited evidence establishing Glasmann's intent to run over Benson and the nuanced distinctions between the different degrees of assault, I agree with the lead opinion that the prosecutor's improper conduct prejudiced Glasmann by affecting the jury's verdict. Further, this misconduct was so flagrant that no curative instruction could have cured the prejudice. I agree that we should reverse Glasmann's second degree assault conviction.

B. The Prosecution Did Not Improperly Shift the Burden of Proof

¶ 59 While I readily condemn the prosecutor's improper conduct in this case, I cannot countenance the inclusion of any alleged burden shift among that

conduct because nothing the prosecutor said during closing argument shifted the burden of proof to Glasmann. It is misconduct for a prosecutor to argue that a jury must find that the State's witnesses are either lying or mistaken in order to acquit a defendant. *State v. Fleming*, 83 Wash.App. 209, 213, 921 P.2d 1076 (1996) (citing *State v. Casteneda-Perez*, 61 *723 Wash.App. 354, 362-63, 810 P.2d 74 **687 (1991)). Misstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant is guilty beyond a reasonable doubt. *Id.*

¶ 60 A comparison with the Court of Appeals, Division One, decision in *Fleming* is instructive here. In *Fleming*, the defendants alleged the prosecutor committed misconduct during closing argument by telling the jury that " ' for you to find the defendants ... not guilty of the crime of rape in the second degree, ... you would have to find either that [D.S.] has lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom. ' " *Fleming*, 83 Wash.App. at 213, 921 P.2d 1076 (third alteration in original). Division One held that the prosecutor's statement misstated the law and misrepresented both the role of the jury and the burden of proof. *Id.*

¶ 61 Here, unlike in *Fleming*, the prosecutor neither misstated the law nor shifted the burden of proof. The prosecutor simply highlighted the jury's role in determining the credibility of witnesses and admonished the jury to "[c]ompare Angel Benson's testimony and the testimony of the remainder of the State's witnesses to the defendant's. The defendant got up and he testified in this case, and the question to you is do you believe him?" 8 VRP at 458. The prosecutor never "informed the jury that in order to reach a verdict, it must decide whether the defendant told the truth when he testified." Lead opinion at 682.

¶ 62 The prosecutor's question asked the jury to do its job and assess Glasmann's credibility vis-à-vis the State's witnesses. "Merely asking ques-

286 P.3d 673
175 Wash.2d 696, 286 P.3d 673
(Cite as: 175 Wash.2d 696, 286 P.3d 673)

Page 19

tions of the jury does not rise to the level of misstating the law or misrepresenting the role of the jury and the burden of proof as in *Fleming*. " *State v. Lewis*, 156 Wash.App. 230, 241, 233 P.3d 891 (2010). In *Fleming*, the prosecutor required the jury to find the victim either lied or was mistaken *in order to find the defendant not guilty*. Here, the prosecutor's question did not impose any prerequisite to finding the defendant not guilty. The *724 prosecutor merely asked the jury to compare the testimony of the State's witnesses to that of the defendant, and to determine if the defendant told the truth. This is a standard credibility determination that our justice system charges to the jury. Thus, the prosecutor neither misstated the law nor shifted the burden of proof and this portion of the prosecutor's closing argument was not misconduct as the lead opinion contends.

END OF DOCUMENT

C. Prosecutors May Use Visual Aids

¶ 63 Although I agree that the prosecutor's inclusion of an altered version of Glasmann's mug shot proclaiming Glasmann "guilty, guilty, guilty" was improper, I do not condemn the use of visual aids generally. When properly created and employed, visual aids can be both effective and helpful during closing argument and I would not discourage their use. I do not read the lead opinion as limiting the proper use of visual aids either. However, I join the lead opinion in condemning the improper use of these aids when they are tantamount to improper closing argument, as was the case here.

¶ 64 For the foregoing reasons, I dissent. I would reverse Glasmann's second degree assault conviction and remand for further proceedings consistent with this opinion.

WE CONCUR: SUSAN OWENS, MARY E. FAIRHURST, and JAMES M. JOHNSON, Justices.

Wash., 2012.
In re Glasmann
175 Wash.2d 696, 286 P.3d 673

Date of Printing: Jun 27, 2013

KEYCITE

▷ In re Glasmann, 175 Wash.2d 696, 286 P.3d 673 (Wash., Oct 18, 2012) (NO. 84475-5)

History

Direct History

- ▷ 1 State v. Glasmann, 142 Wash.App. 1041, 2008 WL 186783 (Wash.App. Div. 2 Jan 23, 2008) (NO. 34997-3-II)
Review Denied by
- ⊞ 2 State v. Glasmann, 164 Wash.2d 1017, 195 P.3d 88 (Wash. Sep 04, 2008) (Table, NO. 81370-1)
AND Post-Conviction Relief Granted by
- ⇒ 3 In re Glasmann, 175 Wash.2d 696, 286 P.3d 673 (Wash. Oct 18, 2012) (NO. 84475-5)
- ⊞ 4 In re Glasmann, 170 Wash.2d 1009, 245 P.3d 226 (Wash. Nov 08, 2010) (Table, NO. 84475-5)
Opinion after Grant of Review
- ⇒ 5 In re Glasmann, 175 Wash.2d 696, 286 P.3d 673 (Wash. Oct 18, 2012) (NO. 84475-5)

Negative Citing References (U.S.A.)

Distinguished by

- ▷ 6 State v. Lindsay, 171 Wash.App. 808, 288 P.3d 641 (Wash.App. Div. 2 Nov 07, 2012) (NO. 39103-1-II, 39113-9-II, 40153-3-II), as amended (Feb 08, 2013) ★ ★ ★ ★ HN: 4,10,12 (P.3d)

Court Documents

Appellate Court Documents (U.S.A.)

Wash. Appellate Briefs

- 7 In re the Personal Restraint Petition of: Edward M. GLASMANN, Petitioner., 2009 WL 7698859 (Appellate Brief) (Wash. Aug. 25, 2009) **Personal Restraint Petition** (NO. 84475-5)
- 8 In re The Personal Restraint Petition of: Edward M. GLASMANN, Petitioner., 2010 WL 6209279 (Appellate Brief) (Wash. Jan. 25, 2010) **State's Response to Personal Restraint Petition** (NO. 84475-5)
- 9 In re the Personal Restraint Petition of: Edward M. GLASMANN, Petitioner., 2010 WL 6209277 (Appellate Brief) (Wash. Mar. 4, 2010) **Reply in Support of Personal Restraint Petition** (NO. 84475-5)
- 10 In re the Personal Restraint Petition of: Edward M. GLASMANN, Petitioner., 2010 WL 6209278

- (Appellate Brief) (Wash. Mar. 4, 2010) **Reply to Response** (NO. 84475-5)
- 11 In re Personal Restraint Petition of Edward Michael GLASMANN, Petitioner., 2010 WL 6209275 (Appellate Brief) (Wash. Apr. 22, 2010) **Motion for Discretionary Review** (NO. 84475-5)
- 12 STATE OF WASHINGTON, Respondent, v. Edward Michael GLASMANN, Appellant., 2010 WL 6209274 (Appellate Brief) (Wash. Oct. 21, 2010) **Corrected Answer to Motion for Discretionary Review** (NO. 84475-5)
- 13 In re Personal Restraint Petition of Edward Michael GLASMANN, Petitioner., 2010 WL 6209276 (Appellate Brief) (Wash. Nov. 1, 2010) **Reply in Support of Motion for Discretionary Review** (NO. 84475-5)
- 14 In re the Personal Restraint Petition of: Edward M. GLASMANN, Petitioner., 2011 WL 996191 (Appellate Brief) (Wash. Mar. 7, 2011) **Supplemental Brief** (NO. 84475-5)
- 15 In re Personal Restraint Petition of Edward Michael GLASMANN, Petitioner., 2011 WL 996192 (Appellate Brief) (Wash. Mar. 7, 2011) **Supplemental Brief of Respondent** (NO. 84475-5)

Dockets (U.S.A.)

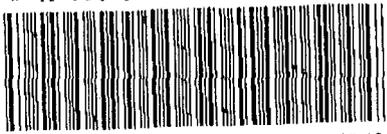
Wash.

- 16 STATE OF WASHINGTON v. GLASMANN, NO. 844755 (Docket) (Wash. Apr. 22, 2010)

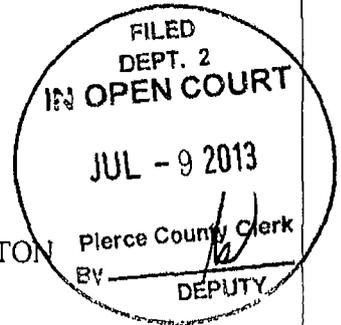
Wash.App. Div. 2

- 17 STATE OF WASHINGTON v. GLASSMAN, EDWARD MICHAEL, NO. 349973 (Docket) (Wash.App. Div. 2 Jun. 23, 2006)

APPENDIX G



04-1-04983-2 40835254 ORDY 07-10-13



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,)
)
 Plaintiff,)
 vs.)
 EDWARD GLASMANN,)
)
 Defendant.)

NO. 04-1-04983-2
ORDER DENYING DEFENSE
OBJECTIONS TO REARRAIGNMENT

THIS MATTER having come on regularly before the undersigned judge of the above-entitled court, upon order by the Court of Appeals for re-trial and the State's decision to rearraign the defendant on all of the ~~original charges~~ ^{charges contained in the Amended Information, dated 07/21/05} and the defense having objected to the rearraignment, Therefore,

IT IS HERBY ORDERD, ADJUDGED AND DECREED that defense objections are denied.

Dated this 9th day of July, 2013.

[Signature]
The Honorable Katherine Stolz

Presented by:

[Signature]
MARY K. HIGH, WSBA #20123
Attorney for Defendant

Approved as to Form:

[Signature] 35502
NEIL HORIBE, WSBA #36724
Deputy Prosecuting Attorney

ORDER DENYING DEFENSE OBJECTIONS
TO REARRAIGNMENT - Page 1 of 1

ORIGINAL

APPENDIX H

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,)
)
 Plaintiff,)
) No. 04-1-04983-2
 vs.)
)
 EDWARD MICHAEL GLASMANN,)
)
 Defendant.)

VERBATIM TRANSCRIPT OF PROCEEDINGS

Friday, May 3, 2013
Before The Honorable Katherine M. Stolz
Pierce County Courthouse
Tacoma, Washington

<<<<<< >>>>>>

A P P E A R A N C E S

For the Plaintiff: NEIL HORIBE
Deputy Prosecuting Attorney

For the Defendant: MARY KAY HIGH
Attorney at Law

Reported by: Kimberly A. O'Neill, CCR
License No. 1954

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

TABLE OF CONTENTS

STATE OF WASHINGTON vs. EDWARD MICHAEL GLASMANN

Proceedings of May 3, 2013

Page:

Motion Hearing re: Clarification of Charges Against Defendant.....	3
Rearraignment.....	10

1 BE IT REMEMBERED that on Friday, the 3rd
2 day of May, 2013, the above-captioned cause came on duly for
3 hearing before THE HONORABLE KATHERINE M. STOLZ, Judge of
4 the Superior Court in and for the county of Pierce, state of
5 Washington; the following proceedings were had, to wit:

6
7 <<<<<< >>>>>>

8
9 (The defendant was present.)

10 THE COURT: All right. The next matter is
11 State of Washington vs. Edward Michael Glasmann,
12 04-1-04983-2. This matter is back from the Court of
13 Appeals. Counsel?

14 MR. HORIBE: Thank you, Your Honor. Neil
15 Horibe for the State. The defendant is present in custody
16 with Ms. High as counsel.

17 We set this for rearraignment, but that's just basically
18 the best fit we could find in LINX. This is actually more
19 of a hearing to clarify what the charges against
20 Mr. Glasmann are.

21 He came back for preassignment after the Court of Appeals
22 mandated reversal in his case and remand. At the
23 preassignment hearing, I believe that they used the original
24 Information from the 2004 case. He acknowledged that he
25 understood that those were the charges and waived formal

1 reading; but that, I don't believe, is correct. I think
2 that what actually should have happened is he should have --
3 it should.--

4 THE COURT: Assault in the second degree.

5 MR. HORIBE: No, it should be -- the
6 Amended Information that he went to trial on, he should just
7 get -- those are the charges again. Did the Court receive
8 *State vs. Daniels*? It's a --

9 THE COURT: Yes, it's attached.

10 MR. HORIBE: Correct. So *State vs.*
11 *Daniels* is 160 Wn.2d 256; but basically in *State vs.*
12 *Daniels*, they hold that when a jury in a case leaves blank
13 the greater charge on the verdict form and then finds the
14 defendant guilty of a lesser charge, it says -- *Daniels* held
15 that the State, on remand, can go to trial on the greater
16 charge. The defendant was not implicitly acquitted. The
17 defendant -- there is no double jeopardy. There is no --
18 there is no argument, essentially, for why the defendant
19 should be only tried on what he was previously convicted of.

20 Basically, *Daniels* had a case where the defendant was
21 convicted -- that she was originally charged with homicide
22 by abuse, and I believe -- felony murder in the second
23 degree, I believe, is what the counts were; and the jury
24 left blank homicide by abuse on the verdict form and found
25 her guilty of a lesser.

1 The Court of Appeals reversed her conviction and remanded
2 it, and it was held in the *Daniels* case that the State could
3 retry her on the greater charge which was homicide by abuse.
4 *Daniels* is slightly complicated because the Ninth Circuit
5 Court of Appeals issued a decision called *Brazzel*; and in
6 *Brazzel*, the Ninth Circuit basically held the opposite that
7 there was some sort of implicit acquittal or something like
8 that.

9 The Supreme Court granted a motion to reconsider the
10 case. They did reconsider it, and they affirmed their
11 previous holding. They said that they were going to stand
12 by their decision in the original case, so the law of this
13 case, and this Court, is *Daniels*; and *Daniels* holds that in
14 a case where the jury leaves blank the verdict form, it is
15 not double jeopardy and is not an implicit acquittal, and
16 the State may go to trial on those upper charges.

17 In this case, I also gave the Court a copy of the verdict
18 forms from Mr. Glasmann's case. As the Court can see in the
19 verdict forms on Verdict Form 1A, it says, we, the jury,
20 find the defendant, and it's blank for assault in the first
21 degree; and then Verdict Form 1B, it says guilty of assault
22 in the second degree; and then again in Verdict Form 2A, it
23 is blank for attempted robbery in the first degree, and it
24 is guilty for attempted robbery in the second degree.

25 Based on the holding in *Daniels*, which I believe is

1 directly on point and controlling, the correct charges that
2 Mr. Glasmann should be going to trial for, right now, are
3 what are listed in the Amended Information which are assault
4 in the first degree, attempted robbery in the first degree,
5 kidnapping in the first degree, and obstructing a law
6 enforcement officer. Those should be the charges that
7 Mr. Glasmann proceeds to trial on in this case.

8 I've got a court-certified copy of the Amended
9 Information, and all I would -- I don't know if it's
10 necessarily a rearraignment. I would just ask the Court to
11 acknowledge that the charges are listed in that Amended
12 Information.

13 THE COURT: I already have a copy of it up
14 here.

15 MR. HORIBE: And so, Your Honor, I would
16 ask the Court to inform the defendant that he is going to
17 trial on the Amended Information. Thank you.

18 THE COURT: Counsel?

19 MS. HIGH: Thank you. Mary Kay High, and
20 I'm here for Mr. Glasmann. Your Honor, we would object to
21 the rearraignment on those charges and ask the Court to find
22 that going to trial on the original charge of the Amended
23 Information would violate his right to be free from double
24 jeopardy; and let me tell you a little bit about the *Daniels*
25 case.

1 After the *Brazzel* case came down in the Ninth Circuit,
2 our Supreme Court accepted a reconsideration on the *Daniels*
3 case; and at that time, four of the justices had changed
4 their opinion that had been in *Daniels*; but there was still
5 a majority saying that she could go to trial on the higher
6 charge. However, then the Ninth Circuit granted the habeas
7 corpus in *Daniels vs. Pastor* and granted that writ and found
8 that trying Ms. Daniels on the charge of homicide by abuse
9 would violate her right to be free from double jeopardy; so
10 we have a situation here where our Ninth Circuit has made it
11 very, very clear that, in fact, just silence, leaving a form
12 blank, is not the same as where you have an affirmative kind
13 of representation to the Court that a jury is firmly
14 deadlocked; and that's kind of the difference on where the
15 double jeopardy comes down. Is there some expression truly
16 that this jury is unable to decide those charges versus just
17 silence?

18 What our Court said, even in *Daniels*, was that the state
19 and federal double jeopardy clauses are given the same
20 interpretation, and that came from our State vs. Gawkin; and
21 so with that, Your Honor, I realize that it's -- well, as
22 *Daniels* and as the Ninth Circuit has said when they, then,
23 granted the writ of habeas in *Daniels*, it's been very, very
24 unclear in the state of Washington with things being a
25 moving target. We had *Linton* that started things off, a

1 plurality decision. We went to *Ervin* which, then, had an --
2 or, I think, five weeks of deliberation with an announced
3 deadlock, and then we had *Daniels* and then the *Daniels*
4 reconsideration and the *Daniels* writ.

5 In terms of the Ninth Circuit when they granted the writ
6 of habeas corpus in *Daniels*, they found that you need a high
7 threshold of disagreement in order to find a jury is hung;
8 and simply the silence, or leaving something blank, is not
9 meeting that high threshold; and what's kind of ironic is
10 that the jury instruction that says, you know, if you can't
11 agree, go on to the next thing was implemented specifically
12 to avoid the situation of mistrials and the costs that are
13 attendant with mistrials by directing juries what steps to
14 take; and that was really part of the rationale underlying
15 the Ninth Circuit's review of the *Daniels* case was that
16 simply the silence, without some express and -- expression
17 by the jury more than just a blank, didn't meet that
18 threshold; so I would ask that the Court find that having
19 Mr. Glasmann run the gauntlet again on attempted assault
20 one, attempted rob one would violate his rights to be free
21 from double jeopardy. He was then convicted of a kidnapping
22 in the first degree and an obstruction charge which were
23 part of the Amended Information, but we object to the
24 attempted assault one and the attempted rob one.

25 MR. HORIBE: And actually, it's just

1 assault one, not attempted assault one.

2 MS. HIGH: Oh, I'm sorry. I was looking
3 at a blank form.

4 MR. HORIBE: Here's a copy.

5 MS. HIGH: I'm sorry. I ran off the
6 verdict forms, and so that's kind of interesting.

7 THE COURT: Assault one, attempted robbery
8 in the first degree --

9 MR. HORIBE: Right.

10 MS. HIGH: Perhaps that's where I got
11 confused. I'm sorry.

12 THE COURT: -- kidnapping in the first
13 degree, and obstructing a law enforcement officer.

14 MS. HIGH: I'm sorry.

15 THE COURT: Well, I do love it when the
16 appellate courts make things so blazingly clear for us.
17 Whatever they have done in the PRP with Ms. Daniels, the
18 bottom line, right now, is that it does reference, you know,
19 *Brazzel*; that if they don't put "not guilty," then they did
20 not reach a verdict. Those are the instructions, and
21 they're to go on to the lesser; so since they didn't reach a
22 verdict in assault in the first degree, double jeopardy does
23 not attach under the *Daniels* case, and the State can retry
24 Mr. Glasmann on those charges.

25 Now, I'm not necessarily saying I agree with *Daniels*. I

1 think they need to get clear, and the composition of the
2 court has changed somewhat since 2007, so perhaps they can
3 give us some greater guidance in terms of what they are
4 doing.

5 MS. HIGH: Thank you, Your Honor.

6 MR. HORIBE: So is the Court --

7 THE COURT: We will allow the
8 rearraignment on the original Amended Information which
9 charged him with assault in the first degree, attempted
10 robbery in the first degree, kidnapping in the first degree,
11 and obstruction of a law enforcement officer; and I assume,
12 Counsel, you have reviewed that Amended Information, waive
13 reading, and are asking the Court to enter a plea of not
14 guilty.

15 MS. HIGH: Yes, Your Honor.

16 THE COURT: All right. The Court will
17 enter a plea of not guilty.

18 MR. HORIBE: Thank you, Your Honor.

19 (Proceedings concluded.)

20 / / /

21 / / /

22 / / /

23 / / /

24 / / /

25 / / /

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,)
)
 Plaintiff,)
) No. 04-1-04983-2
 vs.)
)
 EDWARD MICHAEL GLASMANN,)
)
 Defendant.)

REPORTER'S CERTIFICATE

STATE OF WASHINGTON)
) ss.
 COUNTY OF PIERCE)

I, Kimberly A. O'Neill, Court Reporter in the state of Washington, county of Pierce, do hereby certify that the foregoing transcript is a full, true, and accurate transcript of the proceedings and testimony taken in the matter of the above-entitled cause.

DATED this 8th day of June, 2013.

KIMBERLY A. O'NEILL, CCR
License No. 1954

APPENDIX I

FILED
COURT OF APPEALS
DIVISION II

FILED
IN COUNTY CLERK'S OFFICE
A.M. NOV 22 2006 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

06 DEC 18 PM 2:57
STATE OF WASHINGTON
BY _____
DEPUTY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,
Plaintiff,
vs
EDWARD M. GLASMANN,
Defendant.

ORIGINAL

)
)
) Superior Court
) No. 04-1-04983-2
) Court of Appeals
) No. 34997-3-II
)
)
)

VERBATIM REPORT OF PROCEEDINGS
VERDICT, Vol. 9 of 9

BE IT REMEMBERED that on the 9th day of
May, 2006, the above-captioned cause came on duly
for hearing before the HONORABLE BEVERLY G. GRANT,
Superior Court Judge in and for the County of
Pierce, State of Washington; the following
proceedings were had, to-wit:

Reported by: Kristine M. Triboulet, CCR
License No. TRIBOKM35904

Kristine M. Triboulet, Official Court Reporter

APPEARANCES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

FOR THE STATE:

MARY ROBNETT
Deputy Prosecuting Attorney

FOR THE DEFENDANT:

ROBERT QUILLIAN
Attorney at Law

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROCEEDINGS

May 9, 2006

Verdict

THE COURT: Good afternoon. I understand we have a verdict reached on the matter of State of Washington versus Glasmann. Counsel, would you, please, identify yourselves for the record.

MR. QUILLIAN: Robert Quillian, counsel for Mr. Glasmann, present with Mr. Glassman.

THE COURT: Thank you.

MS. ROBNETT: Thank you. Mary Robnett on behalf of state. I'm standing in for Mr. Hillman.

THE COURT: Thank you will you get the jury. Counsel, do you wants the jury polled?

MR. QUILLIAN: Sure.

(Jury entered courtroom)

THE COURT: Please, be seated. Thank you. Good afternoon, every one. This is in

1 the matter of State of Washington versus
2 Glassman. Have you been able to reach a
3 verdict, jury?

4 JUROR 4: Yes.

5 THE COURT: Who is the presiding juror?

6 JUROR 4: I am.

7 THE COURT: Thank you. Would you hand the
8 verdict forms over to Ms. Henderson, please
9 thank you. With regards to verdict form 1-a,
10 assault in the first degree, that has been left
11 blank and I will ask the presiding juror to
12 sign that later.

13 JUROR 4: Okay.

14 THE COURT: With regards to verdict form
15 1-b, assault in the second degree. We, the
16 jury, having found the defendant Edward Michael
17 Glasmann not guilty of the crime of assault in
18 the first degree as charged or being unable to
19 unanimously agree as to that charge, find the
20 defendant guilty of the lesser degree crime of
21 assault in the second degree.

22 Now, I am going to go through each one of
23 these individually.

24 Juror No. One, is that your verdict and
25 the verdict of the jury?

1 JUROR: Yes.

2 THE COURT: Thank you. Juror No. Two, is
3 that your verdict and the verdict of the jury?

4 JUROR: Yes, it is.

5 THE COURT: Thank you. Juror No. 3, is
6 that your verdict and the verdict of the jury?

7 JUROR: Yes.

8 THE COURT: Juror No. Four, is that your
9 verdict and the verdict of the jury?

10 JUROR: Yes.

11 THE COURT: Juror No. Five, is that your
12 verdict and the verdict of the jury?

13 JUROR: Yes.

14 THE COURT: Juror No. Six, is that your
15 verdict and the verdict of the jury?

16 JUROR: Yes.

17 THE COURT: Juror No. Seven, is that your
18 verdict and the verdict of the jury?

19 JUROR: Yes, Your Honor.

20 THE COURT: Thank you. Juror No. Eight,
21 is that your verdict and the verdict of the
22 jury?

23 JUROR: Yes, it is.

24 THE COURT: Juror No. Ten, is that your
25 verdict and the verdict of the jury?

1 JUROR: Yes, it is.

2 THE COURT: Juror No. Eleven, is that your
3 verdict and the verdict of the jury?

4 JUROR: Yes, it is.

5 THE COURT: Juror No. Twelve, is that your
6 verdict and the verdict of the jury?

7 JUROR: Yes, Your Honor.

8 THE COURT: And Juror No. 13, who was
9 substituted in for No. Nine, is that your
10 verdict and the verdict of the jury?

11 JUROR: Yes, Your Honor.

12 THE COURT: Thank you. With regards to
13 verdict form 1-c assault in the third degree,
14 that has been left blank. With regards to
15 verdict form 1-d, assault in the fourth degree,
16 that has been left blank. With regards to
17 verdict form 2-a attempted robbery in the first
18 degree, that too has been left blank. In
19 regards to verdict form 2-b, attempted robbery
20 in the second degree, we, the jury, having
21 found the defendant Edward Michael Glassman not
22 guilty of the attempted robbery in the first
23 degree as charged in count two or being unable
24 to unanimously agree as to that charge, find
25 the defendant guilty of the lesser degree crime

1 of attempted robbery in the second degree.

2 Juror No. One, is that your verdict and
3 the verdict of the jury?

4 JUROR: Yes.

5 THE COURT: Thank you. Juror No. Two, is
6 that your verdict and the verdict of the jury?

7 JUROR: Yes.

8 THE COURT: Juror No. Three, is that your
9 verdict and the verdict of the jury?

10 JUROR: Yes.

11 THE COURT: Juror No. Four, is that your
12 verdict and the verdict of the jury?

13 JUROR: Yes.

14 THE COURT: Juror No. Five, is that your
15 verdict and the verdict of the jury?

16 JUROR: Yes.

17 THE COURT: Juror No. Six, is that your
18 verdict and the verdict of the jury?

19 JUROR: Yes, Your Honor.

20 THE COURT: Juror No. Seven, is that your
21 verdict and the verdict of the jury?

22 JUROR: Yes, Your Honor.

23 THE COURT: Juror No. Eight, is that your
24 verdict and the verdict of the jury?

25 JUROR: Yes.

1 THE COURT: Juror No. Ten, is that your
2 verdict and the verdict the jury?

3 JUROR: Yes.

4 THE COURT: Juror No. Eleven, is that your
5 verdict and the verdict of the jury?

6 JUROR: Yes.

7 THE COURT: Juror No. Twelve, is that your
8 verdict and the verdict of the jury?

9 JUROR: Yes, Your Honor.

10 THE COURT: And Juror No. Thirteen, is
11 that your verdict and the verdict of the jury?

12 JUROR: Yes, Your Honor.

13 THE COURT: With regards to verdict form
14 3-a kidnapping, in the first degree, we, the
15 jury, find the defendant guilty of the crime of
16 kidnapping in the first degree as charged in
17 count three.

18 Juror No. One, is that your verdict and
19 the verdict of the jury?

20 JUROR: Yes.

21 THE COURT: Juror No. Two, is that your
22 verdict and the verdict of the jury?

23 JUROR: Yes.

24 THE COURT: Juror No. Three, is that your
25 verdict and the verdict of the jury?

1 JUROR: Yes.

2 THE COURT: Juror No. Four, is that your
3 verdict and the verdict of the jury?

4 JUROR: Yes.

5 THE COURT: Juror No. Five, is that your
6 verdict and the verdict of the jury?

7 JUROR: Yes.

8 THE COURT: Juror No. Six, is that your
9 verdict and the verdict of the jury?

10 JUROR: Yes.

11 THE COURT: Juror No. Seven, is that your
12 verdict and the verdict of the jury?

13 JUROR: Yes, Your Honor.

14 THE COURT: Juror No. Eight, is that your
15 verdict and the verdict of the jury?

16 JUROR: Yes.

17 THE COURT: Juror No. Ten, is that your
18 verdict and the verdict of the jury?

19 JUROR: Yes.

20 THE COURT: Juror No. Eleven, is that your
21 verdict and the verdict of the jury?

22 JUROR: Yes.

23 THE COURT: Juror No. Twelve, is that your
24 verdict and the verdict of the jury?

25 JUROR: Yes, Your Honor.

1 THE COURT: Juror No. Thirteen, is that
2 your verdict and the verdict of the jury?

3 JUROR: Yes, Your Honor.

4 THE COURT: All right. Thank you. With
5 regards to verdict form 3-b, kidnapping in the
6 second degree left blank. Verdict form 3-c,
7 unlawful imprisonment, left blank and verdict
8 form 4-a, obstructing a law enforcement
9 officer, we, the jury, find the defendant
10 guilty of the crime of obstructing a law
11 enforcement officer as charged in count four.

12 Juror No. One, is that your verdict and
13 the verdict of the jury?

14 JUROR: Yes.

15 THE COURT: Juror No. Two, is that your
16 verdict and I should ask as to all of those
17 left blank, is that also your verdict and the
18 verdict of the jury. So I am going to start
19 all over again and make it a little bit more
20 inclusive.

21 Juror No. One, is that your verdict and
22 the verdict of the jury on obstructing a law
23 enforcement officer finding the defendant
24 guilty?

25 JUROR: Yes.

1 THE COURT: And is it also your verdict
2 and the verdict of the jury the forms 1-a, 1-c,
3 1-d, 2-a, 3-b, 3-c, are all left blank. Is
4 that your verdict and the verdict of the jury,
5 presiding juror?

6 JUROR 4: Now, when we left them blank,
7 when we did the second degree, we assumed that
8 the third and fourth degree were also
9 acceptable. We just -- the highest one we
10 could agree on was the second degree. So did I
11 fill out the paperwork properly?

12 THE COURT: We will come back to that but
13 let me go through the poll. We will come back
14 to that question.

15 JUROR 4: I am not sure to if I am
16 answering, if I say yes that the blank ones --

17 THE COURT: And you are talking about as
18 far as verdict form No. 2-b? All I'm trying to
19 make sure is that on those verdict forms where
20 you did not indicate anything, that is the
21 intent and that we should follow the verdict
22 forms you did sign. I just wanted the jurors
23 to acknowledge that there were verdict forms
24 that were not signed in accordance to the
25 Court's instructions.

1 JUROR 4: I did not sign any of the lesser
2 charges with the understanding that we stopped
3 at the highest one that we could all agree on
4 so we didn't -- we weren't saying that like the
5 third and fourth degree he wasn't guilty of
6 these. When we came to the second degree one,
7 we all agreed on that one. That was the
8 highest one that we had agreed on assuming that
9 all the other ones he would also be guilty of.

10 THE COURT: All right. Thank you. I
11 understand what you are saying. I just wanted
12 to acknowledge that there were certain forms
13 left blank and all of you agreed on those forms
14 being left blank, okay, without getting into
15 any more substance of your deliberations, all
16 right. So with that in mind, do each of you --
17 I am just going to ask for a show of hands with
18 regards to verdict form 2-b, which is the
19 attempted robbery in the second degree, is
20 there any one who does not concur with the
21 finding the defendant guilty on the attempted
22 -- excuse me of the obstructing a law
23 enforcement officer on verdict form 4-a, the
24 finding was guilty; is that correct? I see no
25 one disagreeing that that was the finding,

Kristine M. Triboulet, Official Court Reporter

1 correct?

2 (All answer yes)

3 THE COURT: Let the record reflect that
4 they have all concurred with regard to that
5 finding. What I would like to do is thank you
6 for your attention and dedication and giving
7 this matter the utmost consideration and I am
8 going to ask that you retire to the jury room.
9 I will be in momentarily. Thank you.

10 (Jury left proceedings).

11 THE COURT: All right. Counsel, I wanted
12 to show you the verdict form and see if you had
13 any questions on that and then we can go into
14 the conditions of release.

15 MR. QUILLIAN: That's fine, Your Honor.

16 MS. ROBNETT: They look to be in order,
17 Your Honor.

18 THE COURT: Let's talk about terms and
19 conditions.

20 MS. ROBNETT: Your Honor, we would ask
21 that the defendant be held without bail.

22 MR. QUILLIAN: That could be done, Your
23 Honor.

24 THE COURT: That will be ordered.

25 Sentencing?

1 MR. QUILLIAN: I have date of May 26th
2 from Ms. Henderson, if that's acceptable to the
3 state?

4 THE COURT: Is that acceptable, Ms.
5 Robnett.

6 MS. ROBNETT: Yes, Your Honor.

7 THE COURT: Thank you. Now, do either one
8 of you wish to confer or talk with the jurors,
9 if they wish to talk to you.

10 MR. QUILLIAN: I need to get back to
11 Thurston County so I am not going to have time
12 to do that.

13 MS. ROBNETT: I would, Your Honor, if they
14 are inclined.

15 THE COURT: All right. Let me sign the
16 order and I will go and give them the
17 certificates of recognition. I will let them
18 know for those who wish to stay that they can
19 meet with Ms. Robnett. You will have to meet
20 with them in the jury room. I am taking
21 another plea.

22 (Matter adjourned)

23

24

25

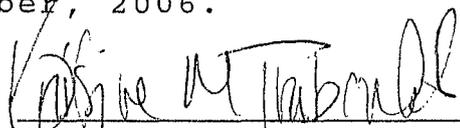
1 STATE OF WASHINGTON)
2) ss
3 COUNTY OF PIERCE)

4 I, Kristine M. Triboulet, a duly certified
5 court reporter in and for the State of Washington do
6 hereby certify that the oral testimony of said
7 matter was recorded in shorthand and later reduced
8 to print.

9 I further certify that I am neither attorney or
10 counsel for, nor related to or employed by any of
11 the parties to the action in which this testimony is
12 taken; and furthermore, that I am not a relative or
13 employee of any attorney or counsel employed by the
14 parties hereto or financially interested in the
15 action.

16 IN WITNESS WHEREOF, I have hereunto set my hand
17 this 2nd day of November, 2006.

18
19
20
21
22
23
24
25



Kristine M. Triboulet
Certified Court Reporter

Kristine M. Triboulet, Official Court Reporter

APPENDIX J

Not Reported in F.Supp.2d, 2010 WL 56041 (W.D.Wash.)
(Cite as: 2010 WL 56041 (W.D.Wash.))

H
Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court, W.D. Washington,
at Tacoma.

Carissa DANIELS, Petitioner,

v.

Paul PASTOR, Sheriff, Pierce County Jail (as cus-
todian), Respondent.

No. C09-5711BHS.

Jan. 6, 2010.

Laura E. Mate, Thomas W. Hillier, II, Federal Pub-
lic Defender's Office, Seattle, WA, for Petitioner.

Kathleen Proctor, Pierce County Prosecuting Attor-
ney's Office, Tacoma, WA, for Respondent.

ORDER GRANTING WRIT OF HABEAS COR- PUS

BENJAMIN H. SETTLE, District Judge.

*1 This matter comes before the Court on Petitioner's Petition Under 28 U.S.C. § 2241 For Writ of Habeas Corpus (Dkt.4). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the writ for the reasons stated herein.

I. FACTUAL AND PROCEDURAL BACK- GROUND

On November 13, 2009, Petitioner filed a Petition Under 28 U.S.C. § 2241 For Writ of Habeas Corpus and argued that her Fifth Amendment right to be free from double jeopardy would be violated if the Pierce County Superior Court for the State of Washington retried her on the charge of homicide by abuse. Dkt. 4. On December 23, 2009, Respondent responded. Dkt. 8. On December 31, 2009, Petitioner filed a traverse. Dkt. 13.

Since October 31, 2000, Petitioner has been in the custody of the State of Washington while her case has been tried by the trial court, reviewed by the Washington State Court of Appeals (*State v. Daniels*, 124 Wash.App. 830, 103 P.3d 249 (Wn.App.2004)), and reviewed twice by the Washington State Supreme Court (*State v. Daniels*, 160 Wash.2d 256, 156 P.3d 905 (Wash.2007) (*"Daniels I"*) and *State v. Daniels*, 165 Wash.2d 627, 200 P.3d 711 (Wash.), cert. denied, --- U.S. ---, 130 S.Ct. 85, 175 L.Ed.2d 28 (2009) (*"Daniels II"*)).

Justice Sanders of the Washington State Supreme Court wrote the original majority opinion in *Daniels I* and also wrote the dissenting opinion in the subsequent *Daniels II*. In that dissenting opinion, Justice Sanders recited the facts as follows:

On July 9, 2000, 17-year-old Carissa Daniels gave birth to her son, Damon. Nine weeks later Damon was dead. Daniels was subsequently charged with homicide by abuse and felony murder in the second degree-domestic violence. The second degree felony murder charge was predicated on either second degree assault or first degree criminal mistreatment. Daniels faced a jury trial on these charges.

At the close of evidence the jury was given two verdict forms: form A pertained to the homicide by abuse charge and form B pertained to the second degree felony murder charge. The jury was instructed to fill in guilty or not guilty on form A if it unanimously agreed to the charge of homicide by abuse, otherwise it should leave this form blank. The jury was instructed to consider the second degree felony murder charge and use form B, if it found Daniels not guilty of homicide by abuse or could not agree on that charge. FN2

FN2. Jury instruction 23 reads in part:

When completing the verdict forms, you will first consider the crime of homicide by abuse

Not Reported in F.Supp.2d, 2010 WL 56041 (W.D.Wash.)
 (Cite as: 2010 WL 56041 (W.D.Wash.))

as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on verdict form A, do not use verdict form B. If you find the defendant not guilty of the crime of homicide by abuse, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the alternatively charged crime of murder in the second de- gree....

*2 The jury left form A blank and used form B to find Daniels guilty of murder in the second degree. Daniels appealed, arguing our decision in *Andress* precluded use of assault as a predicate offense for second degree felony murder. *State v. Daniels*, 124 Wash.App. 830, 844, 103 P.3d 249 (2004) (citing *In re Pers. Restraint of Andress*, 147 Wash.2d 602, 56 P.3d 981 (2002)). The Court of Appeals reversed Daniels's conviction for felony murder as it may have been predicated on assault and remanded for a new trial. The Court of Appeals also held the State could not retry her for homicide by abuse because the jury's silence on that charge acted as an implied acquittal. After the Court of Appeals published its opinion, we decided both [*State v. Linton*, 156 Wash.2d 777, 132 P.3d 127 (2006)] and [*State v. Ervin*, 158 Wash.2d 746, 147 P.3d 567 (2007)], further elaborating on this issue.

The State petitioned this court for review, seeking to retry Daniels on homicide by abuse. Daniels cross-petitioned, asking this court to determine whether she may be retried for second degree felony murder predicated on criminal mistreatment. We accepted review, heard argument, and published an opinion allowing for retrial on homicide by abuse and second degree murder predicated on criminal mistreatment. *Daniels*, 160 Wash.2d 256, 156 P.3d 905 (2007). Shortly

thereafter, the Ninth Circuit Court of Appeals published *Brazzel v. Washington*, 491 F.3d 976 (9th Cir.2007), which considered the same question but reached the opposite conclusion. Based in part on the Ninth Circuit's reasoning in *Brazzel*, Daniels filed a motion for reconsideration, which we granted.

Daniels II, 200 P.3d at 712-713 (some foot- notes omitted).

The majority opinion in *Daniels II*, was as follows:

An opinion in this case was reported in *State v. Daniels*, 160 Wash.2d 256, 156 P.3d 905 (2007). We granted a motion for reconsideration, heard oral argument, and now adhere to our prior published opinion.

Daniels II, 200 P.2d at 711. In a concurring opinion, Justice Madsen wrote that the *Brazzel* decision "provides an interesting perspective, but I do not believe that it compels a different result upon reconsideration of this case." *Daniels II*, 200 P.2d at 711.

Petitioner now asks this Court, via a petition for writ of habeas corpus, to apply *Brazzel* and, as Justice Sanders wrote in dissent, grant to Petitioner the "relief otherwise available by walking across the street to the federal courts." *Daniels II*, 200 P.3d at 714 n. 10.

II. DISCUSSION

A. Procedural Matters

With respect to jurisdiction, a federal court has jurisdiction under 28 U.S.C. § 2241 over "a habeas petition raising a double jeopardy challenge to a petitioner's pending retrial in state court" *Wilson v. Belleque*, 554 F.3d 816 (9th Cir.), cert. denied, --- U.S. ---, 130 S.Ct. 75, 175 L.Ed.2d 53 (2009). Petitioner raises a double jeopardy challenge to her pending trial and, therefore, the Court has jurisdiction over the petition.

*3 With respect to exhaustion, a petitioner

Not Reported in F.Supp.2d, 2010 WL 56041 (W.D.Wash.)
(Cite as: 2010 WL 56041 (W.D.Wash.))

must exhaust all available state court remedies before filing a § 2241 petition. *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490-491, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973). In this case, Petitioner has twice presented her double jeopardy claim to the state supreme court. Respondent concedes this issue and asserts that the state "trial court will be bound" by the state supreme court's decision. Therefore, the Court finds that Petitioner has exhausted all available state court remedies.

With respect to the standard of review, pursuant to § 2241, a federal court reviews *de novo* whether an individual "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241; *Stow v. Murashige*, 389 F.3d 880, 885-886 (9th Cir.2004). Therefore, the Court will review the merits of the petition *de novo*.

B. Double Jeopardy

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., amend V. The two important interests that this clause protects are to prevent the prosecution from making repeated attempts to convict an individual of an alleged offense and to preserve the finality of judgments. *Yeager v. United States*, --- U.S. ----, ----, 129 S.Ct. 2360, 2365, 174 L.Ed.2d 78 (2009). With respect to how this clause relates to the issue before the Court, the opinions speak for themselves and require neither explanation nor paraphrasing from this Court.

Respondent asserts two arguments for denying the petition: (1) the "unable to agree" jury instruction is constitutionally sufficient and there is no need for the trial court to declare a mistrial if the jury returns a blank verdict form as to the greater charge (Dkt. 8 at 9-13); and (2) *Brazzel* is legally distinguishable because the court was reviewing a petition under 28 U.S.C. § 2254 (Dkt. 8 at 13-18). The Court will address the second argument first.

The *Brazzel* court was presented with a petition

under § 2254, which imposes a standard of review that accords a level of deference to state court decisions. See 28 U.S.C. § 2254(d). The court, however, reviewed the applicable state court decision for "clear error" because the state court that rendered that decision "did not provide any reason for its determination" that the jury's silence on the greater charge operated as an implied acquittal. *Brazzel*, 491 F.3d at 983. The Court finds Respondent's distinction unavailing because the *Brazzel* court made no suggestion that the state appellant court somehow made an error that did not rise to the level of clear error. Moreover, accepting Respondent's position would ignore the binding statements in *Brazzel*.

For example, the *Brazzel* court rejected the state's argument that a blank verdict form "should be construed as a hopeless deadlock." *Id.* at 984. The court then interpreted the law regarding the levels of jury disagreement as follows:

*4 Under federal law, an inability to agree [on the greater charge] with the option of compromise on a lesser alternate offense does not satisfy the high threshold of disagreement required for a hung jury and mistrial to be declared. See, e.g., *Arizona v. Washington*, 434 U.S. [497,] 509, 98 S.Ct. 824, 54 L.Ed.2d 717. The Supreme Court has characterized disagreement sufficient to warrant a mistrial as "hopeless" or "genuine" "deadlock." *Id.* ("[T]he trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial."). Genuine deadlock is fundamentally different from a situation in which jurors are instructed that if they "cannot agree," they may compromise by convicting of a lesser alternative crime, and they then elect to do so without reporting any splits or divisions when asked about their unanimity.

Brazzel, 491 F.3d at 984.

In this case, there is no evidence that the jury was genuinely deadlocked or that their disagreement resulted in a hung jury that necessitated the

Not Reported in F.Supp.2d, 2010 WL 56041 (W.D.Wash.)
(Cite as: 2010 WL 56041 (W.D.Wash.))

declaration of a mistrial. Therefore, the Court finds no reason to distinguish *Brazzel* or carve out an exception to that court's interpretation of federal law.

With regard to Respondent's argument that the verdict form is constitutionally sufficient, the Court does not disagree with that assessment. However, being a constitutionally sufficient jury instruction when given by the trial court is separate from being constitutionally sufficient as an exception to the prohibition against double jeopardy. The Washington State Supreme Court recognized that the "unable to agree" instruction "has potential advantages and disadvantages for both the prosecution and the defense." *Labanowski*, 816 P.2d at 36. One disadvantage, or more appropriately unintended consequence, of using the "unable to agree" instruction is that it may result in a record that is silent as to whether the jury was deadlocked. At oral argument, Petitioner's counsel offered the cliché that "the state cannot have its cake and eat it too." When the state enforces silence and compromise, it must accept the consequence of silence and compromise. On the other hand, if either party desires clarity on the issue of jury deadlock, then it is within the trial judge's discretion whether to develop the record on the issue of the jury's inability to agree. Under current federal law, however, the silence of a jury as to unanimity does not reach the "high threshold of disagreement required for a hung jury...." *Brazzel*, 491 F.3d at 984. Therefore, the Court rejects Respondent's argument to the contrary.

Finally, Respondent argues that the Court should find that Petitioner waived her right to both the high threshold of jury disagreement and the trial court's finding of a genuine deadlock because she agreed to the use of the "unable to agree" jury instruction. Dkt. 8 at 12-13. It can hardly be said that Petitioner agreed to this instruction because the instruction is the "proper instruction" in Washington. *State v. Labanowski*, 117 Wash.2d 405, 816 P.2d 26, 27-28, 31 (Wash.1991) ("After the date of this opinion, however, the proper instruction to the jury will allow it to render a verdict on a lesser crime if

it is unable to agree on the charged crime."). This is the functional equivalent of a forced waiver and Respondent's argument is unavailing.

*5 Therefore, the Court grants Petitioner's Writ for Habeas Corpus because the state's retrial of Petitioner on the charge of homicide by abuse would violate her right to be free from double jeopardy.

III. ORDER

Therefore, it is hereby

ORDERED Petitioner's Petition Under 28 U.S.C. § 2241 For Writ of Habeas Corpus (Dkt.4) is **GRANTED**.

W.D.Wash., 2010.
Daniels v. Pastor
Not Reported in F.Supp.2d, 2010 WL 56041
(W.D.Wash.)

END OF DOCUMENT