

No. 89830-8
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,
Respondent,

vs.

Odies Walker,

Petitioner/Appellant.

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Pierce County Superior Court

Cause No. 09-1-02784-8

The Honorable Judge Bryan Chushcoff

Petitioner's Supplemental Brief

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STATEMENT OF FACTS

In two separate police interviews, Odies Walker denied any involvement in the death of a Loomis Security guard. RP¹ 553-617. The guard, Kurt Husted, had been shot during a robbery at WalMart committed by Calvin Finley and Marshawn Turpin. The state charged Mr. Walker with premeditated murder,² alleging that he planned the robbery and drove the getaway car. CP 11-14.

Mr. Walker took his case to trial.

In opening statements, the prosecutor argued that Mr. Walker was “lying like crazy” when he denied his involvement. RP (3/7/11 opening statements) 48. The prosecutor also described the killing as “cold-blooded premeditated murder,” and told jurors that the evidence would show that Mr. Walker, like Finley, had a “depraved heart lacking any conscience whatsoever.” RP (3/7/11 opening statements) 16. Mr. Walker’s attorney did not object.

Despite a pretrial agreement not to discuss domestic violence allegations, the prosecutor told jurors they would learn that “it was wrong” for the state’s main witness, Tonie Williams-Irby, “to be with this guy.” CP 53; RP (3/7/11 opening statements) 13; RP 669-670. Mr. Walker’s

¹ The transcript from the trial is sequentially numbered and will be cited as RP. References to other hearings will include the date and hearing type.

² Other charges included first-degree felony murder (for the same offense), first-degree assault, first-degree robbery, solicitation to commit robbery, and conspiracy to commit robbery. CP 297-299. The felony murder conviction was vacated for double jeopardy reasons. CP 11-14.

attorney did not object. Counsel did object when the prosecutors offered evidence of domestic abuse. RP 669-676.

In closing, the prosecutors showed jurors a 266-slide PowerPoint. Ex. 243³. The presentation included numerous slides featuring a mug shot of Mr. Walker in jail garb. The mug shot itself had not been admitted as an exhibit; instead, the image was taken from a photo montage and enlarged. Ex. 74, 74A. The first slide (after the title page) showed the mug shot, with the words “Shoot the mother f*cker” partly superimposed in red over the image. Ex. 243, slide 3. The prosecutors also used the mug shot in a slide captioned “Major participant.”⁴ Ex. 243, sl. 232. The mug shot appeared twice more near the end of the PowerPoint. The prosecutors superimposed over Mr. Walker’s face, in red, the phrase “Guilty beyond a reasonable doubt.” Ex. 243, sl. 261. The penultimate slide in the presentation featured Mr. Walker’s mug shot with the red caption “We are going to beat this.” Ex. 243, sl. 266.

One-hundred and thirty-seven of the slides bore the caption, bold and capitalized, “Defendant Walker Guilty of Premeditated Murder.” Ex. 243.⁵ One slide showed cash spread on a table, with the words “Money is

³ The PowerPoint presentation was made part of the trial court record as an exhibit. The PowerPoint format allows animation, and slides may change as they appear onscreen. Citations to slides in this brief will refer to the printed version of the PowerPoint presentation. The first slide is blank, and there are a total of 267 slides. Several prints from slides are attached in an Appendix.

⁴ The slide included six arrows pointing inward toward Mr. Walker’s picture. Each arrow originated from a separate allegation regarding Mr. Walker’s participation. Ex. 243, sl. 232.

⁵ The state used similarly captioned slides to assert that Mr. Walker was guilty of first-degree assault and solicitation to commit robbery. Ex. 243, sl. 247, 248, 254.

more important than human life;” another showed Husted, along with an accounting of the money taken superimposed over his face, and the caption “Defendant’s greed and callous disregard for human life.” Ex. 243, sl. 5, 264. Another slide near the end showed a group celebrating over a meal, with the words “This is how you murder and rob n*ggers next time it will be more money.” Ex. 243, sl. 265. Defense counsel did not object to any of the slides. RP 1335-1395, 1422-1439.

The state compared the reasonable doubt standard to a jigsaw puzzle. RP 1393; Ex 243, sl. 198. The prosecutor also told the jury that the elements of an offense are like the steel rails of a railroad track, with the railroad ties as the individual pieces of evidence supporting those tracks. RP 1432. A third analogy employed a basketball metaphor: “[w]hen the State has scored 40 points to the defendant’s 2 points, that doesn’t mean that there is reasonable doubt.” RP 1433. Defense counsel did not object to any of these analogies.

The prosecutor told jurors that a “split second decision” qualifies as premeditation, and compared premeditation with stopping at a stop sign or at a railroad crossing. RP 1376; Ex. 243, sl. 206. The court overruled Mr. Walker’s objections. RP 1376-77, 1380.

In rebuttal argument, the prosecutor repeatedly characterized defense counsel’s efforts as desperate and misleading, and told jurors several times that their job was to find the truth. RP 1424-1429, 1435. Mr. Walker’s attorney did not object.

Counsel did object when the prosecutor told jurors that Williams-Irby testified against Mr. Walker because “she wants the Husted family to know the truth” and that “[t]he true facts coming out in this courtroom is a powerful form of justice.” RP 1435-36. The court excused the jury, cautioned the prosecutor not to ask jurors to send a message,” or to return a verdict “on behalf of the community [or] the family.” RP 1437-38, 1438. When the jury returned, the state’s attorney concluded by asking the jury to “remedy” the crimes committed against “the peace and dignity of the people of the state of Washington” by returning “true verdicts.” RP 1438-39. Counsel objected again. The court did not rule, but allowed the prosecutor to conclude by thanking the jury. RP 1439.

The court instructed jurors that a person commits premeditated murder “when, with a premeditated intent to cause the death of another person, he or an accomplice causes the death of another person.” CP 213. The “to convict” instruction required the state to prove that “the defendant or an accomplice acted with intent to cause the death of Kurt Husted; [and that] the intent to cause the death was premeditated.” CP 216.⁶

During closing argument, the state relied primarily on evidence that Mr. Walker premeditated the killing, even though he was not present when Finley fired the shot that ended Husted’s life. RP 1381; Ex. 243, sl. 145. The prosecution also suggested that Finley premeditated the killing, equating a shot to the head with premeditation. Ex. 243, sl. 41, 214.

⁶ The court also gave standard instructions defining premeditation and outlining accomplice liability. CP 212, 214.

The jury convicted Mr. Walker of all counts, and the court imposed a sentence of life without parole. Mr. Walker appealed, and the Court of Appeals affirmed. CP 268-280.

ARGUMENT

I. PROSECUTORIAL MISCONDUCT REQUIRES REVERSAL OF MR. WALKER'S CONVICTIONS.

A. The prosecutors' misconduct pervaded the entire trial.

The prosecutors engaged in multiple kinds of misconduct. This misconduct denied Mr. Walker a fair trial, and thus is "*per se* prejudicial." *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

Altered exhibits; appeals to passion and prejudice. A prosecutor may not show jurors exhibits that have been altered by the addition of text, graphics, and animation designed to elicit an emotional response. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Here, the prosecutor showed jurors numerous altered exhibits more prejudicial than those at issue in *Glasmann*.

Four slides showed Mr. Walker's booking photo, captioned with the phrases "Shoot the mother f*cker," "Major participant,"⁷ "Guilty beyond a reasonable doubt," and "We are going to beat this." Ex. 243, sl. 3, 232, 261, 266. In addition, jurors saw other photographs captioned "Money is more important than human life," and "This is how you murder and rob n*ggers next time it will be more money." Ex. 243, sl. 15, 265.

⁷ This slide featured additional text and six arrows pointing toward Mr. Walker in a layout intended to produce an emotional response. Ex. 243, sl. 232.

One slide read “Defendant’s greed and callous disregard for human life,” and superimposed the total amount stolen (\$55,188) over Husted’s picture. Ex. 243, sl. 264. The prosecutor also showed jurors 137 slides titled, in bold and all capital letters, “Defendant Walker Guilty of Premeditated Murder.” Ex. 243.

As the Court of Appeals found, the prosecutors’ use of these slides constituted misconduct.⁸ Opinion, pp. 13, 15. The “deliberately altered photographs may have affected the jury’s feelings about strictly observing legal principles.” Opinion, p. 15.

Improper expressions of personal opinion. A prosecutor commits misconduct by conveying a personal opinion regarding the accused person’s guilt or veracity. *State v. Lindsay*, Slip. Op. pp. 16-17, No. 88437-4 (May 8, 2014); *Glasmann*, 175 Wn.2d at 706. A prosecutor’s “repeated assertions of the defendant’s guilt” can express a personal opinion and constitute misconduct. *Glasmann*, 175 Wn.2d at 710.

Here, the prosecutors repeatedly expressed personal opinions. In opening statements, the prosecution told jurors that Mr. Walker was “lying like crazy to the police.” RP (3/7/11 opening statements) 48. The prosecutor opined that Mr. Walker “committed cold-blooded, premeditated murder...” and told jurors that the evidence would show “an

⁸ The state did not file an Answer asking the Supreme Court to reverse the Court of Appeals’ decision on this point. Accordingly, the sole issue before the court involves determining whether or not the misconduct prejudiced Mr. Walker. See *State v. Bobic*, 140 Wn.2d 250, 258, 996 P.2d 610 (2000) (refusing to review Court of Appeals’ decision finding defendant had automatic standing to challenge a search, in light of prosecution’s failure to file a cross-petition on that issue.)

equally depraved heart lacking any conscience whatsoever.” RP (3/7/11 opening statements) 16.⁹

The state also repeatedly conveyed personal opinions in the PowerPoint presentation. The Court of Appeals specifically noted that the prosecutors “improperly expressed their opinion on Walker’s guilt” through the PowerPoint slides. Opinion, p. 15. The prosecutors repeated the message “Defendant Walker Guilty of Premeditated Murder” 137 times throughout the slideshow. Ex. 243. They also labeled Mr. Walker’s mug shot with the words “Guilty beyond a reasonable doubt.” Ex. 243, sl. 261. As in *Glasmann*, these “repeated assertions of the defendant’s guilt” conveyed the prosecutors’ personal opinion. *Id.*, at 710.

In addition, two slides used loaded words to express the prosecutors’ opinions of Mr. Walker’s character. One superimposed over Husted’s picture an accounting of the money stolen during the robbery; it was captioned “Defendant’s greed and callous disregard for human life.” The other superimposed the phrase “Money is more important than human life” over a picture of cash spread on a table. Ex. 243, sl. 15, 264. Both suggested the prosecutors’ view that Mr. Walker is a monster with no concern for anything but money.

Distorting the burden of proof and the jury’s role. A prosecutor may not urge jurors to find the truth. *Lindsay*, Slip. Op. pp. 14-15, No. 88437-4 (May 8, 2014); *State v. McCreven*, 170 Wn. App. 444, 471-473,

⁹ These statements also appealed to the jurors’ passions and prejudices.

284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). Nor can the state urge jurors to convict in order to protect community values, preserve civil order, or deter future crime. *State v. Ramos*, 164 Wn. App. 327, 337-341, 263 P.3d 1268 (2011). A prosecutor commits misconduct by trivializing the burden of proof and the reasonable doubt standard. *State v. Johnson*, 158 Wn. App. 677, 684, 243 P.3d 936 (2010) (Johnson I). This can occur when the state compares a prosecution to a jigsaw puzzle. *Johnson I*, 158 Wn. App. at 685; *see also Lindsay*, Slip. Op. pp. 11-14, No. 88437-4 (May 8, 2014). It can also occur when the prosecutor attempts to quantify the reasonable doubt standard. *Lindsay*, Slip. Op. p. 14, No. 88437-4 (May 8, 2014).

Here, the prosecutors repeatedly told jurors to find “the truth,” in violation of *Lindsay* and *McCreven*. RP 1435-37. They also asked jurors to “remedy” the crimes committed against “the peace and dignity of the people of the state of Washington” by returning “true verdicts,” even after being admonished by the court. RP 1438-39. This distorted the burden of proof, because the jury’s task was not to “remedy” anything, but rather to determine whether or not the state had met its burden beyond a reasonable doubt. *Ramos*, 164 Wn. App. at 337-341.

The prosecutors also used a puzzle analogy that suggested jurors could convict when they could guess at the truth. RP 1393; *see Lindsay*, Slip. Op. pp. 11-14, No. 88437-4 (May 8, 2014); *Johnson I*, 158 Wn. App. at 685. The problem was compounded by the use of slides showing a puzzle consisting of only six pieces. Ex. 243, sl. 198.

The prosecutors also gave two analogies suggesting that some quantity of proof would be sufficient for conviction. The “steel rails” analogy may have prompted jurors to speculate as to how many “railroad ties” would be sufficient to support the “tracks” (elements). RP 1432. The basketball analogy communicated a hard number—40 out of 42 points, or 95%-- sufficient to constitute proof beyond a reasonable doubt. RP 1433. The analogies are improper because reasonable doubt cannot be quantified in this manner. *Lindsay*, Slip. Op. p. 14, No. 88437-4 (May 8, 2014). These repeated instances of misconduct throughout the state’s closing arguments distorted the burden of proof. The prosecutors’ exhortations to find “the truth” and to “remedy” the crime, the improper puzzle analogy, and the two explanations urging jurors to convict based on the quantity of evidence mislead the jury regarding the reasonable doubt standard. *Lindsay*, Slip. Op. p. 11-17, No. 88437-4 (May 8, 2014); *McCreven*, 170 Wn. App. at 471-473; *Ramos*, 164 Wn. App. at 337-341; *Johnson I*, 158 Wn. App. at 684.

Other misconduct. A prosecutor may not refer to matters that have been excluded. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Nor may the prosecution comment disparagingly on defense counsel’s role, or impugn counsel’s integrity. *Lindsay*, Slip. Op. pp. 8-11, No. 88437-4 (May 8, 2014). *State v. Thorgerson*, 172 Wn.2d 438, 450-452, 258 P.3d 43 (2011). A prosecutor commits misconduct by misstating the law or making arguments inconsistent with the court’s instructions. *Davenport*, 100 Wn.2d at 760-762.

Here, the prosecutors improperly hinted at and later sought to introduce evidence of domestic violence, which the parties had agreed not to discuss before the jury. RP 669-681. The state's attorney unfairly labeled defense counsel's "desperate" and underhanded attempts to "mislead" the jury. RP 1425-29. The prosecutors misstated the law by telling jurors that premeditation could occur in a "split second," and by comparing premeditation to obeying a stop sign. RP 1376.

B. The prosecutors' misconduct rendered Mr. Walker's trial fundamentally unfair.

Where misconduct deprives the accused person a fair trial, it is "*per se* prejudicial." *Davenport*, 100 Wn.2d at 762. A jury's verdict will always be affected by pervasive misconduct targeting the jury's unconscious emotional responses, conveying the prosecutor's personal opinions, trivializing the burden of proof, and influencing jurors to convict based on improper factors. This is so even if the defendant concedes guilt. *Glasmann.*, 175 Wn.2d at 712.

When the prosecution alters exhibits to provoke an emotional response and shows them to the jury throughout closing argument, the misconduct will inevitably prejudice the accused person. *Id.*, at 704-712. This is especially true when the prosecutor improperly adds text to a mug shot or other inherently prejudicial images in a blatant appeal to passion and prejudice. Furthermore, the deleterious effect of such misconduct will be compounded and magnified by other improper tactics, such as those employed by the state here.

Despite a sincere attempt to do so, a juror cannot disregard an image-rich media presentation designed to influence subconscious emotional reactions. *Id.*, at 708. Thus, regardless of the strength of the state's case, the plausibility of the defense(s), or any other factors, a closing argument dominated by altered images directed at influencing passion and prejudice and conveying the prosecutor's personal opinion, will always require reversal. Such a closing argument necessarily "affects" the verdict. *Id.*

In this case, the prosecutors' pervasive misconduct affected the verdicts. *Id.*, at 704. Improper images aimed at unconscious and emotional reasoning dominated the prosecutors' closing argument. In addition, the slideshow repeated the phrase "Defendant Walker Guilty of Premeditated Murder" more than 100 times, and included other expressions of the prosecutors' personal opinions. Ex. 243.

The prosecutors supplemented this reversible misconduct with additional expressions of personal opinions, prejudicial distortions of the burden of proof, misstatements about the law, references to excluded material, and disparaging comments about defense counsel's role. No juror could have ignored these pervasive and improper messages, or disregarded their emotional impact on the juror's subconscious. *Id.*, at 708.

The standard instruction that "the lawyers' statements are not evidence" did not mitigate the problem. CP 203. Where misconduct is directed at subconscious emotional reasoning, an instruction conveying a rational message will have no effect. Simply telling jurors that "the

lawyers' statements are not evidence" does not impact emotional decisions based on passion and prejudice at a subconscious level. The prosecutor's use of altered exhibits blurred the line between what constitutes a lawyer's "statement" and what constitutes evidence. Throughout the trial, jurors saw that photographs and other visual exhibits only appeared on the screen after the judge had approved them by resolving any objections and admitting them into evidence. Consciously or unconsciously, jurors learned to treat anything on screen as evidence.¹⁰ No instruction contradicted this belief, or explained that the prosecutor's altered images were mere partisan argument. CP 201-255.

The prosecutors' misconduct here represents an extreme.¹¹ *Id.*, at 704. Grievous misconduct cases such as that perpetrated here and in *Glasmann* will inevitably "affect" a jury's verdict. *Id.*, at 704. It is so flagrant and ill-intentioned that no cautionary instruction could ever alleviate the prejudice caused. *Id.*

C. The misconduct in this case affected the verdict because prosecutors misstated the jury's role and unfairly bolstered the state's position on contested matters.

Misconduct may require reversal even when it is not so egregious and pervasive as to be prejudicial *per se*. In such cases, a defendant need

¹⁰ Because of this, the prejudice created here exceeds that which would attend a prosecutor's use of a whiteboard and dry-erase markers during closing.

¹¹ Most cases involving prosecutorial misconduct hinge on only a few objectionable remarks, unaccompanied by a media presentation. *Ramos*, 164 Wn. App. at 337-342; *see also State v. Evans*, 163 Wn. App. 635, 643-648, 260 P.3d 934 (2011).

only show a substantial likelihood that the misconduct affected the jury's verdicts. *Glasmann*, 175 Wn.2d at 704.

1. The mug shot and other altered exhibits affected the jury's verdict.

The most egregious misconduct in the PowerPoint amplified the testimony of Williams-Irby. Because the state relied heavily on her testimony to establish Mr. Walker's involvement and his state of mind, the misconduct caused significant prejudice.

The very first slide after the title page featured Mr. Walker's mug shot and the words "Shoot the mother f*cker," words attributed to him by Williams-Irby.¹² RP 723; Ex. 243, sl. 3 The last two slides before the final slide also highlighted evidence provided by Williams-Irby. One superimposed the words "This is how you murder and rob n*ggers next time it will be more money" over a picture of Mr. Walker and his family and friends enjoying dinner. Ex. 243, sl. 265. Williams-Irby testified that Mr. Walker made this comment at dinner on the day of the killing. RP 773. The penultimate slide showed Mr. Walker's mug shot and the words "We are going to beat this." Ex. 243, sl. 266. This, too, was a statement attributed to Mr. Walker by Williams-Irby, who claimed that he said those words when the two of them appeared in court together. RP 780-781.

By juxtaposing key portions of Williams-Irby's testimony with these photos, the prosecutor unfairly bolstered her credibility. The slides

¹² Although the prosecutor's opening statement and closing slideshow both used the word "shoot," Williams-Irby used the word "kill" in her testimony. RP 723.

presented her testimony as fact, just as reliable as the photographs admitted into evidence by the court. The slides also joined her testimony with images in a manner calculated to manipulate jurors' emotions. In addition, the pairings communicated the prosecutors' belief that Williams-Irby provided credible testimony: by showing words attributed to Mr. Walker along with his mug shot, the prosecutors conveyed their opinion that Mr. Walker actually spoke the words.

There is a substantial likelihood that these improper slides affected the verdict. Williams-Irby provided the only evidence that Mr. Walker himself prompted Finley to shoot Husted. She was also the only person who said that Mr. Walker obtained a gun for use in the robbery. By boosting her credibility, the misconduct increased the likelihood of conviction.

The effect was multiplied by the emotional nature of the misconduct. The state appeals to the jury's passion and prejudice in several ways. First, the state paired Mr. Walker's mug shot with the most inflammatory statements attributed to him. Ex. 243, sl. 3, 266. Second, they combined a callous and threatening "confession" ("This is how you murder and rob n*ggers...") with a photo showing Mr. Walker at dinner with his family on the same day Mr. Husted died. Ex. 243, sl. 265. Third, they added the phrase "Money is more important than human life" to a photographic exhibit showing piles of cash. Ex. 243, sl. 15. Fourth, they superimposed over Husted's face the words "Defendant's greed and callous disregard for human life" along with a total of the amount taken,

and by showing jurors this slide after an image of Husted's bloody torso. Ex. 243, sl. 263, 264.

The altered mug shot and other modified exhibits amplified the testimony of the prosecution's key witness. The prosecutors also boosted the emotional appeal of these images, urging jurors to rely on passion and prejudice rather than reason and evidence. There is a substantial likelihood the prosecutors' misconduct affected the verdict. *Glasmann*, 175 Wn.2d at 704.

2. The prosecutors' repeated expressions of personal opinion and constant appeals to passion and prejudice affected the verdicts.

Instead of allowing jurors to draw their own conclusions from the evidence, the prosecutors endlessly communicated their own personal opinions on Mr. Walker's guilt. The misconduct affected the verdict by influencing jurors to decide the case based on improper factors.

The prosecutors conveyed their personal opinions of Mr. Walker by superimposing the phrase "Money is more important than human life" over a picture of the cash recovered by police. Ex. 243, sl. 15. No one testified that Mr. Walker spoke these words. These words came from the prosecution, not the evidence. Similarly, the prosecutors superimposed the phrase "Defendant's greed and callous disregard for human life" over a photo of Husted, and paired this message with the total amount of money taken during the robbery. Ex. 243, sl. 264. This, too, was a pure expression of opinions. Greed, callousness, and disregard for human life had nothing to do with the elements of any offense or aggravator.

In addition, the prosecutors hammered their opinion home with 137 slides labeled “Defendant Walker Guilty of Premeditated Murder.” Ex. 243. They also paired Mr. Walker’s mug shot with the words “Guilty beyond a reasonable doubt,” and “Major participant.” Ex. 243, sl. 232, 261. As in *Glassman*, “repeated assertions of [Mr. Walker’s] guilt” were improper. *Id.*, at 710.

Throughout the PowerPoint, the prosecutors sought to paint Mr. Walker as a monster. These efforts supplemented the opening statements, where the prosecutors used phrases such as “cold-blooded,” “depraved heart,” and “lacking any conscience whatsoever.” RP (3/7/11 opening statements). This all served to distract jurors from the evidence and the court’s instructions, pointing them instead toward an emotional judgment resting in part on the prosecutors’ personal opinions.

This repeated and pervasive misconduct affected the verdict. The jurors in this case faced a difficult and emotional task sorting through the evidence, which included graphic photos of Husted’s corpse. By unfairly battering the jury with improper expressions of personal opinion and unfair appeals to passion and prejudice, the prosecutors pushed jurors toward a decision resting on emotion rather than reason. *Glasmann*, 175 Wn.2d at 704.

3. The prosecutors’ efforts to mislead jurors about the law affected the verdicts.

Jurors are not accustomed to dealing with difficult concepts like “reasonable doubt,” or what it means to premeditate for “more than a

moment in point of time.” Because of the power and prestige associated with the prosecutor’s office, jurors tend to trust prosecutors; prosecutorial misstatements about reasonable doubt or substantive law will inevitably sway a juror’s thinking.

Here, instead of encouraging jurors to decide the case in accordance with the court’s instructions, prosecutors misrepresented the law. They encouraged jurors to focus on “the truth,”¹³ to “remedy” the crimes, to approach the case like a jigsaw puzzle, to focus on the quantity of evidence rather than the reasonable doubt standard, and to think of premeditation as something that occurs in a “split second,” just like the decision to obey a stop sign. This was misconduct. *Lindsay*, Slip. Op. pp. 11-17, No. 88437-4 (May 8, 2014). *McCreven*, 170 Wn. App. at 471-473; *Ramos*, 164 Wn. App. at 337-341; *Johnson I*, 158 Wn. App. at 684.

There is a substantial likelihood these instances of misconduct affected the jury’s verdict. Turning the trial into a search for “the truth” undermines the burden of proof and the reasonable doubt standard and implies that jurors need only decide whether to believe Williams-Irby’s testimony or Mr. Walker’s denials. *Lindsay*, Slip. Op. pp. 14-15, No. 88437-4 (May 8, 2014). The misstatement about premeditation and the improper reasonable doubt analogies lessened the state’s burden to show

¹³ This strategy dovetailed with the opening remark that Mr. Walker lied “like crazy” in his statement to police, and their efforts to paint Williams-Irby as credible. RP (3/7/11 opening statements).

actual premeditation for more than a moment in point of time. RCW 9A.32.020; *State v. Bingham*, 105 Wn.2d 820, 827, 719 P.2d 109 (1986).

The prosecutors focused their misconduct on the primary factual disagreement—the nature and extent of Mr. Walker’s involvement—and the primary legal issue—the existence of premeditation. Accordingly, there is a substantial likelihood the misconduct affected the verdict. *Glasmann*, 175 Wn.2d at 704.

D. The Court of Appeals improperly weighed the evidence and upheld Mr. Walker’s convictions despite a substantial likelihood that the misconduct affected the verdicts.

A court reviewing the impact of prosecutorial misconduct may not weigh the evidence when determining the likelihood the misconduct affected the verdict. *Glasmann*, 175 Wn.2d at 712. Instead, the issue is whether the prosecutor “deliberately appealed to the jury's passion and prejudice and encouraged the jury to base the verdict on the improper argument...” *Id.*, at 711. Such deliberate appeals and improper encouragement require reversal even in the face of “overwhelming” evidence, and even if the defense concedes guilt. *Id.*, at 710-711.

Glasmann thus requires reversal of Mr. Walker’s convictions even if, as the Court of Appeals found, “overwhelming evidence connect[ed] [him] to the robbery and murder.” Opinion, p. 15. This is so because any finding of harmlessness would require weighing the evidence, in violation of *Glasmann*’s admonition against doing so. *Id.*, at 711-712.

The jury in this case had to decide contested issues on each of Mr. Walker's charges. In light of this, the prosecutors' pervasive misconduct affected the verdicts. *Id.*

1. There is a substantial likelihood the misconduct affected the verdict because the jury had to resolve conflicting evidence on the extent of Mr. Walker's involvement.

Initially, jurors had to decide if the state had proved beyond a reasonable doubt that Mr. Walker participated in the planning and commission of the robbery. The state's evidence centered on the testimony of Williams-Irby. But Mr. Walker strenuously attacked her credibility, pointing out that she provided testimony in return for a significant reduction in her charges and her potential sentence. RP 782-834. In closing, defense counsel argued vigorously that the jury should not believe Williams-Irby. RP 1396-1421. He urged the jury to question the testimony of a participant in the crime with so much to gain from testifying as the prosecutor wishes, calling her time on the witness stand "bought and paid for". RP 1416-1421. The defense also reminded the jury that Williams-Irby was the only one to provide support for premeditation. RP 1418-1419.

Mr. Walker also impeached the testimony of Trevino, Parrott, and others who claimed they'd overheard evidence of Walker's involvement.¹⁴ RP 899-1018, 1112-1149. In addition, the defense also undermined the

¹⁴ Some witnesses observed Mr. Walker associating himself with the crime after its completion. This does not necessarily prove that he helped plan or commit the robbery. RP (3/7/11 opening statement) 57.

identification testimony of Holly, pointing out weaknesses and inconsistencies in her testimony. RP 229-276. None of the evidence linking Mr. Walker to the planning and commission of the robbery went unchallenged. Accordingly, the case presented real and substantial factual disputes for the jury to resolve.

Furthermore, jurors had before them Mr. Walker's own vigorous denials, expressed to police during two separate interviews with a number of different officers.¹⁵ RP 553-617. The testimony, impeachment, and Mr. Walker's denials formed a mixture of conflicting evidence for the jury to sift through. Resolution of these conflicts required jurors to weigh the evidence. However, the prosecutors unfairly put their thumbs on the scale, distorting the weighing process with improper appeals to passion and prejudice, personal opinions, misstatements about the law, and other instances of misconduct. There is a substantial likelihood this misconduct affected the verdicts. *Glasmann*, 175 Wn.2d at 704.

The Court of Appeals could only uphold the convictions by weighing the evidence, resolving conflicts in the testimony, and determining the credibility of the witnesses. Opinion, pp. 16-17. The court acknowledged as much by declaring the prosecution's case "strong" and

¹⁵ The Court of Appeals erroneously concluded that Mr. Walker's credibility "was not an issue at trial" because he did not testify and because "his argument was that the State's evidence was only circumstantial and its witnesses were not credible." Opinion, p. 12. This is incorrect. Mr. Walker denied involvement. His statements were introduced as substantive evidence. RP 553-617. Defense counsel did not assume the burden of persuading jurors his client told the truth; this does not mean the jury was free to ignore Mr. Walker's vigorous denials.

Mr. Walker's theory "not nearly as plausible" as the defendants' theories in other cases. Opinion, p. 17. The Court of Appeals violated *Glasmann* by weighing the evidence of Mr. Walker's involvement and deciding the case in the prosecution's favor. *Glasmann*, 175 Wn.2d at 712.

The Court of Appeals should not have weighed the evidence. *Id.* Given the pervasive misconduct, the court should have reversed Mr. Walker's convictions. *Id.*

2. There is a substantial likelihood the misconduct affected the verdicts in counts one and three because the jury had to make "nuanced distinctions" between greater and lesser offenses.

In addition to deciding whether or not Mr. Walker participated in the planning and commission of the crimes, jurors also had to decide between greater and lesser charges. The court's instructions focused the jury's attention on the differences between premeditated¹⁶ and intentional murder (count one).¹⁷ CP 212-220. These instructions required jurors to make the kind of "nuanced distinctions [that] often separate degrees of a crime," creating "an especially serious danger" that the misconduct affected the jury. *Glasmann*, 175 Wn.2d at 710.

There is a substantial likelihood the misconduct affected the jury's determination of Mr. Walker's guilt. For the most part, the state provided equivocal evidence on the issue of premeditation: much of Williams-

¹⁶ Premeditation involves actual deliberation lasting "more than a moment in point of time." RCW 9A.32.020; *Bingham*, 105 Wn.2d at 827.

¹⁷ The instructions also outlined the difference between first and second-degree assault (count two). CP 226, 231, 232.

Irby's testimony showed that Mr. Walker contemplated having Finley *shoot* someone, not that he anticipated the need to *kill* someone to carry out the robbery. RP 665. Even Williams-Irby's claim that Mr. Walker told Finley to "kill the mother f*cker" (RP 729) shows only intent to kill, not actual deliberation for "more than a moment in point of time." RCW 9A.32.020; *Bingham*, 105 Wn.2d at 827. In addition, the defense undermined her testimony by impeaching her credibility and demonstrating her bias in favor of the government. RP 782-819.

In addition to arguing that jurors should not trust Williams-Irby, defense counsel highlighted the lack of evidence showing premeditation. Counsel told the jury that Finley may have panicked when near Husted. RP 1418. Counsel also told the jury that the key element in the case involved premeditation. RP 1419.

The Court of Appeals did not consider any impact the misconduct may have had on the jury's consideration of the lesser-included offenses. Instead, the court focused on what it characterized as "the defense theory," that Mr. Walker was not involved in the crimes.¹⁸ Opinion, pp. 16-17. This focus on "the defense theory" was improper. Under *Glasmann*, prejudice occurs whenever misconduct affected the verdict, regardless of the defense theory. *Glasmann*, 175 Wn.2d at 704-712. The court should not have

¹⁸ The Court of Appeals focused on the defense theory in its effort to distinguish *Glasmann* and *State v. Reed*, 102 Wn.2d 140, 684 P. 2d 699 (1984). But neither *Glasmann* nor *Reed* held that the prejudicial effect of misconduct hinges on the defense theory. Reversal is required whenever there is a substantial likelihood the misconduct affected the verdict, regardless of what defense counsel says in closing. *Glasmann*, 175 Wn.2d at 704.

viewed the potential effect on the verdict through the lens of any theory articulated by the defense.

Furthermore, Mr. Walker pursued more than one defense theory, as was his right. *See, e.g., State v. Fernandez-Medina*, 141 Wn.2d 448, 460, 6 P.3d 1150 (2000). In addition to casting doubt on the proof of Mr. Walker's involvement, counsel also proposed instructions on second-degree murder.¹⁹ Counsel argued that premeditation was "key," and that Finley may have shot Husted in a panic. RP 1418-1419.

Because the jury had to make "nuanced distinctions," there is a substantial likelihood the prosecutors' misconduct affected the verdicts. *Glasmann*, 175 Wn.2d at 704-712.

E. Mr. Walker's case is controlled by *Glasmann*.

Repetitive misconduct may have a cumulative effect so flagrant as to be incurable. *Glasmann*, 175 Wn.2d at 707. Here, as in *Glasmann*, the misconduct "permeated the state's closing argument, was flagrant and ill intentioned," and "was so pervasive that it could not have been cured by an instruction." *Id.* As in *Glasmann*, the prosecutor used "[h]ighly prejudicial images" at a time when jurors were "particularly... susceptible," "produced a media event with the deliberate goal of influencing the jury to return guilty verdicts," and visually "shouted" at them in red letters, manipulating their rapid unconscious and emotional

¹⁹ Counsel also proposed instructions on second-degree assault, on count three.

reasoning processes by subjecting them to a lengthy slide presentation “full of imagery that likely inflamed [them].” *Id.*, at 707-709.

Without this, the jury might not have accepted evidence upon which the defense cast doubt.²⁰ *Id.*, at 709-710. The prosecutors’ “pronounced and persistent misconduct... cumulatively cause[d] prejudice” and “demand[s] that [Mr. Walker] be granted a new trial.” *Id.* Mr. Walker’s case is legally indistinguishable from *Glasmann*. His convictions must be reversed. *Id.*

II. MR. WALKER WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Ineffective assistance requires reversal whenever there is a reasonable possibility that defense counsel’s deficient performance affected the outcome of the case. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In this case, defense counsel unreasonably failed to (1) object to improper closing arguments and (2) request an instruction cautioning jurors about accomplice testimony.

Defense counsel should always object when pervasive prosecutorial misconduct undermines the right to a fair trial. *See Hodge v. Hurley*, 426 F.3d 368, 385 (6th Cir. 2005). Failure to object to egregious

²⁰ Similarly, jurors might have reached a different result when considering the “nuanced distinctions” between the greater and lesser charges on counts one and three. *Id.*, at 710.

misconduct will *never* qualify as a reasonable strategy;²¹ there is no justification for allowing a client to receive a trial that is fundamentally unfair. *Id.*; *Glasmann*, 175 Wn.2d at 704-707.

Here, the prosecutor committed misconduct akin to what *Glasmann* condemned. Defense counsel had access to case law and professional standards that “clearly warned against the conduct,” and should have known of the obligation to object.²² *Glasmann*, 175 Wn.2d at 707. Counsel provided deficient performance by failing to raise an objection before the jury saw the prosecutors’ improper slides.²³ *Hodge*, 426 F.3d at 385-386.

There is a reasonable possibility that counsel’s deficient performance affected the outcome. *Reichenbach*, 153 Wn.2d at 130. The prosecutors urged jurors to convict based on passion, prejudice, and personal opinion. *Glasmann*, 175 Wn.2d at 704-707. Counsel failed to protect Mr. Walker’s right to a fair trial. *Id.*; *Hodge*, 426 F.3d at 385-386. Mr. Walker’s convictions must be reversed. *Strickland*, 466 U.S. at 687.

In addition, counsel should have proposed an instruction cautioning jurors to be wary of Williams-Irby’s testimony. Such an

²¹ Such objections can be made outside the presence of the jury, if counsel fears drawing the jury’s attention to the misconduct. *Id.*, at 385-386.

²² The objection could have been made outside the jury’s presence, so jurors would not have their attention drawn unnecessarily to the prejudicial and objectionable material. *Hodge*, at 385-386.

²³ The prosecutor should have provided a copy of the slideshow to the court and to defense counsel before presenting it to the jury. If defense counsel did not receive an advance copy, he should have requested a recess and objected when the first improper slide was shown. *Hodge*, 426 F.3d at 385-386.

instruction must be given when requested, unless the state presents substantial corroboration for the accomplice testimony. *State v. Harris*, 102 Wn.2d 148, 155, 685 P.2d 584 (1984), *overruled on other grounds by State v. Brown*, 113 Wn.2d 520, 554, 782 P.2d 1013 (1989) *opinion corrected*, 787 P.2d 906 (1990) (Brown I). Counsel's failure to request such an instruction cannot be described as legitimate trial strategy.

The prosecution relied heavily on Williams-Irby. The defense strategy involved impeaching her credibility and showing her bias. RP 1335-1439. An instruction cautioning jurors to be wary of her testimony would only have served this strategy. Furthermore, the state failed to provide substantial corroborating evidence: no one else testified that Mr. Walker discussed shooting a guard beforehand, or that he told Finley to "do what you got to do," or that he claimed to have said "kill the mother*cker" when Finley confronted Husted.

Counsel's failure to propose the instruction prejudiced Mr. Walker. There is a reasonable possibility that the deficient performance affected the outcome of the trial. *Reichenbach*, 153 Wn.2d at 130. Given the state's reliance on Williams-Irby's testimony, instructing jurors to regard the testimony with suspicion might well have meant the difference between conviction of premeditated murder and acquittal.²⁴ Mr. Walker was deprived of the effective assistance of counsel; his convictions must be reversed. *Strickland*, 466 U.S. at 687.

²⁴ Or, alternatively, conviction of a lesser charge such as second-degree murder.

III. AN ACCOMPLICE MAY NOT BE CONVICTED OF A CRIME GREATER THAN THAT COMMITTED BY THE PRINCIPAL.

- A. The complicity statute limits accomplice liability to “the crime” committed by the person on whose conduct the charge rests.

Courts review *de novo* issues of statutory construction. *State v. Garcia*, 179 Wn.2d 828, 318 P.3d 266 (2014). In interpreting a statute, the court must “discern and implement the legislature’s intent.” *State v. Williams*, 171 Wn.2d 474, 477, 251 P.3d 877 (2011). The court’s inquiry “always begins with the plain language of the statute.” *State v. Christensen*, 153 Wn.2d 186, 194, 102 P.3d 789 (2004). Unless the legislature has evidenced a contrary intent, courts should rely on the plain and ordinary meaning of words in a statute. *State v. Lilyblad*, 163 Wn.2d 1, 6, 177 P.3d 686 (2008). Courts derive legislative intent solely from clear language in a statute. *Jametsky v. Rodney A.*, -- Wn.2d --, 317 P.3d 1003, 1006 (Wash. 2014).

If a statute is “susceptible to two or more reasonable interpretations, it is ambiguous,” and courts “may turn to additional tools of statutory construction in determining the meaning of the statute.” *In re Det. of Hawkins*, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010). If a criminal statute is ambiguous, the rule of lenity requires the court to construe it in favor of the accused. *State v. Caton*, 174 Wn.2d 239, 242, 273 P.3d 980 (2012).

In Washington, a person “is guilty of a crime if *it is committed* by the conduct of another person for which he or she is legally accountable.” RCW 9A.08.020(1). Under the plain language of this provision, vicarious

liability for a crime only attaches if “another person” engages in conduct that constitutes “it” (the crime). RCW 9A.08.020(1). If the other person has not committed “it,” the accused person cannot be convicted under a theory of vicarious liability. RCW 9A.08.020(1). The complicity statute thus ascribes guilt only for crimes actually committed by the other party.²⁵

Even if RCW 9A.08.020(1) could be interpreted to allow conviction of a greater crime, the remainder of the statute limits accomplice liability to crimes actually committed by the principal. A person may be convicted based on the conduct of another if s/he “is an accomplice of such other person in the commission of *the* crime.” RCW 9A.08.020(2)(c) (emphasis added).²⁶ An “accomplice” is one who knows her or his actions will help the principal commit “the crime.” RCW 9A.08.020(3)(a).²⁷ The plain language of the statute restricts an accomplice’s guilt to “the crime” committed by another person. Although the legislature has decided “that one who participates in a crime is guilty as a principal,”²⁸ this does not mean an accomplice’s mental state can

²⁵ The only exception to this general rule occurs when the other person is “innocent or irresponsible.” RCW 9A.08.020(2)(a).

²⁶ The Supreme Court has found significant the statute’s use of the definite article “the.” *State v. Roberts*, 142 Wn.2d 471, 513, 14 P.3d 713 (2000) (addressing an accomplice’s knowledge of “the crime” in RCW 9A.08.020(3)(a)); *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000) (same). The legislature’s choice of this word indicates intent to narrow liability to the specific crime at issue. *Roberts*, 142 Wn.2d at 511-513.

²⁷ Accomplice liability attaches when a person “[s]olicits, commands, encourages, or requests” another person to commit the crime, or “[a]ids or agrees to aid another person in planning or committing it.” RCW 9A.08.020(3)(a). The prosecution must also prove the accused person knew that his or her actions would “promote or facilitate the commission of the crime.” RCW 9A.08.020(3)(a).

²⁸ *Hoffman*, 116 Wn.2d at 104.

elevate a crime to one more serious than the crime actually committed by the principal.

Both this court and the Court of Appeals have affirmed convictions under circumstances where a jury may have split the elements between two participants. *See, e.g., State v. McDonald*, 138 Wn.2d 680, 690, 981 P.2d 443 (1999); *State v. Hoffman*, 116 Wn.2d 51, 62, 804 P.2d 577 (1991); *State v. Haack*, 88 Wn. App. 423, 428, 958 P.2d 1001 (1997); *State v. Walker*, 321 P.3d 1288, 1290 (Wash. Ct. App. 2014). All of these cases address convictions where the defendant was present and participated in the commission of the crime as a principal. Under these circumstances, a split responsibility theory makes sense.

Unlike *Hoffman* and the other cases cited, the state's evidence in this case showed that Mr. Walker stayed outside while Finley and Turpin went inside to commit the robbery. Regardless of his alleged role in planning the crime, he did not act as a principal because he was not present during the commission of the crime. This does not preclude liability as an accomplice, nor does it prevent him from being convicted and punished in the same manner as Finley, who actually shot Husted. But his liability as an accomplice rested on aid given *with knowledge* of Finley's crimes. RCW 9A.08.020(3). Beyond that, his mental state had no relevance. The split responsibility theory enunciated in *Hoffman* is inapposite. His mental state did not elevate Finley's shooting to premeditated murder, if Finley himself did not premeditate the killing. RCW 9A.08.020(3)(a).

- B. The trial court erroneously instructed jurors that they could convict Mr. Walker of premeditated murder even if Finley committed only intentional murder.

Jury instructions are reviewed *de novo*. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

Instructions that relieve the state of its burden to prove an essential element violate due process. U.S. Const. Amend. XIV; *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). Such an error is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (Brown II). A reviewing court will not affirm a conviction resting on a misstatement that relieves the prosecution of its burden unless uncontroverted evidence supports the misstated element. *Id.*

Here, the court's instructions relieved the state of its burden to show Finley's premeditation. Instruction 10 allowed conviction if Mr. Walker had "a premeditated intent" to cause the death and the jury found that "he *or an accomplice*" caused the death of another. CP 212 (emphasis added). In other words, it permitted conviction if Mr. Walker premeditated the death, but Finley killed with intent and without premeditation. Similarly, the court's "to convict" instruction allowed the jury to vote guilty if "the defendant or an accomplice acted with intent" to cause death, and "the intent to cause the death *was premeditated.*" CP 215 (emphasis

added). This, too, allowed jurors to convict if Mr. Walker premeditated the intent to kill but Finley acted with intent and without premeditation.

The state cannot show the error was harmless beyond a reasonable doubt. Finley's mental state was not uncontroverted, as required for a finding of harmlessness. *Brown II*, 147 Wn.2d at 341. As Mr. Walker argued in closing, the evidence suggested that Finley may have panicked, and decided to kill Husted without deliberating. RCW 9A.32.020; *Bingham*, 105 Wn.2d at 827. Finley's mental state posed a jury question. *Cf. Bingham*, 105 Wn.2d at 827. Under the court's instructions, the jury could convict if it decided that Mr. Walker premeditated the killing, but that Finley did not.

The complicity statute does not permit this result. Although Mr. Walker can be held to answer for the crime Finley actually committed, he cannot be convicted of an offense greater than the one Finley committed. RCW 9A.08.020. Even if Mr. Walker personally deliberated over the idea of killing someone, his mental state at the time Finley shot Husted does not make him guilty of premeditated murder. If Finley did not premeditate the killing, the crime is intentional murder, not premeditated murder. RCW 9A.08.020. Accordingly, the conviction for aggravated premeditated murder must be reversed and the case remanded for a new trial with proper instructions. *Kyllo*, 166 Wn.2d at 864.

IV. MR. WALKER WAS DENIED HIS STATE CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *State v. Johnson*, 88683-I, 2014 WL 1745768 (Wash. May 1, 2014) (Johnson II).

B. The prosecutors' theory infringed Mr. Walker's state constitutional right to a unanimous verdict.

The Washington constitution guarantees the right to a unanimous verdict. Wash. Const. art. I, § 21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). Before a defendant can be convicted, jurors must unanimously agree that he or she committed the charged criminal act. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). Because the federal right does not attach to criminal defendants in Washington,²⁹ it is necessary to determine the scope of the state right.

Ordinarily, the scope of a provision of the state constitution is determined with respect to the six nonexclusive factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). *Gunwall* analysis is required “in cases where the legal principles are not firmly established.” *State v. White*, 135 Wn.2d 761, 769 n. 7, 958 P.2d 982 (1998). Furthermore, even where *Gunwall* analysis is not strictly necessary, “[l]isting the *Gunwall* factors is a helpful approach when arguing *how* Washington's constitution provides greater rights than its federal

²⁹ *Apodaca v. Oregon*, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

counterpart.” *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 642, 211 P.3d 406 (2009). *Id.*³⁰

No Washington court has examined art. I, § 21 under *Gunwall* to determine whether or not an accused person has a constitutional right to jury unanimity as to the mode of participation in a felony. Historically, the common law drew sharp distinctions between accessories before the fact, accessories after the fact, principals in the first degree, and principals in the second degree, and jury unanimity was required as to the mode of participation. *Gunwall* analysis shows that art. I, § 21 incorporated this unanimity requirement.³¹

1. Wash. Const. art. I, § 21 preserves the common law right to a unanimous jury determination of an accused person’s mode of participation in a felony.

The first *Gunwall* factor requires examination of the text of the state constitutional provision at issue. Wash. Const. art. I, § 21 provides

³⁰ See also *White*, 135 Wn.2d at 769 n. 7 (“*Gunwall* analysis is helpful in determining the scope of the broader protections provided in other contexts”); *State v. Pugh*, 167 Wn.2d 825, 846, 225 P.3d 892 (2009) (“The *Gunwall* factors are the best analytical framework this court has for determining how and why the state constitution may offer protections different from the federal constitution.”) (Chambers, J., concurring).

³¹ Mr. Walker did not present a *Gunwall* analysis in the Court of Appeals. This was in part because that court was not empowered to overrule *Hoffman*, 116 Wn. 2d at 104-05 and its progeny. The Supreme Court may consider Mr. Walker’s fleshed-out constitutional argument even though he did not present a *Gunwall* analysis to the Court of Appeals. See, e.g., ; *State v. Iniguez*, 167 Wn.2d 273, 285, 217 P.3d 768 (2009) (“While Iniguez did not provide a *Gunwall* analysis until his supplemental brief, he has argued from the beginning that the pretrial delay violated the Washington Constitution. Therefore, the issue is properly before us”); *State v. Mendez*, 137 Wn.2d 208, 217, 970 P.2d 722 (1999) (deciding an issue on state constitutional grounds raised for the first time in the Supreme Court, and noting that “the core issue is not new”) *abrogated on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400 (2007)

that “[t]he right of trial by jury shall remain inviolate...” The strong, simple, direct, and mandatory language (“shall remain inviolate”) implies a high level of protection, and, in fact, the court has noted that the language of the provision requires strict attention to the rights of individuals. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989).

The second *Gunwall* factor requires analysis of the differences between the texts of parallel provisions of the federal and state constitutions. Art. I, § 21 has no federal counterpart. The Washington Supreme Court has found the difference between the two constitutions significant, and determined that the state constitution provides broader protection.³² *City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982).

Under the third *Gunwall* factor, this court must look to state constitutional and common law history. Art. I, § 21 “preserves the right as it existed at common law in the territory at the time of its adoption.” *Mace*, 98 Wn.2d at 96.³³ Historically, the common law distinguished between four types of participants in crime:³⁴

³² The court held that under the state constitution “no offense can be deemed so petty as to warrant denying a jury trial if it constitutes a crime.” This is in contrast to the more limited protections available under the federal constitution. *Mace*, 98 Wn.2d at 99-100.

³³ See also *State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987); *State v. Smith*, 150 Wn.2d 135, 151, 75 P.3d 934 (2003).

³⁴ Determining the proper category was crucial to a successful prosecution: “the category determined venue (the principal had to be prosecuted where the crime took place, while the aider and abettor had to be prosecuted where his or her act of abetting took place); the phrasing of the indictment (variance was fatal); and, at times, whether the prosecution could
(continued)

- (1) principals in the first degree who actually perpetrated the offense;
- (2) principals in the second degree who were actually or constructively present at the scene of the crime and aided or abetted its commission;
- (3) accessories before the fact who aided or abetted the crime, but were not present at its commission; and
- (4) accessories after the fact who rendered assistance after the crime was complete.

Standefer v. U. S., 447 U.S. 10, 15, 100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980).

Among the other procedural requirements that flowed from these common law distinctions was the requirement of unanimity. In felony cases, the prosecution was required to plead and prove the mode of participation, and conviction required a unanimous finding on that issue:

the common law absolutely prohibited abrogation of verdict specificity, or otherwise eliminating the requirement of unanimity of theory as between an aider and abettor and a principal...

Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principles*, 57 S.C. L. Rev. 85, 112-113 (2005).

These "'intricate' distinctions"³⁵ endured in Washington until they were partially abolished by the territorial legislature in 1881:

No distinction shall exist between an accessory before the fact and a principal, or between principals in the first and second degree, and all persons concerned in the commission of an offense, whether they directly counsel the act constituting the offense, or counsel, aid and abet in its commission, though not present, shall hereafter be indicted, tried and punished as principals.

even be initiated altogether (accessories could be tried only after the conviction of the principal). Consequently, 'considerable effort was expended in defining the categories.'" Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 Fordham L. Rev. 1341, 1357-58 (2002) (footnotes and citations omitted) (quoting *Standefer*, 447 U.S. at 16).

³⁵ *Id.*

Code of 1881, § 956. This statute continued in effect following the 1889 adoption of the state constitution, pursuant to Wash. Const. art. XXVII, § 2.³⁶

Notwithstanding this provision, Washington courts continued to distinguish between the modes of participation where required. *See, e.g., State v. Gifford*, 19 Wash. 464, 53 P. 709 (1898); *State v. Nikolich*, 137 Wash. 62, 241 P. 664 (1925). In *Gifford*, the state charged the defendant with rape as a principal (in accordance with the “no distinction” statute). After conviction, the defendant appealed, and the Supreme Court reversed because the evidence showed he’d aided and abetted the rapist by procuring the victim:

[T]he object of this statute was to do away with some of the technical hindrances which before existed in relation to the trials of accessories, and that it was the intention, under this statute, that the defendant might be indicted and tried even though the principal had been acquitted, and to make an accessory before the fact the same as a principal so far as the punishment was concerned, and so far as the mode, manner, and time of trial were concerned. But we do not think it was the intention of the legislature, in the passage of this law, to set a trap for the feet of defendants. The defendant enters upon the trial with the presumption of innocence in his favor, and if he were called upon to blindly defend against a crime of which he had no notice, and which, we think, would be the result of the strict construction of this law contended for, the law itself would be unconstitutional.

Gifford, 19 Wash. at 468.

In *Nikolich*, several defendants were accused of aiding or abetting “John Doe” in the commission of arson; however, the evidence at trial

³⁶ That provision reads: “All laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature...”

established that the fire was set by one of the codefendants (a Howard Carter).³⁷ Despite this, the jury was instructed to determine whether or not the defendants were guilty of aiding and abetting John Doe. Codefendant Carter was acquitted of the charge, but the remaining defendants were convicted. Under these circumstances, the Supreme Court reversed, reasoning as follows:

Even though the accessory may be tried and convicted as principal either before or after the principal actor, he may not be convicted in the absence of proof that the one to whom he is charged as accessory actually committed the crime... The result [here] is that there is no proof that the principal actor [John Doe] to which the jury were required to find the appellants aiders and abettors had anything to do with the setting of the fire.

Nikolich, 137 Wash. at 66-67. The Supreme Court quoted from a Mississippi case interpreting a similar statute:

“[I]f the evidence shows that one or more [codefendants] were accessories before the fact, though charged in the indictment as principals, it is absolutely necessary to prove the party guilty who actually committed the felony before you can secure proof of the guilt of the accessories before the fact, though charged in the indictment as principals...”

Nikolich, 137 Wash. at 66-67 (quoting *Osborne v. State*, 99 Miss. 410, 55 So. 52, 54 (1911)).³⁸

As these early cases demonstrate, the “no distinction” statute did not purport to dispense with such constitutional requirements as the right

³⁷ Prior to trial, the prosecutor announced that John Doe was Howard Carter; however, no amendment was made to the charging document. *Nikolich*, 137 Wash. at 63-64.

³⁸ The court also cited a Texas case outlining similar reasoning. *Nikolich*, 137 Wash. at 67 (citing *Gibson v. State*, 53 Tex. Crim. 349, 364, 110 S.W. 41 (1908) (“Where a party is being tried as an accessory before the fact, or as an accomplice, it is essential as a predicate for, or condition precedent to, his guilt, that the state should establish the guilt of the principal, for his guilt is dependent on that of the principal, whether the latter is on trial or not.”))

to adequate notice of the mode of participation, or the right to proof beyond a reasonable doubt of the principal's guilt. Nothing in the statute suggests that the legislature sought to eliminate the requirement that jurors be unanimous as to the mode of participation. Code of 1881, § 956. Instead, the object of the statute was to remove certain obstacles to prosecution that had evolved under the common law scheme.

The fourth *Gunwall* factor “directs examination of preexisting state law, which ‘may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.’” *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 809, 83 P.3d 419 (2004) (quoting *Gunwall*, 106 Wn.2d at 62). There do not appear to be any cases addressing nonconstitutional claims on this issue. Nor has there been legislative or executive attempts to address the issue.

The fifth *Gunwall* factor (structural differences in the two constitutions) always points toward pursuing an independent analysis, “because the Federal Constitution is a grant of power from the states, while the State Constitution represents a limitation of the State’s power.” *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

The sixth *Gunwall* factor deals with whether the issue is a matter of particular state interest or local concern. An accused person’s right to juror unanimity is an issue of particular state interest or local concern. *See State v. Silva*, 107 Wn. App. 605, 621, 27 P.3d 663 (2001) (outlining other similar areas of state interest). There is no need for national uniformity on the issue.

Five of the six *Gunwall* factors establish that art. I, § 21 preserved the common law right of unanimity as to mode of participation in a crime; the remaining factor (pre-existing state law) does not favor either side of the analysis. Thus *Gunwall* analysis suggests that the “inviolable” right to a jury trial includes the right to jury unanimity as to the mode of participation. Art. I, § 21.

2. The Supreme Court’s *Hoffman* decision should be reconsidered because the *Hoffman* court did not conduct a *Gunwall* analysis.

The Washington Supreme Court has previously held that “the right to jury unanimity” does not include unanimity as to the mode of an accused person’s participation in a crime. *See Hoffman*, 116 Wn. 2d at 104-05 (citing *State v. Carothers*, 84 Wn.2d 256, 525 P.2d 731 (1974), *disapproved on other grounds by Harris*, 102 Wn.2d at 153-154). Although the *Hoffman* case referred to the “right to jury unanimity,” the court made no mention of art. I, § 21 and did not analyze the scope of that provision under *Gunwall*.³⁹ Instead, the court relied on the reasoning outlined in *Carothers*.⁴⁰

Carothers does not provide an adequate foundation for dispensing with a constitutional right derived from centuries of common law. That decision made only one passing reference to art. I, § 21. *Carothers*, 84

³⁹ Nor did the court undertake any other form of guided historical analysis.

⁴⁰ The *Hoffman* court also claimed that “[t]his court reaffirmed [*Carothers*] in *State v. Davis*, 101 Wn.2d 654, 658, 682 P.2d 883 (1984).” But *Davis* had nothing to do with unanimity. Instead, the *Davis* court held that an accomplice to robbery could be found guilty of first degree robbery even absent proof of knowledge that the principal was armed.

Wn.2d at 262 (noting that the unanimity issue was constitutional and thus could be raised for the first time on review). The court did not analyze the provision to determine whether or not it protected a right to unanimity as to the mode of an accused person's participation.

Second, even if *Carothers* had examined art. I, § 21, it would not have had the benefit of *Gunwall* (which was not decided until 1986). *Gunwall* provides the appropriate framework for answering questions such as that posed by this issue. In the absence of proper *Gunwall* analysis, the *Carothers* court's reasoning amounted to little more than "pure intuition," rather than the "articulable reasoned" process that now governs the analysis. *Gunwall*, 106 Wn.2d at 63.

Third, the *Carothers* court focused on whether the mode of participation comprised an alternative means⁴¹ of committing an offense. *Id.* at 262-264. The court determined that it was *not* an alternative means, and thus the unanimity issue was not controlled by *State v. Golladay*, 78 Wn. 2d 121, 470 P.2d 191 (1970) *overruled in part by State v. Arndt*, 87 Wn. 2d 374, 553 P.2d 1328 (1976).⁴² But this holding is not a determination of the protections afforded by art. I, § 21.⁴³ Whether or not

⁴¹ The court used the phrase "method or mode of committing a crime" instead of the phrase "alternative means."

⁴² In *Golladay*, the court overturned a conviction after the trial court submitted three alternative means to the jury, one of which was not supported by sufficient evidence.

⁴³ If the *Carothers* holding described the scope of art. I, § 21, then multiple acts cases would also not require juror unanimity, since multiple acts are not alternative means of committing a crime. But a unanimity instruction is always required in a multiple acts case, unless the prosecution elects a particular act to support a charge.

the mode of participation is an alternative means of committing a crime, art I, § 21 protects the right to a unanimous jury determination as to the mode of participation.⁴⁴

Because the *Hoffman* court did not undertake a *Gunwall* analysis, *Hoffman* and its progeny should be reconsidered. This is especially so because *Hoffman* rested on the limited and imperfect reasoning of *Carothers*.

3. The trial court's failure to require juror unanimity as to the mode of participation requires reversal of the conviction because the prosecution relied on proof that Mr. Walker acted as a principal and as an accomplice with respect to the element of premeditation.

The rule developed for "multiple acts" cases should apply to cases where conviction might rest on principal or accomplice liability. In multiple acts cases, the failure to provide a unanimity instruction is presumed to be prejudicial.⁴⁵ *Coleman*, 159 Wn.2d at 512; see also *State v. Vander Houwen*, 163 Wn.2d 25, 38, 177 P.3d 93 (2008). Without the election or instruction, each juror's guilty vote might be based on facts that fellow jurors believe were not established. *Coleman*, 159 Wn.2d at 512. Failure to provide a unanimity instruction requires reversal unless the error is harmless beyond a reasonable doubt. *Coleman*, 159 Wn.2d at 512. The presumption of prejudice is overcome only if no rational juror could have a reasonable doubt about any of the alleged criminal acts. *Id.*, at 512.

⁴⁴ In addition, the *Carothers* decision dealt with a prior statute. The legislature enacted RCW 9A.08.020 in 1975. 1975 1st ex.s. c 260 § 9A.08.020.

⁴⁵ Unless the prosecution elects a particular act upon which to proceed.

The same rule should apply as to the mode of participation. If the court instructs on accomplice liability but there is evidence that the accused person acted as a principal, either the prosecution must elect a particular theory of liability or the court must instruct jurors that unanimity is required as to the mode of participation. *See Coleman*, 159 Wn.2d at 512. Failure to do so is constitutional error that is presumed prejudicial and requires reversal unless harmless beyond a reasonable doubt. *Id.*

In this case, the court's instructions allowed conviction by a split jury. CP 212, 215. The prosecutor repeatedly argued that Mr. Walker premeditated the killing, either by planning a murder as part of the robbery, or at the point when he told Finley (over the phone) to shoot (or kill) Husted. The prosecutor also suggested that Finley premeditated the killing, arguing that premeditation was established by Finley targeting Husted's head. But a rational juror could have rejected either argument. RP 1335-1395; Ex 243. Evidence that Mr. Walker premeditated the killing came entirely from state witnesses with credibility problems. Jurors were entitled to disbelieve their testimony, including Williams-Irby's statement that Mr. Walker directed Finley to shoot Husted. For the same reasons, a rational juror could have decided that Finley spontaneously decided to kill Husted without deliberating over his decision.

In light of this, some jurors may have believed that only Finley premeditated the killing. Others might have believed that only Mr. Walker premeditated the killing. Under the court's instructions, the jury could

convict even if they did not unanimously agree.

The court's failure to instruct on the unanimity requirement violated Mr. Walker's state constitutional right to a unanimous jury under art. I, § 21. His conviction must be reversed and the case remanded for a new trial. If the prosecutor does not elect a theory of liability, the jury must be instructed on the unanimity requirement. *See Coleman*, 159 Wn.2d at 512.

CONCLUSION

For the foregoing reasons, the court should reverse Mr. Walker's convictions and remand the case for a new trial.

Respectfully submitted on May 9, 2014.

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CERTIFICATE OF MAILING

I certify that on today's date:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 9, 2014.



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