

NO. 63579-4-I-1

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

STATE OF WASHINGTON,

Respondent,

v.

IVORY BERUBE,

Appellant.

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

The Honorable Jeffrey M. Ramsdell, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Numerous instances of flagrant prosecutorial misconduct denied appellant a fair trial.

2. The trial court erred in instructing the jury that it must be unanimous to negatively answer the firearm special verdict. CP 50; appendix A.

Issues Pertaining to Assignments of Error

1. In closing the prosecutor improperly: injected racial bias, commented on appellant's right to be present for and testify at his trial, shifted the state's burden of proof, argued facts not in evidence, appealed to the jury's passion and prejudice, trivialized the burden of proof and misstated the law. Under any standard of prejudice, does the flagrant and cumulative misconduct require reversal?

2. It is reversible error to instruct a jury it may answer a special verdict "no" only if it unanimously has a reasonable doubt about the question. Appellant's jury received such an instruction. Should this Court vacate the special verdict and the 60-month enhancement based on that verdict?

B. STATEMENT OF THE CASE

1. Procedural Facts

On July 22, 2008, the King County prosecutor charged appellant Ivory Berube with first degree assault. The state alleged Ivory, along with his brother Emory,<sup>1</sup> assaulted Tanisha Barquet. CP 1-2. At the beginning of trial on April 9, 2009, the court allowed the state to file an amended information charging Ivory with two counts: first degree assault, while armed with a firearm and deadly weapon; and first degree unlawful possession of a firearm. 1RP<sup>2</sup> 4-5; Supp. CP \_\_ (sub no. 62A, Motion and Order). The amended information was filed May 6, 2009, after trial concluded. CP 57-59.

The state also alleged the brothers were armed with a firearm, as defined in RCW 9.41.010, at the time of the offense. CP 57. Instruction 18, the firearm special verdict instruction proposed by the state,<sup>3</sup>

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<sup>1</sup> Because the brothers share a last name, this brief generally refers to each by his first name.

<sup>2</sup> This brief refers to the transcripts as follows: 1RP – 4/9/09; 2RP – 4/13/09; 3RP – 4/15/09; 4RP – 4/16/09 (morning, JoAnn Bowen, reporter); 5RP – 4/16/09 (afternoon); 6RP – 4/20/09; 7RP – 4/21/09; 8RP – 4/22/09; 9RP – 4/23/09; 10RP – 4/24/09 (jury inquiry); 11RP 5/29/09 (sentencing); 12RP – 7/20/10 (record reconstruction); 13RP 9/9/10 (record reconstruction).

<sup>3</sup> The defense proposed no instructions and took no exceptions to the state's proposed instructions. 6RP 113; 9RP 3.

erroneously required the jury to be unanimous before it could reject the special verdict. CP 50; Appendix A; see argument 2, infra.

On April 24, 2009, the jury found Ivory guilty of the charged offenses. CP 52-53. It also answered “yes” to this question on the special verdict form: “[w]as the defendant Ivory Berube armed with a firearm at the time of the commission of the crime in Count I?” CP 54.

The trial court imposed concurrent standard range sentences of 318 months on count I and 116 on count II. Based on the special verdict, it added a 60-month enhancement to the count I sentence, for a total of 378 months. CP 73, 75. This appeal timely follows. CP 70-71.

2. Efforts to Construct Missing Parts of the Transcript.

Trial was held in April, 2009. On April 22, the defense presented three witnesses: Evelyn Brown, Sergeant James Dymont, and Ivory Berube. Brown’s testimony was reported and transcribed by court reporter JoAnn Bowen.

Ms. Bowen was replaced that morning by court reporter Dalee Dickinson. After lengthy efforts by appellate counsel to find Ms. Dickinson and any reporter notes from Dymont’s and Ivory’s testimony that morning, it was determined there were no notes to be found. Supp. CP \_\_ (sub 100, correspondence and attachments). By ruling dated June

21, 2010, this Court granted the defense motion to remand the matter to the trial court to make efforts to reconstruct the missing testimony.

Those efforts were discussed at hearings on July 20 and September 9, 2010. Berube participated in the process in good faith, but waived no objections to the adequacy of any “record” it might produce. 12RP 4-5, 9, 13-14, 21, 27; 13RP 4-7, 30-32, 42.

At the July 20<sup>th</sup> hearing, the court directed the state to propose a narrative report of proceedings of the missing testimony, and then allowed Berube and his trial counsel the opportunity to offer additions or deletions. 12RP 19-28. On September 9<sup>th</sup>, the court and the parties discussed the state’s draft. 13RP 2-50; Supp. CP \_\_ (sub no. 127, Draft Narrative Report).

The problems with post-hoc efforts to reconstruct the missing transcript were discussed by the court and counsel at length. 12RP 3-28; 13RP 3-14. Although the court had taken notes during the testimony, it was unwilling to provide those notes to the parties. Defense counsel requested them and that request was denied.<sup>4</sup> 12RP 5, 12, 18; 13RP 7.

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<sup>4</sup> At one point the court pondered the possibility that it would draft a narrative report of proceedings from its notes, then wondered whether that would permit the parties to see the court’s notes. The court stated, “I’m not going there. And no appellate court is going to make me.” 12RP 5. Later the court mentioned “that’s a Rubicon we don’t want to cross.” 12RP 12. The court somewhat modified its position at the second hearing,

Nonetheless, the court used its notes to resolve disputed matters, and resolved some of those disputes against the defense. 13RP 17-18, 21-22, 23, 28, 33-34, 37-40.

Defense counsel also asked the court to direct the state to provide its counsel's notes, since the state had developed its draft report from those notes. The court denied that request. 13RP 7-13. Counsel requested that the state be directed to provide the notes as a sealed exhibit for in camera review. That request also was denied. 13RP 11-13.

Trial defense counsel, Kris Jensen, had little ability to comment on the state's draft. Jensen explained he took few notes during trial and it was impossible for him to separate his recollection of pretrial witness interviews from what the witnesses said on the stand. 13RP 3-4. Jensen believed the state's narrative was inadequate, but felt "powerless to help this situation." 13RP 4-5. The court said the reconstruction process was going to be completed at the September 9<sup>th</sup> hearing. 13RP 15.

The court and the parties then discussed specific disagreements with the state's proposed narrative. The court resolved those disputes orally. 13RP 15-41. At the end of the hearing, the court directed the state

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stating it would discuss its own notes on any specific facts the parties disputed. 13RP 7, 13-14, 40.

to produce a narrative summary and to file a copy of the initial draft the parties and the court were modifying. 13RP 45-49.

The court denied the defense motion to vacate the convictions for lack of an adequate record and to grant a new trial. 13RP 42-45, 49-50. The hearing was fairly rushed, as the court had a jury trial pending. When Ivory Berube asked to address the court with his personal additional recollections, the court denied the request. 13RP 31-32, 47, 50-52.

The summaries of Dyment's and Ivory's testimony were later filed and are referenced in this brief as "Berube summary" and "Dyment summary". Supp. CP \_\_ (sub no. 105A and 105B, Narrative Reports), attached as appendices B and C.

### 3. Trial Testimony

The main questions for the jury were identification and credibility. There was no dispute Barquet was shot near Waid's Haitian Restaurant in Seattle's central area. Ex. 20; 3RP 9-11, 72-79; 4RP 48; 6RP 19, 23. She was seriously injured, bled a lot, and emergency surgery saved her life. 3RP 107-08; 4RP 54-56; 5RP 8-18. The question was who shot her.

Ivory testified and denied shooting Barquet. As noted above, however, the superior court failed to produce a verbatim report of his testimony. His testimony instead is summarized in a narrative report of proceedings. Appendix B.

The state's case was largely based on Barquet's identification and a surveillance video from Waid's. The visual quality was not adequate to identify the shooter, but it provided context. Ex. 20; 9RP 18-19. Barquet was able to identify herself in the video. 4RP 65-66.

a. Barquet's Drinking and Denial

Barquet spent the night of July 11-12, 2008, drinking and patronizing several different clubs in the Seattle area. 4RP 22-67. In the hospital at about 2:30 a.m., her blood alcohol level was .217. This meant she drank somewhere between 4-8 shots of liquor within an hour or two before she reached the hospital. 5RP 19-23.

However, Barquet's testimony conflicted with this physical evidence. She admitted she started drinking early, having two shots of Hennessy cognac before she left her house. 4RP 27-28, 76. She then went to Thompson's Point of View on 23<sup>rd</sup> and Union, with her friend ("cousin") Kyla Jackson. 4RP 25-26. She said Thompson's was "the normal spot where I go have a drink or two before I just ride around and do a little bar hopping." 4RP 25. This was "typical" for her. 4RP 27.

She said she was outside Thompson's for 20-30 minutes. She claimed she did not drink anything during that time, even though there was a bottle in Jackson's car. 4RP 29, 76-77.

She and Jackson left Thompson's and went to the Annex, a tavern in the East Marginal Way area. She said they were there about 30-40 minutes. She said she had one shot of Hennessy. 4RP 42, 76.

She and Jackson then went to Champs, a club in Renton. There she ran into another woman she knew, Alysha Johnson. She had "kicked it" with Johnson before, so she got in Johnson's car. She thought it was about midnight so they would go bar hopping in Skyway or somewhere they knew people, before the bars closed. 4RP 46-47.

Instead they ended up at Waid's. Barquet said her memory between Champs and Waid's was "blurry" and "foggy," but claimed it was not because of alcohol. 4RP 46-47, 81. Barquet said they parked where they usually parked, across the street from Waid's. 4RP 48-49, 65.

Barquet claimed at that point she had drunk four shots of Hennessy. 4RP 27, 46-47, 76, 81. If Barquet's claim was truthful or accurate – that she drank two shots around 9:00 and two more around 11:00 – her blood alcohol reading would have been .1 or less at the hospital. 6RP 23.

b. Shooting and Immediate Aftermath

The shooting occurred near Waid's on Jefferson Street between 12<sup>th</sup> and 13<sup>th</sup> Avenues, about 1:44 a.m. on July 12, 2008. 3RP 9-15, 40-52; 4RP 50-52; 6RP 20-23; Ex. 20. After Barquet was shot she ran across

the street and into a fenced area next to a house. 3RP 20, 49-53, 74-75; 4RP 51-53; Ex. 11, 20.

Officers responding to the scene heard the suspect described as a black male in a white T-shirt and white baseball cap, possibly wearing glasses, running north on 13<sup>th</sup> Avenue. 3RP 17, 30-31; 6RP 21-22, 34.

Officers initially stopped a car with four occupants at 14<sup>th</sup> and Yesler. 3RP 23, 30, 125; 6RP 23, 26-27. Officer James Dymont stopped the car and considered it a high risk situation. Dymont Summary, at 1; 6RP 29. The front seat passenger, Charles Justice, made furtive movements under the seat when the car was stopped. He was breathing hard and admitted he had been at the scene of the shooting. *Id.*, at 2; 3RP 113-15. Justice was wearing a white T-shirt and jeans. Dymont Summary, at 2.

When arrested, Justice pushed an officer and tried to flee. He apparently did not get far, as “there was a taser deployed.” 6RP 27, 90; Dymont Summary, at 2 (“he was tazed and that effectively stopped him”). Additional police efforts to arrest Justice must have been fairly enthusiastic; substantial injuries are shown in Justice’s booking photo. Ex. 37.<sup>5</sup>

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<sup>5</sup> See also, Dymont summary, at 2 (“Justice was injured and incapacitated by being tazed”).

All four of the car's occupants were taken to the precinct. Ex. 37, 38, 39; 3RP 34; 6RP 23, 27-28, 88; Dymment summary, at 2. After a search warrant was secured, officers found 2 guns in the car. A Ruger 9 mm semiautomatic was in the rear passenger seat, and a Colt .380 semiautomatic was recovered from the side of the front passenger seat. Ex. 6; 3RP 65-66, 114-15; Dymment Summary, at 2.

Officers recovered a spent bullet and one of Barquet's earrings in the street. 3RP 28, 46, 54-59, 67-70, 6RP 24. Officers found no shell casings which might be expected if the shots were fired from a semi-automatic pistol, but numerous cars and people had been through the scene and any casing could have been picked up in tire or shoe treads. Ex. 31; 3RP 23-24, 27, 52-53, 126; 6RP 64-65; Dymment Summary, at 2. Officers also did not search an adjacent fenced area for shell casings. 6RP 30.

Responding officers initially tended to Barquet's wounds. Medics took over and she was transported to Harborview. 3RP 19-22, 74-79, 102-03; 5RP 8-9.

c. Montages Presented to Barquet

Barquet had been convicted in 2001 for making a false statement, in 2002 for false reporting, and in 2006 for possessing stolen property. 4RP 69-70. Her presence as a witness was secured through a material

witness warrant. She had been arrested and was required to check in every day with Detective Cooper. 4RP 57-59.

At the time of trial, Barquet was no longer friends with Alysha Johnson. She said the “word on the street” was that Johnson had “set her up.” 4RP 67-68, 89-91.

Numerous people at the scene identified themselves as Barquet’s friends and “cousins.” No one came forward to identify the shooter. 3RP 28, 32-33; 6RP 95.

Barquet has a large family in Seattle. She has eight brothers and sisters, along with hundreds of aunts, uncles, and cousins in the Seattle area. 4RP 24. When she woke up from surgery, somewhere between 10 and 20 members of her family were there. 4RP 86-87. They told her that “Ivory was the one who shot me and basically that was it.” RP 88.

After Barquet’s family told her who they believed shot her, Detective James Cooper prepared a montage including Justice’s photo. He visited Barquet at Harborview after her surgery. Several of her family members were present. 3RP 103-08; 4RP 86-87. She recognized “Chuck Ray” – Charles Ray Justice – but denied he was the shooter. 3RP 112-13; 4RP 62.<sup>6</sup>

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<sup>6</sup> The state did not charge Justice with the shooting, but he was convicted for unlawfully possessing a firearm. 3RP 127.

After Cooper met with Barquet, he made two additional montages, including images of Emory and Ivory Berube. 3RP 115-16, 123. She said Emory had confronted her earlier that night at Thompson's Point of View, a club on the corner of 23<sup>rd</sup> and Union. 4RP 60-61. She said Ivory was the person who shot her. 3RP 124; 4RP 61-62. She denied she identified Ivory based on her family's suggestions. 4RP 93-95.

Cooper did not interview Justice or the other people in the car stopped that night. 6RP 87-88, 93.

d. Surveillance Videos from Waid's

Cooper received a copy of surveillance videos from Waid's of that night's events. The first video showed events leading up to the shooting, but the shooting itself was out of camera range. The second video showed events after Barquet had run to a fenced area across the street after the shooting. Ex. 20; 3RP 128; 6RP 39-40.

Cooper watched the videos 50-60 times. He also watched the videos several times with Barquet. Ex. 20; 3RP 129; 4RP 91.<sup>7</sup>

Barquet narrated her role in the first video. She drove up in Alysha Johnson's car about 35:25 and they parked across the street from Waid's.

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<sup>7</sup> Cooper contacted Alysha Johnson, but said she was "uncooperative." 6RP 40-41, 68-71.

She was the person in the street about 40:03. At 40:29, she was running across from right to left, after being shot. Ex. 20; 4RP 64-67.

At 38:15 or 38:21 in the first video, Cooper believed he saw a person wearing a white T-Shirt and white hat make a gesture designed to represent the “racking” of a gun. Cooper explained that “racking” is the way to chamber a round into a semiautomatic handgun so it is loaded for firing. 3RP 133; 6RP 35-38. About 40:26 in the first video, a person in a white shirt ran eastbound toward 13<sup>th</sup>. 6RP 38-39.

Barquet said she was shot from behind. That shot grazed her head and split her ear. She said she turned and looked at his face “and he shot me again,” the second time in the leg. She said the shooter was Ivory. 4RP 50-54, 92.

Barquet ran across the street into a fenced area next to a house. She tried to climb the fence but could not. She banged on the house and the resident called 911. 4RP 52-53.

About 50 seconds into the second video a number of people walked into the fenced area after Barquet. They left the fenced area about 30 seconds later and stood nearby on the sidewalk, moving around. Ex. 20; 6RP 64-66.

e. State's Theory

The state theorized the shooting was in retaliation for a previous shooting in the Central Area. In early June, Detective Shandy Cobane was assigned to investigate the shooting of Diantre Jefferson, also known as "Eclipse."<sup>8</sup>

Barquet said she was confronted outside of Thompson's by "some dude [she] didn't know," asking her something about his friend "Clips" getting shot in June or July. She said the man was loud and called her names from an arm's length away. People said the man was named "Inch." Ex. 13; 3RP 120-22; 4RP 28-29, 33-34, 74. The confrontation apparently was not unusual for Thompson's, where Barquet said "[e]verybody gets in an argument[.]" 4RP 72. "Inch," who she identified as Emory, just seemed like a loud person. 4RP 80-81.

She said rumors had her being involved with the prior shooting. 4RP 32. When Emory started talking on his phone, she decided she wanted to leave the area. She walked back to Kyla Jackson's car. 4RP 36, 40.

She said Clips arrived before they left. She knew Clips, but had not seen Ivory before that night. She said Jackson told her Ivory's name.

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<sup>8</sup> The record variously refers to the nickname as "Eclipse" and Clips." 2RP 19; 4RP 31, 38, 80; 6RP 5, 7-9, 16.

She said she saw Ivory park the car and put something in his waist before he crossed the street and approached her. She said he was wearing a white T-shirt, gray hooded sweatshirt, a hat, and glasses. She didn't know what he had put in his waist. 4RP 36-39, 75, 79-80.

She said he spoke with her in the car, where he saw a tattoo on her arm. She claimed he said, "Oh, you are a Barquet. . . . I grew up with your family." 4RP 41. Clips and Emory stayed on the other side of the street. 4RP 41, 80.

A liquor store is located across the street from Thompson's. 4RP 36, 39; 6RP 84. Officers did not retrieve surveillance videos from Thompson's or the liquor store. 6RP 85-86. Barquet said there were 20-30 people outside Thompson's, and she knew who some of them were. 4RP 78-79.

The state also offered testimony from Joey Burgess, who was driving down Jefferson when he heard shots. It was almost 2:00 am and he pulled over and called 911. He saw people running to scatter, and another person running with what he called more of a "purpose." That person was wearing a big T-shirt and he scuffled with something shaped like a gun or a banana in the front of his shorts. The person was wearing a baseball hat to the side and ran up 13<sup>th</sup> toward the Seattle University playing field. 5RP 29-39.

Burgess admitted things happened fast, but in court he thought the person looked like Ivory. 5RP 40-41, 46-47. Burgess also admitted the person in Exhibit 13 was wearing a shirt that looked like the shirt worn by the shooter. 5RP 55-56. That was a photo of Emory on the night he was arrested in front of Thompson's. 6RP 95. On August 1, three weeks after Barquet had said it was Ivory and a few days after Ivory had been arrested, Detective Cooper showed Burgess a montage with Ivory's picture. Burgess believed Ivory's picture most resembled the shooter, but was not sure. 5RP 43-48; 6RP 42-44, 58-63.

Emory was arrested near Thompson's about 11:30 pm on July 17<sup>th</sup>. 6RP 42. Shortly after he was arrested, Emory made a phone call to Ivory from the jail. Ex. 31; 6RP 106-08. Much of the call referenced Emory's difficulty contacting his attorney and bail bondsmen. At one point Ivory said something about being "in the wind." Ex. 31. The state theorized Ivory fled Washington after Emory's call. 9RP 21.

On July 28, Ivory was arrested at his mother's house in New Bedford, Massachusetts. 6RP 43-44; 7RP 18-19. The state had initially subpoenaed his mother, Deborah Berube, as a state's witness. But when the state declined to call her, she flew out to testify at her own expense, borrowing money for airfare. 7RP 27, 30-31, 45-47. She confirmed she and Ivory had multiple conversations about his intent to visit in the months

before he came, as she had been in poor health. He had not been able to visit for a long time and had been saving money to make the trip. 7RP 7-14, 32.

Ivory had explained to his mother that the police had arrested Emory because they thought he was involved in the shooting incident. Ivory said he had told Emory to shut up and to stop arguing with the girl. Ivory and Emory both denied any involvement in the shooting. 7RP 15-18, 37, 39, 42, 47. Ivory had said he had drinks with Barquet in the back of the car. 7RP 39-41.

During a family gathering, Ivory received a phone call from his girlfriend Danielle, who said there was a warrant for his arrest. 7RP 14, 36-37. Cooper had secured the warrant. 6RP 42-43. The next morning marshals served the warrant and arrested Ivory. Mrs. Berube was at work at the time, but she came home and consented to a search of her house. 7RP 18-21, 44, 48.

Seattle Detectives Cooper and Seguro interviewed Ivory at a holding cell in New Bedford. After being told why they were there, Ivory denied shooting or knowing Barquet. Ivory said he had spoken with Barquet's friend, not with her. 6RP 44-49.

The officers then tried a "ruse," claiming Emory had told them Ivory was the one wearing the white hat and T-shirt on the video. Ivory

again denied involvement, but said he saw the person who shot Barquet. 6RP 49-52, 75. According to the officers, he would not tell them who it was, saying “[t]hat’s not how I roll. I’m not down like that.” 6RP 52.

Cooper said Ivory told the officers he would see them in court. 6RP 52-53. In response to Cooper’s questions about Ivory’s job at Goodwill and supervision by the Department of Corrections, Ivory said he was quitting the job and had not told his corrections officer of his move to Massachusetts. 6RP 53-54. According to Cooper, when the officers left the holding cell, Ivory said the police might have witnesses now, but he wanted to see who would “actually follow through at the time of trial and testify against him and his brother.” 6RP 55.

The summary of Ivory’s testimony confirms that he had been planning to visit his mother and had discussed it numerous times with her. Berube Summary, at 1. In July of 2008 he was living with his girlfriend, Danielle, and her son. Id., at 2.

On the evening of July 11 he was at Thompson’s. He was inside at times and came outside a couple times. Emory was outside. Ivory described Emory as “cocky” and the kind of person who did not like to be confronted. Id.

Ivory found out Emory had been in an argument with Barquet, and Ivory spoke with Kyla Jackson, whom he knew. Several guys were

around Jackson's truck, and Ivory also spoke with Barquet when he noticed her tattoo. Jackson offered Ivory a drink of vodka from a paper cup, and everything was cordial. There were surveillance cameras at the liquor store, where Jackson's truck was parked. Ivory was unable to calm Emory, so Ivory left. Id., at 2-3.

Ivory went to 12<sup>th</sup> and Jefferson, a place called Teddy's where he had one drink, a Courvoisier. He thought he was in Teddy's at least 15 minutes before the incident. He came outside and Emory was exchanging insults with Barquet again. He said he told them to stop arguing. Id., at 3.

Ivory heard gunshots and then everyone ran. He ran toward 13<sup>th</sup> where he got a ride. Ivory had seen the video, and he was not in the video at all. Id., at 3-4.

Ivory knew Emory had been arrested. They spoke on the phone. He distinguished the saying "in the wind" from "getting in the wind." Ivory had not been concerned that anyone was looking for him; he saw on the news there were three suspects, which did not include him. Id., at 4.

When Ivory visited his mother in New Bedford he spoke with Danielle every day. He thought Danielle would be happy a warrant was issued because he would have to come back to Washington sooner. He did not run away from Seattle and he would not bring a bad situation to his mother's house. Id., at 4, 6.

He was arrested shortly after he heard about the warrant. Cooper and the other detective interviewed him, and during the interview he said he would see them in court. He denied saying that there might be witnesses now, but that none would follow through at the time of trial. He denied that he knew who shot Barquet. Id., at 4-5.

Ivory had seen Eclipse or “E Clips” several times, but did not hang out with him. Ivory did not remember seeing Eclipse that evening at Thompson’s. He knew Eclipse had been shot in June. Ivory said he had no beef with Barquet or her family. Id., at 5.

In his testimony, Ivory provided details regarding his arrival at Waid’s, his alcohol consumption that evening, his whereabouts and his thoughts when the gun went off. Those details were not retained in the narrative summary, however. Id.

Ivory knew people in the area at Waid’s, but he refused to provide their names. He knew he was in serious trouble and the names of other witnesses might help his case. He tried to “take the 5<sup>th</sup> amendment” but the court instructed him to answer the questions. Ivory refused to provide the names of any others who were present. Id., at 6.

#### 4. Closing Argument

To avoid repetition, the prosecutor’s closing is summarized in argument 1, infra.

C. ARGUMENT

1. THE PROSECUTOR'S FLAGRANT AND REPEATED MISCONDUCT DENIED BERUBE A FAIR TRIAL.

A prosecuting attorney's misconduct during closing argument can deny an accused his right to a fair trial as guaranteed by the Sixth Amendment and Const. art. I, § 22. State v. Monday, 171 Wn.2d 667, 676-77, 297 P.3d 551 (2011); State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). Consistent with their duties, prosecutors must not urge guilty verdicts on improper grounds. A prosecutor must always refrain from making statements that are not supported by the evidence. Belgarde, 110 Wn.2d at 507-08; State v. Gibson, 75 Wn.2d 174, 176, 449 P.2d 692 (1969), cert. denied, 396 U.S. 1019 (1970).

In closing, the prosecutor recognized the only real trial issue was identity. 9RP 10. Although the prosecutor argued the jury could find Berube guilty solely on Barquet's testimony (9RP 14), the prosecutor also knew Barquet had lied to minimize the amount she drank that night, she had very little opportunity to see the shooter, and when she came out of surgery her family suggestively told her Ivory was the shooter. To bolster that weak

identification, the prosecutor's closing weaved together a variety of flagrant misconduct condemned by Washington courts. Because the errors are prejudicial, this Court should reverse the convictions.

a. The Prosecutor Wrongly Injected Racial Prejudice Into Deliberations By Arguing African Americans Follow a "Don't Snitch" "Code".

The video showed numerous African Americans on the sidewalk and in the street in front of Waid's. Ex. 20. Charles Justice and the other people in the car with him were African American. Barquet and the Berube brothers were African American.<sup>9</sup> It is in this context that the prosecutor made her argument.

The prosecutor's closing initially started with a theory that people who witnessed the shooting were not willing to testify against Berube

because there is a code. And that code is: Don't snitch. Don't get the police involved. Don't help the police. Don't assist in bringing someone down. We will handle it ourselves. We will execute street justice.

9RP 7. The prosecutor then claimed people "live by this code for a number of reasons." 9RP 7. She then made up several: (1) "to protect their friends and associates," (2) "to frustrate the system," (3) "the system doesn't work very well for them," and (4) "they have to in order to survive where they live." 9RP 7-8. She further argued "the code does not seek justice. It

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<sup>9</sup> Ex. 14, 15, 16, 23, 24, 25, 26, 37, 38, 39.

enables the individual who is committing the crime. It doesn't seek justice because not only does it prevent those witnesses from coming to court; it perpetuates the chaos and lawlessness of the streets." 9RP 8.

According to the prosecutor, "the code" enabled Berube. The prosecutor theorized that Berube knew this when he speculated to Cooper that witnesses might not come to court. 9RP 8. The prosecutor said that Barquet "understands that code." 9RP 8. According to the prosecutor, "the code" made Barquet afraid for herself and her family. 9RP 8-9. The prosecutor said Barquet knew that "street justice applies in her world." 9RP 15.

The Supreme Court recently condemned similar arguments by King County prosecutor Jim Konat as improperly injecting racial prejudice into a trial. State v. Monday, 171 Wn.2d 667, 678-80, 297 P.3d 551 (2011). The state charged Monday with murder for a shooting in Pioneer Square. Much of the event happened to be captured on video. When arrested and interrogated, Monday tearfully confessed. Nonetheless, witnesses to the shooting in large part declined to assist the police. Konat tried to explain this by asking various witnesses if there was a "code" on the streets not to "snitch," or talk to the police.<sup>10</sup> Monday, 171 Wn.2d at 669-74.

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<sup>10</sup> At times, Konat and various witnesses pronounced this word "po-leese." Monday, 171 Wn.2d at 671-75.

In closing, Konat argued that much of the state's eyewitness testimony conflicted with the video evidence because of "the code. And the code is black folk don't testify against black folk. You don't snitch to the police." Monday, at 674. Konat, like the prosecutor here, referenced "the code" several times. Monday, at 674; 9RP 7-8.

The Supreme Court condemned the argument as "injecting racial prejudice into the trial proceedings." Monday, at 678. This was "highly improper." Id., at 679.

The notion that the State's representative in a criminal trial, the prosecutor, should seek to achieve a conviction by resorting to racist arguments is so fundamentally opposed to our founding principles, values, and fabric of our justice system that it should not need to be explained. The Bill of Rights sought to guarantee certain fundamental rights, including the right to a fair and impartial trial. The constitutional promise of an "impartial jury trial" commands jury indifference to race. If justice is not equal for all, it is not justice. The gravity of the violation of article I, section 22 and Sixth Amendment principles by a prosecutor's intentional appeals to racial prejudices cannot be minimized or easily rationalized as harmless. Because appeals by a prosecutor to racial bias necessarily seek to single out one racial minority for different treatment, it fundamentally undermines the principle of equal justice and is so repugnant to the concept of an impartial trial its very existence demands that appellate courts set appropriate standards to deter such conduct. If our past efforts to address prosecutorial misconduct have proved insufficient to deter such conduct, then we must apply other tested and proven tests.

Monday, at 680. The Monday majority settled on constitutional harmless error as the deterrent. Id.

In response the state may suggest Konat's argument was, in some ways, worse than this prosecutor's. After all, he actually said the words "black folk don't testify against black folk." But in the context of this trial, the error was no less obvious and offensive. The group of potential witnesses in front of Waid's were African Americans and no juror could have failed to recognize that fact.<sup>11</sup> Like Konat, this prosecutor offered "the code" to explain the state's frustration with a perceived lack of cooperation. The same racially discriminatory message was made equally clear to this jury.

But this prosecutor's argument was in some ways worse than Konat's. At least Konat asked witnesses about "the code." No testimony graces this record of a "code" to not "snitch"; the prosecutor's closing is the only place in the transcript where the words "snitch" and "code" can be found. This prosecutor not only made the argument condemned in Monday, she did so without the dubious virtue of evidentiary support.<sup>12</sup>

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<sup>11</sup> Ex. 14, 15, 16, 20, 23, 24, 25, 26, 37, 38, 39.

<sup>12</sup> This is a separate egregious error, as a prosecutor is prohibited from commenting on factual matters outside the admitted evidence. Belgarde, 110 Wn.2d at 507-08. This record contains no evidence showing a "code," nor evidence suggesting any witness declined to testify (1) "to protect their friends and associates," (2) "to frustrate the system," (3) "the system doesn't work very well for them," or (4) "they have to in order to survive where they live." 9RP 7-8.

If the prohibited “code” and “don’t snitch” argument was the only instance of misconduct, perhaps this might be a closer case. But as explained below, numerous other instances of serious misconduct plagued this closing. As set forth in section f, infra, reversal is required.

b. The Impermissible Generic Tailoring Argument Violated Berube’s State Constitutional Rights.

In addition, the prosecutor improperly asserted that Berube generically tailored his testimony to conform to what other witnesses had said on the stand.

And what does he do then when he takes the stand about that conversation, he who has sat here throughout the entire trial and listened to everything that everyone testifies about? He has to make his version of his events conform with what he has heard his mother testify about.

9RP 24. The Supreme Court has condemned such arguments as misconduct. State v. Martin, 171 Wn.2d 521, 252 P.3d 872 (2011).

Like every person the state accuses of a crime, Berube had the right to be present for and testify at his trial. Const. art. 1, § 22. These rights are fundamental. Martin, 171 Wn.2d at 540 (Stephens, J., concurring and citing settled case authority).

The Martin court unanimously made clear that article 1, § 22 provides more protection against generic tailoring arguments than does the Sixth Amendment. Martin, 171 Wn.2d at 528-34, (majority); at 538-41

(Stephens, J., concurring); at 543-47 (Sanders, J., dissenting). The Martin court was concerned that a prosecutor should not be able to use a generic tailoring argument to “transform[] a defendant's presence at trial from a Sixth Amendment right into an automatic burden on his credibility.” Martin, at 534 (quoting Justice Ginsburg’s dissent in Portuondo v. Agard, 529 U.S. 61, 76, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000)). Generic tailoring arguments are improper “because a jury is, at that point, unable to ‘measure a defendant's credibility by evaluating the defendant's response to the accusation, for the broadside is fired after the defense has submitted its case.’” Martin, at 535 (quoting 529 U.S. at 78 (Ginsburg, J., dissenting)). “[W]hen a generic argument is offered on summation, it cannot in the slightest degree distinguish the guilty from the innocent.” Martin, at 535 (quoting 529 U.S. at 78 (Ginsburg, J., dissenting)). The Martin majority then concluded

We believe that Justice Ginsburg's view, that suggestions of tailoring are appropriate during cross-examination, is compatible with the protections provided by article I, section 22. It is during cross-examination, not closing argument, when the jury has the opportunity to determine whether the defendant is exhibiting untrustworthiness.

Martin, 171 Wn.2d at 535-36.

The Martin majority found no error in that prosecutor’s questioning because Martin himself specifically referenced other witnesses in his direct

testimony. The state then followed up with additional questions on cross. Martin, 171 Wn.2d at 524-25, 536. On those facts, the majority “conclude[d] . . . that our state constitution was not violated when a deputy prosecutor, in response to testimony Martin had given on direct examination, asked Martin if he had tailored his testimony to conform to testimony given by other witnesses.” Martin, at 537-38 (emphasis added).<sup>13</sup>

When applied here, the Martin majority rule (and certainly the Martin concurrence and dissent) requires reversal. Nothing in the present record shows any direct or cross-examination that might have fairly raised the issue of tailored testimony. Appendix B.<sup>14</sup> The prosecutor therefore made a generic tailoring argument, unmoored from admitted evidence, and prohibited under article 1, § 22.

In response, the state may point out that the Martin majority was careful to note it did not formally decide “whether generic accusations are prohibited under article I, section 22.” Martin, at 536 n.8. Assuming the

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<sup>13</sup> See also, State v. Hilton, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_, 2011 WL 4505273, \*6-7 (2011) (determining there was no error because the subject was addressed on direct and cross-examination; prosecutor therefore did not make an impermissible generic tailoring argument in closing).

<sup>14</sup> As discussed at length in section 2 of the statement of facts, the defense made efforts to reconstruct the missing transcript of Ivory’s testimony. Although the court precluded the defense from any review of the state’s or the trial court’s notes, the state and court had a full and fair opportunity to participate in that process. See 12RP and 13RP.

majority's numerous (and lengthy) quotations from Justice Ginsberg's dissent might technically be dicta, this Court has recognized that some Supreme Court dicta cannot realistically be ignored.<sup>15</sup> The prosecutor's argument was constitutionally improper.

c. The Prosecutor Shifted the Burden and Wrongly Asserted Ivory Should Have Produced Missing Witnesses.

The prosecutor also made an improper burden-shifting argument and an impermissible missing witness argument.

[W]hy wouldn't [Ivory] provide you with the names of any of the people that he was with who could corroborate his version of these events, the people who could help him out and say that he did what he told you he did?

9RP 44. The prosecutor then intertwined this theme with its previous suggestion of an anti-snitch "code",

The code that's out there does not override common sense. And when you're accused of a crime as he is accused of a crime, you do not remain silent and take the hit for someone else. You talk in that situation. And when there are others who can help you out, you provide the names of those others. And you need to ask yourself: Is Ivory Berube so self-sacrificing and is he protecting others with this code or is it because there is no one who can corroborate his version of events?

9RP 44.

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<sup>15</sup> State v. White, 83 Wn. App. 770, 782, 924 P.2d 55 (1996), rev'd on other grounds, 135 Wn.2d 761, 958 P.2d 982 (1998).

An accused “has no burden to present evidence, and it is error for the State to suggest otherwise.” State v. Montgomery, 163 Wn.2d 577, 597, 183 P.3d 267 (2008) (citing State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003)). Under the “missing witness” doctrine, however, when a party fails to call a witness to provide testimony that would properly be part of the case and is uniquely within the party’s control, the jury may draw an inference that the testimony would have been unfavorable to that party. Montgomery, at 598.

Several factors prohibit application of the doctrine against an accused. Where the witness’s absence is explained, no such instruction or argument is permitted. The doctrine does not apply if the potential testimony would be immaterial and cumulative, or if the witness is not particularly under the accused’s control. The doctrine may also not be applied if it would shift the burden of proof. Finally, the doctrine does not apply if the witness is incompetent or where the witness’s testimony would incriminate him. Id. at 589-99.

As the above quotation shows, the prosecutor wrongly argued Ivory should have produced other witnesses for at least two important reasons.

First, there was no showing any of the allegedly missing witnesses were uniquely available to the defense.<sup>16</sup> In fact, the responding officers said numerous witnesses were friends of Barquet's or were otherwise available to the state. 3RP 28, 32-33; 5RP 40-41. Detective Cooper admitted he simply did not interview Justice or the people in the car with him. 6RP 71, 87-88, 93. On these facts, it was patently improper for the state to shift its burdens of production and proof to the defense. Montgomery, 163 Wn.2d at 599-600.

Second, the Montgomery error intertwines with the Monday error in that it shifted the state's frustrations with its pool of potential witnesses to the defense. If the state felt any witness was able to corroborate its case (Charles Justice, for example, or any of the passengers in the car with him where two guns were recovered), it was the state's burden to call the witness. Furthermore, under the defense theory, someone in that car was the shooter, and that person almost certainly would have a Fifth Amendment right not to testify. Arguing that the defense bore the burden to produce such a witness was obvious misconduct. Montgomery, at 599.

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<sup>16</sup> Also, as argued in section a, supra, no witness testified to this alleged "don't snitch" code. On this record, any "code" was a creature of the prosecutor's argument, not the evidence.

d. The Prosecutor Argued Facts Not in Evidence and Appealed to Passion and Prejudice.

The prosecutor also improperly appealed to the jury's passions.

How sad is it that a mother and a son would go for 13 years without seeing each other?<sup>17</sup> And how happy his mother must have been when he came to see her. And how disappointed must she have been when she learned that he came because he was running from the law?

9RP 23. But this jury was not sworn to determine whether Ivory's mother was sad, happy, or disappointed.<sup>18</sup> Instead, the question was whether the state had presented evidence that identified Ivory beyond a reasonable doubt as the person who shot Barquet.

"A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). A prosecutor is therefore forbidden from appealing to the passions of the jury and encouraging it to render a verdict based on emotion rather than properly admitted evidence. Viereck v. United States, 318 U.S. 236, 247-78, 63 S. Ct. 561, 87 L. Ed. 734 (1943); Belgarde, 110 Wn.2d at 507-08.

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<sup>17</sup> This prosecutor was well aware that: (1) Berube had been in custody for most of that 13 years, and (2) the trial court had excluded that evidence as not probative and unfairly prejudicial. CP 78; appendix B, at 6.

<sup>18</sup> Although Mrs. Berube testified, the prosecutor did not ask if she was "sad" or "disappointed." The evidence instead showed Mrs. Berube would not have allowed Ivory to stay with her if she knew he was in trouble with the law. 7RP 35, 44.

A prosecutor's argument is improper when she encourages a jury to render a verdict on facts not in evidence. State v. Stover, 67 Wn. App. 228, 230-31, 834 P.2d 671 (1992), review denied, 120 Wn.2d 1025 (1993). Statements that are unfairly "calculated to align the jury with the prosecutor and against the [accused]" may violate this prohibition. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

Although there may have been minor relevance to the timing of Berube's visit, no relevant or proper purpose could be served by pointing out a mother's potential (but unproved) sadness or disappointment because she had not been visited by her son. Where the prosecutor's flagrantly improper purpose was to inflame the jury's passions against Ivory, the argument was error.

e. The Prosecutor Diminished the Burden of Proof and Misstated the Law.

At the end of her rebuttal, this prosecutor twice trivialized the state's burden to prove guilt beyond a reasonable doubt, first with a derogatory "kid's puzzle" reference, and then with this improper flourish to conclude rebuttal:

The word verdict means to speak the truth. And I ask that you search for the truth. When you go back into that jury room, you search for the truth, not a search for reasonable doubt. And I ask that you find him guilty. Thank you.

9RP 48. This was misconduct because it misleads the jury. Clear case law shows that a jury's proper role in our justice system is to scrutinize evidence for reasonable doubt. It is error for a prosecutor to contrast that scrutiny as contrary to a search for the truth.

The presumption of innocence and the corresponding state burden to prove every element beyond a reasonable doubt is the "bedrock upon which the criminal justice system stands." State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007); State v. Johnson, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010). The proof beyond a reasonable doubt standard "provides concrete substance for the presumption of innocence." State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977) (quoting In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). For that reason, the failure to give clear instruction on reasonable doubt is not only error, it is a "grievous constitutional failure" mandating reversal. McHenry, 88 Wn.2d at 214; Sullivan v. Louisiana, 508 U.S. 275, 280-81, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

Although the court gave a correct instruction, the prosecutor misstated the law. Rather than acknowledging reasonable doubt as the bedrock of our criminal justice system, the prosecutor portrayed reasonable doubt as a defense tool to hide the truth.

A prosecutor's misstatement of the law is a particularly serious error with "grave potential to mislead the jury." State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). Thus, a prosecutor may not shift or diminish the state's burden of proof beyond a reasonable doubt. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008) (improper for prosecutor to argue reasonable doubt does not mean to give the defendant the benefit of the doubt); People v. Harbold, 124 Ill. App. 3d 363, 464 N.E.2d 734, 742 (1984) ("arguments which diminish the presumption of innocence are forbidden.")

In Warren, for example, the prosecutor argued "I want to point out that this entire trial has been a search for the truth. And it is not a search for doubt." Warren, 165 Wn.2d at 25. Consistent with this theme, the prosecutor argued Warren should not get the benefit of the doubt. Id., at 25-26. Although this misconduct was flagrant, reversal was not required because the trial court gave a strongly worded curative instruction. Id., at 27-28.

Arguments about how the jury is to do its "job" are particularly egregious when they misstate the jury's proper role. State v. Coleman, 74 Wn. App. 835, 838-41, 876 P.2d 458 (1994). A prosecutor's request that the jury "declare the truth" is improper because jury's job is not to "solve" a case and "declare what happened on the day in question." State v. Anderson, 153

Wn. App. 417, 429, 220 P.3d 1273 (2009). "Rather, the jury's duty is to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt." Anderson, 153 Wn. App. at 429.<sup>19</sup> The prohibited comments imply the jury should convict even if not convinced beyond a reasonable doubt, so long as it believed its verdict represented the "truth."<sup>20</sup> The New Jersey Supreme Court also warned that an instruction suggesting that the "concept of reasonable doubt is a simple search for truth may run the risk of detracting from both the seriousness of the decision and the State's burden of proof." State v. Purnell, 126 N.J. 518, 545, 601 A.2d 175, 187-88 (1992).

The reasonable doubt standard has long been recognized "as the best means to achieve the ultimate goals of truth and justice." United States v. Shamsideen, 511 F.3d 340, 347 (2d Cir. 2008). Therefore, if it is necessary to identify for the jury one "single, crucial, hard-core question," that question "should be framed by reference not to a general search for truth, but to the reasonable doubt standard." Id. Instructing the jury to search for truth is

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<sup>19</sup> See also, People v. Brown, 111 A.D.2d 248, 250, 489 N.Y.S.2d 92 (N.Y. 1985) (condemning prosecutorial argument to jury that "[b]y your verdict you should speak the truth. It is not a search for reasonable doubt."); People v. Chang, 129 A.D.2d 722, 723, 514 N.Y.S.2d 484, 485-86 (N.Y. 1987) ("the prosecutor's statement that the trial was 'a search for the truth . . . not a search for reasonable doubt' was clearly improper.").

<sup>20</sup> Brown, 111 A.D.2d at 250.

inconsistent with the burden of proof beyond a reasonable doubt. United States v. Wilson, 160 F.3d 732, 747 (D.C. Cir. 1998) (observing potential inconsistency between jury instruction to “determine where the truth lies” and burden of proof beyond a reasonable doubt); United States v. Pine, 609 F.2d 106, 108 (3d Cir. 1979) (instructing jury “[y]our basic task is to evolve the truth” could “dilute and thereby impair the constitutional requirement of proof beyond a reasonable doubt”).

This prosecutor detracted from the seriousness of the jury’s decision and from the state’s burden by arguing, “[w]hen you go back into that jury room, you search for the truth, not a search for reasonable doubt. 9RP 48; Purnell, 126 N.J. at 545. The argument is error because it misled the jury that the reasonable doubt standard is inimical to the truth, rather than our system’s acknowledged best means to achieve it. Shamsideen, 511 F.3d at 347.

The prosecutor further trivialized the state’s burden with this remark:

This is like a puzzle that you need to put together when you go back into that room. And all the pieces of this puzzle fit together. And this is not a thousand-piece puzzle where everything is a shade of blue when you're trying to make it all fit together. This is a kid's puzzle, and the pieces in this puzzle are very big, and they all fit together.

9RP 48. This Court in Johnson recently condemned a prosecutor's similar analogy to a partially completed “puzzle” because it misstated and

trivialized the state's burden, focused on the degree of certainty the jurors needed to act, and implied that the jury had a duty to convict absent a reason not to do so. State v. Johnson, 158 Wn. App. at 685 (citing Anderson, 153 Wn. App. at 432). This prosecutor's argument suffers similar flaws, magnified by the prosecutor's derogatory comparison of the evidence to a "kid's puzzle" with "big pieces." For all these reasons, the prosecutor committed misconduct in closing.

f. The State Cannot Show The Constitutional Errors Were Harmless, and There is a Substantial Likelihood the Flagrant and Cumulative Misconduct Affected the Verdict.

In response, the state will point out that Berube's counsel did not object to the individual or cumulative misconduct. Neither did Monday's counsel. The Supreme Court cited customary rules for reviewing misconduct<sup>21</sup> then stated, "resorting to racist arguments is so fundamentally opposed to our founding principles, values, and fabric of our justice system that it should not need to be explained." Monday, at 680. The court then applied the constitutional harmless error test, rather than the "substantial likelihood" test.

We hold that when a prosecutor flagrantly or apparently intentionally appeals to racial bias in a way that undermines the defendant's credibility or the presumption of innocence,

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<sup>21</sup> Monday, 171 Wn.2d at 679.

we will vacate the conviction unless it appears beyond a reasonable doubt that the misconduct did not affect the jury's verdict. We also hold that in such cases, the burden is on the State.

Monday, at 680.<sup>22</sup> Other Washington courts also have required the state to show the error harmless beyond a reasonable doubt where the misconduct directly violates a constitutional right. State v. Fleming, 83 Wn. App. 209, 213-216, 921 P.2d 1076 (1996); State v. French, 101 Wn. App. 380, 386, 4 P.3d 857 (2000).

As shown above, Monday provides the analytical framework and the state bears the burden to show the error harmless beyond a reasonable doubt. But under any test for misconduct, Ivory's convictions should be reversed.

Each of the varied instances of misconduct was designed to bolster the state's weak identification case. Substantial evidence pointed to Charles Justice, a man arrested mid-flight a few blocks from the scene in a car with two guns. Although Barquet instead identified Berube, she was hardly a beacon of reliability. She said she was able to know the shooter's identity because she claimed she saw him – in between two rapidly successive

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<sup>22</sup> In a strongly worded concurrence, Justices Madsen, Stephens and Fairhurst stated the error required reversal: “[r]egardless of the evidence of this defendant's guilt, the injection of insidious discrimination into this case is so repugnant to the core principles of integrity and justness upon which a fundamentally fair criminal justice system must rest that only a new trial will remove its taint.” Monday, at 682 (Madsen, J., concurring).

gunshots, while her blood alcohol level was remarkably high. The state well knew the jury might instead view her testimony in light of her numerous convictions involving dishonesty and lying to the police, her substantial inebriation at the time of the shooting, her continued willingness at trial to lie about the amount she drank that night, and the obvious bedside coaching from her family's claims that somehow they knew Ivory did it.

Whatever else a juror might glean from Burgess's quick glance and inconclusive identification, the vague and disputed jail calls, or what the state sought to deride as Ivory's allegedly abrupt (albeit long-planned) decision to visit his mother, the evidence here was far less probative than Monday's tearful admission to police that "I wasn't trying to kill that man, I didn't mean to take his life." Monday, at 670. Because the state cannot show there was no substantial likelihood the repeated, flagrant, and cumulative misconduct affected the verdict, let alone overwhelming evidence of guilt, the convictions should be reversed and the case remanded for a new trial.

2. INSTRUCTION 18 ERRONEOUSLY REQUIRED THE JURY TO BE UNANIMOUS TO ANSWER “NO.” THE ERROR REQUIRES THE STRIKING OF THE SPECIAL VERDICT.

Instruction 18 required the jury to unanimously agree before it could reject the firearm special verdict.<sup>23</sup> This incorrectly states the law because a jury need not be unanimous to answer “no” to a special verdict. State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010); State v. Goldberg, 149 Wn.2d 888, 893-95, 72 P.3d 1083 (2003); State v. Campbell, \_\_\_ Wn. App. \_\_\_, 260 P.3d 235, 238-40 (2011). The error requires reversal of the special verdict and remand for resentencing without the firearm enhancement. State v. Williams–Walker, 167 Wn.2d 889, 899-902, 225 P.3d 913 (2010) (remedy for unlawful enhancement is to strike the enhancement and remand for resentencing).

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<sup>23</sup> Instruction 18 provided in pertinent part:

If you find the defendant guilty of this crime, you will then use the special verdict form and fill in the blank with the answer “yes” or “no” according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no.”

CP 50 (emphasis added); appendix A.

This Court's recent decision in Campbell provides the analytical framework. The state charged Campbell with second degree assault, unlawful possession of a firearm, and sought firearm enhancements. The state proved the assault with evidence that "a flurry of gunshots erupted" as a number of people were sitting in a house. The jury found the elements of second degree assault based on the shooting. The jury also found he unlawfully possessed a firearm. Campbell, 260 P.3d at 237-38.

The trial court instructed the jury it must be unanimous to answer "no" to the firearm special verdict.<sup>24</sup> During deliberations the jury asked whether it had to be unanimous, but the trial court declined to clarify the instruction. Id. Relying on Bashaw and Goldberg, the Campbell court held this error required reversal of the firearm special verdict. Campbell, 260 P.3d at 239-40.

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<sup>24</sup> The special verdict form in Campbell stated:

You will also be furnished with special verdict forms. If you find the defendant not guilty do not use the special verdict forms. If you find the defendant guilty, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question you must answer "no."

Campbell, 260 P.3d at 237-38.

Instruction 18 suffers from the same error. When applied here, Campbell, Bashaw, and Goldberg are controlling and require reversal of the special verdict.

In response, the state may argue this error is harmless because the jury found Berube guilty of first degree assault based on a shooting which necessarily required the use of a firearm. CP 44, 52. In Campbell, this Court rejected the state's argument on indistinguishable facts. Campbell, 260 P.3d at 240-42.<sup>25</sup>

The Campbell court first noted the traditional standard for constitutional error – the state must show the error harmless beyond a reasonable doubt. Citing Bashaw, the Campbell court pointed out this harmless error inquiry is conducted

in light of the Supreme Court's observation that “[t]he result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction.”

Campbell, 260 P.3d at 240 (quoting Bashaw, 169 Wn.2d at 147).

“[W]hen unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.”

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<sup>25</sup> Like Campbell, Berube was convicted of two counts: assault and unlawful firearm possession. CP 72; Campbell, 260 P.3d at 237-28.

Campbell, 260 P.3d at 240 (quoting Bashaw, 169 Wn.2d at 147-48).

The Campbell court also held that a unanimous verdict on the elements of the underlying offense cannot substitute for a proper instruction and deliberative process on a firearm enhancement. A contrary rule would allow a sentencing court to ignore requirements that the jury find firearm use by a special verdict, not merely a general verdict. Campbell, 260 P.3d at 241 (citing Williams-Walker, 167 Wn.2d at 893-94). Furthermore, a jury is instructed it must be unanimous to find or not find elements, but a jury need not be unanimous to reject a special verdict. As the Campbell court reasoned, it would “defy logic” to allow a jury’s finding of an element to cure the special verdict error where the elements instruction contains the same error.

If being unanimous after being told the wrong thing once is not harmless, as Bashaw makes clear, how can the error be harmless simply because the jury was unanimous after being told that same thing twice? Logic dictates that it cannot be.

Campbell, 260 P.3d at 241. For these reasons the state cannot show the flawed deliberative process did not affect the jury’s special verdict.

In response, the state may suggest Campbell is distinguishable because that jury specifically inquired whether it must unanimously agree to enter the special verdict and the trial judge declined to answer the

inquiry. Campbell, 260 P.3d at 238. But in Berube’s case this distinction can make no difference. Instruction 18 was worse than the Campbell instruction, in that it specifically – and wrongly – concluded by stating “[i]f you unanimously have a reasonable doubt as to this question, you must answer no.”<sup>26</sup> Although a Campbell juror might have been confused, no juror in Berube’s case could have been confused because this statement was as clear as it was erroneous. For all these reasons, Campbell is on point and requires the rejection of any state claim that the error is harmless.

The state may also argue that Berube cannot raise this claim because trial counsel did not object to the instruction.<sup>27</sup> Citing RAP 2.5(a)(3), Division One rejected the state’s argument in State v. Ryan,<sup>28</sup> and Berube relies on the Ryan decision.<sup>29</sup> As the Ryan court recognized,

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<sup>26</sup> Cf. Appendix A with Campbell instruction in note 24, supra.

<sup>27</sup> The state proposed this erroneous instruction. 9RP 3; Supp CP \_\_ (sub no. 64, State’s Instructions to the Jury, 4/20/09).

<sup>28</sup> State v. Ryan, 160 Wn. App. 944, 948-50, 252 P.3d 895 (2011), rev. granted, 172 Wn.2d 1004 (2011). Oral argument in the consolidated Ryan/Nunez cases will be heard January 12, 2012.

<sup>29</sup> But see, State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2011) (Division Three decision holding that Bashaw error cannot be raised for the first time on appeal), rev. granted, 172 Wn.2d 1004 (2011); State v. Rodriguez, \_\_ Wn. App. \_\_, 259 P.3d 1145 (2011) (Division Three, citing Nunez and declining to reach a Bashaw claim); State v. Morgan, 163 Wn. App. 341, 261 P.3d 167, 171-72 (2011) (2-judge Division One majority declining to reach a Bashaw claim).

Bashaw did not object to this instruction, either,<sup>30</sup> but the Supreme Court reversed after applying the constitutional harmless error test. Bashaw, 169 Wn.2d at 147-48.

Manifest errors that affect constitutional rights may be raised for the first time on appeal. RAP 2.5(a)(3). To fall within RAP 2.5(a)(3), “the appellant must ‘identify a constitutional error and show how the alleged error actually affected the [appellant]’s rights at trial.’” State v. O’Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (alteration in original) (quoting State v. Kirkman, 159 Wn.2d 918, 926–27, 155 P.3d 125 (2007)).

Constitutional error is “manifest” where the appellant plausibly shows the error had “practical and identifiable consequences in the trial of the case.” O’Hara, 167 Wn.2d at 99 (quoting Kirkman, 159 Wn.2d at 935). The State bears the burden to prove harmlessness beyond a reasonable doubt. State v. Gordon, \_\_\_ Wn.2d \_\_\_, 260 P.3d 884, \*2 (2011).

In short, as the Bashaw and Ryan courts recognized, the erroneous instruction is manifest constitutional error under RAP 2.5(a)(3) because it unfairly tainted the deliberation process and coerced holdouts to prematurely abandon properly held positions. The instruction was not a

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<sup>30</sup> State v. Bashaw, 144 Wn. App. 196, 199, 182 P.3d 451 (2008), reversed, 169 Wn.2d 133, 234 P.3d 195 (2010).

simple omission; it instead affirmatively misled each juror by requiring unanimity before the special allegation could be rejected. Bashaw, 169 Wn.2d at 147. The instruction improperly burdened Berube with convincing *every* juror to reject the special verdict, instead of one juror.

The error is comparable to constitutional violations previously found by Washington courts. For example, a trial court violates the rights to due process and a jury trial where a trial court takes actions that improperly limit the possibility that a single juror might reject the majority's inclination to convict. In State v. Elmore and State v. Depaz, for example, the Supreme Court reversed convictions because the trial court wrongly dismissed jurors who appeared to be holding out against the majority's verdict. Const. art. 1, §§ 3, 21, 22; State v. Elmore, 155 Wn.2d 758, 771-78, 123 P.3d 72 (2005); State v. Depaz, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). Both courts recognized the deliberative process can be volatile and a holdout juror may have legitimately different views of the evidence without being accused of improper "nullification" or refusing to follow the court's instructions. Elmore, 155 Wn.2d at 771-73 (citing, inter alia, 12 ANGRY MEN (Orion–Nova Productions 1957)); Depaz, 165 Wn.2d at 846-51. The overarching lesson from Elmore and Depaz is that trial courts cannot intrude into the deliberation process

through actions that might undermine a holdout juror's opportunity to disagree with the majority's view of the evidence.

This error is analogous to the errors in Depaz and Elmore because instruction 18 likewise limits the ability of a single juror to stand firm in his or her beliefs against a majority. In Depaz and Elmore the juror was wrongly excluded; here, that same juror was wrongly told his or her view could not impact the final result. Both illustrate the same "flawed deliberative process" the Supreme Court refused to find harmless in Bashaw, 169 Wn.2d at 138-39, 143-48. In both circumstances, the error is constitutional in that it denies due process and a fair jury trial. Const. art. 1, §§ 3, 21, 22.

The error also is analogous to unconstitutional judicial coercion of the deliberative process when a trial court verbally instructs a jury it must fill in a verdict form initially left blank. State v. Ford, 171 Wn.2d 185, 250 P.3d 97 (2011). Although Ford raised no objection at trial, the Supreme Court unanimously held the verbal instruction was constitutional error that could be raised for the first time on appeal. Ford, 171 Wn.2d at 188-89 (majority), at 194 n.1 (Stephens, J. dissenting).<sup>31</sup>

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<sup>31</sup> The majority ultimately found the error not "manifest," however, because the jury had finished deliberating before the court gave the instruction. 171 Wn.2d at 193.

No other instruction negated or minimized the error in Berube's case, and this jury – unlike the Ford jury – was erroneously instructed before it concluded deliberations. Even when read as a whole, the instructions fail to provide the correct legal standard for rejecting the special verdict. This is a failure "[t]o satisfy the constitutional demands of a fair trial[.]" O'Hara, 167 Wn.2d at 105.

Furthermore, this error affected not only the verdict, but also added 60 months to Berube's sentence. CP 75. An unlawful sentence results when an invalid enhancement is imposed. Williams-Walker, 167 Wn.2d at 900. A manifest constitutional error occurs when a trial court imposes a sentence enhancement not authorized by a proper jury verdict. State v. Recuenco, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (error in imposing a firearm enhancement occurred during sentencing where jury's special verdict found only the use of a deadly weapon). An unlawful sentence may be challenged for the first time on appeal. State v. Sims, 171 Wn.2d 436, 444 n.3, 256 P.3d 285 (2011); State v. Bahl, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008).

As this brief discussion shows, the Ryan court properly characterized the error as a constitutional violation and therefore correctly concluded it may be raised for the first time on appeal. The error requires reversal of the firearm special verdict and remand for resentencing.

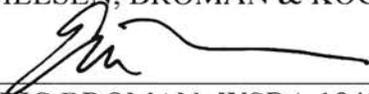
D. CONCLUSION

Based on prosecutorial misconduct shown in argument 1, this Court should vacate Berube's convictions and remand for a new trial. Because the firearm enhancement is unlawful as shown in argument 2, the enhancement should be vacated and the case remanded for resentencing on count 1.

DATED this 3<sup>d</sup> day of November, 2011.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC



ERIC BROMAN, WSBA 18487  
Office ID No. 91051  
Attorneys for Appellant

Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of respondent appellant/plaintiff containing a copy of the document to which this declaration is attached.  
King County  
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.  
[Signature]  
Name \_\_\_\_\_ Done in Seattle, WA Date 11/3/11

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STATE OF WASHINGTON  
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# APPENDIX A

No. 63579-4-1

No. 18

You will also be given a special verdict form for the crime of Assault in the First Degree. If you find the defendant not guilty of this crime, do not use the special verdict form. If you find the defendant guilty of this crime, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

# APPENDIX B

No. 63579-4-1

**FILED**  
KING COUNTY, WASHINGTON

SEP 27 2010

SUPERIOR COURT CLERK  
**KIRSTIN GRANT**  
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

IVORY BERUBE,

Defendant.

No. 08-C-05714-0 SEA

NARRATIVE REPORT OF TRIAL  
TESTIMONY OF IVORY BERUBE  
PURSUANT TO RAP 9.3

On direct examination Ivory Berube testified that he was 33 years old born on May 31, 1975. He was employed at Jiffy Lube for 10 months. He was also employed at the Goodwill. He originally made \$8.50. His pay was eventually increased to \$13.00/hour.

Ivory's mother is Deborah Berube. She has lived in New Bedford, Massachusetts since 1992. He last saw his mother in 1995. In the spring of 2008, he had telephone conversations with his mother. She was ill; she was going to have heart surgery, and he was talking to her more that spring than he had in the past. Ivory wanted to go visit his mother, but he made no specific plans because he was not financially able to make those plans. When he visited, he would visit her by bus. He rides the bus everywhere because he has no other option.

1 During this same time frame, his relationship with his girlfriend Danielle was  
2 deteriorating; they were having arguments. His brother Emory was out of jail on bail under his  
3 mother's name. Ivory was also on court supervision with the Department of Corrections. He had  
4 to check in with his supervisor once a month; he had approximately another year of supervision.  
5 Ivory was required to check in and get permission before leaving the state. He had asked his  
6 supervisor if he could leave the state. He had been violated one time on this supervision.

7 From July 3 until the 12<sup>th</sup>, Ivory and his girlfriend were living together. He was taking  
8 care of the house and taking care of his girlfriend's son who was 8. Sometimes his brother  
9 Emory would come there. Ivory would let him in the house between 3 and 4 a.m.. Ivory and  
10 Danielle had arguments about his brother. They also argued about Ivory leaving the home.  
11 Another argument was about him leaving to go to New Bedford.

12 On July 11<sup>th</sup>, 2008 Ivory was at Thompson's Point of View. He did not remember the  
13 time of day, but it was dark out. He did not remember where he was before he went to  
14 Thompson's. He does not know how long he was there. He was inside the establishment, but he  
15 did come outside a couple of times. There were people hanging around outside. His brother  
16 Emory was there outside. He did not recall that Emory was arguing with anybody at that time.  
17 He later found out that his brother had been in an argument with a female, Ms. Barquet. Ivory  
18 described his brother as being "cocky" and one who does not like to be confronted. Ivory said  
19 that he, Ivory, was not the type of person to get into arguments.

20 Ivory went and talked to a person he knew by the name of Kyla Jackson. Ivory was  
21 attempting to quiet his brother Emory. Ivory said he loved his brother although they never really  
22 got along. Ivory went over to talk to Kyla by himself. There were several guys around. Ms.  
23 Barquet was in the back of Kyla's truck. He talked to her about her tattoo, which stated "Ms.  
24

1 Barquet." The truck was a gray metallic color. Ivory stayed over there 10-15 minutes. He had a  
2 drink of vodka from a paper cup with Tanisha Barquet. Kyla offered him the drink. Everything  
3 was cordial; there were no disagreements between them. He could not recall if Tanisha was also  
4 drinking. The truck was parked across the street at the liquor store where there were surveillance  
5 cameras. Ivory was ultimately unable to calm his brother Emory. Ivory left.

6 Ivory next went to 12<sup>th</sup> and Jefferson. He does not recall the specific clothing he was  
7 wearing that evening, but he acknowledged he often does wear a baseball hat. He always wears  
8 his baseball hat with the brim forward. At the location of 12<sup>th</sup> and Jefferson, there are two  
9 Ethiopian bars. There are video games inside. He went inside one that he calls Teddy's. There  
10 were some Ethiopians inside.

11 Ivory then described himself as someone who "hangs by himself." People know him  
12 from his past, but he has really changed. He does not like being around "rif raf." He likes to do  
13 his own thing.

14 Ivory went to 12<sup>th</sup> and Jefferson to have a drink. He testified he probably had one drink;  
15 a Courvoisier that he nursed. Ivory said he does not "slam" drinks back to back. Ivory does not  
16 really remember specific time frames, but estimated he was in Teddy's at least 15 minutes before  
17 the incident. Lots of people had filtered down the street. He went outside; his brother was  
18 arguing with the same female. They were exchanging insults. He told them to stop arguing.

19 Ivory then heard gunshots and everyone ran. Ivory ran southeast into the street and then  
20 ran down 13<sup>th</sup> where he got a ride. He did not call anyone. He recalls there was a cab on the  
21 corner. Ivory was on DOC supervision at the time, but that is not what he was thinking of at the  
22 time.

1 Ivory has seen the video, and he is not in the video at all. He is off camera. Ivory knows  
2 he is not on the video in front of Waid's. He has been to Waid's before for poetry night.

3 After the shooting Ivory went home. Several days later, he later found out Emory was in  
4 jail. Ivory understood that Emory had been tazed several times when he was arrested.

5 The voice on the jail recordings played in court is Ivory's voice. He denied that he  
6 indicated he shot anyone or that he had anything to do with it. When Ivory was questioned about  
7 the saying "in the wind," he distinguished the phrase from "getting in the wind." During the  
8 time after the shooting Ivory was out and about. He was not under the impression that anyone  
9 was looking for him. He saw on the news that there were three suspects, which did not include  
10 him.

11 Ivory planned to leave for New Bedford the following week. Danielle did not want him  
12 to leave. He bought a bus ticket and told Danielle he was leaving. He did not initially tell his  
13 mom because he wanted to surprise her. He ultimately told her he was coming to visit and did  
14 not surprise her.

15 Ivory stayed with his mom in New Bedford. His mom was working. He talked to  
16 Danielle every day. Danielle was probably happy when he got the warrant because then he  
17 would have to return to Washington earlier. Ivory was not running away; he would never bring a  
18 bad situation to his mother's house.

19 The day he was arrested there was no knock on the door. The police opened the door,  
20 and he immediately saw a gun in his face. He was arrested quickly and was starting to put it  
21 together what the arrest was about.

22 Ivory recalls his conversation with Detective Cooper. Detective Cooper and the other  
23 detective introduced themselves. They read him his Miranda rights. He acknowledged saying to  
24

1 the detectives that he would see them in court. He denied stating that there may be witnesses  
2 now, but that none of them would follow through at the time of trial and come forward as  
3 witnesses against him and his brother. Ivory was agitated during the questioning. He denied that  
4 he knew who the shooter was. He said he told the detectives he did not know who shot the gun.  
5 He acknowledged he could have said the officers were "full of it."

6 Upon further reflection about his earlier testimony about having only been violated once  
7 on his DOC supervision, Ivory amended this to two violations, once in 2006 and once in 2008.

8 Ivory acknowledged he does know a guy who goes by Eclipse or "E Clips." Ivory has  
9 been around Eclipse 10 times in his whole life. He does not call him, but would recognize who  
10 he was. He does not hang out with Eclipse. Ivory has no friends but his family. He has no  
11 "homies." Ivory does not remember seeing Eclipse that evening at Thompson's. Ivory did not  
12 say his name that evening at Thompson's. Eclipse could have been at Waid's, but that is not a  
13 place Eclipse typically frequents.

14 Upon cross examination, Ivory testified that he had no beef with Tanisha Barquet or her  
15 family.

16 Ivory provided details regarding the stay at Thompson's, including the amount of alcohol  
17 consumed and the entirety of his interactions with Tanisha Barquet. He also testified about his  
18 observations regarding Emory's actions while at Thompson's.

19 Ivory was aware that Eclipse was shot in June of 2008. He denied knowing who shot  
20 Eclipse.

21 Ivory provided details of his arrival at Waids, his whereabouts when the gun went off,  
22 and his immediate thoughts when he heard the gun go off. He also provided information about  
23 his level of alcohol consumption that evening.

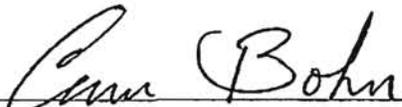
1           Although Ivory knew other people who were present at Waid's and the surrounding area,  
2 he refused to provide the names of anyone. He acknowledged he was in serious trouble and the  
3 names of other witnesses could be helpful to his case. He asked the court if he had to answer  
4 these questions. Ivory tried to "take the 5<sup>th</sup> amendment." (The State recalls that Ivory was  
5 instructed to answer the questions. Mr. Berube does not recall being instructed to answer the  
6 questions. The court's notes do not reflect an instruction, but based on Mr. Berube's subsequent  
7 testimony, he did not take "the fifth.") Ivory refused to provide the name of anyone who was  
8 present. Ivory also refused to provide the legal name of the person whose car picked him up  
9 after the shooting and took him home.

10           When Ivory went to New Bedford, he knew that his mother would not let him stay with  
11 her if she knew he was running from the law. Ivory provided details about his plans to visit his  
12 mother at this particular time. He acknowledged that he knew she had been very sick earlier in  
13 the year, and he had not visited her then. When Ivory went to New Bedford he bought a one way  
14 bus ticket.

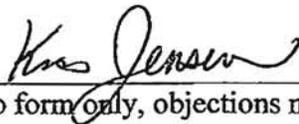
15           When Ivory was arrested and interviewed by Seattle police detectives, he took the  
16 discussion with the detectives very seriously. He was read his rights and he understood them.

17           Ivory acknowledged that he does wear glasses.

1           **During the course of the defendant's testimony the State argued outside the**  
2 **presence of the jury that the defendant's testimony had opened the door to the admission of**  
3 **his criminal history. The defense opposed the motion. The court ruled that the door had**  
4 **not been opened, and the admission of the defendant's criminal history was denied.**

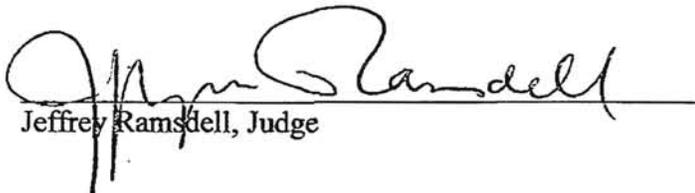
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8 Corinn Bohn  
9 Senior Deputy Prosecuting Attorney  
10 Bar # 16223

11 

12 Kris Jensen  
13 Approved as to form only, objections noted on the record  
14 Kris Jensen  
15 Attorney for defendant Ivory Berube  
16 Bar # 19261

17 Done ~~in open court~~, this 24<sup>th</sup> day of Sept, 2010

18   
19 Jeffrey Ramsdell, Judge

# APPENDIX C

No. 63579-4-1

**FILED**  
KING COUNTY, WASHINGTON

SEP 27 2010

SUP. COURT CLERK  
**KIRSTIN GRANT**  
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

IVORY BERUBE,

Defendant.

No. 08-C-05714-0 SEA

NARRATIVE REPORT OF TRIAL  
TESTIMONY OF JAMES DYMENT  
PURSUANT TO RAP 9.3

James Dymment testified on direct examination that he is the detective sergeant of the gang unit FOR Seattle Police Department. He has been with Seattle Police Department for 17 years and has run the Gang Unit for the past two years.

When he received the dispatch for the incident of the shooting at Waid's he was in the downtown area. He went to 14<sup>th</sup> Ave. on Yesler street and then went north bound on 14<sup>th</sup>. Enroute, he heard a description of a black male in a white T shirt. He observed a car make a southbound turn onto 14<sup>th</sup>. Dymment turned his vehicle around and followed the car. He noticed there were multiple subjects in the car. He saw a baby's car seat on the lap of someone in the car. Dymment considered this to be a more high risk situation than normal, and he was joined by one other back up units. The car he was driving had no exterior markings, but it did have lights.