

64026-7

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Consolidated under No. 64026-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES LOCKREM, SR.,

Appellant.

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COURT OF APPEALS
DIVISION ONE
CLERK

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

The Honorable Charles R. Snyder

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's closure of the courtroom during jury *voir dire* violated the First, Sixth, and Fourteenth Amendments to the United States Constitution and article I, sections 10 and 22 of the Washington Constitution.

2. The prosecutor's comparing Mr. Lockrem and his family to "a pack of wolves" during closing argument violated Mr. Lockrem's due process right to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. This State stringently protects the public's right to open administration of justice. The trial court closed a portion of the jury *voir dire* from the public without undertaking the required pre-closure analysis. Does the court's disregard for the mandatory procedures needed to conduct court proceedings in private violate Article I, sections 10 and 22 and the First, Sixth, and Fourteenth Amendments?

2. The Sixth and Fourteenth Amendments guarantee an accused person a fair trial. Where a prosecutor engages in misconduct during closing argument which seeks a verdict based on passion and prejudice, the defendant is denied a fair trial. Where the prosecutor called Mr. Lockrem and his family a "pack of

wolves” during closing argument, was Mr. Lockrem’s right to a fair trial before an impartial jury violated, requiring reversal of his convictions?

C. STATEMENT OF THE CASE

James Lockrem Sr., along with his son James Lockrem Jr., and his son-in-law, Jarred Ziegler, were charged with third degree assault, obstructing a police officer, and disarming a police officer, for assaulting a Whatcom County Sheriff’s Deputy at the Baker Lake National Forest when the deputy attempted to arrest Mr. Lockrem’s youngest son, Joshua. CP 162-63. Following a jury trial, Mr. Lockrem Sr. was convicted of third degree assault and obstructing a police officer and acquitted of disarming a police officer. CP 6, 34-35.

D. ARGUMENT

1. CONDUCTING INDIVIDUAL JURY *VOIR DIRE* IN A CLOSED COURTROOM WITHOUT CONSIDERING ALTERNATIVES OR MAKING SPECIFIC FINDINGS UNDER *BONE-CLUB* VIOLATED MR. LOCKREM'S RIGHT TO A PUBLIC TRIAL AND THE PUBLIC'S RIGHT TO ACCESS TO THE COURTS

On the first day of trial, the court began by determining it was going to conduct individual jury *voir dire* in chambers for those jurors who had expressed some reluctance to speak in open court:

We have a few jurors here who have indicated in their questionnaire that they would like to answer some questions in private, or may have some information or contact with this case or some knowledge about it, and so we've asked you folks to come in first.

We're going to inquire of you individually, and then those of you, if you're still eligible to remain on the jury panel, we'll bring you back with the whole group and do the formal voir dire, but this is an opportunity for us to make sure that this happens in an appropriate way, without a whole lot of further adieu –

The first thing that I have to ask is there anyone in this courtroom that has any objection whatsoever to the court conducting questions with counsel and their clients, conducting questions of these jurors outside the presence of the public and outside the presence of the remainder of the jury panel? Is there anyone at all with any objections?

...

That's good. That's the first step that we have to cross.

6/1/2009RP 3 (emphasis added). The court went on and conducted this individual *voir dire* as it had stated - in private with the public excluded. 6/1/2009RP 7-72.

After individually questioning seven jurors in the closed courtroom, the court realized it had closed the courtroom without making specific findings regarding why the courtroom was closed:

I want to put on the record something which I think needs to be addressed.

This process that we've gone through just now was to essentially close the courtroom and inquire of this group of jurors individually.

The Court did make the request of whether there was anyone in the courtroom who was present who had any reason to object. There was no such objection.

It's the Court's determination that this method for continuing open access was the least restrictive means available to protect the defendant's interests, and to find out if people had significant knowledge about this case, or about other matters solving [sic] the sheriffs [sic] department.

We wanted to make sure that they didn't influence other jurors when they spoke about those things, and also issues of privacy, which I think some of our jurors pretty adequately attempted to express it was pretty personal to them, and that they were uncomfortable discussing them in a large group, and I think that allows jurors the opportunity to participate in *voir dire* honestly and openly, and participate in a way that we hope everyone will.

In weighing the competing interests of the proponent of the closure, and the public, for the defense interest, and those of the jurors against essentially the public's not being here, and not particularly showing any interest. There was no one here. I don't think it's a real issue. There was no loss to the public in terms of not being able to participate, and the rest of the voir dire will be open, and they can participate if they wish and see that.

I think the order was as narrowly tailored as possible to do this, and short duration, just long enough to ask these few questions of these jurors.

So I would find that all of the *State v. Bone-Club* factors have been met, and that is the record for the court of appeals [sic].

6/1/2009RP 72-74.

A discussion then ensued between the parties and the court over answers in the juror questionnaires indicating potential jurors had been exposed to some newspaper articles regarding Mr. Lockrem's case. 6/1/2009RP 76-85. The court again decided to close the courtroom and individually question those jurors who had been exposed to this article:

Is there anyone in this room who objects to the Court questioning those individuals who have indicated some knowledge of this case individually before we begin the voir dire which includes all of you?

...

Is there anybody in the courtroom that has any objection whatsoever to that? Please raise your hand. No one does. Great.

6/1/2009RP 86. The court questioned an additional 12 jurors privately in the closed courtroom. 6/1/2009RP 88-187.

a. The federal and state constitutions provide the accused the right to a public trial and also guarantee public access to court proceedings. Public criminal trials are a hallmark of the Anglo-American justice system. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-73, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (plurality) (outlining history of public trials from before Roman Conquest of England through Colonial times). “A trial is a public event. What transpires in the court room is public property.” *State v. Coe*, 101 Wn.2d 364, 380, 679 P.2d 353 (1984), quoting *Craig v. Harney*, 331 U.S. 367, 374, 67 S.Ct. 1249, 91 L.Ed.2d 1546 (1947).

Both the federal and state constitutions guarantee the accused the right to a public trial. The Sixth Amendment provides, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial” Article I, section 22 of the Washington Constitution also guarantees “[i]n criminal prosecutions, the accused shall have the right to . . . a speedy public trial.”

In addition, the public also has a vital interest in access to the criminal justice system. The Washington Constitution provides, “Justice in all cases shall be administered openly, and without unnecessary delay.” Const. art. I, § 10. This provision provides the public and the press a right to open and accessible court proceedings. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Public access to the courts is further supported by article I, section 5, which establishes the freedom of every person to speak and publish on any topic. *Federated Publications v. Kurtz*, 94 Wn.2d 51, 58, 615 P.2d 440 (1980). In the federal constitution, the First Amendment’s guarantees of free speech and a free press also protect the right of the public to attend a trial. *Globe Newspaper*, 457 U.S. at 603-05; *Richmond Newspapers*, 448 U.S. at 580 (plurality).

Although the defendant’s right to a public trial and the public’s right to open access to the court system are different, they serve “complimentary and interdependent functions in assuring the fairness of our judicial system.” *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).

The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the

presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.

Id., quoting *In re Oliver*, 333 U.S. 257, 270 n.25, 68 S.Ct. 499, 92 L.Ed. 682 (1948).

Open public access to the judicial system is also necessary for a healthy democracy, providing a check on the judicial process. *Globe Newspaper*, 457 U.S. at 606; *Richmond Newspapers*, 448 U.S. at 572-73 (plurality). Criminal trials may provide an outlet for community concern or outrage concerning violent crimes. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 509, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (*Press-Enterprise I*). When trials are open to the public, citizens may be confident that established, fair procedures are being followed and that deviations from those standards will be made known. *Press-Enterprise I*, 464 U.S. at 508. Openness thus “enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” *Id.* at 501. The role of public access to the court system in maintaining public confidence was also noted by the Washington Supreme Court:

We adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice. Openness of courts is essential to

the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.

Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993).

Further, the federal constitution "resolves any question about what a trial court must do before excluding *the public* from trial proceedings, including *voir dire*." *State v. Paumier*, 155 Wn.App. 673, 685, 230 P.3d 212, *review granted* ___ Wn.2d ___, 236 P.3d 206 (2010) (emphasis added), *citing Presley v. Georgia*, ___ U.S. ___, 130 S.Ct. 721, ___ L.Ed.3d ___ (2010).

By shutting out the public without first considering alternatives to closure and making appropriate findings explaining why closure was necessary, the trial court violated Paumier's *and the public's* right to an open proceeding.

Paumier, 155 Wn.App. at 685. (emphasis added).

The trial court was very explicit in closing the courtroom for individual *voir dire*. Thus the issue is whether the court articulated a compelling reason for the closure and whether the court's *post hoc* analysis was sufficient.

b. Courts may not close the courtroom for individual jury voir dire absent an on-the-record *Ishikawa/Bone-Club* factor analysis. The presumption of open, publicly accessible court hearings, including *voir dire*, may be overcome “only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to preserve that interest.” *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), citing *Press-Enterprise I*, 464 U.S. at 510; *State v. Strode*, 167 Wn.2d 222, 227, 217 P.3d 310 (2009); *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009); see also *Presley*, 130 S.Ct. at 724 (circumstances in which the right to an open trial may be limited “will be rare,” and, “the balance of interests must be struck with special care”).

The trial court must articulate an “overriding interest” justifying any limit on public access to *voir dire*, “along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.” *Strode*, 167 Wn.2d at 227. In order to protect the defendant’s constitutional right to a public trial, a trial court may not conduct secret or closed proceedings “without, first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure

order.” *Easterling*, 157 Wn.2d at 175. The five criteria are “mandated to protect a defendant’s right to [a] public trial.” *In re the Personal Restraint of Orange*, 152 Wn.2d 795, 809, 100 P.3d 291 (2004) (emphasis in original).

The criteria require:

1. The proponent of closure or sealing must make some showing [of a compelling state interest], and where that need is based on a right other than an accused’s right to a fair trial, the proponent must show a “serious and imminent threat” to that right;
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests;
4. The court must weigh the competing interests of the proponent of closure and the public;
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59; *see also Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36-39, 640 P.2d 716 (1982) (same). The trial court “must ensure” that the “five criteria are satisfied” *before* closing court proceedings. *Strode*, 167 Wn.2d at 227. *See also Waller*, 467 U.S. at 45 (the trial court must enter specific findings identifying the interest so that a reviewing court may determine if the closure was proper).

The requirements for protecting the public's right to open courtrooms "mirrors" the requirements used in criminal cases. *Easterling*, 157 Wn.2d at 175. The court may not close the courtroom without "first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order." *Id.*, citing *Bone-Club*, 128 Wn.2d at 258-59; and *Ishikawa*, 97 Wn.2d at 37; see also *Easterling*, 157 Wn.2d at 174-75 (trial court must "*resist a closure motion except under the most unusual circumstance.*") (emphasis in original).

A member of the public is not required to assert the public's right of access in order to preserve this issue for appeal. *Easterling*, 157 Wn.2d at 176 n 8. Further, the court has an independent duty to assure the public's right to an open courtroom. *Presley*, 130 S.Ct. at 724-25.

Courtroom closure for individual jury *voir dire* must be performed *prior* to closing the courtroom. *Bone-Club*, 128 Wn.2d at 258-59 (rather than prohibiting closure, *Bone-Club* allows the trial court to close the courtroom once it has explained on the record the specific issues that require privacy).

Here, the court did not weigh the mandatory *Bone-Club* factors until *after* it had closed the court proceedings to the public

and undergone individual *voir dire* in private. This *post hoc* justification of a closure that already occurred undermines the purpose of the findings, which are required so that the court sets both a strict justification for the closure and the narrowest framework for the closure. *Strode*, 167 Wn.2d at 231. The court's after-the-fact assurance that it conducted a proper, private inquiry of jurors did not guarantee the closure would be as narrow as possible or the least restrictive means available before the court closed the hearings. *Id.* The court improperly closed the courtroom without *first* engaging in the *Bone-Club* analysis.

c. Assuming a court may comply with the *Ishikawa/Bone-Club* analysis *post hoc*, the court's analysis was insufficient and violated Mr. Lockrem's right to a public trial and the public's right to open access. The court here never considered alternatives before closing the courtroom. *Presley*, 130 S.Ct. at 724-25. ("whether or not any party has asserted the right," the court is "required to consider alternatives to closure even when they are not offered by the parties"). Further, the court's focus was misplaced: the court focused solely on the impact on the jurors and the discomfort of the jurors. The court failed to give the proper precedence to the public's right to access, which courts have

overwhelmingly stated is the primary right which must be respected.

The court appeared to give little weight to the public's right to access because it sought objections from the public and no person in the audience objected. The court did not consider alternatives to closure: it failed to explain why jurors could not be questioned individually in the public courtroom, with all other potential jurors waiting elsewhere. If "generic" risks, such as the fear jurors could hear prejudicial information, as articulated by the trial court here, justified closed courtrooms and overrode the constitutional right to a public trial, "the court could exclude the public from jury selection almost as a matter of course." *Presley*, 130 S.Ct. at 725. The *Presley* Court further noted,

even assuming, *arguendo*, that the trial court had an overriding interest in closing voir dire, it was still incumbent upon it to consider all reasonable alternatives to closure. It did not, and that is all this Court needs to decide.

130 S.Ct. at 725. Here, the court considered no other alternatives, moving immediately to court closure. Under *Presley*, the failure violates the constitutional bar on courtroom closure. *Id.*

In *Easterling*, even though the issue was raised for the first time in the petition for review, the Supreme Court reversed a

criminal conviction due to the trial court's closure of the courtroom during a pre-trial hearing that solely involved the co-defendant, whose case had previously been severed from the defendant's. *Id.* at 174, 178, 180 n.11. There was no objection to the courtroom closure, yet the court's failure to articulate a sufficiently compelling reason for closing the hearing to the public violated both the public's and the defendant's rights to an open and public trial. *Id.* at 179.

This decision to close a part of a criminal trial to the public runs afoul of the article I, section 10 guarantee of providing open access to criminal proceedings. It also runs contrary to this court's consistent position of strictly protecting the public's and the press's right to view the administration of justice. *Accord Eikenberry*, 121 Wn.2d 205; *Ishikawa*, 97 Wn.2d 30.

Easterling, 157 Wn.2d at 179.

Here, the court's primary purpose for closing the courtroom was concerns for jurors' privacy. The court failed to consider *any* alternatives to closure and failed to articulate an "overriding interest" justifying any limit on public access to *voir dire*. *Strode*, 167 Wn.2d at 227. Instead, the court relied on the public's failure to object as a valid rationale for the closure. As a consequence, the court violated the public's right to access and Mr. Lockrem's right to a public trial.

d. Mr. Lockrem is entitled to reversal of his conviction and remand for a new trial. The remedy for a violation of the public's right of access and the defendant's right to a public trial is remand for a new trial. *Easterling*, 157 Wn.2d at 179-80. In *Easterling*, the court rejected the possibility that a courtroom closure may be *de minimus*, even for a limited closure applicable to a limited hearing for a separately charged co-defendant. 157 Wn.2d at 180 ("a majority of this court has never found a public trial right violation to be *de minimus*."); accord, *State v. Erickson*, 146 Wn.App. 200, 211, 189 P.3d 245 (2008); *State v. Duckett*, 141 Wn.App. 797, 809, 173 P.3d 948 (2007). The *Easterling* Court further emphasized, "[t]he denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis." *Easterling*, 157 Wn.2d at 181; *State v. Frawley*, 140 Wn.App. 713, 721, 167 P.3d 593 (2007).

The trial court's error in closing portions of *voir dire* to allow potential jurors to discuss matters in private requires reversal of Mr. Lockrem's conviction and remand for a new trial.

2. THE PROSECUTOR VIOLATED MR. LOCKREM'S RIGHT TO A FAIR TRIAL IN COMMITTING MISCONDUCT DURING CLOSING ARGUMENT

During the prosecutor's closing argument, the prosecutor made reference to family:

Again consequences – strike that. Choices, choices, and we live with our, we live with the consequences. Intent, motive doesn't matter. *Family – yes, blood is thicker than water, but it doesn't entitle us to act like a pack of wolves.* It doesn't entitle us to disregard the laws and hide behind it was a family weekend. We were sending our son off to war. We had grandchildren there, because you know what? That's not the evidence. That's an improper appeal.

6/17/2009RP 1574 (emphasis added).

This was the penultimate portion of the argument. *Id.*

Counsel immediately objected to the prosecutor's argument and moved for a mistrial. 6/17/2009RP 1578-80. The court was clearly concerned about the prosecutor's argument, but ultimately denied the mistrial motion:

I don't think there's a basis to grant a mistrial that [sic] one particular comment. However, I do think, and I also believe that a curative instruction would emphasize it more than anything.

I will if I think it's appropriate to reiterate to the jurors the general instruction about argument being merely argument, but again caution the state, and all other parties that that sort of inflammatory language will not be accepted --.

6/17/2009RP 1580.

a. Mr. Lockrem had a constitutionally protected right to a fair trial. The United States Supreme Court has stated that a prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). Because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence," appellate courts must exercise care to insure that prosecutorial comments have not unfairly "exploited the Government's prestige in the eyes of the jury." *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1(1985). Because the average jury has confidence that the prosecuting attorney will faithfully observe his or her special obligations as the representative of a sovereignty whose interest "is not that it shall win a case, but that justice shall be done," his or her improper

suggestions “are apt to carry much weight against the accused when they should properly carry none.” *Berger*, 295 U.S. at 88.

Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Prosecutorial misconduct which deprives an individual of a fair trial violates the individual’s right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. “The touchstone of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause?” *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Therefore, the ultimate inquiry is not whether the error was harmless or not harmless, but rather whether the impropriety violated the defendant’s due process rights to a fair trial. *Davenport*, 100 Wn.2d at 762.

A defendant claiming prosecutorial misconduct who has preserved the issue by objection bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d

221 (2006). A defendant establishes prejudice if there is a substantial likelihood the misconduct affected the jury's verdict.

State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

b. The prosecutor's argument comparing the Lockrem family to "a pack of wolves" constituted egregious misconduct and pandered to the passion and prejudice of the jury.

A prosecutor's "deliberate appeal to the jury's passion and prejudice" constitutes prosecutorial misconduct. *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). In *Belgarde*, unobjected-to remarks made by the prosecutor in closing argument saying that defendant was "strong in" the American Indian Movement and that its members were "a deadly group of madmen" and "butchers that kill indiscriminately," were highly prejudicial, introduced facts not in evidence. *Belgarde*, 110 Wn.2d at 507. The Supreme Court held that these statements were testimony disguised as a closing argument, stating that "[t]he prosecutor stepped far outside his proper role ... to give the jury highly inflammatory 'information.'" *Id.* at 509. Because these statements were a deliberate appeal to the jury's passion and could not have been neutralized even had there been an objection or a request for

a curative instruction, the Court vacated the judgment and remanded for a new trial. *Id.* at 510.

Similarly, this Court reversed a conviction based upon prosecutorial misconduct during argument in *State v. Rivers*, 96 Wn.App. 672, 981 P.2d 16 (1999). In *Rivers*, the prosecutor during closing argument in a first degree assault prosecution referred to the defendant as a “vicious rocker,” a “predator,” and a “jackal.” The prosecutor then proceeded to read the dictionary definition of “jackal” to the jury. The prosecutor went even further and referred to the defendant’s character witnesses, many of whom were incarcerated in the county jail, as the “pajama crowd,” and regaled the jury with the prosecutor’s account of what would have happened to these witnesses in jail if they had not supported the defendant’s version of events. *Rivers*, 96 Wn.App. at 673-74. This Court concluded the prosecutor’s comments fell below the standards of professionalism and were intended to “inflame the jury’s passion and prejudice.” *Id.* at 675-76. In ruling that the comments so egregious that they warranted reversal and a new trial, even where the defense did not request a curative instruction, this Court noted:

No one disputed that Rivers was present at the melee. The State's evidence was countered by the defendant's explanation of the events of the evening. The defendant's case hinged on his and his witnesses' credibility. The prosecutor attacked their credibility in an inappropriate manner, instead of adhering to his responsibility to utilize appropriate evidence that relates to the elements of the crime to persuade the jury that the State has met its burden of proof. Instead of focusing the jury's attention properly on the elements of the crime and the State's burden of proof, the prosecutor resorted to ill-conceived rhetoric aimed squarely at the jury's passion.

Rivers, 96 Wn.App. at 676.

Here, although the prosecutor's argument was not as extensive as that in *Belgarde* and *Rivers*, nevertheless, the impact on the jury and the resulting prejudice to Mr. Lockrem was the same. The case in *Rivers* rested on the relative credibility of the witnesses. Further, as in *Rivers*, the prosecutor did not focus his arguments on the elements of the offense and the State's burden of proof, but instead resorted to an argument designed to inflame the passion of the jury.

The prosecutor's improper comment was one of the last remarks the prosecutor made in his closing argument. This comment no doubt stuck with the jurors given the fact the three family members were alleged to have all attempted to assault the single deputy. Further, the fact the court sustained the defense

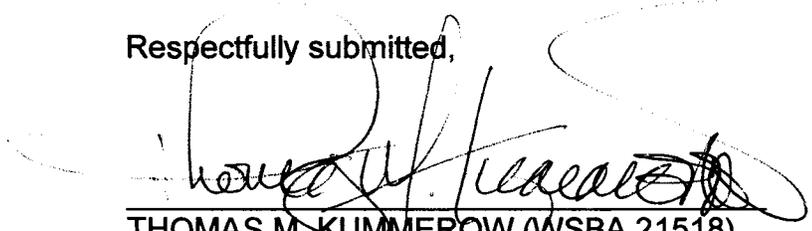
objection to the comment did not mitigate or cleanse the prejudice. There was a substantial likelihood the prosecutor's misconduct affected the jury's verdict. *Dhaliwal*, 150 Wn.2d at 578. Mr. Lockrem is entitled to have his convictions reversed.

E. CONCLUSION

For the reasons stated, Mr. Lockrem submits this Court must reverse his conviction and remand for a new trial.

DATED this 16th day of September 2010.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 64026-7-I
)	
JAMES LOCKREM, SR.,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF SEPTEMBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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