

71844-4

71844-4

COA No. 71844-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

HARUN OSMAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Mary Roberts

APPELLANT'S OPENING BRIEF

OLIVER R. DAVIS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

2019 DEC 26 11:11:25
COURT OF APPEALS
STATE OF WASHINGTON
Mary Roberts

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 2

 1. Charging and verdicts. 2

 2. Trial. 3

 3. Closing argument. 7

 THE PROSECUTOR’S MISCONDUCT IN CLOSING
 ARGUMENT AND THE IMPROPER RESTRICTIONS ON THE
 DEFENSE EXPLANATION OF THE REASONABLE DOUBT
 STANDARD REQUIRE REVERSAL OF MR. OSMAN’S
 CONVICTION. 8

 1. Misconduct in closing argument is prohibited. 8

 2. Mr. Lee objected to the misconduct, and the State’s objection
 was sustained when the prosecutor argued that the defense description of
 the reasonable doubt standard was “inaccurate;” Mr. Osman may
 appeal. 9

 3. Shifting or misstating the burden of proof. 9

 4. The court committed error in sustaining the State’s objection
 and curtailing the defense argument. 11

 5. Vacation of the verdict- highly disputed case – reversal
 required even under non-constitutional error standard. 17

E. CONCLUSION 19

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) 19

State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009) 13

State v. Avendano-Lopez, 79 Wn. App. 706, 904 P.2d 324 (1995) 8

State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988). 8

State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007) 13

State v. Charlton, 90 Wn.2d 657, 585 P.2d 142 (1978) 8

State v. Claflin, 38 Wn. App. 847, 690 P.2d 1186 (1984). 10

State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012) 15,17

State v. Estill, 80 Wn.2d 196, 492 P.2d 1037 (1972) 13

State v. Fisher, ___ Wn. App. ___, ___ P.3d ___, 2014 WL 6778287
(Wash.App. Div. 2,2014). 14

State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996) 11

State v. Fricks, 91 Wn.2d 391, 588 P.2d 1328 (1979). 11

State v. Frost, 160 Wn.2d 765, 161 P.3d 361 (2007), cert. denied, 552
U.S. 1145 (2008). 15

State v. Fuller, 169 Wn. App. 797, 282 P.3d 126 (2012), review denied,
176 Wn.2d 1006 (2013) 13

State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985), cert. denied, 475
U.S. 1020 (1986). 16

State v. Halstien, 122 Wn.2d 109, 857 P.2d 270 (1993) 17

| | |
|--|----|
| <u>State v. Holmes</u> , 122 Wn. App. 438, 93 P.3d 212 (2004) | 19 |
| <u>State v. Huelett</u> , 92 Wn.2d 967, 603 P.2d 1258 (1979). | 12 |
| <u>In re Glasmann</u> , 175 Wn.2d 696, 286 P.3d 673 (2012) | 11 |
| <u>State v. Guizzotti</u> , 60 Wn. App. 289, 803 P.2d 808, <u>review denied</u> , 11610 Wn.2d 1026, 812 P.2d 102 (1991). | 10 |
| <u>State v. Lane</u> , 56 Wn. App. 286, 786 P.2d 277 (1989) | 13 |
| <u>State v. Lindsay</u> , 180 Wn.2d 423, 326 P.3d 125 (2014). | 12 |
| <u>State v. Mabry</u> , 51 Wn. App. 24, 751 P.2d 882 (1988) | 13 |
| <u>State v. Perez–Cervantes</u> , 141 Wn.2d 468, 6 P.3d 1160 (2000). | 12 |
| <u>State v. Pirtle</u> , 127 Wn.2d 628, 904 P.2d 245 (1995) | 13 |
| <u>State v. Price</u> , 33 Wn. App. 472, 655 P.2d 1191 (1982). | 13 |
| <u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984) | 10 |
| <u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994), <u>cert. denied</u> , 514 U.S. 1129 (1995) | 19 |
| <u>Sears v. Seattle Consol. St. Ry. Co.</u> , 6 Wash. 227, 33 P. 389, 33 P. 1081 (1893) | 16 |
| <u>State v. Stith</u> , 71 Wn. App. 14, 856 P.2d 415 (1993) | 10 |
| <u>State v. Thorgerson</u> , 172 Wn.2d 438, 258 P.3d 43 (2011) | 17 |
| <u>State v. Torres</u> , 16 Wn. App. 254, 554 P.2d 1069 (1976). | 8 |
| <u>State v. Traweek</u> , 43 Wn. App. 99, 715 P.2d 1148 (1986), <u>overruled on other grounds by State v. Blair</u> , 117 Wn.2d 479, 816 P.2d 718 (1991) | 11 |

CASES FROM OTHER STATE JURISDICTIONS

People v. Light, 44 Cal. App. 4th 879, 52 Cal. Rptr.2d 218 (1996) . . . 15

People v. Yu, (Ct. App. CAL) (No. 01F04848, Dec. 13, 2005) 15

UNITED STATES DISTRICT COURT CASES

Rodriguez v. Uribe, C.D. Cal. 2013 (District Court No. CV 12-782-JSL (SH) (2013 WL 5329533) 14

UNITED STATES SUPREME COURT CASES

Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 74 L.Ed.2d 1314 (1935) 8

Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) . . 11

Herring v. New York, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). 16

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) . . 12

United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) 8

COURT RULES

RAP 2.5(a). 10

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. 5 10

U.S. Const. amend. 14 8

Wash. Const. art. 1, § 3 8

Wash. Const. art. 1, § 9. 10

REFERENCE MATERIALS

11 Washington Practice: Washington Pattern Jury Instructions: Criminal
4.01 (3d ed. Supp.2011). 9

Burton's Legal Thesaurus, 4E (© 2007 McGraw-Hill) 14

A. ASSIGNMENTS OF ERROR

1. In Mr. Osman's trial in which he was convicted of fourth degree assault, the prosecutor committed reversible misconduct in closing argument.

2. The trial court erroneously sustained the State's objection to the defense closing argument.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is it prosecutorial misconduct for the State to shift the burden of proof in closing argument by asking the jury to find the accused guilty because there was no other explanation, besides assault, for certain aspects of the physical evidence?

2. Was error committed where the trial court agreed with the prosecutor and sustained the prosecutor's objection that the defense argument that an abiding belief in the defendant's guilt should be a belief that lasted a month or a year?

3. Is reversal of the assault conviction required, including for substantial prejudice to Mr. Osman, under the constitutional error standard, and/or under the cumulative error doctrine, where the evidence was not great, and was highly conflicting?

C. STATEMENT OF THE CASE

1. **Charging and verdicts.** Harun Osman was charged with unlawful imprisonment, felony harassment (threat to kill) and fourth degree assault, based on a claim that after meeting Tammy Maxwell at the Castaway Tavern, he drove her in his vehicle, while not letting her get out, to the nearby Cowgirls Espresso stand, and punched her. CP 4.

The jury acquitted Mr. Osman of the felony allegations, and, after several jury inquiries, found him guilty of fourth degree assault. CP 94-96 (verdict forms), CP 97 (judgment of acquittal on felony counts).

According to the affidavit of probable cause, Federal Way police officer Chris Martin was flagged down by a person who stated that there was a “woman screaming for help” near the coffee stand. Officer Martin and Officer Gabriel Castro went to the parking lot and saw a woman in the driver’s seat of a Dodge Durango. She had her legs facing out and Martin asserted he had seen a black male standing over the woman, hitting her with his fist. CP 4. When told to stop by the police, the man, Harun Osman, complied with the police requests. CP 4.

Ms. Maxwell had facial abrasions. CP 4. She stated to the

police that she left the Tavern with Mr. Osman in order to talk, but then said that she was involuntarily inside the car when he drove away, and he punched her, accusing her of taking his wallet. CP 4-5. For his part, Mr. Osman told police that he was driving Tammy to the nearby McDonalds because she was hungry, when she took his wallet. CP 5. Police located Mr. Osman's wallet between the seats of the car. CP 5.

2. Trial. At trial, Officer Martin stated that when he observed the Dodge, he saw the defendant punch Ms. Maxwell three times. 3/25/14RP at 14, 18. This was despite the fact that it was dark; the officer stated there was a street light "in the area." 3/25/14RP at 18-19. Subsequently, Officer Martin testified that he saw marks on Ms. Maxwell's face, but he did not observe any redness or blood. 3/25/14RP at 22. Officer Martin confirmed that the parking lot was adjacent to a McDonalds restaurant. 3/25/14RP at 27-29; Supp. CP ___, Sub # 57 (Exhibit list, Defense exhibit 1).

Officer Robert Guillermo, who responded to the scene where Officer Martin had detained Mr. Osman, stated that Mr. Osman seemed to be arguing with the officers that Ms. Maxwell had mixed something in his drink and taken his wallet and his car keys. 3/25/14RP at 40-41.

Officer Gabriel Castro revealed to the jury that Mr. Osman told

him at the scene that he had been driving Ms. Maxwell to McDonalds, but she took his keys and wallet from him. When the police arrived, he was simply trying to get his wallet back from her. 3/25/14RP at 49, 54-55. Officer Castro testified he misspoke when he told the defense investigator that his attention was first drawn to the coffee stand because he heard a man yelling. 3/25/14RP at 59; Defense exhibit 16. Mr. Osman also told Officer Castro that his wallet was missing.¹ 3/25/14RP at 60. Ms. Maxwell had initially not wanted to give any statement at the scene. 3/25/14RP at 63.

Officer Castro took photographs of Ms. Maxwell, which the prosecutor used in closing argument to contend that she had been assaulted. 3/25/14RP at 54; State's Exhibits 12 and 13; 3/26/14RP at 44.

Neither Officer Martin, Officer Guillermo, or Officer Castro went to the Castaway Tavern to talk to anyone there or to check if the establishment has surveillance video. 3/25/14RP at 34, 47-48, 64-65.

¹ The police located Mr. Osman's wallet down between the seats of the car. 3/25/14RP at 164-65; State's Exhibits 31, 32. In closing argument, the defense noted that Mr. Osman may have made a mistake in believing that Ms. Maxwell had also stolen his wallet from him, and argued that he had not committed crimes, including any fourth degree assault of her at all. 3/26/14RP at 54-60.

Defense investigator Russ Williams confirmed that the Castaway Tavern did have surveillance video, but by then it was too late to obtain it for the date in question because the tape had been “looped over.” 3/26/14RP at 4, 8-10.

Tammy Maxwell stated that Mr. Osman approached her at the Castaway Tavern on “Ladies Night.” 3/25/14RP at 67, 74-76. She testified that she was not interested in him, and then her son Nicolas texted that he was out front in his car, to pick her up. 3/25/14RP at 76-77. She then claimed that she merely agreed to sit and talk with Mr. Osman and sat in the front passenger seat of his car, with the door open and her feet on the ground. 3/25/14RP at 78-79. She also stated that Mr. Osman did have her telephone number, although she denied giving it to him. 3/25/14RP at 118.

Ms. Maxwell stated that Mr. Osman closed her passenger door,² which then was locked, and entered the driver’s seat and began driving away, saying he would take her to her son’s car since it was raining. 3/25/14RP at 80-81.

Ms. Maxwell testified that as the car drove away, Mr. Osman

² Ms. Maxwell’s son Nicholas would later admit that he stated that she saw his mother enter the passenger side of the vehicle and close the car door herself. 3/25/14RP at 153-54; Defense Exhibit 29.

would not let her leave the car. 3/25/14RP at 83. Her son Nicholas telephoned her on her cell phone.³ 3/25/14RP at 81-82.

Finally, Ms. Maxwell stated that she jumped out of the car near the McDonalds, and Mr. Osman chased after her. At some point there was a physical struggle in which the defendant allegedly told her to get back in the car, and Ms. Maxwell stated Mr. Osman punched her several times. 3/25/14RP at 86-88, 90.

Ms. Maxwell claimed that she had not taken Mr. Osman's wallet, but admitted that this was what he was getting on at her about. 3/25/14RP at 87-88, 97, 106-08. Ms. Maxwell also admitted that she had previously stated that she got into Mr. Osman's car so they could talk. 3/25/14RP at 103-05; Defense Exhibit 21. At the Cowgirls coffee stand, although Officer Martin had claimed he saw Mr. Osman punching Ms. Maxwell as she was in the car with her feet sticking out, Ms. Maxwell explained that she had never gotten back in the vehicle after she exited it at that location. 3/25/14RP at 114.

³ Nicholas Maxwell admitted that when he came to pick his mother up, she exited the Castaway with the defendant, and told Nicholas to wait because she was going to talk to Mr. Osman; she did not appear frightened or not normal at all. 3/25/14RP at 129-30, 149-50; Defense Exhibit 30. The car then left, although Nicholas could not see who was driving; when he telephoned his mother, he could hear an argument about a wallet, and also his mother telling him to help her. 3/25/14RP at 131-32.

Ms. Maxwell alleged that because there in fact had been an assault, she broke several acrylic nails, and lost a favorite loop earring, all of which were later found by police on the floor of the vehicle. 3/25/14RP at 91-93, 95-96, State's Exhibits 18, 19. The State called Detective Raymond Unsworth to testify that he located the acrylic nails and a missing earring on the floor of Mr. Osman's car. 3/25/14RP at 161-63; State's Exhibits 18, 19.

3. Closing argument. In closing argument, the prosecutor argued to the jury that a question arose: how did Ms. Maxwell's acrylic nails, and her loop earring, end up on the floor of Mr. Osman's car if a struggle did not occur? 3/26/14RP at 39-40. The trial court overruled Mr. Osman's objection that this argument misstated the burden of proof. 3/26/14RP at 40.

Then, during Mr. Osman's closing, defense counsel argued that the reasonable doubt standard meant that the jury should not think that it made a mistake a month or a year later. 3/26/14RP at 60-61. The trial court sustained the State's objection to this argument as inaccurate. 3/26/14RP 61.

THE PROSECUTOR’S MISCONDUCT IN CLOSING ARGUMENT AND THE IMPROPER RESTRICTIONS ON THE DEFENSE EXPLANATION OF THE REASONABLE DOUBT STANDARD REQUIRE REVERSAL OF MR. OSMAN’S CONVICTION.

1. Misconduct in closing argument is prohibited. A public prosecutor is a quasi-judicial officer charged with the duty to seek a verdict based upon reason. State v. Avendano-Lopez, 79 Wn. App. 706, 904 P.2d 324 (1995) (citing State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978)). Vigor is appropriate but improper argument can “undermine the fundamental fairness of the trial.” United States v. Young, 470 U.S. 1, 6-7, 8-18, 105 S.Ct. 1038, 1042-48, 84 L.Ed.2d 1 (1985); see Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 74 L.Ed.2d 1314 (1935); U.S. Const. amend. 14, Wash. Const. art. 1, § 3. Thus a prosecutor’s closing argument should be confined to the evidence and reasonable inferences. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). The prosecutor must act impartially and “with the object in mind that all admissible evidence and all proper argument be made, but that inadmissible evidence and improper argument be avoided.” State v. Torres, 16 Wn. App. 254, 263, 554 P.2d 1069 (1976).

Here, in closing argument, the prosecutor argued to the jury that

a question arose, how did Ms. Maxwell's acrylic nails, and her loop earring, end up on the floor of Mr. Osman's car if a struggle did not occur? 3/26/14RP at 39-40. The prosecutor asked how these two important pieces of evidence could get broken off Maxwell's fingers, or come out of her ear, if there had not been the encounter as she described it. 3/26/14RP at 39-40. The trial court overruled Mr. Osman's objection that this argument misstated the burden of proof.

Subsequently, during Mr. Osman's closing, defense counsel argued to the jury that the law defining reasonable doubt and requiring the jury to have an abiding belief in the truth of the charge meant that the jurors shouldn't find themselves wondering if they made a mistake when they walked out of the courthouse, or a month, or a year later. 3/26/14RP at 60-61. The trial court sustained the State's objection that this was not "the accurate [sic]." 3/26/14RP 61. The defense argument ended one sentence later, whereupon the prosecutor – now having obtained the judge's agreement that this was *not* what reasonable doubt meant -- declined to offer any rebuttal argument, stating that he was going to "let the jury start deliberating." 3/26/14RP at 61.⁴

⁴ The jury was instructed pursuant to the "abiding belief" definition of reasonable doubt. CP 69 (Instruction no. 3); 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01 (3d ed. Supp.2011).

2. Mr. Lee objected to the misconduct, and the State's objection was sustained when the prosecutor argued that the defense description of the reasonable doubt standard was "inaccurate;" Mr. Osman may appeal. Where the defendant objects to closing argument misconduct, the error is preserved. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); State v. Claflin, 38 Wn. App. 847, 849 n. 2, 690 P.2d 1186 (1984). In addition, some misconduct, such as a prosecutor's comment about the defendant's propensity, can be so prejudicial that it is not curable by cautionary instruction. State v. Stith, 71 Wn. App. 14, 856 P.2d 415 (1993); State v. Guizzotti, 60 Wn. App. 289, 296, 803 P.2d 808, review denied, 116 Wn.2d 1026, 812 P.2d 102 (1991).

Further in this case, the trial court erroneously sustained a State's objection to Mr. Osman's proper attempt to define the constitutional standard of proof in criminal cases. RAP 2.5(a). The errors may be argued on appeal.

3. Shifting or misstating the burden of proof. It is misconduct to argue that the defendant is guilty because of the defense failing to provide an explanation justifying acquittal. Both U.S. Const. amend. 5, and the Washington Constitution, article 1, § 9, prohibit a

State's attempt, at trial, to use a defendant's silence against him by implying to the jury that such silence shows that he is guilty. Doyle v. Ohio, 426 U.S. 610, 617, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); State v. Fricks, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979). Relatedly, a prosecutor also commits misconduct by misstating the law regarding the burden of proof. Shifting the burden of proof to the defendant to explain the evidence is improper argument, and ignoring this prohibition even amounts to flagrant and ill intentioned misconduct. In re Glasmann, 175 Wn.2d 696, 713, 286 P.3d 673 (2012) (citing State v. Fleming, 83 Wn. App. 209, 213–14, 921 P.2d 1076 (1996)); U.S. Const. amend. 14. A prosecutor may not suggest to the jury that it should find the defendant guilty because he did not present evidence or explain away the matter. State v. Traweek, 43 Wn. App. 99, 106-07, 715 P.2d 1148 (1986), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991); U.S. Const. amend. 14. The prosecutor committed misconduct under these standards.

4. The court committed constitutional error in sustaining the State's objection and curtailing the defense argument. The State bears the burden of proving every essential element of a criminal

offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072–73, 25 L.Ed.2d 368 (1970); U.S. Const amend. 14.

In the area of closing argument by the accused’s counsel, the Court of Appeals reviews a trial court’s action limiting the scope of closing argument for abuse of discretion. State v. Perez–Cervantes, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000). The Court will find that a trial court abused its discretion if “no reasonable person would take the view adopted by the trial court.” State v. Huelett, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979).

In this case, error occurred when the State attacked Mr. Osman’s description of the reasonable doubt standard as “inaccurate” and that objection was sustained. State v. Lindsay, 180 Wn.2d 423, 434, 326 P.3d 125 (2014). The defendant’s proper description of the constitutional reasonable doubt standard -- urging the jury to make a decision it would not look back on as a mistake -- was wrongly impugned. 3/26/14RP at 60-61. Thus a prosecutor may certainly and permissibly argue to the jury that the “abiding belief” standard is met if the jurors believe they’re right the next morning, and in two years or twenty years, and after all that time they still say I did the right thing. Notably, emphasis on an “abiding” belief serves, as did Mr. Osman’s

closing argument, to merely repeat the trial court's instruction to the jury under that reasonable doubt standard. CP 69 (“If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.”).⁵

Of course, the standard of proof in a criminal case is higher than that for everyday decisions, and the line is definable and defined. State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009) (prosecutor's arguments trivializing the reasonable doubt standard as having the same gravity as “everyday” decision making such as changing lanes on the freeway was error); see also State v. Fuller, 169 Wn. App. 797, 825, 282 P.3d 126 (2012), review denied, 176 Wn.2d 1006 (2013) (same).

Here, Mr. Osman’s argument was *precisely* proper, under the “abiding belief” standard. At least one Court of Appeals has found entirely proper a prosecutor's argument that the reasonable doubt standard means that the jurors should “know” the defendant committed

⁵ The courts have routinely upheld the constitutionality of the abiding belief language that Mr. Osman was explicating -- or tried to explicate -- to the jury. State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007); State v. Pirtle, 127 Wn.2d 628, 656-58, 904 P.2d 245 (1995); State v. Lane, 56 Wn. App. 286, 299-301, 786 P.2d 277 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988); State v. Price, 33 Wn. App. 472, 475-76, 655 P.2d 1191 (1982). Counsel's arguments are certainly proper if they are based on the court's instructions to the jury. Perez-Cervantes, 141 Wn.2d at 475 (citing State v. Estill,

the crime even when they wake up three years later, because this is an abiding belief. State v. Fisher, ___ Wn. App. ___, ___ P.3d ___, 2014 WL 6778287 (Wash.App. Div. 2, 2014). There, the prosecutor argued,

If you have an abiding belief it just means abiding, long lasting. Are you satisfied—when you reach your verdict today, are you satisfied tomorrow, are you satisfied two years from now? When you wake up three years from now, I did the right thing. It's not I'm 1,000 percent certain. It's, I know he did it. Are you going to be satisfied two years from now? I know he did it.

Fisher, ___. Wn. App. at ___ (Slip Op. at p. 10). Although the appellant in Fisher felt specifically aggrieved by the ‘knowledge’ analysis that the prosecutor used, the Court of Appeals found nothing improper in this prosecutor’s explanation of the proof beyond a reasonable doubt standard. Fisher, ___ Wn. App. at ___ (Slip Op. at p. 10). This is no doubt correct. The very definition of “abiding” means a lasting period. See Burton's Legal Thesaurus, 4E (© 2007 McGraw-Hill) (“abiding” means, *inter alia*, changeless, constant, continuing, durable, enduring); see also <http://www.merriam-webster.com/dictionary/abiding> (defining abiding as “enduring, continuing. ”). See also Rodriguez v. Uribe, C.D. Cal. 2013 (District Court No. CV 12–782–JSL (SH) (2013 WL 5329533) (federal

80 Wn.2d 196, 199, 492 P.2d 1037 (1972)).

prosecutor's argument that an abiding belief of the truth of the charge is a "lasting belief" not shown improper so as to require objection by effective counsel). In the present case, the trial court wrongly curtailed Mr. Osman's closing argument regarding the burden required to be met in order to convict him.⁶

Reversal is required, under any standard. First, this was an incurable set of events – no curative instruction from the trial court, if it had later found the objection proper, could erase the effect on the jury of the government prosecutor stating that proof of guilt did not require the jury to make a decision that it would still believe to be correct a year later. See State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012) (error in closing argument is flagrant and appealable *even without objection* if the resulting prejudice could not have been cured).

Second, an erroneous limitation of the scope of closing argument has been said to be subject to harmless error analysis. State v. Frost, 160 Wn.2d 765, 781–82, 161 P.3d 361 (2007), cert. denied,

⁶ See also People v. Light, 44 Cal. App. 4th 879, 886, 52 Cal. Rptr.2d 218 (1996) (stating that the well established meaning of the word "abiding" in the reasonable doubt instruction refers to the permanent nature of the belief, a lasting or enduring belief in the defendant's guilt); People v. Yu, (Ct. App. CAL) (No. 01F04848, Dec. 13, 2005) (Slip Op., at p. 16) (not misconduct for prosecutor to argue that an abiding belief in the verdict of guilt was one that the jurors must be sure of today, tomorrow, next month and beyond).

552 U.S. 1145 (2008). But the Court must be convinced beyond a reasonable doubt that any reasonable jury would have reached the same result. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986); see Frost, 160 Wn.2d at 773 (a trial court's “[i]mproper limitation of closing argument may . . . infringe upon a defendant’s” constitutional rights).

Here, Mr. Osman’s closing argument was the defendant's “last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.” Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). The Washington Supreme Court has said that defense counsel must be afforded “the utmost freedom in the argument of the case” and even “some latitude” in doing so. Perez-Cervantes, 141 Wn.2d at 474 (citing Sears v. Seattle Consol. St. Ry. Co., 6 Wash. 227, 33 P. 389, 33 P. 1081 (1893)). But Mr. Osman needs *no latitude* here – his argument, that the jury should not think it made a mistake a year later, was an apt and entirely proper description of an “abiding” belief, but the judge’s ruling made the jury think the burden was not this high, when it was. In this case, that serious error requires vacation of the verdict under Guloy, or any test.

5. Vacation of the verdict- highly disputed case – reversal

required even under non-constitutional error standard. Even if the routine non-constitutional standard for reversal in cases of trial court error or prosecutorial misconduct is applied here, reversal is required. See State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011) (reversal required for error of prosecutorial misconduct in closing argument where the error resulted in prejudice that “had a substantial likelihood of affecting the jury verdict.”); Emery, 174 Wn.2d at 760-65 (applying substantial prejudice standard to misconduct in misstating the burden of proof); State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993) (non-constitutional error requires reversal if, within reasonable probabilities, it materially affected the outcome of the trial).

The criminal case of Mr. Osman was a close one. In closing argument, his lawyer argued that Officer Chris Martin had no reliable idea of what he had seen in the dark when he went behind the Cowgirls coffee stand, and that Mr. Osman in fact had not punched or assaulted Ms. Maxwell. 3/26/14RP at 51. None of the officers, and certainly the claimed eyewitness Martin, had flashlights, and the officer’s testimony that he saw any punching of Ms. Maxwell in the driver’s seat, was contradicted by Maxwell herself, who testified she had never returned

to the car once Mr. Osman stopped and she exited the passenger door. 3/26/14RP at 51; see 3/25/14RP at 18, 3/25/14RP at 114.

The jury found the State's case tenuous, sending out a total of four inquiries during deliberations. CP 98-99, CP 100-01, CP 104-05, CP 106-07. On the day of closing argument, the jury asked to be given any recorded statements of Tammy Maxwell and Nicholas Maxwell, and all of the evidence accepted in the case. CP 102-03; 3/26/14RP at 65-67. During the next day of deliberations, the jury asked that Officer Martin's testimony – that of the officer who claimed to have eyewitnessed the crime of conviction -- be repeated for them, because the jurors were inadvertently not given note-taking books until the time of his cross-examination. CP 100-01. The court allowed the jury to hear Officer Martin's complete testimony by tape recording. CP 101; 3/27/14RP at 2-8. The jury also inquired if its decision needed to be "unanimous regardless of outcome." CP 106-07; 3/27/14RP at 10-11.

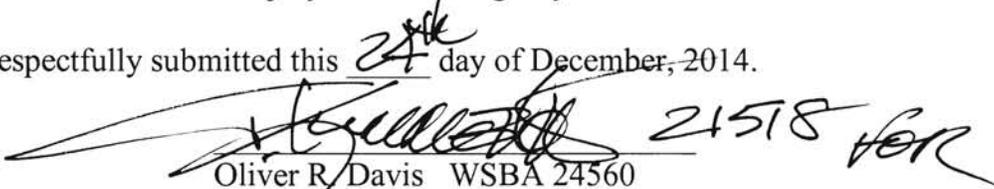
This Court should reverse because it cannot be said that the jury would have reached the same decision, without this error of the trial court telling the jurors it was wrong for counsel to say that they needed to believe their decision was correct a year later. Further, the cumulative error doctrine allows this Court to reverse for multiple

errors that together resulted in denial of the Due Process right of a fair trial. State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995); State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992); U.S. Const. amend. 14, Wash. Const. art. 1, § 3. Under that doctrine, reversal is required because of both improper rulings by the trial court during the parties' closing arguments. See, e.g., State v. Holmes, 122 Wn. App. 438, 447, 93 P.3d 212 (2004) (reversing convictions for misconduct, although victims' testimony was compelling, because defense's theory of case was also believable). Given the competing factual assertions and arguments in the case, the misconduct and the closing argument error by the trial court -- whether looking at the errors individually or cumulatively -- were materially prejudicial to Mr. Osman. This Court should reverse his assault conviction.

E. CONCLUSION

Based on the foregoing, Harun Osman respectfully argues that this Court should reverse the jury's verdict of guilty.

Respectfully submitted this ^{24th} day of December, 2014.

 21518 for
Oliver R. Davis WSBA 24560
Washington Appellate Project - 91052
Attorneys for Appellant