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SUPREME COURT NO. 101749-9

NO. 55944-7-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHARLES HOLMES,

Petitioner.

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

The Honorable Andrew Toynebee, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

	Page
A. <u>PETITIONER AND COURT OF APPEALS DECISION</u>	1
B. <u>ISSUES PRESENTED FOR REVIEW</u>	1
C. <u>STATEMENT OF THE CASE</u>	2
D. <u>REASONS REVIEW SHOULD BE GRANTED</u>	10
1. Review is appropriate under RAP 13.4(b)(3)	10
2. The trial court violated Holmes’s right to jury unanimity on each deadly weapon allegation.	10
a. <u>Unanimity error occurred.</u>	10
b. <u>The error was not harmless</u>	20
3. Counsel provided deficient representation by failing to object when the prosecutor argued facts not in evidence regarding BB gun functionality and deadlines.	23
4. Finally, the prosecutor committed misconduct by offering personal (and institutional) opinion regarding the credibility of witnesses.	28
E. <u>CONCLUSION</u>	31

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
 <u>In re Davis</u>	
152 Wn.2d 647, 101 P.3d 1 (2004)	25, 26
 <u>In re Pers. Restraint of Glasmann</u>	
175 Wn.2d 696, 286 P.3d 673 (2012)	24, 29
 <u>State v. A.N.J.</u>	
168 Wn.2d 91, 225 P.3d 956 (2010)	25
 <u>State v. Armstrong</u>	
188 Wn.2d 333, 394 P.3d 373 (2017)	11
 <u>State v. Ashcraft</u>	
71 Wn. App. 444, 859 P.2d 60 (1993)	27
 <u>State v. Bobenhouse</u>	
166 Wn.2d 881, 214 P.3d 907 (2009)	11
 <u>State v. Boyd</u>	
137 Wn. App. 910, 155 P.3d 188 (2007)	11
 <u>State v. Carson</u>	
184 Wn.2d 207, 357 P.3d 1064 (2015)	16
 <u>State v. Coleman</u>	
159 Wn.2d 509, 150 P.3d 1126 (2007)	14
 <u>State v. Davenport</u>	
100 Wn.2d 757, 675 P.2d 1213 (1984)	24, 28

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Eckenrode</u> 159 Wn.2d 488, 150 P.3d 1116 (2007)	13
<u>State v. Finch</u> 137 Wn.2d 792, 975 P.2d 967 cert. denied, 528 U.S. 922 (1999)	24
<u>State v. Gurske</u> 155 Wn.2d 134, 118 P.3d 333 (2005)	13, 22
<u>State v. Guzmán Nuñez</u> 174 Wn.2d 707, 285 P.3d 21 (2012)	13
<u>State v. Hanson</u> 59 Wn. App. 651, 800 P.2d 1124 (1990)	14
<u>State v. Hennessey</u> 80 Wn. App. 190, 907 P.2d 331 (1995)	15
<u>State v. King</u> 75 Wn. App. 899, 878 P.2d 466 (1994)	14, 20, 22
<u>State v. Kitchen</u> 110 Wn.2d 403, 756 P.2d 105 (1988)	14
<u>State v. Kyлло</u> 166 Wn.2d 856, 215 P.3d 177 (2009)	25
<u>State v. Levy</u> 156 Wn.2d 709, 132 P.3d 1076 (2006)	18
<u>State v. Oeung</u> noted at 196 Wn. App. 1011, 2016 WL 7217270 (2016) ...	16-18

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Peters</u> noted at 13 Wn. App. 2d 1026, 2020 WL 1930211 <u>review denied</u> , 196 Wn.2d 1008 (2020).....	18
<u>State v. Petrich</u> 101 Wn.2d 566, 683 P.2d 173 (1984)	14, 15, 16, 18
<u>State v. Pirtle</u> 127 Wn.2d 628, 904 P.2d 245 (1995)	10
<u>State v. Sassen Van Elsloo</u> 191 Wn.2d 798, 425 P.3d 807 (2018)	15
<u>State v. Stockmyer</u> 83 Wn. App. 77, 920 P.2d 1201 (1996)	16
<u>State v. Vander Houwen</u> 163 Wn.2d 25, 177 P.3d 93 (2008)	12
<u>State v. Williams</u> 136 Wn. App. 486, 150 P.3d 111 (2007)	17, 19
 <u>FEDERAL CASES</u>	
<u>Ramos v. Louisiana</u> ___ U.S. ___, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020)	11
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	24
<u>Wiggins v. Smith</u> 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)	27

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
GR 14.1.....	2
RAP 2.5	11
RAP 13.4	10, 31
RCW 9.94A.533	12
RCW 9.94A.825	9, 12, 20, 21
RCW 9A.04.110.....	21, 27
RCW 9A.52.020.....	8
RCW 9A.56.190.....	8
RCW 9A.56.200.....	8
U.S CONST. amend. VI.....	10, 24
U.S. CONST. amend. XIV	24
CONST. art. I, § 3.....	24
CONST. art. I, § 22.....	24

A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner Charles Holmes seeks review of the Court of Appeals' unpublished decision in State v. Holmes, filed December 28, 2022 ("Op."). Appendix A. The Court denied Holmes's motion for reconsideration. Appendix B.

B. ISSUES PRESENTED FOR REVIEW

1. The constitution requires a jury to unanimously find beyond a reasonable doubt any aggravating circumstance that increases a penalty for crime. Here, the jury was not instructed it must be unanimous as to which weapon, a BB gun or a hatchet, was being relied on as to each deadly weapon allegation, and the State made no election. As to each charged enhancement, based on weaknesses in the State's evidence, a rational trier of fact may have harbored a reasonable doubt. Should this Court grant review on this important constitutional issue,¹ and should the deadly weapon enhancements be reversed?

¹ Even persuasive authority is sparse. In rejecting Holmes's constitutional claim, the Court of Appeals resorted to normally

2. Did counsel provide ineffective assistance by failing to object to the prosecutor's closing argument—essentially, improper testimony—about the functionality and power of BB guns?

3. Did the prosecutor also engage in flagrant and prejudicial misconduct by offering a personal opinion on witness credibility, and was counsel ineffective in failing to object?

C. STATEMENT OF THE CASE²

Holmes, who has struggled with substance addition, made a bad decision in February of 2020 and went to a trailer, owned by Tina Pase, where he was not welcome. He was eventually convicted of first degree burglary and two counts of second degree robbery, with deadly weapon sentence enhancements on each charge.

uncitable 2012 unpublished decision—which the parties could not even discuss in the briefing. Op. at 9 (relying on GR 14.1(c)).

² This petition refers to verbatim reports as in the brief of appellant.

Holmes disputed that he brought weapons. Further, he challenged the credibility of the State's primary witnesses, Pase and Angela Rothschiller (Rothschiller), the latter of whom claimed Holmes concocted a plan to commit robbery.

The parent of a young child, Rothschiller cut a plea deal that would lead to significantly reduced charges if she cooperated. 1RP 164-66. Rothschiller testified that on February 15, 2020, her friend Holmes contacted her because he needed a ride. 1RP 139. Rothschiller's sister Michelle Rothschiller (Michelle) and Michelle's boyfriend Sam Loeung came along. 1RP 141.

The three went to Holmes's residence. Drugs were consumed. 143-44. Holmes wanted to go to the trailer of a woman who had been selling on Holmes's turf. 1RP 145. According to Rothschiller, some of them would go into the trailer with masks and fake guns and take the drugs, and Rothschiller would drive. 1RP 145-46. Sometime after dark, Holmes loaded

a box into the trunk of Rothschiller's car and the four left for the trailer. 1RP 150.

About halfway there, Rothschiller pulled over, and Holmes got masks and "fake guns" out of the trunk. 1RP 150. Holmes put on a mask and handed items to Loeung; Rothschiller assumed it was another mask and gun. 1RP 151. Holmes had what appeared to be a long gun. 1RP 151.

At the property where the trailer was located, Rothschiller let Holmes and Loeung out of the car and turned the car around. 1RP 152-53, 158. Rothschiller and Michelle remained in the car. The plan was for Rothschiller to monitor the police scanner and communicate by walkie-talkie if the police were coming. 1RP 154-56. Loeung got away but Holmes did not. 1RP 161.

Rothschiller, arrested at the scene, initially told police she just gave a ride to a friend who was going to trade for drugs, and she didn't know what was going on. 1RP 163, 172-73. She never saw any object that looked like a gun. 1RP 171.

Rothschiller was charged with, and pleaded guilty to, two counts of first degree robbery, as well as burglary and theft. 1RP 164, 181. But Rothschilder entered an agreement allowing her to withdraw that plea and plead to reduced charges if she cooperated with the State. 1RP 165, 181-83. So, Rothschilder gave a second statement to police, one that was similar to her eventual testimony. 1RP 166-67.

Michelle was in the car but was occupied with her smartphone the whole time. 1RP 199-200, 205. She did not, for example, see masks or guns. 1RP 204, 213, 215. Like her sister, Michelle pleaded to more serious charges pending reduction if she testified. 1RP 210.

Pase, the trailer resident, also testified. Her boyfriend, David Miller, present the night of the incident, died before trial.³ 1RP 367-68. During early morning hours, Pase was sleeping in

³ Pase was charged with Miller's murder. The trial court excluded this but allowed the defense to ask limited questions about Pase's competency. 1RP 13-16, 354-61.

the bedroom area when she woke to raised voices. 1RP 370-72, 415-16. She overheard something like, “where’s the drugs, this is a holdup.” 1RP 372. Pase called 9-1-1 and set the phone on the bed. 1RP 376-79.

Pase heard a voice say, “there’s someone upstairs.” 1RP 379-80. The larger of the two men who entered the trailer came up the stairs to the sleeping area. Pase later learned this was Holmes. 1RP 379-80.

Holmes shone a flashlight in Pase’s face and appeared to carry a gun or a stick covered with electrical tape. 1RP 380. He said he would blow Pace’s head off and she should tell him where to find drugs. 1RP 380.⁴ Holmes took Pase to Miller, zip-tied and lying on the floor, and Holmes began searching the trailer. 1RP 383-84.

Pase also said that when she was standing near the back door of the trailer, Holmes picked up her hatchet (or ax) and

⁴ Pase eventually clarified she saw the item later, and it appeared to be a gun. 1RP 422-23.

threatened to chop off her toes. 1RP 400. It was not clear from Pase's testimony when in the sequence the events described above this occurred. 1RP 400, 426.

Pase also saw a smaller man haphazardly searching. 1RP 387. This man alerted Holmes the police were coming and soon left carrying a satchel with several items. 1RP 391, 396-99.

On cross-examination, Pase acknowledged that after the incident, a court found her incompetent to stand trial in an unrelated case (i.e., the murder trial, which the jury did not hear about). But she was found competent about two months before she testified at Holmes's trial. 1RP 437. Further, Pase met and spent time with Rothschiller after the incident and by trial considered her a friend for life. 1RP 433, 440.

Deputy Andrew Scrivner was one of the officers dispatched to the property. 1RP 276. After Scrivner arrived, Holmes came out of the trailer and officers arrested him. 1RP 280, 285.

According to Scrivner, Pase's trailer was in disarray. Scrivner noticed what looked like a rifle, but was actually a BB gun, on a table by one of the doors. 1RP 283, 295. Shortly before trial, Scrivner successfully test-fired the BB gun. 1RP 297-98. But, although the prosecutor offered *argument* about the functionality and power of BB guns, 2RP 52-53, no witness so testified.

Scrivner also observed a hatchet. 1RP 302. But Pase had to point out the hatchet to Scrivner because it was buried under other items. 1RP 338-39.⁵

Based on the events described, the State charged Holmes (and the three co-defendants) with first degree burglary⁶ (elevated based on deadly weapon and/or assault) (Count 1); two counts of first degree robbery⁷ (two complainants, Miller and

⁵ Scrivner also noted that, contrary to Rothschilder's testimony, there was no box in the trunk of the car. 1RP 340.

⁶ RCW 9A.52.020(1).

⁷ RCW 9A.56.190; RCW 9A.56.200 (1)(a).

Pase, each count elevated based on being armed with deadly weapon, displaying of what appeared to be firearm, and/or inflicting of bodily injury) (Count 2 & 3); and second degree theft (Count 4). CP 1-4. The State also alleged Holmes was armed with a deadly weapon other than a firearm as to each count. CP 1-4; RCW 9.94A.825.

The jury convicted Holmes of burglary and robbery, Counts 1-3, and answered yes to the weapon allegation as to each. But it acquitted Holmes of theft. CP 74-78.

The trial court sentenced Holmes to 216 months of incarceration, including 72 months for the three consecutive 24-month deadly weapon enhancements. 2RP 106-07, 115; CP 303.

Holmes timely appealed. The Court of Appeals rejected each of Holmes's claims except for arguments related to legal financial obligations. Op. at 19-21. Holmes moved for reconsideration, arguing the Court of Appeals misapplied the doctrine of invited error as to the jury unanimity claim. The Court denied the motion. Appendix B.

Holmes now asks that this Court grant review and reverse the Court of Appeals.

D. REASONS REVIEW SHOULD BE GRANTED

1. **Review is appropriate under RAP 13.4(b)(3).**

Review is appropriate under RAP 13.4(b)(3) because, as to the first issue specifically, the case presents a significant and novel question of constitutional law, namely, unanimity as to deadly weapon enhancements.

2. **The trial court violated Holmes's right to jury unanimity on each deadly weapon allegation.**

Contrary to the Court of Appeals decision, which relies on unpublished decisions and decisional law regarding alternative *means* crimes, the trial court violated Holmes's right to a unanimous verdict as to each deadly weapon special verdict.

a. Unanimity error occurred.

This Court reviews the adequacy of jury instructions de novo. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). The Sixth Amendment and article I, section 21 of the state

Constitution guarantee criminal defendants the right to a unanimous jury verdict. Ramos v. Louisiana, ___ U.S. ___, 140 S. Ct. 1390, 1397, 206 L. Ed. 2d 583 (2020); State v. Armstrong, 188 Wn.2d 333, 340, 394 P.3d 373 (2017). Where the State alleges multiple acts, a trial court's failure to ensure a unanimous verdict may be challenged for the first time on appeal. RAP 2.5(a)(3); State v. Bobenhouse, 166 Wn.2d 881, 892 n.4, 214 P.3d 907 (2009).

Failure to ensure jury unanimity is constitutional error that can be raised for the first time on appeal because there is a possibility that jurors will rely on different incidents to convict, resulting in a lack of unanimity. State v. Boyd, 137 Wn. App. 910, 922-23, 155 P.3d 188 (2007).⁸ Further, constitutional error

⁸ The Court of Appeals' opinion, while addressing the matter on the merits, also erroneously concludes Holmes invited error. Op. at 7, 10. As argued in Holmes's motion for reconsideration, this conclusion was erroneous for several reasons. Among them, an unanimity error develops *after* a prosecutor fails to make an election. It is the combination of the lack of election coupled with the lack of an unanimity instruction that produces the error.

that is not harmless beyond a reasonable doubt requires reversal.
State v. Vander Houwen, 163 Wn.2d 25, 39, 177 P.3d 93 (2008).

Under RCW 9.94A.825, “[i]n a criminal case [where] there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime[,] the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was *armed* with a deadly weapon at the time of commission[.]” (Emphasis added.)

For purpose of such a verdict, “a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death.” Id.

RCW 9.94A.533(4)(b) authorizes a 24-month sentence enhancement if the defendant was armed with a deadly weapon other than a firearm during the commission of a class A felony.

As with an underlying crime, the jury must unanimously find beyond a reasonable doubt any aggravating circumstance

that increases a penalty. State v. Guzmán Nuñez, 174 Wn.2d 707, 712, 285 P.3d 21 (2012). Thus, jury unanimity is required in order to answer “yes” or “no” on a special verdict form for an aggravating factor. See id. at 716-17.

To establish that an accused person was “armed,” moreover, the State must prove (1) a weapon was easily accessible and readily available for offensive or defensive purposes during commission of the crime and (2) a nexus exists between “the defendant, the crime, and *the* weapon.” State v. Eckenrode, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007) (plurality opinion) (emphasis added). The presence, close proximity, or constructive possession of a weapon at the scene are, by themselves, insufficient proof. State v. Gurske, 155 Wn.2d 134,138, 118 P.3d 333 (2005).

Meanwhile, when the State presents evidence of multiple acts that could constitute the crime charged, the State must (1) elect to rely on one of the acts, or (2) the court must instruct the jury to reach a unanimous verdict based on a specific act. State

v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007); State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); accord State v. Petrich, 101 Wn.2d 566, 570, 683 P.2d 173 (1984). In such “multiple acts” cases, a mere verdict of guilt, along with the general unanimity instruction, are insufficient. See State v. Hanson, 59 Wn. App. 651, 657, 800 P.2d 1124 (1990) (general verdict reflects unanimous agreement only where State offers one alleged violation as proof).

This is known as the Petrich rule. When this rule is violated—the State does not elect and the instructions are inadequate—error occurs, “stem[ming] from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” Kitchen, 110 Wn.2d at 411; State v. King, 75 Wn. App. 899, 903-04, 878 P.2d 466 (1994) (unanimity error where the jury could have determined defendant was guilty of possession based on cocaine found in a car, or in a backpack; appellate court rejected course of conduct argument).

Such a verdict “will be overturned if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime.” Id. at 903.

As indicated, jury unanimity is required on deadly weapon verdicts. Indeed, Washington courts generally treat statutory sentence enhancements the same way they do the elements of substantive criminal offenses. State v. Sassen Van Elsloo, 191 Wn.2d 798, 826, 425 P.3d 807 (2018) (addressing sufficiency standard for weapon enhancement and stating, “[t]o determine the sufficiency of evidence, we must establish ‘whether any rational trier of fact could have found’ fact); State v. Hennessey, 80 Wn. App. 190, 194, 907 P.2d 331 (1995) (State must prove beyond a reasonable doubt “every essential element of the allegation [that] triggers the enhanced penalty”; standard of review on appeal is the same as for base crime).

Nonetheless, no published decision explicitly discusses application of the Petrich rule to firearm or deadly weapon sentence enhancements.

In State v. Oeung, noted at 196 Wn. App. 1011, 2016 WL 7217270 (2016) (unpublished), Division Two determined the rule did *not* apply. Here, the court relied on Oeung, as well as another uncitable (by counsel) 2012 unpublished decision in rejecting Holmes’s argument. Op. at 9.

In Oeung, two appellants argued their right to a unanimous jury verdict was violated when, as to several home invasion robberies, the State failed to elect which firearm the jury should rely on to support a special verdict. For example, the defendants’ accomplices were alleged to have carried guns, and guns were stolen from one of the homes. Oeung, 2016 WL 7217270 at *4-5. Without delving into a discussion of the specific firearms, the Court rejected the argument, stating,

The Petrich rule applies only to *multiple acts or “alternative means”* cases. [State v. Stockmyer, 83 Wn. App. 77, 86, 920 P.2d 1201 (1996)⁹].

⁹ Despite this language in Stockmyer, the Petrich rule only deals with unanimity of *acts*. See State v. Carson, 184 Wn.2d 207, 217, 357 P.3d 1064 (2015). Unfortunately, the Court of Appeals continues to conflate unanimity of means and unanimity of acts

Therefore, while the State may have presented multiple firearms that could satisfy [defendants'] firearm enhancements on their first degree burglary and first degree robbery charges, *the jury only had to find beyond a reasonable doubt that [defendants'] accomplices were armed with any firearm, not a specific firearm.*

Oeung, 2016 WL 7217270, at *27 (emphasis added). Therefore, the court concluded, “the State was not required to elect, nor was the trial court required to instruct the jury on which firearm[.]”

Id.

But such “any firearm” logic could be applied to any case involving multiple conceptually separate acts where the acts that must be proven are not specifically named in the jury instructions. That does not mean jury unanimity considerations are absent or that an unanimity instruction (or election) is not required (putting aside the matter of harmlessness).

State v. Williams, 136 Wn. App. 486, 150 P.3d 111 (2007), is one such example. With first degree burglary, the

in the present case. See Op. at 10 (discussing only alternative means cases).

statute does not explicitly require, and a court would not necessarily instruct a jury, that a specific assault must be proven for the elevated, first degree crime to be proven. But the Court of Appeals nonetheless found that because there were two possible assault victims, unanimity error occurred. Williams, 136 Wn. App. at 499. The reasoning set forth in Oeung for not requiring an unanimity instruction breaks down under scrutiny.

In a more recent unpublished decision, State v. Peters, Division Two had presumed that the Petrich rule applied to special verdicts but noted that “there was no unanimity issue” because, despite evidence of two possible weapons, “the State clearly elected the type of weapon used in relation to each of the special verdicts.” State v. Peters, noted at 13 Wn. App. 2d 1026, 2020 WL 1930211, *4, review denied, 196 Wn.2d 1008 (2020). As stated, prosecutorial election is one manner of avoiding unanimity error. Moreover, it is quite possible to provide an instruction that ensures unanimity as to the special verdict. See State v. Levy, 156 Wn.2d 709, 717, 132 P.3d 1076 (2006)

(providing example of such an instruction, although instruction was problematic for unrelated reason).

There was no instruction and no election of a specific deadly weapon in this case. Indeed, the State appeared to rely on either/or. 2RP 62. Williams, 136 Wn. App. 486, is analogous. Although that case did not address jury unanimity as to a weapon enhancement, it addressed a similar deficiency as to an element of a crime elevating that crime to the first degree and, hence, subjecting the defendant to an enhanced penalty.

Here, the trial court did not instruct the jury it must be unanimous as to whether Holmes was armed with a BB gun, a hatchet, or both, to find he was “armed” with a deadly weapon for purposes of the special verdicts. It could have easily done so. Nor did the State, based on the lack of such an instruction, elect which weapon it was relying on. 2RP 61-62. Constitutional jury unanimity error therefore occurred.

b. The error was not harmless.

A jury verdict that is potentially defective based on inadequate unanimity instruction, or appropriate election by the State, “will be overturned if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt.” King, 75 Wn. App. at 903.

There was no specific jury instruction and no election in this case. 2RP 62; CP 256-93. The question becomes whether, as to each charged crime, any juror could have had a reasonable doubt as to whether the hatchet or firearm was a deadly weapon for purposes of RCW 9.94A.825, *and* whether Homes was “armed” with it.

As to the Miller robbery charge, Count 2, the jury could have harbored doubt as to whether the hatchet met all deadly weapon enhancement criteria. For example, threats involving the hatchet were not directed to Miller, and it was unclear from the record if he heard them. See 1RP 400, 426. And the jury may have had doubts as to whether the BB gun was, in fact, a deadly

weapon and whether Holmes was “armed” with it for purposes of that charge. Unlike in the case of deadly weapons as elements of a base crime of burglary or robbery, the capacity to inflict substantial bodily harm, including the capability to inflict bruising, would not suffice as to an enhancement. Compare RCW 9A.04.110(6) (deadly weapon as element of underlying crime) with RCW 9.94A.825 (deadly weapon for purposes of enhancement). There was no testimony regarding the harm such a device could inflict.

As to the Pase robbery charge, Count 3, although the hatchet evidence was comparatively stronger as to Pase, the defense placed Pase’s credibility at issue based on her loyalty to Rothschiller and her shifting levels of competency. Police initially saw the hatchet (Pase’s own) buried under several items; she had to point it out. 1RP 338-39. The jury may have had doubts regarding Pase’s credibility regarding Holmes’s use of the hatchet, considering where police found it. And, as is the

case with the Miller robbery count, the jury may have harbored doubts as to whether the BB gun was capable of inflicting death.

The same logic applies to the enhancement as to the Count 1 burglary charge—a reasonable juror could have harbored doubt as to whether the BB gun qualified as a deadly weapon and whether Holmes was in fact “armed” with either weapon. Jury unanimity was not assured as to the special verdicts on any of the three counts.

This Court should grant review on this important issue, which has repeatedly stymied the Court of Appeals, and reverse each deadly weapon enhancement. King, 75 Wn. App. at 904; see also Gurske, 155 Wn.2d at 142 (striking deadly weapon enhancement and remanding for resentencing).

3. Counsel provided deficient representation by failing to object when the prosecutor argued facts not in evidence regarding BB gun functionality and deadliness.

This Court should also consider whether counsel provided ineffective assistance by failing to object when the prosecutor argued facts not in evidence regarding BB gun functionality.

There was no testimony about the capability of a BB gun to cause bodily harm or death. A deputy simply testified the device discharged a BB. 1RP 297-98. Yet the prosecutor injected his own experiences to support the State's theory. Argument occurred as follows:

What can a BB gun do to your body? *Especially one that you can pump. I don't know how many of you are familiar with pump BB guns. Typically the more you pump it the more powerful it becomes, and the BB travels at a higher velocity. But, I've been shot with a BB gun. You know, I think most folks—maybe/maybe not—I grew up in Alaska so I was abused as a child—but, I'm sure some of you have probably experienced the very same thing. But most of us think of it, it hits you in your rear end or something like that, not that it's going to cause that much damage; but, what if it hits you in the eye? Is it going to cause substantial loss*

or impairment of the function of any bodily part?
Maybe sight. Of course.

2RP 52-53 (emphasis added). Defense counsel did not object.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments, as well as article I, section 3, and article I, section 22 of the state constitution. State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999). Prosecutorial misconduct may deprive an accused of their right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). It is improper for a prosecutor to argue facts not in evidence. See In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704-05, 286 P.3d 673 (2012).

Meanwhile, the Sixth Amendment and article I, section 22 guarantee accused persons the right to the effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A claim of ineffective

assistance may be considered for the first time on appeal. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

An accused asserting ineffective assistance must show (1) counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's deficient performance prejudiced them. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010). Where an accused alleges ineffective assistance based on failure to object, they must also show a reasonable likelihood the trial court would have sustained an objection. In re Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).¹⁰

Holmes satisfies each of requirement. As for the performance prong, there could be no legitimate trial strategy in failing to object. The prosecutor essentially testified that, based on his personal experiences with BB guns, BB guns could be made more powerful by pumping them and that (based on the prosecutor's specific childhood experiences) they could cause a

¹⁰ This Court reviews claims of ineffective assistance of counsel de novo. A.N.J., 168 Wn.2d at 109.

certain level of harm. This was not proper evidence, and the jury should not have considered it in reaching a verdict. Yet defense counsel did not object.

Had counsel objected, moreover, it is reasonably likely the court would have sustained the objection and stricken the argument. See Davis, 152 Wn.2d at 714. The facts to which the prosecutor testified were not in evidence.

Finally, as for the prejudice prong, counsel's failure to object, and failure to ensure the prosecutor's "testimony" was stricken, likely affected the deadly weapon special verdicts, requiring their reversal.

The court instructed the jury, per the standard instruction, that the attorneys' arguments were not evidence. CP 258. But it is doubtful jurors would think of that instruction when considering the prosecutor's childhood anecdote, which existed in a liminal twilight between argument and evidence but nonetheless conveyed untested assertions regarding BB guns' capacity to cause harm.

It might be common knowledge a BB gun can cause bruising, a form of temporary but substantial disfigurement,¹¹ which is sufficient to prove an underlying deadly weapon element. Thus, it is doubtful whether the argument affected the underlying verdicts. But, in contrast, it was reasonably likely the prosecutor's assertions that certain BB guns could become even more powerful by pumping them tipped the scales on the deadly weapon special verdicts, which required proof the implement was readily capable of causing death.

Contrary to the Court of Appeals decision, there was a reasonable probability the improper argument influenced at least one juror to answer "yes" on the special verdicts. See Wiggins v. Smith, 539 U.S. 510, 537, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). For this reason, as well, this Court should grant review and strike the deadly weapon enhancements.

¹¹ See State v. Ashcraft, 71 Wn. App. 444, 455, 859 P.2d 60 (1993) (discussing "substantial bodily harm" under RCW 9A.04.110(4)(b)).

4. Finally, the prosecutor committed misconduct by offering personal (and institutional) opinion regarding the credibility of witnesses.

This Court should also consider whether the prosecutor committed misconduct by providing a personal opinion as to the credibility of two witnesses. As to key witness Angela Rothschilder, the misconduct was prejudicial as to all counts.

Expressing a personal opinion on the credibility of witnesses, the prosecutor argued in rebuttal as follows:

I could talk about the credibility of Michelle. To be perfectly honest, I think Michelle was covering for [Loeung]. But, you know, we're trying to figure out the truth so we made a deal with them. And the same thing with [Rothschilder]; I don't think she was covering for anybody; she gave it all up. The State believes she told you what she remembers.

2RP 90.

The right to a fair trial fundamental, and prosecutorial misconduct may deprive an accused person of this right. Davenport, 100 Wn.2d at 762.

Here, the prosecutor expressed personal and institutional "State" beliefs regarding the credibility and value of the

testimony of two State's witnesses. Of the two, Angela Rothschiller provided the most significant and damaging testimony. Even though she might not remember everything, what she did remember was, in the prosecutor's personal opinion, correct.

To show prejudice from misconduct, and that reversal is warranted, a defendant must demonstrate a substantial likelihood that the misconduct affected the outcome of trial. Glasmann, 175 Wn.2d at 704. Where counsel fails to object, the defendant must show the misconduct was so flagrant and ill-intentioned that an instruction could not have cured prejudice. Id.

As to Rothschiller, the misconduct was incurably prejudicial. The defense theory was that even if Holmes came to the trailer to confront the occupants, he did not bring a BB gun. E.g., 2RP 68-70. Nor did he use a hatchet, which was so buried in trailer debris Pase had to point it out. 2RP 74-75. Rothschiller provided key corroboration, including that Holmes brought the BB gun that Pase thought was a real firearm. The defense was

able to demonstrate that, following the incident, Rothschiller and Pase became friends, 1RP 433, placing Rothschiller's credibility in issue. Further, Rothschiller testified to avoid a lengthy prison sentence. 2RP 67-69. On rebuttal, the prosecutor, placed his prestige, and the prestige of the State of Washington, behind her testimony.

As Holmes argued in the Court of Appeals, moreover, defense counsel was also ineffective in failing to object to this argument.

The misconduct affected each of the crimes (and enhancements) requiring the presence of a deadly weapon. This Court should therefore grant review on this issue and reverse each conviction and enhancement.

E. CONCLUSION

This Court should accept review under RAP 13.4(b) and reverse Holmes's enhancements and convictions on various grounds.

I certify this document contains 4,982 words, excluding those portions exempt under RAP 18.17.

DATED this 24th day of February, 2023.

Respectfully submitted,

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APPENDIX A

December 28, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CHARLES GERARD HOLMES,

Appellant.

No. 55944-7-II

UNPUBLISHED OPINION

PRICE, J. — Charles Holmes appeals from his convictions of one count of first degree burglary and two counts of first degree robbery along with deadly weapon enhancements for each of the convictions. He asserts: (1) the trial court erred in not giving the jury a unanimity instruction for the deadly weapon enhancements, (2) the State presented insufficient evidence to convict him of first degree robbery, (3) the prosecutor's statements regarding witness credibility were misconduct, (4) defense counsel was ineffective for failing to object to the prosecutor's statements during closing argument, (5) the trial court erred in imposing discretionary legal financial obligations (LFOs), and (6) the trial court erred in imposing community custody supervision fees. We determine that Holmes' arguments fail, except that we remand for the trial court to strike the discretionary LFOs imposed.

FACTS

I. BACKGROUND

In February 2020, Holmes and Sambeth (Sam) Loeung, with the aid of Angela Rothschiller and Michelle Rothschiller, broke into a trailer owned by Tina Pase. Holmes and Loeung entered the trailer with fake guns while Angela and Michelle waited in a car, listening to the police scanner.¹

The four individuals believed Pase was selling drugs out of the trailer, and they planned to rob her of the drugs. All four were under the influence of drugs at the time of the incident.

Once inside the trailer, Holmes and Loeung threatened Pase and her boyfriend, David Miller, demanding drugs. Shortly after Holmes and Loeung entered the trailer, police arrived and arrested Holmes, along with Angela and Michelle. Loeung fled the scene of the crime but was later arrested by police.

The State charged Holmes with one count of first degree burglary, two counts of first degree robbery, and one count of theft in the second degree along with deadly weapon enhancements for each charge. The State struck deals with both Angela and Michelle for reduced charges in exchange for their testimony against Holmes.

II. TRIAL

A. TESTIMONY

The case proceeded to a jury trial. Angela and Michelle both testified. Angela testified that on the way to the trailer, she stopped the car, and Holmes opened the trunk and pulled out the

¹ Because Angela and Michelle share the same last name and to avoid confusion, we refer to them using their first names. No disrespect is intended.

“fake guns.” 1 Verbatim Report of Proceedings (VRP) (June 9, 2021) at 150. Holmes then got back into the car and handed a gun to Loeung. Michelle testified that she had not seen anything that looked like a gun prior to the incident.

Pase testified that Holmes and Loeung entered her trailer in the middle of the night while she was in bed. Miller got out of bed, and then Pase heard yelling, screaming, and a loud bang from the other side of the trailer. Pase called 911. Soon thereafter, Holmes came into Pase’s bedroom and threatened her with what appeared to be a gun or a stick while screaming, “Where’s the drugs or I’m going to blow your head off. Tell me where the drugs are.” 1 VRP (June 10, 2021) at 380.

Holmes grabbed Pase by the face and pulled her out of bed while continuing to scream and ask her where the drugs were. When asked if it hurt when Holmes grabbed and pulled her by her face, she responded, “Yeah. I think it scared me more, you know; you focus more on the fear than the pain.” 1 VRP (June 10, 2021) at 382. Holmes ordered Pase to go to the other end of the trailer where Miller was lying on the ground with his hands zip-tied.

Pase also testified that, at some point during the robbery, Holmes picked up an axe that was in the trailer and threatened to chop off her toes.

B. CLOSING ARGUMENT

During its closing argument, the State commented on the credibility of both Michelle and Angela. The State said,

I could talk about the credibility of Michelle. To be perfectly honest, I think Michelle was covering for Sam. And you can understand why. I totally understand why. But, you know, we’re trying to figure out the truth so we made a deal with them. And the same thing with Angela; I don’t think she was covering for anybody; she gave it all up. The State believes she told you what she remembers.

No. 55944-7-II

2 VRP (June 11, 2021) at 90. But the State ended its comments with the following,

Of course, you have to take that with a grain of salt because everybody was high. Everybody was high.

2 VRP (June 11, 2021) at 90. Defense counsel did not object to these statements.

There was evidence a BB gun was used, but no evidence was admitted at trial about the characteristics or capabilities of BB guns. However, the State said the following about BB guns in its closing argument:

So, what can a BB gun do to your body? Most people, depending on your age, a lot of them are either outlawed or have a thing at the end of them. What can a BB gun do to your body? Especially one that you can pump. I don't know how many of you are familiar with pump BB guns. Typically the more you pump it the more powerful it becomes, and the BB travels at a higher velocity. But, I've been shot with a BB gun. You know, I think most folks -- maybe/maybe not -- I grew up in Alaska so I was abused as a child -- but, I'm sure some of you have probably experienced the very same thing. But most of us think of it, it hits you in your rear end or something like that, not that it's going to cause that much damage; but, what if it hits you in the eye? Is it going to cause substantial loss or impairment of the function of any bodily part? Maybe sight. Of course.

So the State would submit that a BB gun is a deadly weapon and can cause substantial bodily harm.

2 VRP (June 11, 2021) at 52-53. Defense counsel did not object to these statements.

C. JURY INSTRUCTIONS AND VERDICT

The jury instructions included a special verdict form for a deadly weapon enhancement for the charges. Both the State and Holmes proposed a jury instruction for the deadly weapon enhancement special verdict that included the definition of a deadly weapon when used as an element of a crime. Neither party proposed an instruction that included a unanimity requirement for the deadly weapon enhancement.

The State did not make an election regarding the specific instrument, the axe or the BB gun, on which it was relying. Rather, the State argued that both could be considered deadly weapons, indicating the jury could rely on either to find the enhancement:

The State would submit to you that in this particular case there's no ax on [the list of examples of deadly weapons]. That doesn't mean it's not a deadly weapon. There's no BB gun on there; that doesn't mean it's not a deadly weapon

2 VRP (June 11, 2021) at 62.

The trial court did not instruct the jury that it must unanimously decide that Holmes was armed with a specific weapon, either the axe or the BB gun, in order to agree on the deadly weapon enhancement.

The trial court instructed the jury that the arguments of the attorneys were not evidence and to “disregard any remark, statement, or argument that is not supported by the evidence or the law” Clerk’s Papers (CP) at 258. The trial court also instructed the jury that it was the sole judge as to the credibility of each of the witnesses.

The jury found Holmes guilty of all of the charges, except for theft in the second degree. The jury also unanimously agreed to the deadly weapon enhancements for each of the charges of which Holmes was found guilty.

III. SENTENCING

At sentencing, defense counsel argued for a lower sentence by explaining that Holmes had been able to maintain employment in the past when he had not been in custody and if he had been acquitted, his employer would have hired him back. Defense counsel also noted that Holmes had three children, including one who was still a minor.

The trial court imposed a sentence of 102 months for the first degree burglary conviction and 144 months for the two first degree robbery convictions. Each conviction included a 24 month deadly weapon enhancement. In total, the trial court sentenced Holmes to 216 months in prison. The trial court also imposed 18 months of community custody for each of the counts.

Regarding fees, the trial court did not ask any questions of Holmes or his attorney about Holmes' financial situation. But it did reference defense counsel's earlier statements made in the course of arguing for a lower sentence:

I find that [Holmes] does, based on his work history and the fact that he had a job waiting for him, he does have the ability to pay legal financial obligations. He only has one current dependency on his three children. And all the -- taking all the things into consideration that I would, I find that he does have the ability to pay legal financial obligations.

2 VRP (June 16, 2021) at 115. Thereafter, the trial court imposed LFOs on Holmes, including a \$500 crime victim assessment fee, a \$200 criminal filing fee, and \$2,500 in attorney fees. The trial court also ordered that Holmes pay community custody supervision fees.

Holmes appeals both his convictions and his sentence.

ANALYSIS

I. UNANIMITY

Holmes argues that his right to a unanimous jury verdict was violated because the jury did not receive a unanimity instruction regarding the deadly weapon enhancements and the State did not make an election about a specific weapon during closing argument. We disagree.

A. LEGAL PRINCIPLES

1. Invited Error

The invited error doctrine precludes review of an error the defendant invited below, even if the error is one of constitutional rights. *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). Invited error applies where a party proposes an instruction that does not include a unanimity requirement and then complains on appeal that a unanimity requirement should have been included. *State v. Corbett*, 158 Wn. App. 576, 592, 242 P.3d 52 (2010).

2. Unanimity

Criminal defendants have a right to a unanimous jury verdict found in the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. *Ramos v. Louisiana*, ___ U.S. ___, 140 S. Ct. 1390, 1397, 206 L. Ed. 2d 583 (2020); *State v. Armstrong*, 188 Wn.2d 333, 340, 394 P.3d 373 (2017). Criminal defendants may be convicted only if a jury unanimously determines the defendant committed the criminal act with which they were charged. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), *abrogated on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988).

“When the prosecution presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act.” *Kitchen*, 110 Wn.2d at 409, *abrogated on other grounds by In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 316 P.3d 1007 (2014). This is done through a *Petrich* instruction, which is designed to prevent confusion because where such an instruction is necessary, but not given, “some jurors may have relied on one act or

incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” *Id.* at 411.

We review constitutional issues de novo. *State v. Jorgenson*, 179 Wn.2d 145, 150, 312 P.3d 960 (2013).

B. APPLICATION

Holmes argues that his right to a unanimous jury verdict was violated by the deadly weapon enhancements. He asserts that the jury was not instructed that it must be unanimous as to the specific deadly weapon for the enhancements, and the State failed to make an election. We disagree.

1. Invited Error

Holmes proposed, in part, the deadly weapon enhancement jury instruction used by the trial court that did not include a unanimity instruction. By specifically proposing this instruction, Holmes invited the error about which he now complains and, accordingly, his argument fails. *Corbett*, 158 Wn. App. at 592.

2. Unanimity

Even if the absence of a unanimity instruction for the firearm enhancements was not invited by Holmes, his argument still fails because such an instruction is not required. Holmes does not cite any Washington cases that hold the jury must be unanimous as to the specific weapon used for a deadly weapon enhancement, and we have found none. Both parties also recognize that no published Washington decisions address this issue. Of the few unreported decisions of this court

No. 55944-7-II

on this issue,² each has found that firearm and deadly weapon enhancements do not implicate jury unanimity concerns as to the specific firearm or deadly weapon allegedly used. *See State v. Benitez*, noted at 172 Wn. App. 1018, 2012 WL 6098271, *review denied*, 117 Wn.2d 1003 (2013); *State v. Oeung*, No. 46425-0-II (Wash. Ct. App. Sept. 27, 2016) (unpublished), *review denied*, 187 Wn.2d 1015 (2017).³

For example, in *Benitez*, the defendant was arrested in the presence of multiple firearms, and he argued that his constitutional right to a unanimous jury verdict was violated because the jury was not instructed to agree on the specific gun it thought he was armed with for the purposes of firearm enhancements. Division One of this court disagreed, stating:

Benitez fails to cite to any authority suggesting how the general jury unanimity analysis applies to a firearm enhancement, which is not an independent crime. The firearm and deadly weapon enhancement statutes do not provide that the State must specify which weapon it is relying on. RCW 9.94A.533, .825. And, Benitez similarly fails to cite to relevant authority suggesting that a jury must be unanimous as to the specific weapon used when returning a firearm or deadly weapon special verdict. The trial court was not required to provide a unanimity instruction for the firearm enhancement.

Benitez, 2012 WL 6098271, at *8.

Moreover, if general jury unanimity analysis is applied to enhancements, the analysis results in no unanimity being required as to the specific weapon used to support the enhancement.

The deadly weapon enhancement statute lists multiple instruments that qualify as deadly weapons:

Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

² We cite to unpublished cases that are necessary for a reasoned decision. GR 14.1(c).

³ <https://www.courts.wa.gov/opinions/pdf/D2%2046425-0-II%20Unpublished%20Opinion.pdf>.

RCW 9.94A.825. These instruments are analogous to “a ‘means within a means’ ” in an alternative means crime. *State v. Jallow*, 16 Wn. App. 2d 625, 638, 482 P.3d 959 (2021) (quoting *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007)). “The alternative means analysis focuses on whether the statute describes the crime in terms of separate, distinct acts (alternative means) or in terms of closely related acts that are aspects of one type of conduct (not alternative means).” *State v. Roy*, 12 Wn. App. 2d 968, 974, 466 P.3d 1142, *review denied*, 196 Wn.2d 1004 (2020). If the statute is describing a “means within a means,” no unanimity instruction is required. *Id.*

In the case of the deadly weapon enhancement statute, the listed instruments are “closely related” to one another and are all aspects of one type of thing—weapons; as such, they are not truly “separate and distinct.” This makes them similar, conceptually, to statutes describing “means within means” and, accordingly, a unanimity instruction should not be required.

Here, the jury agreed unanimously that the deadly weapon enhancements were proven. Holmes points to no persuasive authority that this unanimity must extend to the specific weapon used when returning a deadly weapon special verdict. Simply put, the deadly weapon enhancement statute does not define an independent crime and does not provide that the State must specify the specific weapon on which it is relying.

Accordingly, we determine Holmes invited the error he now alleges on appeal, and even if he did not, the trial court did not err in not giving a unanimity instruction with regard to the deadly weapon enhancements.

II. SUFFICIENCY OF THE EVIDENCE

Holmes argues that the State presented insufficient evidence to support his first degree robbery conviction related to Pase. We disagree.

A. LEGAL PRINCIPLES

The State has the burden of proving every element of each charged offense beyond a reasonable doubt under the state and federal constitutions. *State v. Johnson*, 188 Wn.2d 742, 750, 399 P.3d 507 (2017). In reviewing claims for insufficient evidence, we consider “ ‘whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ ” *Id.* at 751 (quoting *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)).

A criminal statute that provides for multiple ways to prove that a defendant committed the crime is characterized as an alternative means crime. *State v. Barboza-Cortes*, 194 Wn.2d 639, 643, 451 P.3d 707 (2019). Alternative means crimes require an expression of jury unanimity as to which means the defendant used to commit the crime. *Id.* However, “ ‘an expression of jury unanimity is not required provided each alternative means presented to the jury is supported by sufficient evidence.’ ” *Id.* (quoting *State v. Sandholm*, 184 Wn.2d 726, 732, 364 P.3d 87 (2015)).

First degree robbery is an alternative means crime. *See In re Pers. Restraint of Brockie*, 178 Wn.2d 532, 538, 309 P.3d 498 (2013). A defendant may commit first degree robbery if they are armed with a deadly weapon, display what appears to be a firearm or deadly weapon, or inflict bodily injury—three alternative means for committing the crime. RCW 9A.56.200; *see Brockie*, 178 Wn.2d at 537. “ ‘Bodily injury’ . . . means physical pain or injury, illness, or an impairment

of physical condition.” RCW 9A.04.110(4)(a). Accordingly, each alternative means must be supported by sufficient evidence. *See Barboza-Cortes*, 194 Wn.2d at 643.

B. APPLICATION

Holmes argues the State was required to present evidence for each of the alternative means for the first degree robbery against Pase, including that Pase experienced bodily injury. Holmes contends that although Pase testified she was scared, being scared does not satisfy the first degree robbery requirement for bodily injury. Accordingly, Holmes claims that the State presented insufficient evidence to support the first degree robbery conviction. We disagree.

Holmes’ view of Pase’s testimony is too narrow. Pase, in fact, did testify that Holmes inflicted bodily injury. She testified that Holmes grabbed her face with his hands and that it hurt. This was evidence of “physical pain,” as required for first degree robbery. RCW 9A.04.110(4)(a). Although Pase noted that it scared her more than it hurt, her emphasis on the emotional impact of Holmes’ actions does not nullify her clear agreement, when asked, that she felt pain and that it hurt. Especially when viewed in a light most favorable to the State, a reasonable juror could have found beyond a reasonable doubt that Holmes inflicted physical pain on Pase. Thus, we determine that there was sufficient evidence for the first degree robbery conviction related to Pase.

III. PROSECUTORIAL MISCONDUCT

Holmes argues that the prosecutor committed misconduct during closing argument by giving their personal belief about the credibility of witnesses. We determine that, although the prosecutor did commit misconduct, there was no prejudice that could not have been cured by a jury instruction.

A. LEGAL PRINCIPLES

To prevail on a claim of prosecutorial misconduct, a defendant must first demonstrate that the prosecutor's statements were improper and, second, that they were prejudicial. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008), *cert denied*, 556 U.S. 1192 (2009). "If the defendant proves the conduct was improper, the prosecutorial misconduct still does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict." *State v. Stenson*, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997), *cert denied*, 523 U.S. 1008 (1998).

Where a defendant fails to object to a prosecutor's statements at the trial court level, a waiver is presumed unless the defendant can show that the statements were so flagrant and ill-intentioned that no instruction could have cured them. *Warren*, 165 Wn.2d at 30.

"[A] prosecutor's expressions of personal opinion about the defendant's guilt or the witnesses' credibility are improper." *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010). A prosecutor commits misconduct when they personally vouch for a witness' credibility. *Warren*, 165 Wn.2d at 30. "Improper vouching generally occurs (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness or (2) if the prosecutor indicates that evidence not presented at trial supports the witness's testimony." *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). However, a prosecutor "has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010).

B. APPLICATION

Holmes argues that the prosecutor made specific statements about the testimonies of both Michelle and Angela that violated the prohibition on vouching and impermissibly provided his personal opinion of their credibility. Specifically, Holmes points to the prosecutor's statements that included "I think Michelle was covering for Sam," "I don't think [Angela] was covering for anybody," and "[t]he State believes she told you what she remembers." 2 VRP (June 11, 2021) at 90.

Because the prosecutor injected his personal beliefs about these witnesses in these statements, they clearly constituted expressions of the prosecutor's personal opinion and, thereby, exceeded the wide latitude enjoyed by prosecutors to draw inferences and comment on credibility based on evidence. Thus, they were improper.

However, defense counsel did not object at the time of these comments. Holmes, therefore, must show the comments were so flagrant and ill-intentioned that a jury instruction could not have cured them. Viewed this way, the comments fall short of being incurable by an instruction. The prosecutor's statements were merely a few sentences. And the prosecutor minimized the reliability of all of the witnesses, including those for whom he was vouching, when he said,

Of course, you have to take that with a grain of salt because everybody was high.
Everybody was high.

2 VRP (June 11, 2021) at 90. Given this minimization, Holmes has not shown that this misconduct was so flagrant and ill-intentioned that an instruction from the trial court would not have cured any risk to the jury's consideration of the evidence.

Moreover, the trial court instructed the jurors that they were the sole judges of the credibility of each witness. We presume that the jurors followed this instruction and did not attribute importance to the prosecutor's improper remarks in light of how minimal they were. *See State v. Lamar*, 180 Wn.2d 576, 586, 327 P.3d 46 (2014) (“ ‘Juries are presumed to follow instructions absent evidence to the contrary.’ ” (quoting *State v. Dye*, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013))).

Accordingly, we determine that Holmes' prosecutorial misconduct claim fails.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Holmes argues that defense counsel was ineffective for failing to object to the State's closing argument regarding the credibility of witnesses Angela and Michelle, as well as its closing argument regarding the capabilities of BB guns. We disagree.

A. LEGAL PRINCIPLES

The Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington Constitution guarantee a defendant the right to effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011), *cert denied*, 574 U.S. 860 (2014). Prevailing on an ineffective assistance of counsel claim requires the defendant to show: (1) deficient performance and (2) prejudice to the defendant. *Id.* at 32-33. A defendant who fails to show either prong fails to establish ineffective assistance of counsel. *Id.* at 33.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Id.* We engage in a strong presumption that counsel's performance was reasonable. *Id.* A defendant may overcome this presumption by showing no “ ‘conceivable legitimate tactic

No. 55944-7-II

explaining counsel's performance.' ” *Id.* (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

The prejudice prong requires the defendant to show “a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.” *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). “ ‘A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ ” *Grier*, 171 Wn.2d at 34 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Where a defendant's ineffective assistance of counsel claim is centered on defense counsel's failure to object, “ [o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal.’ ” *State v. Vasquez*, 198 Wn.2d 239, 248, 494 P.3d 424 (2021) (quoting *State v. Crow*, 8 Wn. App. 2d 480, 508, 438 P.3d 541 (2019)).

B. APPLICATION

1. Failure to Object to Prosecutor's Credibility Comments

In addition to his argument about prosecutorial misconduct for personal opinions on the credibility of Angela and Michelle, Holmes also argues that he received ineffective assistance of counsel when his defense counsel failed to object to these same comments by the prosecutor. As discussed above, the prosecutor's comments about his personal opinion about the credibility of Angela and Michelle were improper. However, for the same reasons that Holmes cannot show prosecutorial misconduct for these comments, he cannot show ineffective assistance of counsel—he cannot show prejudice.

Even if defense counsel was deficient for failing to object to these improper statements, Holmes has failed to establish a reasonable probability that, but for this failure, the results of the trial would have been different. Again, notwithstanding the fact that the prosecutor made statements like “I think Michelle was covering for Sam,” “I don’t think [Angela] was covering for anybody,” and “[t]he State believes she told you what she remembers,” the full context of the closing argument lessened the weight of the improper statements. Additionally, they were merely a few sentences during closing argument for a trial that spanned three days. Given the relatively minimal amount of time that the prosecutor devoted to these statements, their impact was likely negligible to the outcome of the trial.

Finally, again, the trial court instructed the jury that it was the sole judge of the credibility of each witness, and we presume that the jury followed that instruction. *See Lamar*, 180 Wn.2d at 586.

Thus, given his inability to show the results of the trial would have been different, Holmes’ ineffective assistance of counsel claim related to the prosecutor’s credibility comments fails.

2. Failure to Object to BB Gun Comments

Holmes also argues that defense counsel was ineffective for failing to object to the prosecutor’s remarks in closing argument about the capabilities of the BB gun. We disagree.

At closing, the prosecutor offered his thoughts about BB guns that were not tied to evidence admitted at trial. In the course of arguing that a BB gun can constitute a deadly weapon, the prosecutor shared his own experience of being shot by a BB gun and said increasing the pressure in a BB gun by pumping it means the “BB travels at a higher velocity.” 2 VRP (June 11, 2021) at 52-53.

The functioning and effect of pumping a BB gun and its relationship to the velocity of the BB is a fact likely outside of common knowledge. Because this fact was not admitted at trial, this comment constituted misconduct by the prosecutor. *Warren*, 165 Wn.2d at 29 (prosecutor commits misconduct when they refer to facts not in evidence during closing argument). But the portion outside common knowledge was narrow. In fact, most of what the prosecutor said was permissible argument using common public knowledge about BB guns. For example, the prosecutor also said:

But most of us think of it, it hits you in your rear end or something like that, not that it's going to cause that much damage; but, what if it hits you in the eye? Is it going to cause substantial loss or impairment of the function of any bodily part? Maybe sight. Of course.

2 VRP (June 11, 2021) at 52-53.⁴

Focusing solely on the improper statements, Holmes must, again, show a reasonable probability that, but for the allegedly deficient performance, “the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862

Holmes cannot meet this burden. The jury was instructed that the statements by the attorneys were not evidence and it was to disregard any statement not supported by the evidence or the law. Juries are presumed to follow instructions. *See Lamar*, 180 Wn.2d at 586. Absent evidence to the contrary, we presume that the jury followed the instruction and properly disregarded the limited improper statements regarding the BB gun. Accordingly, we determine

⁴ References to the fact that BB guns are capable of injuring eyes can be fairly characterized as common knowledge.

that Holmes' ineffective assistance of counsel argument with regard to the prosecutor's comments about the capabilities of the BB gun fails.⁵

V. CRIMINAL FILING FEE AND ATTORNEY FEE RECOUPMENT

Holmes argues that the trial court erred in imposing mandatory and discretionary LFOs. The State concedes that the trial court erred. We accept the State's concession.

A. LEGAL PRINCIPLES

Prior to imposing discretionary LFOs, a trial court must "consider the defendant's individual financial circumstances and make an individualized inquiry into the defendant's current and future ability to pay." *State v. Blazina*, 182 Wn.2d 827, 837, 344 P.3d 680 (2015). The record must reflect that such an inquiry has been made by the trial court. *Id.* at 838. Factors that trial courts should consider include "(1) employment history, (2) income, (3) assets and other financial resources, (4) monthly living expenses, and (5) other debts." *State v. Ramirez*, 191 Wn.2d 732, 744, 426 P.3d 714 (2018). "[T]he record must reflect that the trial court inquired into all five categories before deciding to impose discretionary costs." *Ramirez*, 191 Wn.2d at 744.

Under RCW 36.18.020(2)(h), a criminal filing fee may not be imposed on an indigent defendant, as defined by RCW 10.101.010(3)(a)-(c). A criminal defendant is indigent if they receive certain types of public assistance, are involuntarily committed to a public mental health

⁵ It is unclear whether Holmes is also making a direct argument that the prosecutor's comments about BB guns is prosecutorial misconduct, as opposed to solely supporting his ineffective assistance of counsel argument. To the extent Holmes also contends these comments are misconduct, he cannot establish that they are so flagrant and ill-intentioned that a jury instruction could not have cured them.

facility, or receive an annual income of 125 percent less than the current federal poverty level. RCW 10.101.010(3)(a)-(c).

B. APPLICATION

Holmes argues that the trial court erred in imposing the criminal filing fee and the attorney fee recoupment despite the fact that Holmes was statutorily indigent.⁶ The State concedes that Holmes was statutorily indigent, the trial court erred, and the fees must be reversed. We accept the State’s concession and reverse.

VI. COMMUNITY CUSTODY SUPERVISION FEES

Holmes argues that the trial court erred in imposing community custody supervision fees on him as an indigent defendant.⁷ We disagree.

A trial court cannot order an indigent defendant to pay costs. Former RCW 10.01.160(3) (2018).⁸ “Costs” are defined as “expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision.” Former RCW 10.01.160(2).

⁶ Holmes also argues that defense counsel was ineffective for failing to object to the criminal filing fee and attorney fee recoupment. Because we accept the State’s concession that the trial court erred in imposing the fees, we do not address this issue.

⁷ Holmes also argues that defense counsel was ineffective for failing to object to the trial court’s imposition of community custody supervision fees. However, for the same reasons we determine that the trial court did not err in imposing the supervision fees, we also determine that Holmes has not established prejudice—because he has not shown a reasonable probability that, had defense counsel objected, the outcome would have been different.

⁸ The legislature has amended the statutes at issue here since Holmes’ sentencing. This opinion cites to the previous version of the provisions.

In addressing the issue of whether community custody supervision fees qualify as costs, we have previously held that, although community custody fees are discretionary LFOs, they do not qualify as “costs” under the statutory definition because “they are not an expense specially incurred by the State to prosecute the defendant, to administer a deferred prosecution program, or to administer pretrial supervision.” *State v. Starr*, 16 Wn. App. 2d 106, 109, 479 P.3d 1209 (2021).

Consistent with *Starr*, we determine that the trial court did not err in imposing community custody supervision fees because they do not qualify as “costs” under the statutory definition.⁹


CONCLUSION

The trial court erred in imposing mandatory and discretionary LFOs, but did not err in imposing community custody supervision fees. The remainder of Holmes’ arguments fail. Accordingly, we affirm the convictions but remand to the trial court to strike the LFOs consistent with the State’s concession.

⁹ We acknowledge, however, that the imposition of LFOs on indigent defendants creates significant hardships and the legislature has amended the relevant statutes since this sentencing. *See Blazina*, 182 Wn.2d at 835-37; RCW 9.94A.703(2). Therefore, the trial court on remand should reevaluate the imposition of the supervision fee. *State v. Spaulding*, 15 Wn. App. 2d 526, 537, 476 P.3d 205 (2020).

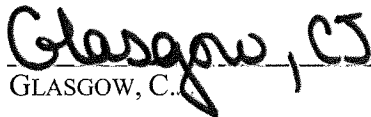
No. 55944-7-II

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



PRICE, J.

I concur:



GLASGOW, C.

LEE, J. (concurring) — The parties did not raise the issue of invited error in their briefing; therefore, the unanimity challenge should not be decided on the basis of invited error without the parties having had the opportunity to provide this court with their respective positions on the issue. RAP 12.1(a) (“[T]he appellate court will decide a case only on the basis of issues set forth by the parties in their briefs.”); *Wash. Pro. Real Est., LLC v. Young*, 163 Wn. App. 800, 818, n.3, 260 P.3d 991 (2011) (“We will not decide a case on the basis of issues that were not set forth in the parties’ briefs.”), *review denied*, 173 Wn.2d 1017 (2012). To the extent the majority desired to decide this case on invited error, which neither party raised nor briefed, the majority should have allowed the parties the opportunity to present written argument on the issue of invited error. RAP 12.1(b); *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (“If a party has a meritorious argument, which has not been briefed, that is believed to be necessary to the resolution of the case, . . . we may consider the issue pursuant to RAP 12.1(b).”). Therefore, I respectfully disagree with the majority’s reliance on invited error to resolve this appeal.

I agree, however, with the majority’s “even if” analysis and conclusion that Charles G. Holmes’ right to a unanimous jury verdict was not violated because deadly weapon enhancements do not require a jury unanimity instruction. I also agree with the remainder of the majority’s opinion.



LEE, J.

APPENDIX B

FILED
1/31/2023
Court of Appeals
Division II
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

CHARLES GERARD HOLMES,

Appellant.

No. 55944-7-II


ORDER DENYING MOTION
FOR RECONSIDERATION

Appellant moves for reconsideration of the opinion filed December 28, 2022, in the above entitled matter. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj: GLASGOW, LEE, PRICE

FOR THE COURT:


PRICE, J.

NIELSEN KOCH PLLC

February 24, 2023 - 4:04 PM

Transmittal Information

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Appellate Court Case Title: State of Washington, Respondent v. Charles Gerard Holmes, Appellant
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