

67909-1

67909-1

NO. 67909-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,  
Respondent and Cross-Appellant,

v.

PAUL DOUGLAS LOISELLE,  
Appellant and Cross-Respondent.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SHARON S. ARMSTRONG

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**BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR ON CROSS-APPEAL</u> .....	1
B. <u>ISSUES PRESENTED</u> .....	1
C. <u>STATEMENT OF THE CASE</u> .....	1
1. PROCEDURAL FACTS .....	1
2. SUBSTANTIVE FACTS .....	2
D. <u>ARGUMENT</u> .....	6
1. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S FINDING THAT THE WEAPON USED BY PAUL LOISELLE IN HIS ASSAULT AGAINST RORY TRIPP AND RANDY NICKELL WAS A DEADLY WEAPON .....	6
2. THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY REFERENCING THE LITERAL MEANING OF THE LATIN PHRASE <i>RES IPSA LOQUITUR</i> .....	10
3. THE TRIAL COURT ERRED IN REFUSING TO IMPOSE THE DEADLY WEAPON ENHANCEMENT .....	14
E. <u>CONCLUSION</u> .....	15

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

In re Martinez, 171 Wn.2d 354,  
256 P.3d 277 (2011)..... 7, 10

Morner v. Union Pac. R. Co., 31 Wn.2d 282,  
196 P.2d 744 (1948)..... 12

State v. Bashaw, 169 Wn.2d 133,  
234 P.3d 195 (2010)..... 1, 2, 14, 15

State v. Belgarde, 110 Wn.2d 504,  
755 P.2d 174 (1988)..... 11, 13

State v. Boehning, 127 Wn. App. 511,  
111 P.3d 899 (2005)..... 11, 13, 14

State v. Cobb, 22 Wn. App. 221,  
589 P.2d 297 (1978)..... 8, 9

State v. Dhaliwal, 150 Wn.2d 559,  
79 P.3d 432 (2003)..... 11

State v. Green, 94 Wn.2d 216,  
616 P.2d 628 (1980)..... 7

State v. Jones, 71 Wn. App. 798,  
863 P.2d 85 (1993)..... 11

State v. Lord, 117 Wn.2d 829,  
822 P.2d 177 (1991)..... 12, 14

State v. Nunez, 174 Wn.2d 707,  
285 P.3d 21 (2012)..... 1, 14, 15

State v. Russell, 125 Wn.2d 24,  
882 P.2d 747 (1994)..... 12

<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	7
<u>State v. Shilling</u> , 77 Wn. App. 166, 889 P.2d 948 (1995).....	8
<u>State v. Skenandore</u> , 99 Wn. App. 494, 994 P.2d. 291 (2000).....	8
<u>State v. Sorenson</u> , 6 Wn. App. 269, 492 P.2d 233 (1972).....	8
<u>State v. Thompson</u> , 88 Wn.2d 546, 564 P.2d 323 (1977).....	8, 9
<u>State v. Weber</u> , 159 Wn.2d 252, 149 P.3d 646 .....	12, 13

#### Statutes

##### Washington State:

RCW 9.94A.825 .....	7, 9
RCW 9A.04.110 .....	7

**A. ASSIGNMENT OF ERROR ON CROSS-APPEAL**

The trial court erred by striking the deadly weapon special verdicts and refusing to impose a deadly weapon enhancement based on State v. Bashaw. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010); overruled by State v. Nunez, 174 Wn.2d 707, 285 P.3d 21 (2012).

**B. ISSUES PRESENTED**

1. The jury properly found that the weapon used by Paul Loiselle in his assault against Rory Tripp and Randy Nickell was a deadly weapon.

2. The prosecutor did not commit misconduct by referencing the literal meaning of the Latin phrase *res ipsa loquitur*.

3. The trial court erred in striking the deadly weapon special verdict and refusing to impose the deadly weapon enhancement.

**C. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS

Paul Loiselle was charged by amended information in King County Superior Court with two counts of assault in the second

degree for assaulting Rory Tripp and Randy Nickell with a box cutter. CP 6-7. The information included a deadly weapon enhancement for each charge. CP 6-7. On August 3, 2011, the jury convicted Loïselle as charged. CP 79-82. The defendant was sentenced on October 14, 2011. CP 164-71. Although the jury found that Loïselle was armed with a deadly weapon at the time of the crime, the trial court refused to impose the deadly weapon enhancement at sentencing. CP 165. Relying on State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), the trial court concluded that the deadly weapon enhancement could not be imposed as the instructions for the special verdict form were not correct. CP 161, 218, 220; 10/14/2011RP 5, 20.

## 2. SUBSTANTIVE FACTS

On December 15, 2011, at 1 a.m., Rory Tripp was with friends at the Yen Wor Tavern. 7/28/2011RP 109. Tripp was celebrating his birthday with approximately five friends, including Randy Nickell and Corey Flynn. 7/28/2011RP 109-10; 8/1/2011RP 101. Paul Loïselle was also at the Yen Wor Tavern. 8/1/2011RP 104. Loïselle works there on occasion as a Karaoke host but was

not working on December 15<sup>th</sup>. 8/1/2011RP 105. When the bar was closing, Loiselle and Flynn exchanged words. 8/1/2011RP 104.

Flynn, Nickell, and Tripp exited the bar, followed a short time later by Loiselle. 8/1/2011RP 108. Outside of the tavern, Loiselle came out with a pool stick raised above his head. 7/28/2011RP 115. He was walking aggressively towards them as if he was going to swing it or use it. 7/28/2011RP 165. Perry Southerland, a customer at Yen Wor, followed Loiselle outside and brought the pool cue back inside. 8/1/2011RP 153-54, 169. More words were exchanged. Southerland came back outside and saw that Loiselle had a box cutter in his hand. 8/1/2011RP 170. Loiselle punched Nickell in the throat and knocked him backwards onto the concrete. 7/28/2011RP 169-70. It was not until Nickell stood up and someone said something that he realized he had been cut and was bleeding from the neck. 7/28/2011RP 171.

After Nickell was injured, Loiselle lunged at Tripp, cutting him on the neck. 7/28/2011RP 120, 123. Tripp's grey sweatshirt and tee shirt were cut at the same time that he was injured by something sharp. 7/28/2011RP 127-28. The box cutter was not recovered.

Nickell was taken to Harborview Medical Center. 7/28/2011RP 174. The preoperative diagnosis of his injury was left

neck penetrating stab wound. 8/1/2011RP 27. Nickell was brought to the operating room for potential injuries to the larynx and the esophagus. 8/1/2011RP 30.

Dr. Amit Bhrany, a head and neck surgeon, was called in to evaluate Nickell's external wound and determine the extent of the injury. 8/1/2011RP 8, 24-25. A specialist was necessary, as injuries to the neck are specifically concerning based on the major blood vessels in the neck that supply blood to the brain, as well as the condition of the trachea and the larynx, which impacts an individual's ability to breathe. 8/1/2011RP 10. Nickell's injury was consistent with being caused by a sharp object. 8/1/2011RP 37. Nickell had an injury to the skin, the platysma muscle, the anterior jugular vein, the strap muscles were lacerated, a superficial cut to the thyroid cartilage, and most likely a small tear that was not seen in the voicebox or pharynx that created the air underneath the skin. 8/1/2011RP 47-48.

At the conclusion of trial, the court instructed the jury that the lawyers' arguments were not evidence, the defendant is presumed innocent and the State has the burden of proving the crime charged beyond a reasonable doubt. 8/3/2011RP 6, 8. During closing argument, the prosecutor referenced the Latin term *res ipsa*



*loquitur*. 8/3/2011RP 45, 63. This was done in an attempt to refute a claim by defense that no one knew what had caused the victim's injury, that the State could not show how these cuts occurred, and that the victim was seen falling into a tree. 8/3/2011RP 49-50, 54. Defense focused throughout the trial and argument on the fact that a weapon had not been recovered.

The prosecutor stated in closing argument:

The injuries in this case speak for themselves. They're speaking to you. The evidence in this case is overwhelming. The defendant escalated the situation far beyond necessity and he used an instrument to cut intentionally the throat of Randy and he intentionally used an instrument, a blade, to cut Rory. He's the only one that can do it. *Res ipsa loquitur*. It speaks for itself . . .

8/3/2011RP 45.

This was contained in the conclusion of the prosecutor's argument and does not overlap with a discussion regarding the State's burden to prove this crime beyond a reasonable doubt, which the prosecutor mentions three separate times. 8/3/2011RP 34, 37, 39.

Defense at no time objected to the prosecutor's argument regarding *res ipsa loquitur*.

**D. ARGUMENT**

1. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S FINDING THAT THE WEAPON USED BY PAUL LOISELLE IN HIS ASSAULT AGAINST RORY TRIPP AND RANDY NICKELL WAS A DEADLY WEAPON.

Loiselle claims that the State failed to prove beyond a reasonable doubt that the box cutter he used was a deadly weapon. During the course of trial, the jury heard testimony from several witnesses and a medical professional regarding the injury suffered by the victims and the weapon possessed by Loiselle. The evidence presented overwhelmingly proved that the box cutter Loiselle used to injure the victims had the capacity to cause death, and that Loiselle used the weapon in such a manner that it may easily have caused death.

A conviction will be affirmed if the appellate court, viewing the evidence in the light most favorable to the State, is satisfied there is sufficient evidence to convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. All reasonable inferences must be drawn in favor of the State. This test does not require the State to convince the appellate court that the defendant is guilty beyond a reasonable doubt - just that a rational trier of fact

could so conclude. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

A deadly weapon is defined as “any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance . . . which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.” RCW 9A.04.110(6). For purposes of a special verdict, the weapon in question must be “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.” RCW 9.94A.825.

In re Martinez, 171 Wn.2d 354, 366, 256 P.3d 277 (2011), determined that “under the plain meaning of this statute, mere possession is insufficient to render ‘deadly’ a dangerous weapon other than a firearm or explosive.” The status of the specific weapon used, when not falling within the narrow category of per se deadly weapons, “rests on the manner in which it is used, attempted to be used, or threatened to be used.” Martinez, 171 Wn.2d at 366. A variety of factors may be considered in establishing a deadly weapon, including but not limited to, the injury

suffered by the victim based on expert testimony. State v. Shilling, 77 Wn. App. 166, 172, 889 P.2d 948 (1995).

The surrounding circumstances are also important to determine whether the weapon used was a deadly weapon. State v. Skenandore, 99 Wn. App. 494, 500, 994 P.2d. 291 (2000). These circumstances include “the intent and the present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted.” Id. (quoting State v. Sorenson, 6 Wn. App. 269, 273, 492 P.2d 233 (1972)). In State v. Cobb, 22 Wn. App. 221, 223, 589 P.2d 297 (1978), the victim was stabbed by a knife with a blade less than three inches, in the forehead, chest, and arm. Even though those wounds were superficial, the test is not the wounds themselves, but “whether the knife was capable of inflicting life threatening injuries under the circumstances of its use.” Id. at 223. The court found that under the circumstances of its use, the knife was a deadly weapon, based in part on the fact that the weapon could “easily reach major blood vessels.” Id. at 223-24. Similarly, a defendant that held an open pocketknife against the neck of the victim, causing a cut on her neck, was properly found to be armed with a deadly weapon based on the circumstances of its use. State v. Thompson, 88 Wn.2d 546, 550, 564 P.2d 323 (1977).

In this case, the weapon used by Loiselle was not recovered. However, it was identified by a witness as a box cutter. 8/1/2011RP 170. Two victims were injured; one with a penetrating stab wound to the neck that required surgery and the other had a superficial cut to his neck that went through his tee shirt and sweatshirt. 7/28/2011RP 127-28; 8/1/2011RP 27.

The weapon in this case could not be classified as a per se deadly weapon. RCW 9.94A.825. However, on the manner in which it was used, circumstances prove that the box cutter fulfills the statutory requirements of a deadly weapon. This was not merely a question of potential injury, but location and severity of the injury in fact. Both victims were cut on their neck, with one suffering a penetrating wound that caused concern based on the proximity to major blood vessels. The facts here are very similar to both Cobb and Thompson based on the injuries caused and their respective location on the victims' bodies. Life-threatening injuries are not required to find that a deadly weapon was used. The evidence presented at trial fully established that Loiselle used the weapon in a manner capable of causing death to both victims. Cobb, 22 Wn. App. 221, 589 P.2d 297 (1978); Thompson, 88 Wn.2d 546, 564 P.2d 323 (1977).

Loiselle relies heavily on the disapproval of the court in Martinez for the potential for a weapon to cause injury. In re Martinez, 171 Wn.2d 354, 256 P.3d 277 (2011). However, that is distinguished from this case, as the knife in Martinez was found some distance away and the defendant was not “seen with the knife and he manifested no intent to use it.” Id. at 368. The court was addressing attempted use only, specifically stating that “neither actual nor threatened use is at issue here.” Id. at 368. Martinez did not involve actual injury, but just the hypothetical potential for use.

Loiselle used a weapon and cut both victims on the neck. Viewing the evidence in the light most favorable to the State confirms that there were sufficient facts to establish that Loiselle was armed with a deadly weapon when he assaulted the victims.

2. THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY REFERENCING THE LITERAL MEANING OF THE LATIN PHRASE *RES IPSA LOQUITUR*.

Loiselle argues that the prosecutor committed misconduct by referencing the Latin phrase *res ipsa loquitur* in his closing argument. Loiselle states that by mentioning this term three times in his closing, and once on rebuttal, the prosecutor shifted the burden

of proof to Loisel. These statements were not improper as the prosecutor was referencing the literal meaning of the term and never suggested that the State did not have the burden of proving the case beyond a reasonable doubt.

In presenting closing arguments to a jury, prosecutors have wide latitude to draw and express reasonable inferences from the evidence. State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993). A defendant alleging prosecutorial misconduct has the burden of establishing that the prosecutor's conduct was both improper and prejudicial. Dhaliwal, 150 Wn.2d at 578, 79 P.3d 432. Failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by a curative instruction. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

A prosecuting attorney's allegedly improper remarks are reviewed "in the context of the total argument, the evidence addressed, the issues in the case, and the jury instructions." State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). A conviction is reversed only "if there is a substantial likelihood that

the alleged prosecutorial misconduct affected the verdict." State v. Lord, 117 Wn.2d 829, 887, 822 P.2d 177 (1991). Moreover, even improper remarks by the prosecutor will not support the reversal of a conviction, "if they were invited by argument of defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." State v. Weber, 159 Wn.2d 252, 276-77, 149 P.3d 646 (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (further citations omitted).

In this case, the prosecutor made reference to the Latin phrase, *res ipsa loquitur*, during closing arguments. 8/3/2011RP. The defense did not object and the issue was raised for the first time on appeal. The brief reference, made at the end of the prosecutor's argument, was not improper as it was referring to the literal meaning of the Latin term. Translated to "the thing speaks for itself," the prosecutor was arguing to the jury that they should look to the nature of the injury suffered by the victims to determine what caused it. Morner v. Union Pac. R. Co., 31 Wn.2d 282, 290, 196 P.2d 744 (1948). This was not done in context of the State's burden, and in no way conflicted with prosecutor's prior reference to the State's burden or the court's jury instruction.



Loiselle argues that “the prosecutor’s argument plainly constituted misconduct,” but this is not supported by the case law. Appellant’s Opening Brief, 21. The prosecutor was referencing the literal meaning of a Latin phrase. Looking at the context of the whole argument, this in no way implied that the State’s burden was anything less than beyond a reasonable doubt. Boehning, 127 Wn. App. at 519 (2005). There was nothing flagrant or ill-intentioned in the argument, only a creative turn-of-phrase to get the jury to focus on the evidence. Belgarde, 110 Wn.2d at 507 (1988). Even if there was prejudice to Loiselle, it was cured by the court’s instruction that the crime must be proved by the State beyond a reasonable doubt. 8/3/2011RP 6, 8.

If the court finds that the prosecutor’s statements were improper, reversal of conviction is not supported. First, the remarks were invited by argument of defense counsel and are in reply to his or her acts and statements. Weber, 159 Wn.2d at 276-77. Throughout the trial and closing argument, defense counsel emphasized that the State could not show how the victims were injured. Referencing *res ipsa loquitur* was merely an attempt to properly argue that the evidence supported the conclusion that the injury was caused by a sharp instrument. Secondly, Loiselle has

not demonstrated that the brief references misled the jury, or that they could not have been neutralized with a curative instruction. The statement must be reviewed in reference to the entire argument and there is no case law or argument to support that the limited use of the Latin term impacted the jury's verdict. Boehning, 127 Wn. App. at 519 (2005); Lord, 117 Wn.2d at 887 (1991).

The reference by the prosecutor to *res ipsa loquitur* did not shift the burden of proof and was not improper. Given the overwhelming evidence of guilt, the lack of objection at the time of trial and the lack of compelling argument that the verdict was impacted, reversal is not warranted.

3. THE TRIAL COURT ERRED IN REFUSING TO IMPOSE THE DEADLY WEAPON ENHANCEMENT.

In State v. Nunez, 174 Wn.2d 707, 285 P.3d 21 (2012), the court overruled its prior decision in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), and concluded that the nonunanimity rule could not stand. The court found "that the legislature intended complete unanimity to impose or reject an aggravator." Nunez, 174 Wn.2d at 715.

Relying on State v. Bashaw, the trial court concluded that the deadly weapon enhancements could not be imposed because of incorrect instruction to the jury. CP 161, 218, 220; 10/14/2011RP 5, 20. The instruction given in this case regarding the special verdict form specified:

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

CP 121.

Based on Nunez, this instruction was sufficient and the State requests Loiselle be remanded for resentencing with the deadly weapon enhancement.

**E. CONCLUSION**

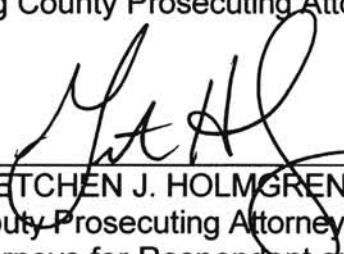
For the reasons set forth above, the State respectfully requests that the Court affirm the jury's finding that Loiselle was armed with a deadly weapon when he assaulted the victims, that

the prosecutor did not commit misconduct, and remand for  
imposition of the deadly weapon enhancement.

DATED this 22 day of October, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas M. Kummerow, the attorney for the appellant/cross-respondent, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent/Cross-Appellant, in STATE V. LOISELLE, Cause No. 67909-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Janice Schwarz  
Name

Done in Kent, Washington

10/22/12  
Date

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