NO. 41167-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY SCOTT REED,

Appellant.

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

The Honorable Robert Lewis, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

CATHERINE E. GLINSKI
Attorney at Law
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

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2. The prosecutor's improper argument misstating the law of reasonable doubt denied appellant due process.

3. Trial counsel's failure to object to the prosecutor's misconduct denied appellate effective representation.

4. There was insufficient evidence to support a conviction for a separate crime of kidnapping.

5. The special verdict instruction misstated the unanimity requirement.

6. The court's refusal to grant a mistrial based on improper opinion testimony denied appellant his right to jury trial.

7. Cumulative error denied appellant a fair trial.

Issues pertaining to assignments of error

1. During trial, courtroom security personnel removed a member of the public from the courtroom and told him if he returned he would be arrested for trespassing. Where the court did not undertake the required analysis on the record before the public was excluded from the proceedings or determine that exclusion was necessary, did the court fail

to fulfill its constitutional obligation to ensure that appellant received a public trial?

2. The prosecutor argued in closing that the jury's job was to "declare the truth," and he trivialized the reasonable doubt standard by comparing it to everyday decision making, easing the State's constitutional burden. Where these improper arguments have been repeatedly condemned by appellate courts and where there is a substantial likelihood the prosecutor's flagrant misconduct affected the verdict, is reversal required?

3. Did trial counsel's failure to object to the prosecutor's improper argument constitute ineffective assistance of counsel?

4. Appellant was convicted of burglary, kidnapping, and robbery arising out of a home invasion. The evidence showed that the victim was held to the floor at gunpoint by one man as a second man searched the home for items to steal, but he was not moved and the restraint ended when the home invasion was completed. Where the restraint was merely incidental to the robbery, was the evidence insufficient to establish a separate crime of kidnapping?

5. Where the special verdict instruction incorrectly required the jury to be unanimous to answer the special verdicts "no," must the weapons enhancements and exceptional sentence be vacated?

6. On the way to the home invasion, an officer pulled over a vehicle he suspected was involved. When he ordered the driver to turn off the car, the driver leaned forward, the officer reached in to grab him, and the passenger raised a gun over the driver's back and shot the officer. Appellant did not dispute that he was the driver or that the passenger shot the officer, but he argued there was no premeditated intent to kill. The State's theory was that the driver leaned forward intentionally so that the passenger could shoot the officer, and, despite the court's pretrial ruling excluding it, the officer gave his opinion that the driver was acting willfully and intentionally. The court sustained appellant's objection but denied his motion for mistrial. Did the officer's opinion as to this critical issue invade the province of the jury and deny appellant a fair trial?

7. Does cumulative error require reversal?

B. STATEMENT OF THE CASE

1. Procedural History

The Clark County Prosecuting Attorney charged appellant Jeffrey Scott Reed and co-defendant Daylan Berg with attempted first degree murder, first degree burglary, first degree kidnapping, first degree robbery, and intimidating a witness, and charged Reed with first degree unlawful possession of a firearm. CP 7-9; RCW 9A.28.020(1), (3)(b); RCW 9A.32.030(1)(a); RCW 9A.28.020(3)(a); RCW 9A.52.020(1)(a)(b); RCW

9A.40.020(1)(b); RCW 9A.56.200(1)(a)(i); RCW 9A.56.200(1)(a)(ii); RCW 9A.08.020(3); RCW 9A.72.110(1)(d); RCW 9.41.040(1)(a). The State alleged that Reed or Berg was armed with a firearm during the commission of counts 1 through 5 and that the attempted murder was committed against a law enforcement officer performing his official duties. CP 7-9.

The case proceeded to a joint jury trial before the Honorable Robert Lewis, and the jury returned guilty verdicts and affirmative findings on the weapon enhancement and exceptional sentence allegations. CP 334-46. Reed filed a motion for arrest of judgment or a new trial, which the court denied. CP 350, 484.

The court declined to count the burglary and intimidating a witness charges separately at sentencing. CP 488. It imposed an exceptional sentence of 500 months plus a 60 month firearm enhancement on the attempted murder charge, standard range sentences on the remaining counts, with firearm enhancements on the robbery and kidnapping counts. The sentences on the attempted murder and kidnapping convictions were set to run consecutively, with a total confinement imposed of 749 months. CP 489.

Reed filed this timely appeal. CP 500.

2. Substantive Facts

On April 15, 2009, two men broke into Albert Watts's house through the back door and entered the garage, where Watts was tending his medical marijuana plants. 24RP[1] 987, 989, 992, 994. The first man pointed a gun at Watts and told him to get to the ground. When Watts was on the ground, the second man held the gun to his head while the first man started ripping up the marijuana plants. 24RP 995-97. The first man made a couple of trips in and out of the garage while the second man continued to hold Watts to the ground. 24RP 998. After several trips, the first man returned, told Watts he had his wallet and knew where he lived, and said he would hunt Watts down and kill him if he went to the police. 24RP 1000, 1017. The men told Watts to stay on the floor for 15 minutes, and then they left. 24RP 1000. After about three minutes, Watts went inside his house and discovered that his cell phone and wallet were missing. 24RP 1001.

[1] The Verbatim Report of Proceedings is designated as follows: 1RP—7/1/09; 2RP—7/8/09; 3RP—7/16/09; 4RP—7/29/09; 5RP—9/18/09; 6RP—9/29/09; 7RP—10/2/09; 8RP—10/9/09; 9RP—10/22/09; 10RP—11/6/09; 11RP—12/15/09; 12(A)RP—12/17/09; 12(B)RP—12/17/09; 13RP—12/22/09; 14RP—1/27/10; 15RP—2/23/10; 16RP—3/18/10; 17RP—4/16/10; 17(B)RP—4/16/10; 18(A)RP—4/29/10; 18(B)RP—4/29/10; 19RP—5/5/10; 20RP—5/13/10; 21RP—5/14/10; 22RP—5/17/10; 23RP—5/18/10; 24RP—5/19/10; 25(A)RP—5/20/10; 25(B)RP—5/20/10; 26(A)RP—5/24/10; 26(B)RP—5/24/10; 27(A)RP—5/25/10; 27(B)RP—5/25/10; 28(A)RP—5/26/10; 28(B)RP—5/26/10; 29RP—5/27/10; 30RP—5/28/10; 31RP—6/1/10; 32RP—7/19/10; 33RP—7/30/10; 34RP—8/17/10; 35RP—9/3/10; 36RP—9/15/10.

Watts's neighbor, Cynthia Surber, called 911 when she saw a man in a black hoody running back and forth through the house. 24RP 1092, 1098. As she was watching, Surber saw a white car back up into the driveway and a man carrying what looked like a Christmas tree and a pillowcase. 24RP 1093-94. Surber also saw something with a wood frame being shoved into the back of the car. 24RP 1099. She reported that she saw three to four young guys, all in their 20's, get into the car. 24RP 1100-01.

Vancouver Police Sergeant Jay Alie was dispatched to Watts's home, responding to Surber's 911 call. 24RP 1131. As he was on his way, Alie heard on the radio that the suspect vehicle had left the scene. 24RP 1134. He then saw the described white car heading away from the burglary address. 24RP 1135. Alie informed dispatch that he intended to stop the vehicle, and he provided the license plate number. 24RP 1136. Alie activated his emergency lights and conducted a traffic stop, as another officer pulled his car behind Alie's. 24RP 1137-38.

Alie saw two occupants in the white car. As he approached the driver's side, he noticed that both driver's side windows were down. 24RP 1139-41. When he saw a marijuana plant and some other items in the back of the car, Alie surmised that the vehicle's occupants had been involved in the burglary he was responding to. 24RP 1141-42.

The driver of the car was sitting with both hands on the steering wheel, staring straight ahead, with the engine running. Alie told him to shut the engine off, there was a pause, and then the driver said okay and ducked toward the center console with his head past the steering wheel. 24RP 1143-44. When Alie reached in to grab the driver, the passenger raised a gun over the driver's back and shot Alie. 24RP 1144-45. The car then took off. 24RP 1146.

Tony Beck observed the traffic stop. He was working in his garage when his attention was drawn by flashing lights on the street outside his home. He looked outside and saw that two patrol cars had pulled over a small white car. 24RP 1109-10. After about two minutes, one of the officers approached the car. 24RP 1119. Beck looked away and then heard a loud pop. When he turned back around, he saw the white car speeding away. 24RP 1113.

Alie was wearing a ballistic vest, and the bullet did not penetrate his chest. 24RP 1149. He was taken to the hospital by ambulance, and while he was there he provided a description of the driver and passenger to the investigating officer. 24RP 1150. Alie described the driver as a white male with short reddish hair and a cheesy looking beard, 165 to 170 pounds, wearing a dark hoody. The passenger was clean shaven with

short brown hair and was possibly wearing a brown jacket. 25(A)RP 1195, 1199, 1203.

The white car, a Kia Spectra, had previously been associated with Jeffrey Scott Reed and was registered to an address in Portland. 25(A)RP 1205; 26(B)RP 1620. Vancouver dispatch requested that Portland police determine if the vehicle had returned to that address. 25(A)RP 1205. A Portland officer drove by the residence but did not see the Kia. As he was driving away, however, the Kia passed him heading the other direction. 25(A)RP 1211. The officer turned around to pursue the Kia. He found the car a short distance away abandoned, with the passenger door open and the engine running. 25(A)RP 1211-12. Inside the car, he saw a large flat screen TV and some marijuana plants. 25(A)RP 1214. The Portland Police set up a containment perimeter. 25(A)RP 1213.

As the perimeter was being established, someone at a nearby apartment complex called 911 to report seeing a young man wearing a black hoody run through the complex parking lot and jump the fence. A maroon Camaro then drove into the parking lot without headlights. The man in the hoody came back over the fence into the parking lot and got into the Camaro. The Camaro then pulled out onto Holgate Avenue. 25(A)RP 1225-30.

A roadblock was set up at the intersection of 118th and Holgate to stop all traffic coming into or going out of the perimeter area. 25(A)RP 1236-37. The officers conducting the roadblock had a vague description of the possible suspects in the Vancouver shooting and information that Jeffrey Scott Reed was possibly one of suspects. 25(A)RP 1237, 1241.

As a line of cars was waiting to be checked and let through the roadblock, a maroon Camaro approached in the inside lane at a high rate of speed for the situation. 25(A)RP 1238. An officer flagged the car down and approached the passenger side window. She asked for identification, and the passenger identified himself as Jeffrey Scott Reed. 25(A)RP 1241. Reed was arrested, handcuffed, and searched incident to his arrest. 25(A)RP 1241, 1258. In Reed's front pocket officers located a cell phone later determined to belong to Albert Watts. 25(A)RP 1259, 1275; 25(B)RP 1319-20.

The driver of the Camaro was Reed's brother, James Roberts. 25(A)RP 1272; 27(A)RP 1681. Reed had visited Roberts's house earlier that evening with Daylan Berg. 27(A)RP 1683. Sometime around 10:00, Roberts received a phone call, Berg showed up at the house, and Roberts left in his Camaro. 27(A)RP 1687-89. Berg stayed the night, and in the morning Roberts's girlfriend drove him to an apartment complex in Vancouver. 27(A)RP 1692-94. From there, Berg received a ride to a

friend's house in Portland, where he was later arrested. 27(A)RP 1716, 1738. At the time of his arrest, Berg was carrying a gun which testing showed was consistent with the gun used in the shooting. 27(A)RP 1748; 28(A)RP 1992.

Portland police obtained warrants to search the Kia and the Camaro. Inside the Kia they found a flat screen TV and marijuana plants in back seat, a laptop computer on the floor of the back seat, and a white trash bag full of marijuana. They also found a .40 caliber round, a .40 caliber casing, and black plastic fragments consistent with the buttons on Alie's uniform shirt. 26(B)RP 1647-54; 27(B)RP 1873. In the Camaro police found a pet store receipt associated with Watts. 26(B)RP 1657, 1659; 27(A)RP 1758.

Keely Royston, James Roberts's girlfriend, was charged with rendering criminal assistance. She testified under a cooperation agreement regarding her contacts with Reed and Berg. 27(A)RP 1695.

Michael Alldritt, an inmate awaiting trial in Oregon, also testified under a cooperation agreement. 28(A)RP 1898-99. Alldritt testified that he was incarcerated with Berg in April and May 2009, and in that time Berg boasted about being involved in a home invasion robbery and officer shooting. 28(A)RP 1901-02. According to Alldritt, Berg said he and a friend planned a home invasion robbery in Vancouver and followed

through with it the same day. As they were leaving the robbery, they were pulled over, and when the officer approached, Berg reached over the driver and shot the officer. 28(A)RP 1902-03. Berg never suggested to Alldritt that the shooting was planned, however. 28(A)RP 1914.

Watts was never able to identify the intruders, nor was Alie able to identify the driver or the person who shot him. 24RP 1005, 1147. Neither Reed's nor Berg's fingerprints were found on the .40 caliber round and casing found in the Kia, the gun, or the magazine. 27(B)RP 1838-40.

In closing argument, Reed's counsel did not dispute that Reed was responsible for the offenses committed at Watts's house. 30RP 2382. He argued, however, that the State failed to prove Reed was an accomplice to attempted first degree murder, because there was no evidence of premeditation. 30RP 2386-88. Counsel argued that the passenger shot Alie with the intent to kill, but there was no evidence Reed knew in advance what the passenger was going to do. 30RP 2387, 2389-90.

C. ARGUMENT

1. THE TRIAL COURT DID NOT FULFILL ITS CONSTITUTIONAL OBLIGATION TO ENSURE THAT REED RECEIVED A PUBLIC TRIAL, AND REMAND FOR A NEW TRIAL IS REQUIRED.

Following a request from courtroom security personnel, the trial court permitted undercover officers in the courtroom audience during the

proceedings, under the authority of the Clark County security team. 25(A)RP 1182-83; 26(B)RP 1670. On the third day of trial, Berg's counsel reported to the court that a member of the public had been excluded from the trial by one of these officers. He was sitting in the back of the courtroom when he was told he had to leave. 26(B)RP 1606. The court questioned a member of the courtroom security team, who reported that an undercover officer in the courtroom felt the man had intimidated a witness who was leaving the courtroom the previous day, and the team was looking into it. 26(B)RP 1609-10.

Counsel objected that the security team was not permitted to exclude members of the public from attending trial. 26(B)RP 1611. The court noted the objection but ruled that no member of the public had been excluded. 26(B)RP 1612. The court also noted that the only reason the Vancouver Police officers were allowed in the courtroom was to provide increased security under the control of the Clark County security team. If those officers were removing people from the courtroom because they perceived them to be looking at witnesses funny, it might be a problem. 26(B)RP 1670.

The next day, defense counsel presented the court with a declaration from Joel Wyman, the man who had been removed from the courtroom. Wyman explained that he was told if he returned to court he

would be arrested for trespassing, and he was afraid to return. 27(A)RP 1674-75. The court noted that it had not ordered anyone excluded from the courtroom nor given anyone authority to exclude anyone else. If anyone told Wyman he was excluded from the courtroom while the trial was in progress, it was done without the court's authority. 27(A)RP 1674. The court declined a request by counsel to delay the proceedings until Wyman could return. 27(A)RP 1677.

At the end of the day, Berg's counsel moved for mistrial based on violation of the right to a public trial. 27(B)RP 1856. Wyman was in attendance as a member of the public, but he was pulled from the courtroom and told not to return under threat of arrest. Counsel argued this was a structural defect which required a new trial. 27(B)RP 1856-57. Reed's counsel joined the motion. 27(B)RP 1858; CP 183-85.

The court denied the motion for a mistrial, stating it had not excluded anyone and that the proceedings had been open to the public at all times. 27(B)RP 1861. Although Wyman was erroneously told that he was excluded from the courtroom, when the court learned of this it informed the sheriff's office that there was no authority to ban him from the courtroom. 27(B)RP 1862. At counsel's request, the court issued an order that, absent good cause, no one should be removed from the

courtroom or prevented from viewing the proceedings. 27(B)RP 1863; CP 186-87.

After the jury entered its verdicts, Reed again raised the public trial issue, moving for a new trial. CP 350-54. The court denied the motion, pointing out again that the court did not exclude anyone from the trial. 35RP 2480. The court did not believe that Wyman's removal from the courtroom, or the fact that he was told he would be arrested if he returned, violated any right of the defendants or the public. 35RP 2581-82. The court was mistaken.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant the right to a public trial. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). In addition, article I, section 10 of the Washington Constitution states, "Justice in all cases shall be administered openly," which provides the public itself a right to open, accessible proceedings. Easterling, 157 Wn.2d at 174. Moreover, the First Amendment implicitly grants the public a right of access to trials. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604-606, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982).

These constitutional provisions assure a fair trial, foster public understanding and trust in the judicial system and give judges the check of

public scrutiny. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); see also Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 508, 104 S.Ct. 819, 823, 78 L.Ed.2d 629, 637 (1984) ("The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed."). A public trial "ensure[s] that [the] judge and prosecutor carry out their duties responsibly ... encourages witnesses to come forward[,] and discourages perjury." Waller v. Georgia, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

The court has an independent obligation to protect the defendant's and the public's right to open proceedings and assure that justice is administered openly. Easterling, 157 Wn.2d at 187 (Chambers, J., concurring) ("[T]he constitutional requirement that justice be administered openly is not just a right held by the defendant. It is a constitutional obligation of the courts."); State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995); State v. Duckett, 141 Wn. App. 797, 806, 173 P.3d 948 (2007).

While the public trial right is not absolute, it is strictly guarded to assure that members of the public are excluded from trial proceedings only in the most unusual circumstances. Easterling, 157 Wn.2d at 174-75; Brightman, 155 Wn.2d at 509. "Trial courts are obligated to take every

reasonable measure to accommodate public attendance at criminal trials." Presley v. Georgia, ___ U.S. ___, 130 S.Ct. 721, 725, 175 L.Ed.2d 675 (2010). Thus, members of the public cannot be excluded unless the court has conducted an analysis of relevant factors[2] on the record and entered specific findings that justify the closure. Presley, 130 S.Ct. at 724-25; Waller, 467 U.S. at 45-47; Easterling, 157 Wn.2d at 175; Bone-Club, 128 Wn.2d at 258-59; State v. Leyerle, 158 Wn. App. 474, 481, 242 P.3d 921 (2010). Exclusion of the public without the required analysis and findings violates the right to a public trial. Brightman, 155 Wn.2d 506, 515-16; Duckett, 141 Wn. App. at 805.

Denial of the right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis. Easterling, 157

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[2] The Washington Supreme Court has identified the relevant factors as:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.

2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

4. The court must weigh the competing interests of the proponent of closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59. In Waller, the United States Supreme Court held, "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." Waller, 467 U.S. at 48.

Wn.2d at 181 (citing Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (citing Waller, 467 U.S. 39)). This is because denial of the public trial right is structural error, and prejudice is presumed. Neder, 527 U.S. at 8; Easterling, 157 Wn.2d at 181. The remedy is therefore remand for a new trial. In re Pers. Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

In this case there is no question that a member of the public was improperly excluded from the courtroom during the proceedings. The court did not authorize the exclusion, did not consider on the record whether the exclusion was necessary, and did not enter any findings that the exclusion was justified. In fact, the court agreed that Wyman should not have been excluded from the proceedings and told the sheriff's office it had no authority to ban him from the courtroom. 27(B)RP 1862. Because the court failed to ensure that the courtroom remained open to the public during the trial proceedings, the right to a public trial was violated.

The improper exclusion in this case implicates constitutional protections, even if only one member of the public was impacted. In Washington, the guarantee of a public trial has never been subject to a *de minimis* exception. State v. Strode, 167 Wn.2d 222, 230, 217 P.3d 310 (2009); State v. Erickson, 146 Wn. App. 200, 189 P.3d 245 (2008); Duckett, 141 Wn. App. at 809 (right of public trial violated where only

limited portion of voir dire was conducted outside courtroom without proper analysis and opportunities to object). While some federal cases have held that trivial courtroom closures do not violate the Sixth Amendment[3], the denial of public access in this case cannot be deemed trivial under Washington precedent.

For example, in Leyerle, during voir dire the trial judge and counsel moved to the hallway to individually question a prospective juror. Following individual voir dire, defense counsel successfully challenged the juror for cause. Leyerle, 158 Wn. App. at 477. On appeal this Court held that, because the trial court did not engage in the required analysis, conducting this portion of voir dire in the hallway violated the public's right to an open proceeding. Leyerle, 158 Wn. App. at 486. This was so even though there were no members of the public in court during the hallway voir dire. The trial court had a duty to protect public trial rights by ensuring that proper closure procedures were followed. Leyerle, 158 Wn. App. at 484. Where the court failed to fulfill its duty, the closure

[3] See Peterson v. Williams, 85 F.3d 39, 42-44 (2nd Cir. 1996) (trial court inadvertently left courtroom door closed for 20 minutes following justified closure, held too trivial to amount to Sixth Amendment violation where testimony during closure was repeated during summation); U.S. v. Al-Smadi, 15 F.3d 153 (10th Cir. 1994) (Sixth Amendment not violated where court personnel locked courthouse doors at regular time, even though trial proceeded after hours); Snyder v. Coiner, 510 F.2d 224, 230 (4th Cir. 1975) (bailiff's refusal to let anyone enter or leave courtroom for a time during closing arguments was too trivial to amount to constitutional violation).

could not be dismissed as trivial, even though no member of the public was actually excluded. Leyerle, 158 Wn. App. at 485-85.

While there was no showing that any member of the public was affected by the improper closure in Leyerle, here it is undisputed that Wyman was pulled from the courtroom after having attended part of the proceedings and told he would be arrested if he returned. The trial court failed in its duty to ensure that the right to a public trial was protected, and the improper exclusion cannot be dismissed as trivial. See also Presley, 130 S.Ct. at 722, 724-25 (right of public trial violated when court failed to consider alternatives to closure before requiring lone observer in courtroom to leave during voir dire); Tinsley v. U.S., 868 A.2d 867, 873-74 (D.C. App. 2005) (even limited closure of courtroom by exclusion of specific spectators implicates Sixth Amendment; closure upheld because court found necessary after offer of proof); Gonzalez v. Quinones, 211 F.3d 735 (2nd Cir. 2000) (Court security guard acted without knowledge/order from court in locking courtroom, three spectators unable to enter. Not trivial, Sixth Amendment implicated.)

The court below seemed to believe that because it did not intentionally exclude anyone, there was no violation of the right to public trial. See 27(A)RP 1674; 27(B)RP 1861; 35RP 2480-82. Whether the closure was intentional or inadvertent is constitutionally irrelevant,

however. See Walton v. Briley, 361 F.3d 431, 433 (7th Cir. 2004); State v. Vanness, 304 Wis.2d 692, 699, 738 N.W.2d 154, 158 (2007). The purpose of the right to a public trial, to ensure the fairness of the system, is thwarted whether the court affirmatively denies access to the courtroom or simply fails to prevent the public from being excluded. Where there is an unjustified courtroom closure, the right to a public trial is violated, whether the court intended the closure or not.

Moreover, the exclusion in this case was not inadvertent. Wyman was intentionally excluded from the proceedings: he was pulled from the courtroom and told that if he returned he would be arrested for trespassing. The fact that the intentional exclusion was done by an undercover police officer rather than the court does not matter. See Kelly v. State, 195 Md.App. 403, 422 n.10, 6 A.3d 396 (2010) (irrelevant that intentional closure was done by sheriff's office without knowledge of court).

The trial court did not fulfill its constitutional obligation to ensure that Reed received a public trial, and remand for a new trial is required.

2. THE PROSECUTOR'S IMPROPER ARGUMENT MISSTATED THE LAW AS TO REASONABLE DOUBT, AND REED'S CONVICTION FOR ATTEMPTED FIRST DEGREE MURDER MUST BE REVERSED.

The prosecutor, as an officer of the court, has a duty to see that the accused receives a fair trial. State v. Carlton, 90 Wn.2d 657, 664-65, 585

P.2d 142 (1978). While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). Prosecutorial misconduct may deprive the defendant of a fair trial, and only a fair trial is a constitutional trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. V and XIV; Wash. Const. art. 1, § 3.

Under both the state and federal due process clauses, the prosecution bears the constitutional burden of proving every element of the charged crimes beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991). It is misconduct for a public prosecutor, with all the weight of the office behind him, to misstate the applicable law when arguing the case to the jury, especially where the misstatements affect the defendant's constitutional rights. See e.g. Davenport, 100 Wn.2d at 762.

This Court has recognized that a prosecutor commits misconduct by misstating the law so as to misrepresent the jury's duty, trivialize the reasonable doubt standard, and suggest that the jury must convict the

defendant unless it finds a reason not to. State v. Emery, ___ Wn. App. ___, (No. 39119-8-II, April 13, 2011), Slip Op. at 9; State v. Johnson, 158 Wn. App. 677, 684-85, 243 P.3d 936 (2010), review denied, ___ Wn.2d ___ (No. 85486–6, March 30, 2011); State v. Anderson, 153 Wn. App. 417, 429, 431-32, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010).

In Anderson, the prosecutor told the jury its duty was to declare the truth about what happened on the day in question. Anderson, 153 Wn. App. at 424. This Court condemned the argument as a misstatement of the law. A prosecutor's request that the jury "declare the truth" is improper because the jury's job is not to solve a case and declare what happened. Anderson, 153 Wn. App. at 429. "Rather, the jury's duty is to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt." Anderson, 153 Wn. App. at 429. This Court recently reiterated this holding in Emery, Slip Op. at 9.

In addition, the prosecutor in Anderson compared the reasonable doubt standard to everyday decision making, such as choosing to have elective surgery, leaving children with a babysitter, or changing lanes on the freeway. Anderson, 153 Wn. App. at 425. This Court held those arguments "were also improper because they minimized the importance of the reasonable doubt standard and of the jury's role in determining whether

the State has met its burden." Anderson, 153 Wn. App. at 431. Comparing the jury's decision to the process of making everyday decisions—even important ones—"trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case" against the defendant. Anderson, 153 Wn. App. at 431. By discussing common decisions in which one might chose to act or refrain from acting, "focusing on the degree of certainty the jurors would have to have to be willing to act, rather than that which would cause them to hesitate to act," the prosecutor implied that the jury should convict the defendant unless it found a reason not to do so. Anderson, 153 Wn. App. at 431-432.

Similarly, in Johnson, the prosecutor compared the reasonable doubt standard to intuiting the subject of a partially completed puzzle. Johnson, 158 Wn. App. at 682. This Court held the argument was improper because it "trivialized the State's burden, focused on the degree of certainty the jurors needed to act, and implied that the jury had a duty to convict without a reason not to do so." Johnson, 158 Wn. App. at 685.

a. The prosecutor's flagrant misconduct in closing argument requires reversal.

The prosecutor in this case pulled these same tricks in closing argument. First, the prosecutor told the jury that a criminal trial is a search

for the truth and that the State's role was to present evidence, the court's role was to enforce the rules and give the jury the law, and the jury's role was to declare the truth. 29RP 2240-42.

Then, after reminding the jury that the State has the burden of proving each alleged criminal event beyond a reasonable doubt, the prosecutor elaborated on the meaning of that standard:

> And an abiding belief is, I think, I will suggest to you, the same sort of frame of mind that we require in any important decision we make. Say, a decision to marry or a decision to make a significant investment. What we do in those scenarios, hopefully is to consider all of the facts, the pros, the cons, the ups, the downs, consider all the facts in an objective, reasonable way, and then determine a course of action.
>
> And the point I would make to you is that you're never certain if that marriage is going to succeed or that investment is going to pay off big time, but we have n abiding belief in the decision that we made, we – we – we believe the decision to marry or make that investment was a correct one.
>
> And that's where we are in the question of our burden of proof, the question of reasonable doubt.

29RP 2243-44. Defense counsel did not object to the prosecutor's improper argument, choosing instead to address it in closing. 30RP 2376-77.

These arguments constitute flagrant misconduct. The prosecutor's focus on the decision making process the jury would undertake to decide if they were willing to act, rather than what would make them hesitate to act, essentially invited the jury to render a decision based on a less exacting

standard than the constitution requires. Anderson, 153 Wn. App. at 432; see also Emery, Slip Op. at 9; Johnson, 158 Wn. App. at 685.

The United States Supreme Court condemned the kind of "willing to act" argument used by the prosecutor in this case over half a century ago. Holland v. United States, 348 U.S. 121, 140, 75 S.Ct. 127, 99 L.Ed. 150 (1954). Since Holland, "courts have consistently criticized the 'willing to act' language" as inviting the jury to render a decision based on a standard less than that required by the constitution. Tillman v. Cook, 215 F.3d 1116, 1126-27 (10th Cir. 2000) (citing cases). "Being convinced beyond a reasonable doubt cannot be equated with being 'willing to act ... in the more weighty and important matters in your own affairs.'" Scurry v. United States, 347 F.2d 468, 470 (D.C. Cir. 1965).

Prosecutorial misconduct is grounds for reversal where there is a substantial likelihood the improper conduct affected the verdict. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). The constitutional harmless error standard applies when a prosecutor's improper argument implicates a constitutional right other than the right to a fair trial. State v. Toth, 152 Wn. App. 610, 614-15, 217 P.3d 377 (2009). Thus, reversal is required unless the State proves the misconduct was harmless beyond a reasonable doubt. Toth, 152 Wn. App. at 615; State v. French, 101 Wn. App. 380, 386, 4 P.3d 857 (2000), review denied, 142 Wn.2d 1022 (2001);

State v. Fleming, 83 Wn. App. 209, 213-16, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). Moreover, because such misconduct rises to the level of manifest constitutional error, the absence of a defense objection does not preclude appellate review. Fleming, 83 Wn. App. at 216.

During closing argument, the prosecutor violated Reed's right to due process by misstating the reasonable doubt standard, shifting the burden of proof and turning the presumption of innocence on its head. Although defense counsel did not object to this misconduct, it rises to the level of constitutional error. The State cannot show, as it must, that the prosecutor's misconduct was harmless beyond a reasonable doubt.

The instructions in this case encouraged the jurors to consider the lawyers' remarks when applying the law. CP 281 ("The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law.") The standard reasonable doubt instructions are not a model of clarity. See State v. Bennett, 161 Wn.2d 303, 317, 165 P.3d 1241 (2007) (recognizing concept of reasonable doubt is difficult to explain even under pattern instructions). The jury would be particularly tempted to follow the approach set forth by the prosecutor, because his comments had the ring of truth. To a layperson, the prosecutor's description of reasonable doubt—comparing it to matters of ordinary

life—sounds correct and provides a simple (albeit mistaken) way for jurors to decide the case.

By misstating the law as to reasonable doubt, the prosecutor eased the State's constitutional burden. This increased the odds that jurors would convict Reed of the charged offenses. The prosecutor's misconduct was not harmless beyond a reasonable doubt.

Moreover, even in the absence of objection, appellate review is not precluded if the misconduct is so flagrant and ill intentioned that no curative instruction could have erased the prejudice. Fisher, 165 Wn.2d at 747. The standard for showing prejudice remains a substantial likelihood that the misconduct affected the verdict. Fisher, 165 Wn.2d at 747.

In Johnson, this Court held that prosecutorial misstatements of the law trivializing the reasonable doubt standard "are flagrant and ill-intentioned and incurable by a trial court's instruction in response to a defense objection." Johnson, 158 Wn. App. at 685 (following State v. Venegas, 155 Wn. App. 507, 523 n. 16, 525, 228 P.3d 813, review denied, 170 Wn.2d 1003 (2010)). This Court reasoned that "a misstatement about the law and the presumption of innocence due a defendant, the 'bedrock upon which [our] criminal justice system stands,' constitutes great prejudice because it reduces the State's burden and undermines a

defendant's due process rights." Johnson, 158 Wn. App. at 685-86 (quoting Bennett, 161 Wn.2d at 315).

In Johnson, the defendant was charged with possession of cocaine, and he presented a defense of unwitting possession. In closing, the prosecutor compared the reasonable doubt standard to intuiting the subject of a partially completed puzzle. With the conflicting evidence and the misstatement of the reasonable doubt standard, this Court could not conclude that the prosecutor's misconduct did not affect the jury's verdict, and it reversed Johnson's conviction. Johnson, 158 Wn. App. at 686.

By contrast in Anderson, several witnesses testified that they saw the defendant enter the store, steal items, attempt to escape, and use force as he attempted to flee, and surveillance footage confirmed this version of events. Because the State's evidence was overwhelming, this Court could not conclude that the defense was prejudiced by the prosecutor's improper comments. Anderson, 153 Wn. App. at 432 n.8; see also Emery, Slip Op. at 9 (multiple witnesses and evidence corroborating victim's version of events, including DNA and items belonging to victim found at the scene; viewing prosecutor's misstatements in light of evidence, Court could not say they affected the verdict).

This case is in line with Johnson. The State's evidence as to the premeditation necessary to prove attempted first degree murder was

conflicting at best. Alldritt testified that Berg bragged to him about shooting the officer, but he never said the shooting was planned. 28(A)RP 1914. Alie testified that Reed leaned forward before Berg fired the gun. 24RP 1143-44. He could not testify to Reed's intent, although he tried[4], but the prosecutor argued that Reed's actions showed he and Berg were working in concert. 29RP 2283-84. Defense counsel argued that there were alternative explanations, however, and Reed could have simply been reacting to Alie's presence rather than carrying out some plan he and Berg devised as they were being pulled over. 30RP 2396-97. In short, the State's evidence on premeditation was not strong enough that this Court can conclude the prosecutor's misstatement of the law as to reasonable doubt did not affect the verdict. The prosecutor's improper arguments could easily have served as the deciding factor, and reversal is therefore required.

b. Counsel's failure to object denied Reed effective assistance of counsel.

The most obvious responsibility for putting a stop to prosecutorial misconduct "lies with the State, in its obligation to demand careful and dignified conduct from its representatives in court. Equally important, defense counsel should be aware of the law and make timely objection

[4] Alie violated the court's pretrial ruling excluding opinion testimony as to Reed's intent by testifying that the driver leaned forward in a "wilfull, intentional movement." 24RP 1142. See Argument § C.5, *infra*.

when the prosecutor crosses the line." State v. Neidigh, 78 Wn. App. 71, 79, 95 P.2d 423 (1995); see also Emery, Slip Op. at 9 n.7. If this Court decides that proper objection or request for a curative instruction could have erased the prejudice caused by the prosecutor's misconduct, then defense counsel was ineffective in failing to take such action.

Every criminal defendant is guaranteed the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland, 466 U.S. at 687-88), cert. denied, 510 U.S. 944 (1993).

To establish the first prong of the Strickland test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. Thomas, 109 Wn.2d 222, 229-30, 743 P.2d 816 (1987). To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. Thomas, 109

Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226.

There was no legitimate reason for counsel not to object to the prosecutor's misconduct, given the prejudicial nature of the prosecutor's arguments. Counsel clearly recognized the arguments misstated the law, and he attempted to correct the error by addressing it in his closing argument. 30RP 2376-77. If counsel had objected, however, the court would have supplied the necessary curative instruction, correcting the misstatement of the law. It is not counsel's role to persuade the jury what the law is. See State v. Byrd, 72 Wn. App. 774, 780, 868 P.2d 158 (1994), aff'd, 125 Wn.2d 707, 887 P.2d 396 (1995).

Because counsel failed to object, the jury was left without clear guidance as to the appropriate application of the reasonable doubt standard. As discussed above, there is a reasonable likelihood this error affected the verdict, and reversal is required.

3. THE MERE INCIDENTAL RESTRAINT OF WATTS TO FACILITATE THE ROBBERY WAS INSUFFICIENT TO PROVE A SEPARATE CRIME OF KIDNAPPING, AND REED'S KIDNAPPING CONVICTION MUST BE DISMISSED.

In every criminal prosecution, the State must prove all elements of a charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). Therefore, as a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

To establish that Reed committed the crime of first degree kidnapping, the State had to prove he intentionally abducted Albert Watts. CP 308; RCW 9A.40.020. "Abduct" means "to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force[.]" RCW 9A.40.010(2). "Restrain" means "to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his

liberty. Restraint is 'without consent' if it is accomplished by (a) physical force, intimidation, or deception[.]" RCW 9A.40.010(1).

The Washington Supreme Court has held that "the mere incidental restraint and movement of [a] victim during the course of another crime" is insufficient to show a separate kidnapping crime where the movement and restraint had "no independent purpose or injury." State v. Brett, 126 Wn.2d 136, 166, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996); Green, 94 Wn.2d at 227 ("While movement of the victim occurred, the mere incidental restraint and movement of a victim which might occur during the course of a homicide are not, standing alone, indicia of a true kidnapping."); see also State v. Elmore, 154 Wn. App. 885, 901, 228 P.3d 760, review denied, 169 Wn.2d 1018 (2010); State v. Saunders, 120 Wn. App. 800, 817-18, 86 P.3d 232 (2004), review denied, 156 Wn.2d 1034 (2005). Thus, to affirm the kidnapping conviction, this Court must find sufficient evidence that Reed restrained and moved Watts for a purpose independent of his intent to commit robbery. See State v. Korum, 120 Wn. App. 686, 703, 86 P.3d 166 (2004), reversed in part on other grounds, State v. Korum, 157 Wn.2d 614, 141 P.3d 13 (2006)

In Korum, the defendant and some friends committed a series of home invasion robberies. During each of the home invasions, the victims were restrained while the perpetrators searched the home for items to steal.

In one of the incidents, one of the victims was moved to a trailer where other victims were located. Korum, 120 Wn. App. at 690-92. Korum was charged with burglary, assault, robbery, and kidnapping, for each of the home invasions. Korum, 120 Wn. App. at 695-96. Relying on Green, this Court dismissed the kidnapping charges, finding they were incidental to the robberies as a matter of law. Korum, 120 Wn. App. at 703-04, 707.

First, this Court noted, "As the Supreme Court held in Green, restraint and movement of a victim that are merely incidental and integral to commission of another crime, such as rape or murder, do not constitute the independent, separate crime of kidnapping." Examining the facts in Korum's case, the Court found it significant that

> (1) The restraints were for the sole purpose of facilitating the robberies—to prevent the victims' interference with searching their homes for money and drugs to steal; (2) forcible restraint of the victims was inherent in these armed robberies; (3) the victims were not transported away from their homes during or after the invasions to some remote spot where they were not likely to be found; (4) although some victims were left restrained in their homes when the robbers left, the duration of the restraint does not appear to have been substantially longer than that required for commission of the robberies; and (5) the restraints did not create a significant danger independent of that posed by the armed robberies themselves.

Korum, 120 Wn. App. at 707 (citing Green, 94 Wn.2d at 216).

Although this case involved only one home invasion, the facts are strikingly similar to those in Korum. Reed and Berg were charged with

burglary, robbery, and kidnapping arising out of a home invasion. CP 7-9. The evidence showed that two men broke into Watts's home, and one held him at gunpoint while the other searched the home for drugs and other items to steal. 24RP 998. Watts was not moved to another location; rather, he was told to get to the ground right where he was when he encountered the robbers, and he remained there throughout. 24RP 994. Although he was told to remain on the ground for 15 minutes after the robbers left, he was not physically restrained, and he got up within three minutes. 24RP 1000. There was no evidence that Watts was restrained for any purpose separate and independent of the home invasion, and the restraint did not create any independent danger.

The kidnapping in this case was incidental to the robbery as a matter of law. Because there was insufficient evidence of a separate crime of kidnapping, Reed's conviction of that offense must be dismissed. See Korum, 120 Wn. App. at 703.

4. THE ERRONEOUS INSTRUCTION REQUIRING JURY UNANIMITY TO ANSWER "NO" ON THE AGGRAVATOR AND ENHANCEMENT SPECIAL VERDICTS REQUIRES VACATION OF REED'S EXCEPTIONAL SENTENCE AND FIREARM ENHANCEMENTS.

It is manifest constitutional error to instruct a jury that it must be unanimous in order to find the State failed to prove either an aggravating

factor or the facts supporting a sentencing enhancement. State v. Bashaw, 169 Wn.2d 133, 145–48, 234 P.3d 195 (2010); State v. Ryan, ___ Wn. App. ___ (No. 64726–1–I, April 4, 2011), Slip Op. at 1. Washington requires unanimous verdicts in criminal cases. Wash. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). For special verdicts, jurors must be unanimous to find that the State has proven the special finding beyond a reasonable doubt. State v. Goldberg, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). Jury unanimity is not required to answer a special verdict "no," however. Bashaw, 169 Wn.2d at 145; Goldberg, 149 Wn.2d at 893. Where the jury is deadlocked or cannot decide, the answer to the special verdict is "no." Id.

Here, the jury was given special verdict forms asking whether count 1 was committed against a law enforcement officer performing his official duties and whether Reed was armed with a firearm in the commission of counts 1 through 5. CP 335-36, 338, 341, 343, 345. The jury was also instructed how to fill out the special verdict forms:

> You will also be given special verdict forms for the crimes charged in counts 1-5 for each defendant. If you find a defendant not guilty of a charged crime, do not use the special verdict form for that crime. If you find a defendant guilty of a crime charged, you will then use the special verdict forms for that crime and defendant and fill in the blank with the answer "yes" or "no" according to each decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer a special verdict form. In order to answer a 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 330 (Instruction No. 46).

This is an incorrect statement of law. "[A] unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. A nonunanimous jury decision is a final determination that the State has not proved the special finding beyond a reasonable doubt." Bashaw, 169 Wn.2d at 146. The State's burden is to prove to the jury beyond a reasonable doubt that the special verdict allegations are established. "If the jury cannot unanimously agree that the State has done so, the State has necessarily failed in its burden. To require the jury to be unanimous about the negative—to be unanimous that the State has not met its burden—is to leave the jury without a way to express a reasonable doubt on the part of some jurors." Ryan, Slip Op. at 2 (citing Bashaw, 169 Wn.2d at 145).

Although Reed did not object to the court's special verdict instruction below, he may challenge this error for the first time on appeal because it is a manifest error affecting a constitutional right. Ryan, Slip Op. at 2; RAP 2.5(a)(3); cf State v. Nunez, ___ Wn. App. ___, 248 P.3d 103, 107-08 (2011) (Division III held error not of constitutional

magnitude). In Ryan, the trial court gave the same special verdict instruction given in this case, and the defendant did not object at trial. Ryan, Slip Op. at 1. The Court of Appeals rejected the State's argument that the instructional error could not be raised for the first time on appeal, holding that the Supreme Court's decision in Bashaw demonstrates that the error is of constitutional magnitude:

> The Bashaw court strongly suggests its decision is grounded in due process. The court identified the error as "the procedure by which unanimity would be inappropriately achieved," and referred to "the flawed deliberative process" resulting from the erroneous instruction. The court then concluded the error could not be deemed harmless beyond a reasonable doubt, which is the constitutional harmless error standard. The court refused to find the error harmless even where the jury expressed no confusion and returned a unanimous verdict in the affirmative.

Ryan, Slip Op. at 2 (citing Bashaw, 169 Wn.2d at 147-48.

The fact that the defendant in Bashaw did not challenge the special verdict instruction at trial but the Supreme Court nonetheless addressed the issue and applied the constitutional harmless error standard demonstrates that the issue is of constitutional magnitude. Reed can raise the issue in this appeal.

The Court of Appeals in Ryan also rejected the State's argument that Bashaw applies only to special verdicts on sentencing enhancements, not aggravating circumstances for exceptional sentences. The State

argued that the statutory provision[5] requiring a verdict beyond a reasonable doubt on aggravating circumstances requires jury unanimity, whether affirmative or negative. Ryan, Slip Op. at 2-3. Reading the statute in context with other statutory provisions, however, the Court of Appeals concluded that unanimity is required only for an affirmative finding. Ryan, Slip Op. at 3. Subsection 6 of the exceptional sentencing statute empowers the court to impose the maximum sentence "[i]f the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence." RCW 9.94A.537(6). The Court concluded, "This language plainly contemplates the possibility that the jury will not be unanimous, in which case the court may not impose the aggravated sentence." Ryan, Slip Op. at 3. The Court found no basis to distinguish Bashaw in cases involving special verdicts supporting an exceptional sentence. Id.

In this case, the jury answered the special verdict questions in the affirmative, and the court imposed an exceptional sentence and firearm enhancements based on those verdicts. CP 489. The procedural error by which unanimity on these verdicts was "inappropriately achieved" cannot be dismissed as harmless. See Bashaw, 169 Wn.2d at 147.

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[5] RCW 9.94A.537(3) states, in pertinent part: "The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory."

In Bashaw, the Supreme Court held that the instructional error was not harmless beyond a reasonable doubt because, given a proper special verdict that did not require unanimity, the jury may have returned a different special verdict. Bashaw, 169 Wn.2d at 147. The Court stated,

> We can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

Bashaw, 169 Wn.2d at 147-48. The same holds true here. Given the "flawed deliberative process" by which the special verdicts were reached, this Court cannot say beyond a reasonable doubt that the error was harmless. Reed's exceptional sentence and firearm enhancements must therefore be vacated. See Bashaw, 169 Wn.2d at 148.

5. ALIE'S OPINION TESTIMONY AS TO REED'S INTENT VIOLATED REED'S CONSTITUTIONAL RIGHT TO A JURY TRIAL, AND THE COURT SHOULD HAVE GRANTED HIS MOTION FOR MISTRIAL.

Prior to trial, Reed moved to preclude Sergeant Alie from testifying to his opinion as to the intent, state of mind, or purpose of the driver of the Kia in moving forward before the passenger shot Alie. 19RP 809; CP 77, 112-14. Counsel argued that the officer's opinion on why the driver moved was irrelevant, because he was not an expert on the driver's

state of mind. 19RP 809-10. The court granted the motion, ruling that personal opinions about mental state are not relevant, and the State indicated that the witnesses would be instructed to describe only the behavior they observed. 19RP 810-11.

When Alie testified, however, he characterized the driver's movements as willful and intentional: "There's a beat where there's nothing, no response at all. Suddenly he makes a real willful, intentional movement." 24RP 1142. Defense counsel objected and the court sustained, telling the officer to simply describe what he saw and telling the jury that personal opinions of the officer should be disregarded. 2RP 1142.

When Alie finished testifying, defense counsel moved for a mistrial. 24RP 1160. He explained that he had gone to great lengths before trial to establish the ground rules for Alie's testimony regarding mental state, and he was told that Alie had been advised of the court's ruling. 24RP 1161. Despite the court's clear ruling prohibiting such testimony, Alie testified that the driver made a willful and intentional act. This testimony invaded the province of the jury and prejudiced the defense. Counsel argued that the court's admonition did not remove the prejudice, and Reed could not receive a fair trial from this jury. 24RP 1161-62.

The court acknowledged that Alie's testimony improperly presented his opinion of the driver's state of mind to the jury, but it felt that sustaining the objection and admonishing the jury to disregard was sufficient to cure any prejudice. 24RP 1162-63. The court denied the motion for mistrial. It noted that while Alie unnecessarily used words linked to the elements of the offense to describe the driver's movement, he did not express a specific opinion about the elements of the crime. 24RP 1165. Because the jury was instructed to disregard, and the error was not repeated, there was no basis for a mistrial. 24RP 1166.

Defense counsel moved for reconsideration of the motion for mistrial, arguing that Alie's violation of the court's in limine ruling was intentional and malicious. CP 150-61; 26(A)RP 1475. Counsel pointed out that, because Alie is a police officer, as well as the victim of the crime, his opinion carries an aura of reliability and thus is especially prejudicial. No instruction could cure this prejudice, the jury was tainted, and a mistrial was required. 26(A)RP 1476-77. The court denied the motion for reconsideration, stating that the curative instruction it had given was sufficient. 26(A)RP 1477-79.

A witness may not offer an opinion as to the defendant's guilt, either by direct statement or by inference. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008); State v. Black, 109 Wn.2d 336,

348, 745 P.2d 12 (1987); State v. Hudson, 150 Wn. App. 646, 208 P.3d 1236, 1239 (2009). Improper opinion testimony violates the defendant's constitutional right to a jury trial by invading the fact-finding province of the jury. Montgomery, 163 Wn.2d at 590; State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003). In determining whether testimony constitutes improper opinion as to the defendant's guilt, the reviewing court considers the circumstances of the case, including (1) the type of witness, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. Montgomery, 163 Wn.2d at 591; Hudson, 208 P.3d at 1239.

In Montgomery, the defendant was charged with possession of pseudoephedrine with intent to manufacture methamphetamine, after detectives followed him and a companion from store to store as they individually purchased several items which could be used in the production of methamphetamine. Montgomery, 163 Wn.2d at 584-86. After describing these events at trial, one of the detectives testified, "I felt very strongly that they were, in fact, buying ingredients to manufacture methamphetamine based on what they had purchased, the manner in which they had done it, going from different stores, going to different checkout lanes. I'd seen those actions several times before." Montgomery, 163 Wn.2d at 587-88. Another detective also testified that

"those items were purchased for manufacturing." Montgomery, 163 Wn.2d at 588. And, after testifying about the ingredients necessary for making methamphetamine, a forensic chemist testified that he concluded the pseudoephedrine was possessed with intent. Montgomery, 163 Wn.2d at 588.

In concluding that this testimony constituted improper opinion evidence, the Supreme Court noted that opinions regarding the intent of the accused are clearly inappropriate. Montgomery, 163 Wn.2d at 591, 593. As the testimony went to the core issue and the only disputed element, the defendant's intent, it amounted to improper opinion on the defendant's guilt. Montgomery, 163 Wn.2d at 593.

Similarly, in Hudson, the defendant was convicted of third degree rape. He did not dispute the sexual encounter, or that the alleged victim was injured. At issue was whether the encounter was consensual. The nurse who examined the alleged victim and the coordinator who had reviewed her report testified at trial. Hudson, 208 P.3d at 1237. Both witnesses were permitted to testify over defense objection that the alleged victim's injuries were related to nonconsensual sex. Hudson, 208 P.3d at 1238.

On appeal, this Court held that the experts' explicit testimony that the injuries were caused by nonconsensual sex amounted to statements

that the defendant was guilty of rape. Because the opinions went to the essence of the rape charge and the only disputed issue, they were improper. Hudson, 208 P.3d at 1239-40. Since the case turned on whether the jury believed the defendant or the alleged victim, the error was not harmless. Hudson, 208 P.3d at 1241.

Here, as in Montgomery and Hudson, the deputy gave his personal opinion as to the core issue and only disputed element of the attempted murder charge, Reed's intent. Reed did not dispute at trial that he was involved in the home invasion, that he was driving the Kia, or that his passenger shot Alie. 30RP 2382-83, 2387. He disputed the State's allegation that he had acted as the passenger's accomplice in the shooting, however. 30RP 2388. To prove that allegation, the State had to show that Reed's intent in leaning forward was to facilitate the shooting. 29RP 2283-84. Alie gave his opinion that Reed was doing just that when he explicitly stated that the driver intentionally and willfully leaned forward as the passenger reached over him to shoot Alie. 24RP 142. Alie's opinion as to Reed's intent was clearly inappropriate. See Montgomery, 163 Wn.2d at 591, 593; see also State v. Farr-Lenzini, 93 Wn. App. 453, 461, 970 P.2d 313 (1999) (officer not qualified to testify as to defendant's state of mind while driving).

Although the trial court sustained Reed's objection to this improper opinion, its admonition to the jury to disregard could not restore Reed's right to an untainted jury trial, and the court should have granted Reed's motion for mistrial. A trial court should grant a mistrial when a trial irregularity is so prejudicial that it deprives the defendant of a fair trial. State v. Babcock, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008). In determining whether a trial irregularity deprived the defendant of a fair trial, the appellate court considers (1) the seriousness of the irregularity, (2) whether the challenged evidence was cumulative of other properly admitted evidence, and (3) whether the irregularity could have been cured by an instruction to disregard. Babcock, 145 Wn. App. at 163; State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). An appellate court reviews a decision on a motion for mistrial for an abuse of discretion. Babcock, 145 Wn. App. at 163.

In this case, despite the court's pretrial ruling, Alie gave the jury his opinion that Reed was acting willfully and intentionally. This was a serious irregularity which invaded the province of the jury, not involving cumulative evidence, which was not cured by the court's brief instruction. The court abused its discretion in denying Reed's motion for a mistrial.

The State charged Reed with attempted first degree murder, requiring it to prove he and Berg premeditated the shooting. CP 291, 293.

Although Berg made several statements about his plans that day, none of them included a plan to shoot Alie. 28(A)RP 1902-03, 1914. The evidence showed that Alie pulled Reed's car over as he was leaving the scene of the home invasion, and the State's case as to attempted first degree murder rested on the theory that Reed and Berg formulated a plan to shoot Alie between the time they were pulled over and the time Alie approached the car. 29RP 2283-84. The State argued that Reed's actions in leaning forward demonstrated such a plan, but defense counsel pointed out that there were alternative explanations. 30RP 2385-86, 2396. The case came down to what the jury thought Reed's intent was at that moment, and Alie did his best to tell them how to decide. It is well recognized that testimony from police officers carries an "aura of reliability" likely to influence the jury. See Montgomery, 163 Wn.2d at 595 (citing State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001)). Although the court instructed the jury to disregard Alie's opinion, given the closeness of the case on the critical issue of premeditation, this serious trial irregularity could not have been cured by instruction, and the mistrial should have been granted. This Court should reverse Reed's conviction of attempted first degree murder and remand for a new trial.

6. CUMULATIVE ERROR REQUIRES REVERSAL OF REED'S CONVICTIONS.

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may nonetheless find that the errors combined together denied the defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 685 P.2d 668 (1984). The doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998).

In Johnson, the trial court improperly admitted the evidence of the defendant's prior conviction and prior self defense claim, refused to allow the defense to impeach a prosecution witness with a prior inconsistent statement, and improperly admitted evidence of a defense witness's probation violation. While the Court of Appeals held that none of these errors alone mandated reversal, the cumulative effect of these errors resulted in a fundamentally unfair trial. Johnson, 90 Wn. App. at 74.

In this case the jury heard the police officer/victim's opinion regarding Reed's intent on the core issue of premeditation, and the prosecutor's closing argument trivialized the reasonable doubt standard and gave the jury a skewed impression as to the nature of their decision. The jury was also given an incorrect special verdict instruction. Although

Reed contends that each of these errors on its own engendered sufficient prejudice to merit reversal, he also argues that the errors together created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdicts. Reversal of his convictions is therefore required.

D. CONCLUSION

Denial of the right to a public trial is structural error which requires reversal of Reed's convictions and remand for a new trial. In addition, prosecutorial misconduct, ineffective assistance of counsel, and introduction of improper opinion require reversal and remand for a new trial. Because the State did not present sufficient evidence of an independent kidnapping, however, the kidnapping charge must be dismissed. Finally, the exceptional sentence and weapon enhancements must be vacated because the court gave an improper instruction regarding the unanimity required for special verdicts.

DATED this 18th day of April, 2011.

Respectfully submitted,

CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Jeffrey S. Reed,* Cause No. 41167-9-II directed to:

Michael C. Kinnie
Clark County Prosecutor's Office
PO Box 5000
Vancouver, WA 98666-5000

Jeffrey S. Reed, DOC# 343607
Washington State Penitentiary
1313 N 13th Ave
Walla Walla, WA 99362

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

Catherine E. Glinski
Done in Port Orchard, WA
April 18, 2011