NO. 73026-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

JASON BENSON,

Appellant.

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

The Honorable Leroy McCullough, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied a fair trial due to bailiff misconduct and the trial court's failure to inform counsel of ex parte contacts with the deliberating jury.

2. Appellant was denied due process when the jury heard two officers' opinions as to his guilt.

3. Appellant was denied his right to a fair trial due to the prosecutor's misconduct.

4. Cumulative error resulted in a violation of appellant's right to a fair trial.

Issues Pertaining to Assignments of Error

1. While the jury was deliberating, they wrote a question to the judge asking for clarification as to what specific act formed the basis of the assault charge, apparently not understanding the State's election in closing argument. The bailiff read the question and told the jury the judge would not answer their question and they should just look at the instructions they were given. The bailiff told the judge about the incident prior to the verdict being returned. The judge did not inform the parties. Did this violate appellant's right to an impartial jury verdict and a fair trial?

2. Appellant was charged with assaulting an officer. Prior to trial, the defense asked the trial court to prevent officers from referring to appellant's conduct as an "assault" because such testimony would constitute an improper opinion on guilt. The trial court granted the motion and ordered the prosecutor to instruct her witnesses accordingly. Two officers violated this order. Did the officers' testimony constitute improper opinions on guilt?

3. Appellant was also charged with disarming a police officer by taking away the officer's Taser. The prosecutor stated in front of the jury that she believed the appellant had taken the officer's Taser. The prosecutor also framed her question to one of the officers in such a way that she vouched for the credibility of that officer. Finally, in her closing argument, she repeatedly used "we know" arguments to align the jury with her belief appellant was guilty. Was this reversible misconduct?

4. Was appellant denied a fair trial due to cumulative trial errors?

B. STATEMENT OF THE CASE

1. Procedural History

On November 6, 2012, the King County prosecutor charged appellant Jason Benson with one count of disarming a law

enforcement officer. CP 1-5. The information was later amended and the prosecutor added one count of third degree assault. CP 25-26. The jury convicted Benson as charged. CP 52-53. The court sentenced Benson to five months with work release and community service. RP 79-87.

2. Substantive Facts[1]

On November 1, 2012, Benson was at the home of Drew Galas. RP 596. He called 911 requesting emergency aid for his son who was incapacitated due to excessive alcohol consumption. Benson was also drunk.[2] RP 208, 601. The 911 call was mistakenly dispatched as a domestic violence incident. RP 226.

Before an ambulance arrived, Deputies Scott Fitchett and Paul Mulligan showed up and entered the house. RP 600. Benson quickly informed the deputies he did not want the police there and only needed an ambulance. RP 600-01. There were varying stories as to what happened next.

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[1] Facts specifically relevant to appellant's legal arguments are set forth in greater detail below.

[2] Benson was so intoxicated that after he had been arrested and placed in the police car, he was unable to distinguish between officers in uniform (who had entered the house and tased him) and those in plain clothes (who arrived after he was arrested). RP 198, 327, 571.

Mulligan and Fitchett testified Benson was immediately verbally combative. RP 232; RP457. They claimed Benson "shoulder checked" Mulligan as Benson walked down the hall to get his phone.[3] RP 459. After retrieving his phone, Benson called 911 and the dispatcher heard the entire incident. RP 233-35, 290, 459. According to Fitchett, he told Benson to put his hands up, but Benson refused to comply. RP 237. The deputies claimed Benson yelled, "I am going to fuck you up," so Fitchett pulled out his Taser, to which Benson reportedly screamed, "Tase me. Tase me. Tase me." RP 241, 292; 463.

According to Mulligan and Fitchett, Fitchett Tased Benson after Benson charged at Fitchett; and when Benson got up, Mulligan also Tased him. RP 245, 247-48, 477, 480. Afterward, Mulligan and Benson reportedly began wrestling and Benson wrested Mulligan's Taser from him. RP 249-51, 480, 483, 532. During the tussle, Mulligan pushed his emergency button, requesting back up. RP 258. Eventually, Benson was taken to the ground; at this point, Mulligan grabbed Fitchett's Taser and executed two "drive stuns" into Benson until his muscles locked up.

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[3] Mulligan conceded that both he and a very drunk Benson were in motion when the alleged shoulder bump took place. RP 513, 516.

RP 253, 486-87. Benson was placed in hand cuffs and arrested. RP 256, RP 491.

In contrast to the deputies' accounts, civilian Drew Galas – who was also present – testified that although Benson was verbally confrontational and not complying with orders, he never charged at the deputies and was always most concerned about getting his son medical assistance. RP 601, 607, 627, 628, 632. Galas testified that Benson made no threats toward the deputies and never hit them. RP 615, 633.

Galas testified it was the deputies who were truculent and inflamed matters, at one point calling Benson "retarded." RP 604. Instead of asking Galas if he could help deescalate the situation, the deputies pushed Galas out of the way and Tased Benson. RP 605, 632. Galas never saw Benson take Mulligan's Taser away from him. RP 610.

The State's case rested on establishing the credibility of the deputies and attempting to explain away Galas' account as biased or incomplete. RP 672-681.

The defense theory of the case was that the deputies fabricated or exaggerated Benson's conduct in order to justify their improper use of force. RP 37-38, 556. To this end, the defense

established that Mulligan had previously been involved in an excessive use-of-force investigation fifteen years ago and the results had negative repercussions that seriously impacted his career. RP 538, 548. The defense also established that the deputy was particularly hostile and visibly angry during his interview when defense counsel questioned him regarding that investigation. RP 638.

Additionally, the defense established several inconsistencies between the deputies' reports and other evidence. RP 326, 346, 414, 520, 537. During cross examination, Fitchett admitted that the 911 tape did not record Benson saying "I am going to fuck you up" or "Tase me. Tase me," which directly contradicted their written reports. RP 326, 346, 520. When cross examining the deputies with the Taser logs, the defense exposed that the logs showed more tasings than the deputies admitted in their accounts. RP 414, 537. Defense counsel also established discrepancies between Mulligan and Fitchett's separate accounts. RP 407-10.

Finally, after the State called Sergeant Rodney Chinnick to establish that the deputies' use of force was reasonable,[4] defense

[4] Chinnick had been tasked with the first level of internal investigation into the incident. RP 363.

counsel exposed the fact that the Sergeant did not independently investigate or resolve the discrepancies between the deputies' accounts and the other evidence. RP 40, 410-416.

C. ARGUMENT

1. BENSON WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE BAILIFF IMPROPERLY RESPONDED TO A JURY QUESTION DURING DELIBERATIONS AND THE TRIAL COURT FAILED TO DISCLOSE THE EX PARTE CONTACT TO THE PARTIES.

The bailiff improperly instructed the jury during deliberations, and the trial court failed to disclose the ex parte communication to the parties so that the bailiff's erroneous instructions could be remedied. This was a violation of RCW 4.44.300 and CrR 6.15(f)(1), resulting in a denial of Benson's right to a fair trial and an impartial verdict.

(i) Relevant Facts

Prior to trial, defense counsel asked for a bill of particulars, asking the State to specify which act formed the basis of the assault charge. RP 10. In response, the State identified that it was the "shoulder check." RP 11-12. Defense counsel wanted the jury specifically instructed as to that election. RP 12.

After both sides had rested, it remained unclear as to which act the State was alleging to be the assault. RP 654-55. Defense counsel wanted the jury instructed that the assault charge was limited to the single act of shoulder checking. RP 652. It proposed WPIC 4.26. RP 652. The prosecutor said she would make sure the state's argument alerted the jury that the shoulder check was the basis for the assault charge. RP 653. However, she argued the jury instructions could not specifically state "shoulder check," "because that would constitute an improper comment on the evidence. RP 653-54.

The jury was instructed that for the assault charge, the State was relying on a "single act," and the jury had to unanimously agree that "this specific act" was proved. CP 48 (Instruction 17). Although the instruction was correct, it did not specify the "shoulder check" was that single act. CP 48.

During deliberations, the jury was confused about Instruction 17 and could not determine which specific act formed the basis of the assault charge. CP 63-70. It wrote a question to the judge asking for clarification as to the charged act. CP 63-70. The bailiff took the note from the foreman, read it, and informed the jury the judge would not answer its question. CP 63-70. She told the jury

to read the instructions already given and get back to work. CP 63-70.

Sometime before the verdict, the bailiff informed the trial judge about this communication. RP 727. The trial court did not notify the parties about the bailiff's communications with the jury. CP 56.

It was not until after the verdict was returned that defense counsel learned of the communication. CP 56. He moved for a new trial, arguing that the criminal rule for handling jury questions had been violated and, consequently, Benson's right to a fair trial and unanimous verdict had been violated. CP 59-60; RP 728-732. The prosecutor argued the error was harmless. RP 734. The trial court denied Benson's motion for a new trial. RP 742-46.

(ii) Legal Argument

The United States and Washington Constitutions each guarantee a defendant the right to a fair and impartial jury trial. U.S. CONST. amend. VI; WASH. CONST. art. I, §§ 3, 22. Neither a trial court nor a bailiff may communicate with the jury about a case in the absence of the defendant.

RCW 4.44.300[5]; State v. Bourgeois, 133 Wn.2d 389, 407, 945 P .2d 1120 (1997). A trial court should promptly disclose any ex parte communication to the parties and determine if the communication requires a new trial. Bourgeois, 133 Wn.2d at 407 (quoting Rushen v. Spain, 464 U.S. 114, 119, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983)).

An improper communication by the court or the bailiff violating RCW 4.44.300 is an error of constitutional magnitude. Bourgeois, 133 Wn.2d at 407. Once a defendant establishes such a communication took place, the State bears the burden of showing that the error was harmless beyond a reasonable doubt. State v. Johnson, 125 Wn. App. 443, 460-61, 105 P.3d 85, 93 (2005). If it cannot meet this burden, a new trial must be ordered. O'Brien v. City of Seattle, 52 Wn.2d 543, 540, 327 P.2d 433 (1958) (ordering

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[5] This statute provides:

> During deliberations ... [the jury] must be kept together in a room provided for them, or some other convenient place under the charge of one or more officers, until they agree upon their verdict, or are discharged by the court. The officer shall, to the best of his or her ability, keep the jury separate from other persons. The officer shall not allow any communication to be made to them, nor make any himself or herself, unless by order of the court, except to ask them if they have agreed upon their verdict, and the officer shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on.

new trial where bailiff communicated with jurors in response to a jury question); State v. Moore, 38 Wn.2d 118, 127, 228 P.2d 137 (1951) (ordering a new trial where bailiff gave factual information and said the judge wanted them to disregard writing on the pictures); State v. Christensen, 17 Wn. App. 922, 926, 567 P.2d 654 (1977) (ordering a new trial where the bailiff's comments dissuaded the jurors from asking the judge to clarify an instruction).

Here, the jurors were confused as to Instruction 17 and which specific act formed the basis of the assault charge. CP 63-71. This was a critical question for determining guilt as to the assault charge. Understanding the importance of this, the foreman wrote a question that effectively inquired whether the jurors had to agree the shoulder check was an assault or whether they could convict based on other acts. Id.

Instead of taking the jury's question to the judge, however, the bailiff took matters into her own hands and wrongly informed the jury that this was not a question the judge would answer and to rely on the court's previous instructions.[6] Id. The bailiff's communication went far beyond innocuous statements that are permissible between the bailiff and the jury, constituting a clear violation of RCW 4.44.300. Christensen, 17 Wn. App. at 924.

Additionally, the bailiff's action resulted in a violation of CrR 6.15(f)(1).[7] Although that rule specifically directs the actions of the trial court, it also applies to the action of bailiffs. This is because

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[6] Although the bailiff testified she told the jury that she would take its note to the judge and the foreman chose not to pursue it (RP 722), the jurors clearly heard the bailiff say the judge would not answer such a question and they had to figure it out on their own. CP 63-71. This Court must view the record from the perspective of what the jury heard as opposed to what the bailiff claims to have said. O'Brien, 52 Wn.2d at 548 (explaining courts must look not to what actually was said by the bailiff but to what the jurors heard when considering a bailiff's improper communications).

[7] That rule provides in relevant part:

> The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing. Any additional instruction upon any point of law shall be given in writing.

when a judge delegates part of the judge's official duties to a bailiff, the bailiff becomes in effect the "alter ego" of the judge. Adkins v. Clark County, 105 Wn.2d 675, 678, 717 P.2d 275 (1986). The actions of the bailiff are the actions of the judge and the shortcomings of the bailiff are the shortcomings of the judge.[8] King Cy. v. United Pacific Ins. Co., 72 Wn.2d 604, 612, 434 P.2d 554 (1967).

Here, the bailiff's answer to the jury question violated CrR 6.15(f)(1) in several ways. First, the parties were not notified about the question. Second, the parties were not given an opportunity to respond or object on the record. Third, the answer to the jury question was not given in open court or in writing. CP 61-70; RP 722-25.

But more troubling here is the fact that the bailiff informed the trial court of her action prior to the verdict (RP 727), and yet the trial court did nothing to remedy the situation. It did not inform the

[8] This record shows the bailiff was aware she was acting as a proxy for the judge when she directed the jurors to review the instructions. When testifying in the post-trial hearing, she said the question the jury was asking would have required the trial court to comment on factual details of the trial so she simply instructed the jurors to go back to their previous instructions. RP 725. Not only was this a violation of RCW 4.44.300, as shown below, but the bailiff's arm-chair analysis was incorrect.

parties of the circumstances. It did not allow them any input in how to rectify the situation.

Based on this record, the court's action (or inaction) – independent of the bailiff's actions – violated CrR 6.15(f)(1). Once it knew of the bailiff's ex parte communications, it was the court's responsibility to disclose the communication to counsel. Johnson 125 Wn. App. at 460-61. It was error not to do so. See, State v. Jasper, 158 Wn. App. 518, 541, 245 P.3d 228 (2010) (finding error under similar circumstances).

A trial judge must respond to a bailiff's ex parte contacts as if they were his own. In Johnson, 125 Wn. App. at 452-54, the bailiff had ex parte contacts with two jurors. The bailiff reported these back to the trial court. Id. The trial court did not inform the parties. Id. Defense counsel moved for a new trial, but the same judge denied that motion. Id. On appeal, Division II found the contacts were highly improper and had possible prejudicial impact. Id. at 460-61. It reversed the conviction and ordered a new trial in front of a different judge. Id. The same result is required here.

The trial errors established above cannot be dismissed as harmless. When considering whether ex parte contacts between the trial court and jury are prejudicial, reviewing courts do not

consider a juror's statement as to whether the communication influenced the jury. Instead, reviewing courts must consider what was said and examine the remarks for their possible prejudicial impact on the defendant's right to a fair trial. Id. Reversal is required unless the State can show there is no doubt the bailiff's remarks did not prejudice the deliberation process and the jury's verdict. Christensen, 17 Wn. App, at 926.

Here, the prejudicial impact of the error was extremely high because the jury was uncertain as to what act constituted the assault. Thus, it could have convicted Benson of an uncharged crime or could have reached a verdict without being unanimous as to the specific act the State had elected. Either of these situations violates Benson's right to a fair trial.

The State limited the basis for the assault charge to the alleged "shoulder check," and nothing more. RP 11. Thus, the charge was limited to that specific conduct and any other acts remained uncharged under Count II. With this limitation, it was incumbent upon the trial court to see that the State "elected" this act during closing and that the jury was properly instructed. It appears that the closing arguments and Instruction 17 might have accomplished this in the abstract. However, the jury's question

revealed that it was still confused about the scope of the assault charge.[9]

Once the trial court was aware of this confusion, it had a duty to insure the jury was instructed such that its conviction would be based only the charged act. See, State v. Laramie, 141 Wn. App. 332, 342, 169 P.3d 859 (2007) (holding the trial court must instruct the jury as per the actual charges); State v. Goebel, 36 Wn. 2d 367, 368, 218 P.2d 300, 301 (1950) (holding due process requires a defendant must be tried for the offenses charged in the information). This could have, and should have, been accomplished by instructing the jury as to what was the specially elected act.

Specifically, the trial court could have properly responded: "To convict the defendant of Assault in the Third Degree you must

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[9] Perhaps this confusion existed because the State's election as to the specific act was made during argument and the jury was instructed that the law was contained in the court's instructions and it must disregard argument that was not supported by the law as set forth in the instructions. CP 30. Here, as the judge noted, the evidence made it unclear as to which act served as the basis for the assault charge. RP 654. There is nothing in the instructions that informs the jury that the specific charged act was the "shoulder check." CP 27-49. If the only clarification as to the elected act came in the State's closing argument and was not specifically supported in the court's instructions, the jury would certainly be confused as to whether they were to disregard that election and decide on a specific act for themselves.

agree the specific act of a shoulder bump was proved." This essentially takes the last line in Instruction 17 and inserts the specific act. Alternatively, the trial court could have clarified: "For Count II, the State has elected to charge only the specific act of shoulder checking." Such answers do not constitute comments on the evidence because they do not convey or indicate to the jury a personal view of the trial judge regarding credibility or the weight of the evidence. Instead, these answers merely outline the dispositive issue or premise, which the jury must find to convict. See, State v. Galbreath, 69 Wn. 2d 664, 671, 419 P.2d 800, 804-05 (1966) (explaining that case law has long supported such instructions which are not comments on the evidence).

Additionally, such an instruction would not have required the jury to be instructed on new legal theories. Both parties had argued the shoulder check as the basis for the assault charge. As such, the instruction was acceptable and should have been given. Compare, Jasper, 158 Wn. App. at 543 (finding harmless error where an answer to the jury's question would have required the court to instruct the jury on a new defense theory).

The trial court's reasoning when denying Benson's motion for a new trial reveals it did not understand its duty to clear up the

jury's confusion and make sure Benson was convicted unanimously and only as charged. See, Bollenbach v. United States, 326 U.S. 607, 612–13, 66 S.Ct. 402, 405, 90 L.Ed. 350 (1946) (explaining that when a jury makes explicit its difficulties in understanding the law or the charges, a trial judge should clarify the jury's task with concrete accuracy); Davis v. Greer, 675 F.2d 141, 145 (7th Cir.1982) (explaining the trial court has a duty to respond to the jury's question and clarify the law where confusion exists).

First, the trial court found that the violation of CrR 6.15(f)(1) was harmless because the bailiff's response to the jurors was "neutral" and merely directed them to reread the previous instructions. RP 744. However, this is exactly why the bailiff's response was a problem. The bailiff's "neutral" response did not clear up the jury's confusion as to a fundamental question – what facts must be unanimously proven beyond a reasonable doubt to support a conviction for assault. The general jury instructions were not specific enough to spell out the State's election, and the jury obviously still had questions after argument. Hence, a neutral response was not sufficient in this situation. See, United States v. Nunez, 889 F.2d 1564, 1568 (6th Cir. 1989) (holding it is not

sufficient for the court to rely on the general statements of its previous instructions where juror confusion persists).

Had defense counsel been afforded the opportunity to participate in responding to the jury's questions – as provided for in CrR 6.15(f) and as is constitutionally required[10] -- there is no doubt he would have advocated for something other than a "neutral" instruction that simply referred the jury back to the same instructions that were confusing them. However, this avenue of discussion and participation was foreclosed by the bailiff's improper communications and the court's irregular trial procedures.

Second, the trial court also wrongly concluded that it was irrelevant whether the jury misunderstood that the shoulder check was the specific act referred to in Instruction 17, because "the arguments [the parties] made were clear, the instructions were clear." RP 746. Jury confusion as to the instructed law is always relevant. Sometimes arguments and general instruction simply do not hit home with a jury and it remains confused, as was the case

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[10] See, Musladin v. Lamarque, 555 F.3d 830, 840–43 (9th Cir.2009) (finding defendant had a constitutional right to participate in district court's communication with the jury during deliberation); United States v. Barragan–Devis, 133 F.3d 1287, 1289 (9th Cir.1998) (finding a constitutional right to participate in court's decision of whether to respond to jury question during deliberation and the response itself); Manning v. State, 131 Nev. Adv. Op. 26, 348 P.3d 1015, 1018 (2015) (same).

here. The court had an obligation to make sure that the instructions were clear – not in the abstract, but in fact. As the Supreme Court has warned: "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." Bollenbach, 326 U.S. at 613.

In sum, this record establishes that the bailiff's improper communications with the jury and the trial court's response to these violated both RCW 4.44.300 and CrR 6.15(f)(1). Based on this record, it cannot be said beyond a reasonable doubt that Benson's right to a fair trial was not prejudiced. Indeed, by not providing the jury with clarification as to the specific act, the trial court created a situation in which the jury was allowed to speculate regarding which act constituted the assault charge and possibly permitted conviction of an uncharged act or a non-unanimous verdict. As such, reversal is required.

2. APPELLANT'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY COMMENTS ON GUILT FROM MULTIPLE OFFICERS.

(i) Relevant Facts

Prior to trial, defense counsel moved to preclude State witnesses from deliberately describing Benson's conduct as an assault because such testimony would constitute an impermissible opinion on guilt. CP 16. The prosecutor said she would instruct the

witnesses, but if they called his acts an assault it was not an opinion on guilt that would prejudice the trial process. RP 62. The Court granted the defense's motion specifically ruling that such testimony would constitute an opinion on guilt. RP 62-63.

Prior to Fitchett's testimony, the prosecutor instructed him not to describe Benson's conduct as an assault. RP 259-60. The officer and the prosecutor apparently joked about it a bit. RP 260. Shortly after the deputy was on the stand, he testified that Mulligan had been "assaulted" by Benson. RP 235. Defense counsel moved to strike and asked to be heard outside of the jury's presence. RP 236. The trial court asked the jury to disregard the remark but decided to hear argument later. RP 236.

After the jury was taken out, defense counsel moved for a mistrial due to the deputy's improper opinion testimony and violation of another pretrial order.[11] RP 259-62. The trial court denied the motion because it deemed the opinion testimony was not "flagrant or intentional" and was not prejudicial in light of the court's instruction to disregard. RP 262-63. The trial court ordered

[11] The other pretrial violation involved Fitchett's testimony that the deputies were responding to a "domestic violence" call. RP 226, 259-61.

the prosecutor to once again advise her witnesses of the pretrial rulings. RP 263.

Later, the State called Sergeant Chinnick, the supervising sergeant who had investigated the incident to determine whether the deputies had used excessive force against Benson. RP 356. When asked why he was not concerned with discrepancies between the deputies' reports and the Taser logs, Chinnick stated the use of force was minimal in overcoming Benson's "assault" on the deputy. RP 432. Defense counsel objected. RP 432. The jury was instructed to disregard "the use of the term assault." RP 432. No other instructions were given. RP 432.

(ii) Legal Argument

A defendant's right to a fair trial under the Sixth Amendment and article I, section 21 of the Washington Constitution is violated when a witness is permitted to express his or her opinion as to guilt. See, State v. Kirkman, 159 Wn.2d 918, 927-28, 155 P.3d 125 (2007).

The role of the jury is to be held "inviolate" under Washington's constitution. State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267, 273 (2008). The right to have factual questions decided by the jury is crucial to the right to trial by jury. Id. When a

witness opines on a defendant's guilt, he essentially tells the jury what result to reach rather than allowing the jury to make an independent determination. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); 5A K. Tegland, Wash.Prac., Evidence, § 309, at 470 (3d ed. 1989).

"Opinions on guilt are improper whether they are made directly or by inference[.]" Montgomery, 163 Wn.2d at 594. Such an opinion is not helpful to the jury and is highly prejudicial, offending both constitutional principles and the rules of evidence. Id. at 591 n.5. It is the duty of every trial advocate to prepare witnesses for trial. Trial advocates must explain to witnesses any orders in limine entered by the court and what constitutes improper opinion testimony. Id. at 592.

In making a determination as to whether there has been impermissible opinion testimony, the court will consider the circumstances of the case, including the following: (1) the type of witness involved; (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. State v. Quaale, 182 Wn. 2d 191, 199-200, 340 P.3d 213, 217 (2014). Some areas, however, are clearly inappropriate for opinion testimony in criminal trials,

including personal opinions as to the defendant's guilt, the intent of the accused, or the veracity of witnesses. Id.

Here, the Sheriff's deputy and sergeant testified that Benson assaulted Mulligan. This constituted a violation of pretrial orders and a direct opinion on guilt as to the assault charge. As such, the testimony violated Benson's constitutional right to have his guilt determined by an impartial jury.

This error was not harmless. Constitutional error is harmless only if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. Quaale, 182 Wn. 2d at 202. Here, the evidence as to the State's evidence of the "shoulder check" was not overwhelming. Fitchett and Mulligan testified that the contact occurred. However, Galas testified there was no shoulder check. Moreover, even if a bump did occur, given Benson's drunken state, the jury could have reasonably concluded that he accidentally bumped into Mulligan while moving through the hallway to his phone.

The Sheriff's deputy and sergeant's opinions that Benson assaulted Mulligan were also highly prejudicial because they came from police. It is well established that the testimony of police officers carries with it an "aura of reliability" despite the fact such

testimony has a low probative value. Montgomery, 163 Wn. 2d at 595. In this case, the "aura of reliability" was further compounded by the fact that Chinnick was in an investigatory role that essentially validated Fitchett's actions and opinions. These were seasoned officers with lots of experience. They presumably had been instructed as to the pretrial order. As such, there was no legitimate excuse for such sloppy testimony.

The trial court's instructions to disregard the comments were not adequate to rectify the harm. After the first remark, the jury was told to disregard the deputy's answer to the question. RP 235. However, the jury was not contemporaneously informed that it was the jury's sole responsible for determining whether the State had proved that an assault had occurred. This is important because such an instruction would have underscored the jury's understanding of its role at the very moment that its role had been usurped by the deputy.

When the second improper opinion occurred, the court only instructed the jury to disregard the "use of the word assault." However, it was not the use of the word that was the problem. RP 380. The problem was the jury had been informed of the sergeant's opinion that Benson was guilty of the charged assault.

The instruction did nothing to cure that problem. Even if the jury followed the instruction and disregarded the word "assault," it was still left to consider it was the sergeant's opinion Benson was guilty. Moreover, once again, there was no instruction telling the jury that it alone was to determine guilt. As such, the court's response to the improper opinion testimony was too tepid to be effective.

In response, the State may argue that the trial court's denial of the motion for mistrial and ruling that Fitchett's testimony was not prejudicial shows the error was harmless. First, that decision was made prior to Chinnick's improper opinion, which compounded the prejudice. In fact, The trial court specifically said that its decision was based its consideration of the impact of the improper testimony on the evidence submitted to that point. RP 263. The trial court did not have the second violation in front of it at that time.

The trial court also denied the motion for mistrial because it determined that the deputy's testimony was not an "intentional" violation of the pretrial order. However, improper opinion testimony does not somehow become proper just because an officer *accidentally* pops out with his opinion that the defendant is guilty. The prejudice to the defendant's right to have a jury independently assess guilt still exists despite the fact that the officer may not have

flagrantly violated a pretrial order prohibiting such improper testimony. As such, the trial court applied the wrong legal standard when denying the mistrial.

In sum, the deputy and sergeant's testimony constituted impermissible comments on guilt that prejudiced Benson's right to an impartial jury verdict. Consequently, this Court should reverse the assault conviction and remand for a new trial. Quaale, 182 Wn. 2d at 202.

3. APPELLANT WAS DENIED A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT.

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed him under the state and federal constitutions. State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); State v. Evans, 163 Wn. App. 635, 642, 260 P.3d 934 (2011). Because of their unique position in the justice system, prosecutors must steer wide from unfair trial tactics. Monday, 171 Wn.2d at 676 (citations omitted).

> A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice.

Id. Defendants are among the people the prosecutor represents and, therefore, the prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Id.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct is both improper and prejudicial. Monday, 171 Wn.2d at 675, (citations omitted). If the defendant objected at trial, he must show only that the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Even if a defendant does not object, however, he does not waive his right to review of flagrant misconduct by a prosecutor. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Where "repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect," reversal is appropriate. In re Glasmann, 175 Wn. 2d 696, 707, 286 P.3d 673, 679 (2012).

Here, the prosecutor committed prejudicial, flagrant, and repetitive misconduct by giving her personal opinion on guilt, bolstering the credibility of an officer, and improperly aligning the jury with the State.

(i) Personal Opinion on Guilt

(a) Facts

Deputies Fitchett and Mulligan testified Benson pulled the Taser away from Mulligan. RP 250-5, 299, 532. Galas testified that did not occur. RP 610.

While Chinnick was testifying, the prosecutor asked about the Sheriff's policy in regard to a deputy maintaining control of his weapon. RP 354. Defense counsel objected on relevance grounds. RP 354. The State responded that it was relevant to show the impact of what happened when Benson took hold of the Taser. RP 354-55. Then, the prosecutor added: "Also the State believes he pulled the TASER from Deputy Mulligan." RP 355. She finished by arguing the testimony would show Mulligan had no incentive to lie. RP 355.

The trial court stated it was not accepting the testimony for "any veracity on the part of any witness." However, it went on to rule as follows: "But in light of the facts of this case, the allegation that the one weapon was taken by the defendant, the Court will overrule the objection." RP 355. There was no admonishment to the jury to disregard the prosecutor's stated belief that Benson disarmed Mulligan. RP 355.

(b) Legal Argument

It is well established that a prosecutor cannot use his or her position of power and prestige to sway the jury and may not express an individual opinion of the defendant's guilt. E.g., Glasmann, 175 Wn. 2d at 706 (finding it improper to write the words "guilty" on exhibits used in closing argument); State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006) (finding it improper for a prosecuting attorney to express his individual opinion that the accused is guilty); State v. Stith, 71 Wn. App. 14, 21–22, 856 P.2d 415 (1993) (deeming a prosecutor's comment in closing argument that the appellant "was just coming back and he was dealing [drugs] again" an impermissible opinion); State v. Traweek, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986) (concluding it was error for a prosecutor to tell the jury he "knew" the defendant committed the crime); State v. Armstrong, 37 Wash. 51, 54, 79 P. 490 (1905) (explaining that it is improper for the prosecuting officer to tell the jury that he believes the defendant committed the crime).

Additionally, RPC 3.4(e) expressly prohibits a lawyer from vouching for any witness's credibility or stating a personal opinion "on the guilt or innocence of an accused." Similarly, the

commentary on American Bar Association Standards for Criminal Justice std. 3–5.8 emphasizes:

> The prosecutor's argument is likely to have significant persuasive force with the jury. Accordingly, the scope of argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor's conduct. Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.

Here, the prosecutor stated she believed Benson took the Taser from Mulligan. This was the core element in dispute as to the disarming charge. Hence, the prosecutor's statement was tantamount to a direct comment on guilt. Quaale, 182 Wn.2d at 200.

The case law and professional standards described above were available to the prosecutor and clearly warned against the conduct here. The prosecutor knew it was for the jury alone to decide whether Benson disarmed Mulligan by taking his Taser. As such, this misconduct was flagrant and requires reversal. Glasmann, 175 Wn. 2d at 707.

(ii) Vouching for Police

(a) Facts

It was the defense's theory that Mulligan and Fitchett fabricated their story as to Benson's conduct in order to cover up their use of excessive force against him. RP 37-38, 556. Thus, establishing the credibility of Mulligan and Fitchett was critical to the State's case. RP 670.

When questioning Mulligan, the prosecutor stated: "I'm embarrassed to ask this but did you and Deputy Fitchett come up with a story about Mr. Benson's activities to cover up anything?" RP 494. Defense counsel objected as to the form of the question. RP 494. The prosecutor rephrased the question taking out the comment about her own "embarrassment." However, the jury was never instructed to disregard the prosecutor's statement as to her personal feelings about questioning Mulligan about whether he lied. RP 495.

(b) Legal Argument

It is improper for a prosecutor to vouch for the credibility of a witness because the trier of fact has sole authority to assess the credibility of witnesses. State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). In fact, RPC 3.4(e) expressly prohibits this. Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony. State v. Allen, 161 Wn. App. 727, 746, 255 P.3d 784 (2011).

The prosecutor may not implicitly or explicitly express a personal belief about the veracity of a witness. State v. Reed, 102 Wn.2d 140, 143–48, 684 P.2d 699 (1984). Vouching improperly puts the prestige of the prosecutor's office behind the witness's testimony and violates a prosecutor's "special obligation to avoid 'improper suggestions, insinuations, and especially assertions of personal knowledge.'" United States v. Roberts, 618 F.2d 530, 533 (9th Cir.1980) (quoting Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)).

The prosecutor's comment that she was personally embarrassed to ask whether Mulligan had fabricated his story was improper. Her feelings were entirely irrelevant. She had a job to do

and should have done it without interjecting insinuations as to Mulligan's credibility. The question was simple. There was nothing inherently embarrassing about the subject matter.

The prosecutor's statement about being embarrassed had no purpose other than to convey her professional opinion that Mulligan was a person whose credibility was beyond reproach. The prosecutor's statement indicated the State had access to information regarding Mulligan's credibility that was not reported to the jury such that it made the prosecutor feel foolish to even ask him about the possibility of fabrication. This wa improper vouching and constituted misconduct.

The prosecutor's vouching was prejudicial. This case came down to whether Mulligan and Fitchett were credible. The question being asked by the prosecutor at the time of her alleged embarrassment went to the heart of the defense. Although the prosecutor rephrased the question, the jury was never instructed to disregard it. As such, they were left with the full implications of the prosecutor's vouching. Given the circumstances of this case, the prosecutor's misconduct was highly prejudicial and reversal is required.

(iii) "We Know" Argument

Courts discourage the frequent use of the phrase "we know" and related formulations during jury arguments because it blurs the line between improper vouching and legitimate summary. United States v. Younger, 398 F.3d 1179, 1191 (2005). "The question for the jury is not what a prosecutor believes to be true or what 'we know,' rather, the jury must decide what may be inferred from the evidence." Id.

A prosecutor may properly introduce a factual representation in a closing argument with a "we know," if the facts are essentially undisputed. State v. Corbett, 281 Kan. 294, 315–16, 130 P.3d 1179 (2006). Used that way, the phrase refers to everyone in the courtroom accepting something to be so, as in, "We [all] know the sun rises in the east and sets in the west." However, attaching the phrase to specific facts in a case, except for obviously uncontroverted ones is problematic.

First, arguments that use the terms "we know" or "I believe" are improper if used to vouch for the defendant's guilt and suggest the State has more information than is before the jury. In that context, the phrase "we know" becomes an improper assertion of the prosecutor's personal opinion of the evidence and what it

proves. In other words, the phrase becomes a proxy for the prosecutor saying, "I know this to be true." See, United States v. Lamerson, 457 F.2d 371, 372 (5th Cir. 1972) (reversing a criminal conviction on the grounds that "the prosecutor said: 'I know it is the truth,' the inference being that he had outside knowledge").

If the "we" is used in the sense of the "royal we," the prosecutor is using the power of her office to bolster the State's case. This is entirely inappropriate. The prosecutor may not attempt to place the prestige of her office, or that of the police, behind a contention that the defendant is guilty or a witness is more credible. Glasmann, 175 Wash.2d at 706.

Finally, the "we know" argument may be used to impermissibly align the prosecutor with the jurors. It is improper for the prosecutor to use "we" to refer to herself and the jurors with the implicit exclusion of the defendant and his or her lawyer. In that way, the phrase "we know" conveys that you (the jurors) and I (the prosecutor) know what is really going on here, but the defendant doesn't. Such a usage is particularly inappropriate, since it teams the prosecutor with the jurors as the knowledgeable participants in the trial in direct contrast to the defendant and his or her legal representative. See, Reed, 102 Wn.2d at 147–48, 684 P.2d 699

(1984) (holding the prosecutor must refrain from making comments "calculated to align the jury with the prosecutor and against the [accused]").

Here, the prosecutor's argument is riddled with her use of "I believe" and "we know" statements. RP 670-683; 708-715. While some of these statements were merely used to summarize uncontroverted facts admitted at trial, many were not. As shown below, several uses of the "we know" argument were improper.

First, the State argued: "[The defense] spent a lot of time talking about where Mr. Benson got that cut on the back of his head. We don't know where he got it." RP 674 (emphasis added). The prosecutor's statement is a classic example of the prosecutor aligning herself with the jury as the knowledgeable participants in the trial in direct contrast to the defendant and his counsel. The record shows defense witness Galas testified that the cut on the back of Benson's head was the result of him being Tased and then falling backward and hitting his head on a table. RP 609. Hence, the defense was certainly not included in this "we." The prosecutor might have argued that the evidence suggested Benson did not cut his head when he hit the table, but using "we know" when referring to this controverted fact was improper.

Next, the prosecutor stated: "We know [Benson] knowingly removed [the TASER]. We spent a lot of time talking to Deputy Fitchett and Deputy Mulligan and asking, How did he actually get that TASER." RP 681. Here, the prosecutor is using the term "we" to mean herself. Indeed, the record does not support a claim that defense counsel "knows" Benson removed the Taser. Moreover, the prosecutor certainly is not referring to the jury when talking about questioning the deputies. As such, this statement boils down to nothing more than the prosecutor's improper assertion that she knows the defendant is guilty of disarming Mulligan.

Next the prosecutor stated: "[Mr. Benson" knew that if he grabbed that TASER out of Deputy Mulligan's hand ... he would remove it from him and he also was intending to do that. And so we know that [he did] that." RP 682 (emphasis added). This statement was calculated to align the jury with the prosecutor's personal belief that Benson was guilty. The defense disputed that Mr. Benson knew that he grabbed the Taser out of Mulligan's hands. Indeed, the defense offered testimony establishing that Benson never grabbed the Taser. RP 610. Given this record, the prosecutor's "we know" statement was improper.

The prosecutor next stated: "Fitchett testified that the TASER was wrested out of Deputy Mulligan's hand. So we know the disarming occurred." RP 709. (emphasis) Clearly, both the fact of the disarming and Fitchett's credibility were disputed. Thus, by using "we know," the prosecutor referred to herself and the jury as the knowledgeable parties to the exclusion of the defendant. Moreover, she used the "we know" statement to vouch for Fitchett's credibility by suggesting that because he testified to this fact, we (prosecutor and jury) know it to be true. This is unquestionably improper and diverted the jury away from its duty to independently determine credibility.

Next, the prosecutor stated: "On the disarming, [the State has to prove] that the defendant, with the attempt to interfere with the performance of Deputy Mulligan's duties he did that, he took the weapon away. And we know that he did that. RP 710 (emphasis added). This amounts to nothing more than the prosecutor's personal opinion on guilt. In this case, the prosecutor did not say we have to prove Benson disarmed Mulligan and the evidence shows he did. Instead, the prosecutor essentially stated the State may have to prove the elements, but "we know" he committed this

crime. That was for the jury to determine, not the prosecutor, however.

The prosecutor also stated: "We know that Mr. Benson got that TASER. We know that he pushed it back and he pulled it away." RP 714 (emphasis added). Again, this was a disputed issue. The defense witness testified this did not happen. RP 610. As such, the use of the "we know" was entirely improper as it is calculated to align the jury with the prosecutor's own belief Benson was guilty.

Next, the prosecutor stated: "What you are not going to wonder about is whether or not Mr. Benson is guilty of Assaulting an Officer. We know he assaulted Deputy Mulligan." RP 714-15 (emphasis added). She also stated: "You're also not going to have any questions about whether or not Mr. Benson took Deputy Mulligan's TASER. We know he did that." RP 715 (emphasis added). Notably, the prosecutor did not say that the evidence showed Benson assaulted and disarmed Mulligan. Instead she stated, "we know" this to be what happened. In this way, the phrase "we know" conveys that "we" (i.e. you, the jurors and I, the prosecutor) know what is really going on in this case, but the

defendant does not know this because he continues to dispute that this happened. As such, the comments were improper.

The examples set forth above demonstrate the prosecutor's argument included the frequent misuse of the '"we know" argument. Although defense counsel did not object, the repetitive and pervasive use of this technique to obfuscate the jury's duty to render a verdict based on the evidence alone establishes the flagrancy of the prosecutor's misconduct. Walker, 182 Wn. 2d at 479.

The comments were not harmless. As one legal commentator has noted, too often courts fail to recognize the prejudicial impact the prosecutor's misconduct (including wrongly using the "we know" argument) has on the jury:

> ...courts underestimate the power of these statements. Research consistently shows that jurors inherently find prosecutors to be more credible than defense counsel. These statements play on those perceptions in powerful ways: This method employs a devastatingly powerful approach combining the stature of the prosecutor's office with his experience and knowledge of the case. He is, in effect, becoming a witness advising the jury as to the guilt of the defendant.

Mary Nicol Bowman, Mitigating Foul Blows, 49 Ga. L. Rev. 309, 322-23 (2015) (internal quotes and citations omitted).

The question for the jury was not what did the prosecutor believed to be true, but whether the evidence presented at trial when viewed as a whole demonstrated beyond a reasonable doubt that Benson was guilty of the charges. Yet, the jury never got to consider that question independent of the prosecutor's improper vouching and aligning. As such, Benson was denied his right to have an impartial jury determine his guilt based only on the evidence before the jury.

In sum, the prosecutor's repetitive misuse of the "we know" argument constituted flagrant misconduct that prejudiced Benson's right to a fair trial in front of an impartial jury. As such, this Court should reverse.

(iv) Cumulative Prejudice

To determine prejudice arising from prosecutorial misconduct, courts look not to the strength of the State's case, but instead consider whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. Glasmann, 175 Wn. 2d at 711.

Where the cumulative effect of repetitive, prejudicial prosecutorial misconduct is so pervasive that no instruction or

series of instructions can erase their combined prejudicial effect, the conviction must be reversed. Walker, 164 Wn. App. at 737.

Here, the prosecutor repeatedly vouched for witnesses and let her opinion as to Benson's guilt be known to the jury. She attempted to improperly align the jury with the State and divert their attention away from rendering a fair and impartial verdict based only on the evidence. The misconduct was flagrant and pervasive

Although the jury was instructed to disregard some of the misconduct above, these instructions could not cure the cumulative prejudice. The Washington Supreme Court has previously conceptualized the prejudicial impact of such government misconduct as an "evidential harpoon" that is "willfully jabbed into the defendant and then jerked out by an admonition to the jury not to consider the same. State v. Taylor, 60 Wn.2d 32, 37-38, 371 P.2d 617, 620 (1962) (citing Wright v. State, 325 P.2d 1089, 1093 (Okl. Cr. 1958). As the Court recognized, the harpoon inflicts a wound regardless of whether it is subsequently removed. Id.

In this case, the defendant's right to a fair trial did not suffer just one wound. Instead, numerous "harpoons" were jabbed into it. While due process might have survived one of these wounds – or even a few – in the end there was far too much damage to breathe

life back into the process. Simply put, the cumulative misconduct ultimately denied Benson his right to a fair trial, and reversal is required.

4. CUMULATIVE ERROR RESULTED IN DENIAL OF A FAIR TRIAL.

Under the cumulative error doctrine, the appellate court may reverse a defendant's conviction when the combined effect of trial errors effectively denied the defendant his right to a fair trial, even if each error alone would be harmless. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). If the defendant shows the accumulated prejudice from multiple trial errors affected the outcome of his or her trial, reversal is required. State v. Venegas, 155 Wn. App. 507, 524, 527, 228 P.3d 813,

Here, there were multiple trial errors including: bailiff misconduct, failure of the trial court to reveal ex parte contacts, improper opinion testimony from two officers regarding Benson's guilt, repeated expressions of the prosecutor's personal belief that Benson was guilty, improper vouching, and numerous incidents of prosecutorial misconduct in the State's closing argument.

As shown above, these errors were prejudicial as they collectively undermined the jury's ability to fully, fairly, and

independently consider whether the State had proved Benson was guilty of the charged crimes. Consequently, this court should reverse Benson's convictions.

D. CONCLUSION

Benson respectfully requests this Court reverse his convictions.

DATED this 21st day of August, 2014.

Respectfully Submitted,

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 73026-6-I
	)	
JASON BENSON,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21ST DAY OF AUGUST 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JASON BENSON
650 S. 198TH STREET
SEATTLE, WA 98148

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF AUGUST 2015.

X Patrick Mayovsky