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FILED
May 11, 2015
Court of Appeals
Division I
State of Washington

NO. 72514-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

MARCUS RUFFIN,

Appellant.

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

The Honorable Timothy A. Bradshaw, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION¹

On August 16, 2013, the King county prosecutor charged appellant Marcus Ruffin with first degree murder, second degree assault and second degree violation of the uniform firearms act (VUFA).² CP 1-8. The state alleged that in the course or furtherance of a robbery on January 3, 2012, Ruffin caused the death of Ashton Reyes. CP 1. The state also alleged that during the same incident, Ruffin assaulted Jason Rose with a firearm. RP 2. The state also alleged Ruffin was armed with a firearm for counts one and two. CP 1-2, 10-11.

The state initially prosecuted Jacob Mommer for first degree murder of Reyes and second degree assault of Rose. CP 6. The state's theory was that Reyes and Rose were shot after agreeing to meet Mommer to sell him marijuana. CP 4. Phone records associated with Rose's cell phone and a fingerprint left in Reyes' car eventually led police to Mommer. CP 6.

¹ This brief refers to the verbatim report of proceedings as: 1RP – 6/2/14; 2RP – 6/3/14; 3RP – 6/4/14; 4RP – 6/9/14; 5RP – 6/11/14; 6RP – 6/12/14; 7RP – 6/16/14; 8RP – 6/17/14; 9RP – 6/23/13; 10RP – 6/24/14; 11RP – 6/25/14; 12RP – 6/30/14; 13RP – 7/1/14; 14RP – 7/2/14; 15RP – 7/7/14; and 16RP – 9/19/14.

² At trial, Ruffin stipulated he had a prior qualifying offense for VUFA. CP 18-19.

Prior to Mommer's conviction, police had uncovered only tenuous evidence suggesting Ruffin's possible involvement. CP 5-6. Mommer's phone records indicated calls to a "229" number belonging to Ruffin's brother, Lyndell Ruffin, before and after the shooting and interspersed with communications between Mommer and Rose. CP 5; 11RP 170. The 229 number hit on a cell tower in the general area of the shooting around the time of the shooting. CP 5. Based on communication police had with someone who knew Marcus Ruffin, police believed Marcus Ruffin had used the 229 number at one point. CP 6.

But it was not until after Mommer was convicted of murder, that he claimed Ruffin was involved and actually the one who shot Reyes and Rose. CP 6. Mommer received a reduction-of-sentence offer in exchange for testimony against Ruffin. Supp. CP ___ (sub. no. 9, Motion and Certificate for Appointment of Expert, 8/29/13).

Ruffin denied any involvement in the shooting or robbery and presented an alibi. CP 12; 14RP 37.

In this appeal, Ruffin argues he should receive a new trial because the court gave an unconstitutional instruction on reasonable doubt, impermissibly shifting the burden of persuasion

to the defense. Ruffin should also receive a new trial due to prosecutorial misconduct and the court's ruling prohibiting Ruffin from presenting relevant evidence in his defense, in violation of his constitutional right to present evidence.

B. ASSIGNMENTS OF ERROR

1. The reasonable doubt instruction required more than a reasonable doubt to acquit and shifted the burden to appellant to provide the jury with a reason for acquittal.

2. Prosecutorial misconduct deprived appellant of his right to a fair trial.

3. The court's erroneous ruling deprived appellant of his right to present a defense.

Issues Pertaining to Assignments of Error

1. The trial court instructed the jury that a "reasonable doubt is one for which a reason exists." Does this instruction require the jury to have more than reasonable doubt to acquit and impermissibly shift the burden of proof by instructing the jury it must be able to articulate a reason before it can have a reasonable doubt?

2. Did prosecutorial misconduct deprive appellant of his right to a fair trial where the prosecutor impermissibly vouched for the credibility of Jacob Mommer, the state's key witness against appellant?

3. Was appellant deprived of his right to present a defense where the court precluded him from presenting evidence to rebut the state's claim of recent fabrication as to his alibi defense?

C. STATEMENT OF THE CASE

1. Reasonable Doubt Instruction

At Ruffin's trial, the court gave the standard reasonable doubt jury instruction, WPIC 4.01,³ which reads, in part: "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence." CP 29; 13RP 118; 14RP 160.

³ 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008).

2. State's Case

In January 2012, Jason Rose was selling marijuana on Craigslist. 6RP 106-107. On January 3, he agreed to meet Jacob Mommer in the University District to sell him an ounce for \$200.00. 6RP 109. Rose drove from Edmonds with his girlfriend Ashton Reyes to meet Mommer. 6RP 111-13. Mommer did not identify himself by name, but Rose recognized Mommer's cell number from a previous transaction. 6RP 109. Rose testified Mommer previously met him in Edmonds to buy a starter plant. 6RP 152.

Rose and Reyes arrived at the meeting place around 7:00 p.m., but Mommer was not there. 6RP 113. When Rose phoned, Mommer explained he was having car trouble and asked if Rose could meet him further south at a Chevron on Rainier Avenue. 6RP 114.

Rose mistakenly went to a Chevron at the Martin Luther King Way exit off of I-5. 6RP 114. Upon finding no one there, Rose phoned Mommer again and obtained directions to the other Chevron. 6RP 117. When Mommer was not at that Chevron either, Rose called again; Mommer directed him to the Safeway on Rainier Avenue in Seattle's Rainier Beach neighborhood. 6RP 117.

Rose arrived at the Safeway, but Mommer was not there. Mommer was still on the phone with Rose and directed Rose to the Subway across the street. 6RP 118-121.

Rose was irritated by the time he pulled into the parking lot and connected with Mommer. 6RP 124. He started to talk with Mommer through the unrolled driver's side window, but Reyes suggested Mommer get in the car. Subway was closing but there were still employees inside. 6RP 124-25. Mommer got in the back seat behind Reyes, and Reyes handed him the marijuana. 6RP 125.

Rose testified he expected to be paid immediately but felt Mommer was stalling by asking questions. 6RP 126. Suddenly, Reyes started screaming. 6RP 127. Rose looked over his left shoulder and saw an African American man at the window with a gun. 6RP 127.

Rose testified the gunman threatened him and asked for money; at the same time, Mommer was moving from side to side trying to get out. The doors had child safety locks and could only be opened from the outside. 6RP 133-34. Rose suggested the gunman let his "buddy" out and they talk about the situation. 6RP 135. Rose believed the two were working together. 6RP 135.

Rose knew Reyes didn't have any money, but handed the gunman her purse. 6RP 139. Rose decided that when the gunman turned to go through the purse, he would jump out and try to tackle him. 6RP 140.

Rose testified that as soon as he got a few steps out of the car, the gunman started shooting. Before Rose had the chance to react, the gunman fired two shots. 6RP 140. According to Rose, the two men stared at each other momentarily before the gunman raised the gun and shot Rose. 6RP 140. At the same time, Rose jumped and spun around. 6RP 141. He was shot in the right buttock. 6RP 141.

Rose testified he back-pedaled on his hands and feet toward Subway but the door was locked. 6RP 142-43. He noticed there was traffic at the McDonald's across the street and back-pedaled away from Subway toward McDonald's. 6RP 143. Rose testified that as he backed away from the building, he saw the two men standing together at the back of Reyes' car with the bag of marijuana, cell phones and other belongings from the car. 6RP 146. Rose made it to the McDonald's drive-through and an employee called 911. Rose testified did not realize Reyes had been shot. 6RP 148.

Carmalita Aguilar had gone through the McDonald's drive-through and was parked waiting for her food when something drew her attention to the Subway across the street. 9RP 10-12. She remembered seeing a Caucasian man and another man arguing in the Subway parking lot. 9RP 13-14, 37. Aguilar described seeing jumpy movement and suddenly hearing gunshots. 9RP 14.

According to Aguilar, it looked like the Caucasian man was by the driver's door trying to pull something out. 9RP 15. Aguilar saw one of the men run towards 52nd Avenue and the other (who was dragging his leg and calling for police) run towards McDonald's. 9RP 17. She thought the man running towards McDonald's was the same man she saw trying to pull something out of the driver's seat. 9RP 17. Aguilar was anxious to leave and drove away while calling 911. 9RP 23.

Aguilar thought she saw a flash as the other man was running up 52nd Avenue. 9RP 19-20. 9RP 37.

Quoc Tran was working at Safeway that night. 11RP 24. He testified that when he went outside for a cigarette around 10:00 p.m., he heard a gunshot. 11RP 24. Tran looked toward Subway and saw one man chasing another man. 11RP 28-29. Tran testified he saw a man in the Subway parking lot shoot at another

man who was running towards McDonald's. 11RP 30. The man in the parking lot then ran up 52nd Avenue South. 11RP 30. Tran told police he saw two people running up the hill. 11RP 33.

Susan Usmial was also working at Safeway that night. 11RP 120-120-25. She heard a shot and saw a man running toward McDonalds. 11RP 120-21. She heard another shot and saw a man in the Subway parking lot with his arm outstretched pointing at the vehicle on the side of Subway.⁴ 11RP 122, 128. Usmial saw a flash when she heard the shot and then saw the man run by himself up 52nd Avenue. 11RP 125. When she looked up the hill, however, she saw another person. 11RP 125.

Seattle police officer Steven Bale was working security at Safeway that night. 5RP 61-63. Just before 10:00 p.m., he went outside to the parking lot and heard two gunshots. 5RP 65-66.

⁴ Usmial remembered seeing only the white truck that was parked in the lot, not the Corolla. 11RP 133.

Bale's attention was drawn to the Subway at the intersection of 52nd Avenue South and Rainier Avenue South. 5RP 72. He saw someone running towards McDonald's and another person standing on the southeast corner of the intersection with his left arm raised, pointing in the direction of the man running towards McDonalds. 5RP 73, 75. According to Bale, the man with the outstretched arm stood there for several seconds before running up 52nd Avenue. 5RP 75-76.

Bale continued toward Subway and found Reyes' Corolla in the parking lot with the driver's door open. 5RP 81. Bale discovered Reyes slumped faced-down in the car with her feet sticking out the driver's side. 5RP 82. Aid was summoned, but Reyes died at the hospital from a gunshot wound. 12RP 39.

When police responded to McDonald's, Rose informed them the cell phone number of the person he agreed to meet would be in his phone as his last contact. 5RP 132.

Detective Rolf Norton followed up with Rose on January 5. 6RP 21. Rose was not able to identify anyone by photo or name but remembered the cell phone prefix for the man he agreed to meet was (206) 883. 6RP 23. Rose told Norton there would be some back and forth between his phone and the 883 number the

night of the shooting, and also, that the man in the back seat handled the door locks. 6RP 24.

Police did not find Rose or Reyes' phones in the car. 6RP 28; 7RP 68. But police obtained their cell phone records. 6RP 28. Rose's records showed back and forth exchanges between his phone and (206) 883-5797 on January 3, beginning at 8:22 p.m. and going until 9:51 p.m. 6RP 30.

Norton served a warrant on AT&T and obtained the phone records for the 883 number. 6RP 32. The subscriber was prepaid, so there was no subscriber information. 6RP 33. According to Norton, the records for the 883 number showed a pattern of contacting Rose's phone and then contacting a 229 number immediately afterward. Records for the 229 number listed Lyndell Ruffin as the subscriber. 11RP 170, 180. According to Norton, this pattern continued up until the time of the shooting. 6RP 35.

Norton ran a search of the 883 number on Google and discovered a number of advertisements placed on Craigslist. 6RP 38. Norton served a warrant on Craigslist and obtained the internet protocol (IP) address where the postings were made; it was an IP address in Maple Valley. 6RP 39. Through Comcast, Norton determined the physical location to be 24405 Witte Road in Maple

Valley, which was one of six townhomes in a cluster known as Maple Place. 6RP 41.

Norton served a warrant on Maple Place to obtain the names of the residents. 6RP 42-43. He also ran the license plates of various vehicles parked nearby, but ran out of leads. 6RP 41.

About two days later, Norton received information that latent examiners had lifted a print from the rear door lock of Reyes' car and matched it to a known print of Jacob Mommer.⁵ 6RP 47. Norton testified a cream colored Oldsmobile parked on Witte Road was also registered to Mommer. 6RP 47.

Norton thereafter obtained a search warrant for the Maple Place townhome of Julie Mommer. 6RP 48. Police arrested Mommer while executing the warrant on February 14, 2014. 6RP 47-48.

During the search, police obtained two cell phones and former Seattle police computer forensic investigator David Dunn conducted forensic analysis on them. 6RP 48-49; 8RP 137-180. Dunn examined one of the phones – a black and silver Nokia (ex 37) – and determined it had data on it from late 2011 and a number

⁵ Detective Kevin O'Keefe testified he obtained the print from one of the interior doors of the Corolla's backseat. 7RP 92. Latent print examiner Katie Hosteney testified she matched it to a print of Jacob Mommer's. 9RP 99-100.

of exchanges with (206) 229-1428. 6RP 48-50; 7RP 140, 163; 8RP 142, 145, 153. Dunn testified it looked like some of the exchanges had been deleted. 8RP 152. Detective Norton testified he compared Dunn's "data dump" from exhibit 37 to the phone records for the 883 number and was able to determine the Nokia was using the 883 number in December 2011. 11RP 180-185. 8RP 154.

The second phone was an HTC MyTouch Android (ex 38). 6RP 50; 7RP 164; 8RP 143, 172. Listed in the contacts was someone identified as "Snap" with a phone number of: (206) 455-3072. 6RP 52; 8RP 177. The number for the MyTouch was: (425) 343-3725. 6RP 57. Records indicated this account was opened on January 5, 2012. 6RP 63.

Norton obtained the phone records for the 455 number. 6RP 52. The records were for a T-Mobile phone, with a subscriber listed as Marcus Ruffin. 6RP 53. The records indicated the account was opened on December 27, 2011, and listed an alternative phone number of: (206) 229-1428. 6RP 53.

Norton assembled the phone records for Rose ((425) 791-0130) and Reyes ((425) 633-0749) to be compared with the records for two phones associated with Mommer (883 and 343) and the 455 number associated with Ruffin and the other 229 number. 6RP 59.

Norton made a timeline describing which numbers contacted which numbers at which time. 6RP 59

According to the phone records, there were a number of exchanges between the 883 number and the 229 number on December 31, 2011, the same day 883 also had contact with Rose. 6RP 67. Norton testified there were approximately 15 exchanges between 883 and 229 starting at 12:02 a.m. and going until 11:14 p.m. 6RP 67. Norton testified there were 4 or 5 exchanges between 883 and 229 between noon and 3:01 p.m. 6RP 67. There was no communication between 883 and 229 for the next six hours. 6RP 79.

According to Norton, there were 4 exchanges between 883 and Rose's phone between 3:45 p.m. and 3:58 p.m. 6RP 79. There was no further communication between 883 and Rose until January 3. 6RP 79.

Norton testified the shooting occurred at 9:56 p.m. on January 3. 6RP 68. Norton made an additional timeline of communications exchanged before and after. 6RP 68. Norton testified 883 and 229 communicated back and forth at 7:38 p.m., 7:54 p.m., 9:09 p.m. and 9:27 p.m. The last call made from 883 to 229 (and last communication exchanged between the two

numbers) was at 9:52 p.m. 6RP 68, 81-83. There was a text message from the 455 number associated with Ruffin to the 883 number at 12:30 a.m. on January 4. 6RP 74. There were no further outgoing communications from the 883 number after the shooting. 6RP 36-37.

Norton testified communication between the 883 number and Rose started at 6:22 p.m. on January 3. 6RP 81. The last communication between Rose and 883 was at 9:53 p.m. 6RP 81.

Norton also testified about the cell tower cites accessed by the 229 number on January 3. 6RP 82. Norton testified cell tower technology is designed to be efficient, so the phone's signal generally reaches out to the nearest tower. 6RP 85. Sometimes, however, there are obstructions. 6RP 86. Weather patterns or a high volume of cell phone activity can also influence the tower that is ultimately accessed. 6RP 86. As a result, a phone might reach out to a tower that is further away.⁶ 6RP 86.

Norton testified that the records for 229 indicated that at 9:31 p.m. there was a data transaction using the cell tower at 2900 NE

⁶ For instance, Norton acknowledged that between 9:51 and 9:52 p.m., Rose's phone "was pinging off the tower that was obviously in a place he was not." 13RP 97. Norton further acknowledged that to rely on that tower as a point of location for Rose at that time clearly would be erroneous, as it was on the other side of Lake Washington. 13RP 97, 106.

30th in Renton, right off of SR-405. At 9:39 p.m., there was an outgoing call to T-Mobile's voicemail system using the cell tower at 5148 South Director Street. 6RP 91. Norton testified the cell tower is located behind the Safeway in Rainier Beach. 6RP 91. At 9:41 p.m., there was another outgoing call to T-Mobile, also using the Director Street cell tower. 6RP 91-92. At 9:42 p.m., the 229 number received a text with no cell tower information. 6RP 92. At 9:43 p.m., the 229 number made an outgoing call using the Director Street tower. 6RP 92. At 9:53 p.m., the 229 number received an incoming call from the 883 number using the Director Street tower. 6RP 92.

There were incoming and outgoing calls, respectively, at 9:53 and 9:54 p.m., but the records did not indicate a cell tower. 6RP 93. The next call was made at 10:02 p.m. to (206) 331-9571.⁷ Another call was made at 10:04 p.m. 6RP 94. According to Norton, the last two calls accessed the cell tower at 2201 Meadow Avenue North in Renton, on the east side of Lake Washington, off SR-405. 6RP 95.

⁷ Norton testified he obtained the records for this number and determined it belonged to Lyndell Ruffin. 6RP 94.

Angela Cunningham testified she communicated with Ruffin while he was in jail in 2011.⁸ 7RP 22. Ruffin reportedly called her father's landline to speak to her. 7RP 23. At trial, Cunningham testified she listened to a compact disk containing two such calls and identified Ruffin's voice on them. 7RP 24. Cunningham testified that during one of the calls, Ruffin asked Cunningham to make a three-way call to 331-9571 to include his brother. 7RP 26-27.

Cunningham testified that following Ruffin's release in November 2011, she continued to speak to him by phone. 7RP 27; 14RP 118. While she did not remember the number she dialed to reach him, she testified it was listed as a contact in the phone she was using at a time when she spoke to police. 7RP 28. Detective Norton testified that when he interviewed Cunningham, she read the number she had listed for Ruffin to him as: (206) 229-1428. 11RP 164.

But Cunningham also testified she knew Ruffin to have more than one phone. 7RP 34. It was Cunningham's perception that

⁸ He was released in November 2011. 11RP 165.

Ruffin was on a plan with his brother and that he was using his brother's phone until he could obtain one of his own.⁹ 7RP 34-35.

As indicated, Jacob Mommer testified against Ruffin in exchange for a reduced sentencing recommendation from the state. 9RP 182-89. Interestingly, when interviewed by defense counsel after the deal was brokered, Mommer had difficulty remembering what happened. 9RP 191. At one point, he told defense counsel he was with a black male on the night of the shooting, but was not sure if it was Marcus Ruffin. 9RP 191; 10RP 36, 65.

At trial, the prosecutor began direct examination by asking Mommer about his trial on the same accusations:

Q [prosecutor] And you were convicted of being an accomplice to murder in the first degree and assault in the second degree?

A Yes.

Q Do you know what an accomplice is?

A Yes.

Q What is it?

MR. PEALE [defense counsel]: Objection.

⁹ The court later ruled it should have sustained the prosecutor's objection to this part of Cunningham's testimony. 7RP 170-72. However, the prosecutor decided not to ask for any relief and allow the testimony to stand. 8RP 116.

THE WITNESS: Somebody that aids somebody.

MR. PEALE: Legal conclusion. It is not relevant.

THE COURT: Objection is overruled. You may answer.

BY MR. MCCOY [prosecutor]:

A I was convicted of it as being an accomplice, somebody that aids somebody in a crime.

Q You used the word aid.

A Aid and abet

Q Help out?

A What?

Q Help out?

A Yes.

Q All right.

9RP 122.

Before addressing the deal Mommer made with the state, the prosecutor again sought to confirm Mommer was “convicted as an accomplice for this crime; is that correct?” 9RP 182. Mommer agreed. 9RP 183. The prosecutor also elicited that Mommer agreed to testify truthfully as part of the deal:

Q Was part of the agreement that you agreed to come and testify at trial?

A Yeah, truthfully.

9RP 187.

Mommer testified that he knew Jason Rose through Craigslist. 9RP 126. Mommer also sold things on Craigslist, such as clothes and phones, and used the 883 number as his contact number. 9RP 120.

Mommer testified he and Ruffin were friends from school and that on January 3, 2012, Ruffin was using the 229 number as his contact number, which was programmed into Mommer's phone. 9RP 124-25. According to Mommer, Ruffin's nickname was "Snap." 9RP 125. Mommer acknowledged knowing Ruffin's brothers as well, but claimed he knew them only in passing. 9RP 125.

Mommer testified he talked to Rose first on December 31. 9RP 127. Reportedly, Mommer was also texting and spending time with Ruffin on December 31. 9RP 127. Mommer testified he and Ruffin went to Northgate that day, but did not meet Rose or buy marijuana from him. 9RP 128-130.

On January 3, 2012, Mommer contacted Rose to buy some marijuana. 9RP 131. Mommer acknowledged he initially asked Rose to meet him in the U-District, but claimed his car overheated. 9RP 132. As a result, Mommer asked Rose to meet him in Renton at the Rainier Avenue Chevron. 9RP 133. As indicated, however, there was some confusion as to which Chevron; Mommer eventually directed Rose to the Rainier Beach Safeway. 9RP 133.

Mommer testified he was communicating with Ruffin at the 229 number during this same time. 9RP 133-34. Mommer picked Ruffin up at a Renton minimarket on Rainier Avenue and explained he was on his way to meet somebody to buy marijuana. 9RP 133-135. The two drove to Safeway and parked on the street between Safeway and McDonald's. 9RP 137.

Mommer testified he called Rose and directed him to the Subway across the street, reasoning it would be easier to find each other in a smaller parking lot. 9RP 138. Mommer parked his car halfway up 52nd Avenue South, adjacent to the Subway. 9RP 138. According to Mommer, when he got out of the car, Ruffin asked: "Should I rob the dude?" 9RP 139. Mommer claimed he told Ruffin it was up to him and walked down to meet Rose, leaving Ruffin in the car. 9RP 139-40.

Mommer waived Rose in from the sidewalk and walked up to the driver's door. 9RP 142. Mommer testified he might have "pocket called" Ruffin while he was standing on the corner waiting. 9RP 142.

Mommer testified Rose told him to get in the car, so he got in the backseat. 9RP 145. After some small talk, Rose reportedly gave Mommer the marijuana. 9RP 146. Mommer said he did not give Rose any money, because suddenly, Ruffin appeared at the window with a gun, demanding keys and money. 9RP 146. According to Mommer, Reyes was freaking out. Rose said he didn't have any money but reportedly gave Ruffin Reyes' purse. 9RP 147.

Mommer testified Ruffin took the purse and was walking to the corner of Subway when Rose jumped out of the car and went after him. 9RP 147. Mommer testified he heard a gunshot. 9RP 148. According to Mommer, Reyes jumped out of the car and followed Rose after the first shot. 9RP 148. Mommer heard another gunshot and tried to jump out. 9RP 148. He had to climb over the center console and out the driver's door because of the child safety locks. 9RP 149.

Mommer testified that when he got back to his car, Ruffin was in the passenger seat. 9RP 150. Ruffin supposedly said he "shot them" and that the woman "was really injured." 9RP 151. According to Mommer, he and Ruffin talked about not using their phones anymore. 9RP 155. Mommer testified he dropped Ruffin off at the same minimarket he picked him up from. 9RP 152.

Mommer testified that after that night, he spent time with another friend, Marcus Neble. 9RP 162-65. According to Mommer, on one occasion they picked up Ruffin and smoked marijuana together in Mommer's car. 9RP 166-67. Mommer claimed that when Ruffin left, Mommer told Neble that Ruffin was the person who robbed Rose. 9RP 168.

Marcus Neble was at Mommer's house when he was arrested. 11RP 58. He told police Mommer had a friend with a nickname starting with the letter "S." 11RP 60.

Neble testified that one night he, Mommer and someone with a name starting with the letter "S" were smoking pot in Mommer's car. 11RP 53; 11RP 97-98. Previously, Mommer had intimated "something had happened that he wasn't too sure about." 11RP 55. When "S" got out of the car that night, Mommer said: "This is the dude that was involved with it or involved in it." 11RP 58.

During a police interview, Neble identified a picture of Ruffin as someone who looked like "S." 11RP 76, 159. However, Neble said he was not sure. 11RP 98, 159. At trial, Neble could not say whether Ruffin was the person he met that night in the car. 11RP 83, 115.

At trial, Rose did not recognize Ruffin. 6RP 164. Rose testified that when he met Mommer on January 3, he recognized him from the previous transaction.¹⁰ 6RP 127, 130-31, 162-64. To police, Rose described the men from January 3 as young black men, although Mommer is white. 6RP 151, 168-69, 170-71; 5RP 144-46; 10RP 54.

3. Defense Case

On the twelfth day of trial, but before the defense began its case, defense counsel gave notice that he had just been made aware of two potential alibi witnesses: Monica King and Danielle Phillips.¹¹ 12RP 4. The court agreed to recess early for the day to allow the prosecutor to interview the witnesses. 12RP 15, 76. The

¹⁰ As indicated, Rose testified Mommer previously purchased a starter plant from him. 6RP 152. Rose testified Mommer was with another man on that occasion, but it was not the gunman. 6RP 153.

¹¹ Phillips testified about Ruffin's whereabouts on February 14, 2012, the day police executed the search warrant at the Mommer residence. 14RP 88-90. Because Ruffin's whereabouts on that day are not germane to this appeal, her testimony will not be addressed.

following day, the prosecutor confirmed he was able to interview the witnesses. 13RP 5.

Monica King testified she is Ruffin's girlfriend. 14RP 28. On January 3, 2012, she was living with her parents in Renton. 14RP 28-29. King testified that on January 3, she met Ruffin in the afternoon and stayed with him all night until the next day, January 4. 14RP 37.

On cross-examination, King acknowledged she first spoke to defense counsel about this the preceding week. 14RP 41. Prior to that, she never told anyone that she was with Ruffin on January 3, 2012. 14RP 47. She also acknowledged she visited Ruffin in jail before speaking with defense counsel. 14RP 42.

On cross-examination, King also acknowledged that she knew Ruffin was charged with murder in August 2013. 14RP 59. Despite knowing she had an alibi for him, she did not tell anyone. 14RP 61. King testified she tried to bring it up with Ruffin but he did not want her involved. 14RP 61.

The prosecutor thereafter returned to King's meeting with Ruffin the week prior and asked whether he asked her to tell his lawyer and testify she was with him on January 3. 14RP 64. King

responded Ruffin asked only: "Will you talk to them." 14RP 65.

The prosecutor followed up, asking:

Q He asked you to lie; didn't he?

A No, he did not.

Q Because he would never do that.^[12]

14RP 65. The prosecutor's last remark was stricken as argumentative. 14RP 65.

On redirect, King explained her hesitance to get involved:

I did not want to get involved in it because I have been surrounded by the system all my life and it's stressful. It drains me. Because my mom has been in jail for twelve years –

MS. MCCOY [prosecutor]: Objection, move to strike. Relevance.

THE COURT: Overruled.

BY MR. PEALE [defense counsel]:

A And so it just – I don't like the feeling of being surrounded by the system, the jail and courts and stuff like that. Because I felt like it destroyed my life. So that's why it took me so long to say something and discuss about the incident.

14RP 65-66.

Following up, defense counsel asked whether Ruffin was aware of King's feelings. 14RP 66. When King said yes, counsel

¹² The prosecutor earlier cross-examined King about a phone call during which Ruffin asked King to take responsibility for a drug charge. 14RP 50-53.

asked whether Ruffin did anything to protect her. 14RP 66. King responded, "Yes. He told – [.]” 14RP 66.

At this point, the prosecutor objected on grounds “[t]he defendant’s motivation is not relevant to this witness’s testimony.” 14RP 66-67.

At the recess defense counsel disagreed:

Your Honor, the third of the cross-examination by counsel was to establish that Mr. Ruffin was motivated by a desire to obtain information favorable to his case and he accomplished that by having this witness purposefully misstate facts known to her to be false.

The motivation of Mr. Ruffin has been brought into questioning of this witness though cross-examination. And the witness should be allowed to explain what she understood the nature of the conversations with Mr. Ruffin were, what she was being asked to do, what she understood she could or should do, and then what it is that she intended to do.

14RP 67-68.

The court indicated the witness already testified Ruffin did not want King involved and knew about her concern with the system. 14RP 68.

Defense counsel offered:

Did he essentially protect her by not asking her to do things that would bring her into the system in this case, and the answer was yes.

I am prepared to present testimony that he has said that he did not – that Mr. Ruffin has said and

given instructions that he did not want Ms. King contacted because he considered her to be fragile and respected the seriousness of this case and her reaction to the system as she was testifying, and did not want her to be brought in.

14RP 69.

The prosecutor countered the offer could elicit out-of-court statements by Ruffin. 14RP 69. Because that was not the objection before the court, however, the court overruled the prosecutor's relevance objection. 14RP 70.

Ruffin testified he was not at the Rainier Beach Subway on January 3 and did not shoot Rose or Reyes. 14RP 104. He knew Jacob Mommer but was not with him that night. 14RP 104. Ruffin testified he never met Jason Rose or Marcus Neble. 14RP 112.

Ruffin testified that around Christmas time in 2011, Mommer sold him a red HTC Android phone. 14RP 107. Ruffin purchased it for \$170.00 and gave Mommer a phone in exchange. 14RP 107. Before that, Ruffin did not have his own phone and borrowed phones to make calls. 14RP 107-108. Ruffin gave Angela Cunningham his brother's phone number as a way to reach him. 14RP 108-09. It was that phone Ruffin gave to Mommer to reduce the price of the Android. 14RP 109. When Ruffin opened up an account with T-Mobile for the new phone, he listed his brother's

number as a reference. 14RP 109. Ruffin knew his brother always paid his bills on time. 14RP 110.

Ruffin admitted he previously asked King to lie with regard to the drug case. 14RP 113. It was something he regretted and admired her integrity for not following through. 14RP 113. Ruffin made no such request regarding this case. 14RP 114. In fact, he was concerned about King's emotional involvement with such a serious case. 14RP 114. Considering her background, it made him "go into a protection mode." 14RP 114.

On cross-examination, Ruffin acknowledged he spoke with King right after detectives first came to talk to him in relation to this case, but did not discuss his alibi. 14RP 124. Ruffin also acknowledged that he did not speak to King about his alibi after he was charged with murder in August 2013. 14RP 129-30. It was not until six days earlier that he asked King to speak to the attorneys if she was willing. 14RP 130-31.

On redirect, defense counsel asked whether Ruffin discussed the possibility of an alibi defense with defense counsel. 14RP 131-32. The prosecutor objected on hearsay grounds. Defense counsel argued the testimony was admissible under ER

801(d)(1)(ii) to rebut the prosecutor's claim of recent fabrication.

14RP 132-34.

Defense counsel made the following offer of proof:

What I am trying to do is lay the foundation for the context in which he and I discussed his alibi. And the offer of proof would be that I asserted to him that an alibi defense is available if someone is available who can say you weren't there.

After he asserted – he said to: Me I didn't do it. All right? And so, when I said: If you didn't do it and you have an alibi, tell me who the alibi is. And his response was: I can tell you who it is, but I don't want you to talk to her, I don't want her involved in this because I don't want her to be emotionally hurt, and I don't want to have to put her through the process and experience of going through a hearing of the type that we are going through now.

Now, the State is suggesting that Mr. Ruffin is making a recent fabrication and he is inducing someone else to assert that there is an alibi and produce the evidence in support of that.

And further, it is suggesting by the questioning that Mr. Ruffin never discussed it with anyone and it never came to him or to his counsel until last week. Which is not a true impression. It's not factually accurate.

And the witness can and should be allowed to explain what he did and why he did it.

14RP 137-38.

Defense counsel asserted he would be able to rebut the recent fabrication claim without becoming a witness, as the defense investigator was present during some of these discussions. 14RP 139-41.

The court ruled it would not admit the testimony for the following reasons:

. . . whether the time of the out-of-court assertion was a showing that the consistent statements were made at a time when the motive to falsify was not present.

Meeting with one's attorney to discuss legal strategy is an opposite of that. This does not have the hallmark of reliability to it.

Additionally, the Court does not believe that this evidence would be truly subject to cross-examination by the prosecuting attorney because the State would need to inexorably cross-examine or at least question the hearer of the declaration; here, Mr. Peale.

The Court is also considering Evidence Rule 403 that applies to all evidentiary questions. Here, the need for a particular testimony the Court believes to be minimal in light of Ms. King's testimony that previously Mr. Ruffin had told her and communicated to her that he did not want her, did not wish her to get involved previously.

Additional 403 concerns, with the limited relevance there is, would include the concern about satellite trials, confusion of the issues and waste of time.

This, if continued, would in all likelihood require substitution of counsel, would require Mr. Peale to testify. This should have been brought to the Court's attention earlier. But it's difficult to try cases.

The question of attorney's credibility, the attorney, the escape of the waiver of the attorney-client privilege, are all matters that further make this Court conclude that the objection out be sustained.

14RP 154-55.

When the jury came back, the court indicated it sustained the objection and neither party had further questions. 14RP 157.

C. ARGUMENT

1. THE MANDATORY JURY INSTRUCTION, “A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS,” IS UNCONSTITUTIONAL.

Ruffin’s jury was instructed, “A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence.” CP 29; 14RP 160; see also 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008) (WPIC). The Washington Supreme Court requires that trial courts provide this instruction in every criminal case, at least “until a better instruction is approved.” State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007).

However, WPIC 4.01 is constitutionally defective for two reasons. First, it instructs jurors they must be able to articulate a reason for having a reasonable doubt. This engrafts an additional requirement on reasonable doubt. Jurors must have more than just a reasonable doubt; they must also have an articulable doubt. This makes it more difficult for jurors to acquit and easier for the prosecution to obtain convictions. Second, telling jurors a reason must exist for reasonable doubt is identical to “fill-in-the-blank” arguments, which Washington courts have invalidated in prosecutorial misconduct cases. If fill-in-the-blank arguments

impermissibly shift the burden of proof, so does an instruction requiring the same thing. Instructing jurors with WPIC 4.01 is constitutional error. This court should accordingly reverse and remand for retrial.

- a. WPIC 4.01's language improperly adds an articulation requirement.

Having a reasonable doubt is not, as a matter of plain English, the same as having a reason to doubt. But WPIC 4.01 requires both for a jury to acquit. A basic examination of the meaning of the words "reasonable" and "a reason" reveals this grave flaw in WPIC 4.01.

"Reasonable" means "being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining within the bounds of reason . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment." WEBSTER'S THIRD NEW INT'L DICTIONARY 1892 (1993). Thus, for a doubt to be reasonable, it must be logically derived, rational, and have no conflict with reason. See Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ("A 'reasonable doubt,' at a minimum, is one based upon 'reason.'"); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct.

1620, 32 L. Ed. 2d 152 (1972) (collecting cases defining reasonable doubt as one “based on reason which arises from the evidence or lack of evidence” (quoting United States v. Johnson, 343 F.2d 5, 6 n.1 (2d Cir. 1965))).

The placement of the article “a” before “reason” in WPIC 4.01 improperly alters and augments the definition of reasonable doubt. In the context of WPIC 4.01, “a reason” means “an expression or statement offered as an explanation of a belief or assertion or as a justification.” WEBSTER’S, supra, at 1891. In contrast to “reason,” which refers to a doubt based in reason or logic, “a reason” requires reasonable doubt to be capable of explanation or justification. In other words, WPIC 4.01 requires not just a reasonable doubt, but also an explainable, articulable doubt.

Due process “protects the accused against conviction except upon proof beyond a reasonable doubt.” In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). But, in order for the jury to acquit under WPIC 4.01, reasonable doubt is insufficient. Rather, Washington courts instruct jurors that they must also be able to point to a reason that justifies their reasonable doubt. A juror might have reasonable doubt but also have difficulty articulating or explaining the reason for that doubt. A case might

present such voluminous and contradictory evidence that a juror with legitimate reasonable doubt would struggle putting it into words or pointing to a specific, discrete reason for it. But, despite having reasonable doubt, the juror could not vote to acquit under WPIC 4.01.

Scholarship on the reasonable doubt standard elucidates similar concerns with requiring jurors to articulate their doubt:

An inherent difficulty with an articulability requirement of doubt is that it lends itself to reduction without end. If the juror is expected to explain the basis for a doubt, that explanation gives rise to its own need for justification. If a juror's doubt is merely, 'I didn't think the state's witness was credible,' the juror might be expected to then say why the witness was not credible. The requirement for reasons can all too easily become a requirement for reasons for reasons, *ad infinitum*.

One can also see a potential for creating a barrier to acquit for less-educated or skillful jurors. A juror who lacks the rhetorical skill to communicate reasons for a doubt is then, as a matter of law, barred from acting on that doubt. This bar is more than a basis for other jurors to reject the first juror's doubt. It is a basis for them to attempt to convince that juror that the doubt is not a legal basis to vote for acquittal.

A troubling conclusion that arises from the difficulties of the requirement of articulability is that it hinders the juror who has a doubt based on the belief that the totality of the evidence is insufficient. Such a doubt lacks the specificity implied in an obligation to 'give a reason,' an obligation that appears focused on the details of the arguments. Yet this is precisely the

circumstance in which the rhetoric of the law, particularly the presumption of innocence and the state burden of proof, require acquittal.

Steve Sheppard, The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence, 78 NOTRE DAME L. REV. 1165, 1213-14 (2003) (footnotes omitted). In these various scenarios, despite having reasonable doubt, a juror could not vote to acquit in light of WPIC 4.01's direction to articulate a reasonable doubt. By requiring more than a reasonable doubt to acquit a criminal defendant, WPIC 4.01 violates the federal and state due process clauses. Winship, 297 U.S. at 364; U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3.

- b. WPIC 4.01's articulation requirement impermissibly undermines the presumption of innocence.s

"The presumption of innocence is the bedrock upon which the criminal justice system stands." Bennett, 161 Wn.2d at 315. It "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." Id. at 316. To avoid this, Washington courts have strenuously protected the presumption of innocence by rejecting an articulation requirement in different contexts. This court should safeguard the presumption of innocence in this case.

In the context of prosecutorial misconduct, courts have prohibited arguments that jurors must articulate a reason for having reasonable doubt. A fill-in-the-blank argument “improperly implies that the jury must be able to articulate its reasonable doubt.” State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Therefore, such arguments are flatly barred “because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence.” Id. at 759-60.

For instance, in State v. Walker, the court held improper a prosecutor’s PowerPoint slide that read, “If you were to find the defendant not guilty, you *have* to say: ‘I had a reasonable doubt[.]’ What was the reason for your doubt? ‘My reason was ____.’” 164 Wn. App. 724, 731, 265 P.3d 191 (2011) (quoting clerk’s papers). Likewise, in State v. Venegas, the court found flagrant and ill-intentioned misconduct where the prosecutor argued in closing, “In order to find the defendant not guilty, you have to say to yourselves: ‘I doubt the defendant is guilty, and my reason is’—blank.” 155 Wn. App. 507, 523-24 & n.16, 228 P.3d 813 (2010) (quoting report of proceedings); see also State v. Johnson, 158 Wn. App. 677, 682, 684, 243 P.3d 936 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009).

Although it does not explicitly tell jurors to fill in a blank, WPIC 4.01 implies that jurors need to do just that. Trial courts instruct jurors that a reason must exist for their reasonable doubt. This is, in substance, the same exercise as telling jurors they need to fill in a blank with an explanation or justification in order to acquit. If telling jurors they must articulate a reason for reasonable doubt is prosecutorial misconduct because it undermines the presumption of innocence, then it makes no sense to allow the same undermining to occur through a jury instruction.

Outside the prosecutorial misconduct realm, Division Two recently acknowledged that an articulation requirement in a trial court's preliminary instruction on reasonable doubt would have been error had the issue been preserved. State v. Kalebaugh, 179 Wn. App. 414, 421-23, 318 P.3d 288, review granted, 180 Wn.2d 1013, 327 P.3d 54 (2014). The court determined Kalebaugh could not demonstrate actual prejudice given that the trial court instructed the jury with WPIC 4.01 at the end of trial. Id. at 422-23. The court therefore concluded the error was not manifest under RAP 2.5(a). Id. at 424.

In sidestepping the issue before it on procedural grounds, the Kalebaugh court pointed to WPIC 4.01's language with

approval. 179 Wn. App. at 422-23. Similarly, in considering a challenge to fill-in-the-blank arguments, the Emery court approved of defining “reasonable doubt as a ‘doubt for which a reason exists.’” 174 Wn.2d at 760. But the Emery court made this statement without explanation or analysis. And, neither the Emery nor the Kalebaugh court explained or analyzed why an articulation requirement is unconstitutional in one context but is not unconstitutional in all contexts.¹³ Furthermore, neither court was considering a direct challenge to the WPIC language, so their approval of WPIC 4.01 does not control. See In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) (“[Courts] do not rely on cases that fail to specifically raise or decide an issue.”).

Instead, just like fill-in-the-blank arguments, WPIC 4.01 “improperly implies that the jury must be able to articulate its reasonable doubt.” Emery, 174 Wn.2d at 760. By requiring more than just a reasonable doubt to acquit, WPIC 4.01 impermissibly

¹³ The Kalebaugh court stated it “simply [could not] draw clean parallels between cases involving a prosecutor’s fill-in-the-blank argument during closing, and a trial court’s improper preliminary instruction before the presentation of evidence.” 179 Wn. App. at 423. But both errors undermine the presumption of innocence by misstating the reasonable doubt standard. As the dissenting judge correctly surmised, “if the requirement of articulability constituted error in the mouth of a deputy prosecutor, it would surely also do so in the mouth of the judge.” Id. at 427 (Bjorgen, J., dissenting).

undercuts the presumption of innocence and is therefore erroneous. WPIC 4.01 is unconstitutional.¹⁴

c. WPIC 4.01's articulation requirement requires reversal.

An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the Sixth Amendment's jury-trial guarantee. Sullivan v. Louisiana, 508 U.S. 275, 279-80, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Where, as here, the "instructional error consists of a misdescription of the burden of proof, [it] vitiates *all* the jury's findings." Id. at 281 (emphasis in original). Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as structural error." Id. at 281-82 (internal quotation marks omitted).

Ruffin's jury was instructed pursuant to WPIC 4.01 that it must articulate a reason for having reasonable doubt. This required more than just a reasonable doubt to acquit; it required a

¹⁴ The State may argue this issue was already decided in State v. Thompson, 13 Wn. App. 1, 533 P.2d 395 (1975). However, Thompson was decided over 40 years ago and can no longer be squared with Emery and the fill-in-the-blank cases. WPIC 4.01 requires the jury to articulate a reason for its doubt, which "subtly shifts the burden to the defense." Emery, 174 Wn.2d at 760. Because the State will avoid supplying reasons to doubt in its own case, WPIC 4.01 suggests that either the jury or the defense should supply them, "further undermining the presumption of innocence." Kalebaugh, 179 Wn. App. at 426 (Bjorgen, J., dissenting). Therefore, "[t]he logic and policy of the decision in [Emery] impels the conclusion" that the articulation requirement in WPIC 4.01 is "constitutionally flawed." Id. at 424.

reasonable, articulable doubt. This articulation requirement undermined the presumption of innocence. It is structural error and requires reversal. This court should accordingly reverse and remand for retrial before a jury that is accurately instructed on the meaning of reasonable doubt.

2. PROSECUTORIAL MISCONDUCT DEPRIVED RUFFIN OF HIS RIGHT TO A FAIR TRIAL.

In questioning Mommer, the prosecutor elicited testimony and suggested that Mommer was convicted of the same crimes for which Ruffin stood charged as an “accomplice.” The prosecutor elicited that an accomplice is “Somebody that aids somebody.” 9RP 122. He elicited from Mommer that his convictions were akin to aiding or abetting and/or that his jury found he merely helped out. 9RP 122.

First, it is not possible to determine whether Mommer’s jury convicted him as an accomplice or principal. For the first degree murder charge, Mommer’s jury was instructed it must find “the defendant or an accomplice” committed or attempted to commit robbery in the first or second degree, and that “the defendant or an accomplice” caused the death of Ashton Reyes in the course or furtherance of the robbery. Supp. CP __ (sub. no. 84A, State v.

Jacob Mommer, No. 12-1-01162-8, 4/30/13).¹⁵ The to-convict for second degree assault was similarly worded requiring the jury to find “the defendant or an accomplice” committed the acts in question. Appendix A. Nor did the verdict forms ask the jury to indicate its theory of liability. Supp. CP __ (sub. no. 87, State v. Jacob Mommer, No. 12-1-01162-8, 5/01/13); Supp. CP __ (sub. no. 89, State v. Jacob Mommer, 12-1-01162-8, 5/01/13).¹⁶ And significantly, Mommer never spoke to police and he did not testify at trial. 9RP 182; 9RP 182. The first time he ever spoke to police was after he was convicted. 13RP 28.

Thus, whether accomplice liability was the state’s theory at Mommer’s trial, the prosecutor’s assertion at Ruffin’s trial that Mommer was *convicted* as an accomplice was based on nothing more than the prosecutor’s unsubstantiated speculation.

¹⁵ The court’s instructions in Mommer’s case are being designated contemporaneously with the filing of this brief and are attached as Appendix A.

¹⁶ The verdict forms are also being designated and are attached as Appendix B.

By inserting this speculation as fact into Ruffin's trial, the prosecutor invaded the province of the jury to determine the facts as tried before them. The prosecutor's insertion of speculation as fact also amounted to vouching by asserting a jury already decided Mommer was the less culpable participant of the two, which likely caused jurors to attach more weight to his testimony than they otherwise would. For these reasons, the prosecutor's assertion Mommer was a mere accomplice amounted to prosecutorial misconduct.

It was also misconduct for the prosecutor to elicit Mommer's agreement to testify "truthfully." This likewise amounted to vouching.

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed him under the state and federal constitutions. Miller v. Pate, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967); In re Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012); State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011). The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Estelle v. Williams**Error! Bookmark not defined.**, 425 U.S. 501, 503, 96

S.Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Finch, 137 Wash.2d 792, 843, 975 P.2d 967 (1999).

Because of their unique position in the justice system, prosecutors must steer wide from unfair trial tactics.

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.

Monday, 171 Wn.2d at 676. 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 was both improper and prejudicial. Monday, 171 Wn.2d at 675 (citations omitted); see also United States v. Yarbrough, 852 F.2d 1522, 1539 (9th Cir.1988) (analysis of a claim of prosecutorial misconduct focuses on its asserted impropriety and substantial prejudicial effect).

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. Monday, 171 Wn.2d at 675 (citations omitted). Prejudice is

established where there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Yates, 161 Wash.2d 714, 774, 168 P.3d 359 (2007). Even if a defendant does not object, 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); State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

The jury alone determines issues of witness credibility. State v. Jungers, 125 Wn. App. 895, 901, 106 P.3d 827 (2005). It is improper for a prosecutor to personally vouch for the credibility of a witness. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). A prosecutor also commits misconduct when he encourages a jury to render a verdict on facts not in evidence. State v. O'Neal, 126 Wn. App. 395, 421, 109 P.3d 429 (2005), aff'd, 159 Wn.2d 500, 150 P.3d 1121 (2007).

Improper vouching generally occurs (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness or (2) if the prosecutor indicates that evidence not presented at trial supports the witness's testimony. United States v. Brooks, 508 F.3d 1205, 1209 (9th Cir. 2007) (quoting United States v. Hermanek, 289 F.3d 1076, 1098 (9th Cir. 2002)). "It is

misconduct for a prosecutor to state a personal belief as to the credibility of a witness.” State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). Whether a witness has testified truthfully is entirely for the jury to determine. Brooks, 508 F.3d at 1210.

The prosecutor’s suggestion Mommer was convicted as an accomplice constituted misconduct for two reasons. First, it encouraged the jury to render a verdict on facts not in evidence. As indicated above, there is no evidence and no way to deduce from the jury instructions on what basis the jury convicted Mommer. And by asserting it was as an “accomplice,” the prosecutor suggested Mommer was less culpable and therefore more believable as a witness.

Second, the prosecutor was essentially vouching that evidence not presented at trial supported Mommer’s testimony. Otherwise, the jury would not have convicted him as merely an accomplice but as a principal.

It was also misconduct for the prosecutor to elicit Mommer’s agreement to testify “truthfully.” State v. Ish, 170 Wn.2d 189, 241 P.3d 389 (2010). Nathaniel Ish was convicted of second degree felony murder for the beating death of his girlfriend. Prior to trial, the prosecutor’s office entered into an agreement with Ish’s jail

cellmate, David Otterson, promising to recommend a reduced sentence for Otterson in another matter in exchange for Otterson's testimony against Ish. Among other things, the agreement provided that Otterson's testimony be truthful. During direct examination of Otterson, the prosecutor referenced the agreement asking if it required Otterson to testify truthfully. Ish argued the use of the plea agreement and the prosecutor's reference to Otterson's promise to testify truthfully amounted to improper prosecutorial vouching for the witness's credibility. Ish, 170 Wn.2d at 190.

On review, five members of the Court agreed the evidence should not have been admitted:

Evidence that a witness has promised to give "truthful testimony" in exchange for reduced charges may indicate to a jury that the prosecution has some independent means of ensuring that the witness complies with the terms of the agreement. While such evidence may help bolster the credibility of the witness among some jurors, it is generally self-serving, irrelevant, and may amount to vouching, particularly if admitted in the State's case in chief. "[P]rosecutorial remarks implying that the government is motivating the witness to testify truthfully: . . . 'are prosecutorial overkill.'" Roberts, 618 F.2d at 536^[17] (alteration in original) (quoting United States v. Arroyo-Angulo, 580 F.2d 1137, 1150 (2d Cir. 1978) (Friendly, J., concurring)). We agree with the court's conclusion in Green^[18] that evidence that a witness has

¹⁷ United States v. Roberts, 618 F.2d 530 (9th Cir. 1980).

agreed to testify truthfully generally has little probative value and should not be admitted as part of the State's case in chief.

State v. Ish, 170 Wn.2d at 198 (lead opinion); State v. Ish, 170 Wn.2d at 206-208 (Sanders, J., dissenting). The lead opinion and dissent disagreed, however, as to whether the error was prejudicial under the particular facts of the case. Id.

Similarly here, the prosecutor elicited Mommer's agreement to testify truthfully in its case-in-chief. As in Ish, this was improper and amounted to prosecutorial overkill.

There is a substantial likelihood the prosecutor's suggestion Mommer was convicted as an accomplice affected the jury's verdict. Ruffin's defense was alibi. However, assuming arguendo the jury did not believe he wasn't there, jurors would still have to find that he committed the crimes in question or acted as an accomplice to them.

Significantly, Susan Usmial testified she heard a shot and then saw a man running towards McDonald's. 11RP 120-21. She heard another shot and saw a man in the Subway parking lot with his arm outstretched pointing at the vehicle on the side of Subway. 11RP 122, 128. Usmial saw a flash and heard a shot and then saw

¹⁸ State v. Green, 119 Wn. App. 15, 79 P.3d 460 (2003).

the man run by himself up 52nd Avenue. 11RP 125. When she looked up the hill, she saw another person. 11RP 125.

Mommer testified that when he got back to the car, Ruffin was already there. 9RP 150. Viewed together, this testimony suggests that Mommer was the last to leave the scene and therefore the person Usmial saw with his arm outstretched pointing at the car before she saw the flash and heard the gunshot. This suggests that Mommer could have shot Reyes after Ruffin was gone. But because the prosecutor vouched that another jury found Mommer guilty as an accomplice, rather than as principal, jurors might have resolved any doubt about Ruffin's participation in the murder against him.

There is also a substantial likelihood the prosecutor's reference to the state's agreement with Mommer and his agreement to testify truthfully affected the jury's verdict. Mommer was the only witness placing Ruffin at the scene. Although there was circumstantial evidence in the form of phone records suggesting he may have been in the vicinity, there were many reasons to doubt the accuracy of such records. In fact, Rose's cell phone records put him in a place Detective Norton acknowledged he could not have been. 13RP 97. Without the prosecutor's

vouching for Mommer's truthfulness, jurors may have been reluctant to convict Ruffin based on Mommer's say-so.

Although this latter instance of prosecutorial misconduct was not objected to, it was flagrant and ill-intentioned in light of Ish, which was decided several years before Ruffin's trial. See e.g. State v. Fleming, 83 Wash.App. 209, 214, 921 P.2d 1076 (1996) (improper prosecutorial arguments were flagrant and ill-intentioned where that court had previously recognized those same arguments as improper in a published opinion). Considering the importance of Mommer's testimony to the state's case, it likewise would have been impossible to unring the bell had defense counsel objected and sought a curative instruction. The state's confidence in Mommer was already out of the bag at that point. See e.g., State v. Powell, 62 Wn. App. 914, 920, 816 P.2d 86 (1991) (curative instruction will not "unring the bell" of flagrant misconduct), rev. denied, 118 Wn.2d 1013 (1992); Fleming, 83 Wn. App. at 215-16. This Court should reverse Ruffin's convictions.

3. THE COURT'S ERRONEOUS RULING DEPRIVED RUFFIN OF HIS RIGHT TO PRESENT A DEFENSE.

Ruffin's defense was alibi. Admittedly, it was not timely disclosed to the prosecutor's office. The prosecutor insinuated on

cross-examination of King and Ruffin the late disclosure was evidence of recent fabrication. Ruffin should have been allowed to present evidence he previously discussed his alibi with defense counsel but chose not to pursue it for personal reasons at that time, as he did not wish to involve his girlfriend whom he perceived as fragile. Contrary to the court's ruling, this evidence was not only relevant, but vital to Ruffin's defense, which the state tore apart on cross. The court's ruling deprived Ruffin of his constitutional right to present evidence.

The Sixth and Fourteenth Amendments to the United States Constitution, and article 1, § 22 of the Washington Constitution, guarantee the right to trial by jury and to defend against the State's allegations. These constitutional guarantees provide persons accused of crimes the right to present a complete defense. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); State v. Cheatam, 150 Wn.2d 626, 648, 81 P.3d 830 (2003) (citing Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)). The right to present a defense is a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); Washington v. Texas, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967); State v.

Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. Relevant evidence may only be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. ER 403. "Evidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is always relevant and admissible." State v. Harris, 97 Wn. App. 865, 872, 989 P.2d 553 (1999).

"[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." [State v. Darden, 145 Wn.2d [612], 622, [41 P.3d 1189 (2002)]. The State's interest in excluding prejudicial evidence must also "be balanced against the defendant's need for the information sought," and relevant information can be withheld only "if the State's interest outweighs the defendant's need." Id. We must remember that "the integrity of the truth finding process and [a] defendant's right to a fair trial" are important considerations. State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). We have therefore noted that for evidence of high probative value "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." Id., at 16.

Jones, 168 Wn.2d at 720.

Ruffin's defense was that he was not at the scene of the shooting on January 3, but with his girlfriend Monica King at her parents' house. Evidence that Ruffin previously told defense counsel he had an alibi but instructed counsel not to speak to King was relevant, as it made the existence of Ruffin's alibi more probable than it would have been without the evidence. In other words, it tended to prove the defense theory.

The evidence was also relevant to rebut the prosecutor's allegation of recent fabrication, which hinged on Ruffin's late disclosure of his alibi. The fact Ruffin previously discussed his alibi with counsel – before King came to talk to defense counsel – therefore made the allegation of recent fabrication less probable than it would have been without the evidence. In other words, it was relevant to disprove the state's theory.

Thus, evidence Ruffin previously discussed his alibi with defense counsel should have been admitted unless the state could show its admission would be so prejudicial as to disrupt the fairness of the fact-finding process at trial. The state made no such showing.

First, the state asserted and the court agreed Ruffin's statement was not made at a time when there was no motive to falsify. 14RP 154-55. Under ER 801(d)(1), a statement is not hearsay if:

The declarant testifies at the trial or hearing and is subject to cross[-]examination concerning the statement, and the statement is ... (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive

State v. McWilliams, 177 Wn. App. 139, 311 P.3d 584 (2014).

Contrary to the court's ruling, however, that the declarant may have had a motive to lie at the time of the prior consistent statement does not bar its admission. McWilliams, 177 Wn. App. at 149.

The McWilliams case is instructive. McWilliams and his friend Henderson went to a convenience store and encountered Labee and Reynald. Apparently mistaking Labee and Reynald for gang members, McWilliams started arguing with them. When Henderson joined the argument, Labee and Reynald used a racial epithet toward Henderson, and Henderson threw the first punch. McWilliams then punched Labee in the face and knocked him out. McWilliams then produced a pistol and fired it in Reynald's

direction, lacerating Reynald's neck. McWilliams, 177 Wn. App. at 143-44.

Police captured Henderson as he was running away. Henderson initially told Deputy Huber he did not know what was happening; he merely heard gunshots and ran. But later that same night, Henderson told Huber about his involvement in the fistfight and that McWilliams produced a gun and fired it. McWilliams, 177 Wn. App. at 144. The state charged both men with two counts of first degree assault with firearm enhancements. Id. at 145.

In an interview with Detective Nist, Henderson stated only that he heard shots; he did not say McWilliams was the shooter. Henderson did tell Nist, however, that he and McWilliams had been in the fistfight at the store. About five or six months later, Henderson entered into an agreement to plead guilty, for which the state would recommend a nine-month sentence. McWilliams, 177 Wn. App. at 145.

At trial, Henderson identified McWilliams as the shooter. McWilliams cross-examined Henderson about his plea agreement. Henderson admitted it spared him from a possible 25-30 year sentence and a "second strike" in exchange for his testimony against McWilliams. On cross-examination, Henderson admitted

he lied to officers by telling them that he was not involved in anything and confirmed both Labee and Reynald called him “the ‘N’ word” and that they had directed this derogatory term only toward him, because McWilliams is white. McWilliams then asked if Henderson had pulled the gun and pointed it at Labee and Reynald because he was so angry. Henderson denied this. McWilliams, 177 Wn. App. at 145-46.

After Henderson’s testimony, the prosecutor asked Nist whether Henderson told her about McWilliams’ involvement. McWilliams objected on hearsay grounds. The state countered the testimony was admissible under ER 801(d)(1)(ii) as a prior consistent statement. The court agreed and Nist testified Henderson had not told her that McWilliams was the shooter but that Henderson’s testimony was consistent with what he had told her regarding McWilliams’ involvement in the fight. McWilliams, 177 Wn. App. at 146.

On appeal, McWilliams argued the trial court erred in admitting Henderson’s statements to Nist under ER 801, because Henderson had ample time and reason to fabricate a story blaming McWilliams. Specifically, Henderson made the statement after police arrested Henderson for his involvement and after Henderson

had replied to police inquiry with an admitted fabrication. The state responded that when McWilliams cross-examined Henderson, he strongly implied Henderson fabricated the story to receive the benefits of the plea agreement; therefore, the court properly admitted the testimony. McWilliams, 177 Wn. App. at 147.

Division Two agreed with the state:

Cross-examination that merely attempts to point to inconsistencies in the witness's testimony does not raise an inference of recent fabrication and does not justify admission of prior consistent statements. State v. Bargas, 52 Wn. App. 700, 702-03, 763 P.2d 470 (1988). However, if cross-examination raises an inference "that the witness changed [his] story in response to an external pressure, then whether that witness gave the same account of the story prior to the onset of the external pressure becomes highly probative of the veracity of the witness's story given while testifying." Thomas, 150 Wn.2d 821, at 865, 83 P.3d 970.^[19] Cross-examination designed to show that the witness has the motive to change his story to receive a plea agreement triggers ER 801(d)(1)(ii). Thomas, 150 Wn.2d at 866, 83 P.3d 970.

McWilliams, 177 Wn. App. at 148.

By the same token, so, too, should cross-examination designed to show a defendant's alibi is a last ditch effort to avoid conviction or a "hail mary pass" thrown out of desperation. In both

¹⁹ State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004), abrogated on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

instances, the cross-examiner is suggesting the witness has changed his story due to external pressure. In both instances, the insinuation is that the witness changed his story due to the external pressure of an impending conviction.

Moreover, as with Henderson, the mere assertion that Ruffin had a motive to lie because he had been charged at the time and was speaking with counsel does not bar the statement's admission. McWilliams, 177 Wn. App. at 149 (citing State v. Makela, 66 Wn. App. 164, 173, 831 P.2d 1109 (1992)). Rather, it was incumbent upon the court to "decide, as a threshold matter, whether the proffered motive to lie rises to the level necessary to exclude the prior consistent statement." Makela, 66 Wn. App. at 173. Here, the court failed to do so.

One of the factors the court may consider is whether the witness made the prior consistent statements when "the witness was unlikely to have foreseen the legal consequences of his or her statements." Makela, 66 Wn. App. at 149. Consideration of this factor weighs in favor of admitting Ruffin's statement. First, he was not speaking to police. He was speaking confidentially to defense counsel. Accordingly, there was likely to be no legal consequences to foresee, particularly because Ruffin wanted no further action

taken as a result. The court therefore erred when it ruled against admitting the statement based on the mere assertion Ruffin had a motive to lie.

But even if the statement were inadmissible under ER 801(d)(1)(ii), there are times when application of a court rule violates a defendant's right to present a defense. See e.g. Holmes v. South Carolina, 547 U.S. 319, 331, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (quoting United States v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998)). Evidentiary rules must sometimes give way when constitutional rights are at stake. State v. Jones, 117 Wn. App. 221, 232, 70 P.3d 171 (2003). This is just such a case.

As defense counsel noted, without the evidence, the jury was left with the impression that Ruffin "never discussed [his alibi] with anyone and it never came to him or to his counsel until last week." 14RP 137-38. This was not factually accurate, as defense counsel asserted. Thus, Ruffin's need for the evidence was great. In excluding the evidence, the court failed to balance this need against the state's purported need to exclude the evidence. For this reason, the court also erred.

In fact, a weighing of the competing interests favors admission. First, whether Ruffin had a motive to lie at the time of the statement could have been explored on cross-examination of Ruffin. Second, contrary to the court's ruling, the state would not have needed to cross-examine defense counsel, Mr. Peale. 14RP 154-55. Defense counsel's perception of the statement was irrelevant. It was the fact that it was made that was material to the defense case. And defense counsel asserted his investigator could testify to that fact. It was Ruffin's motive that mattered to the state, and the state would have been allowed to cross-examine him about that.

Third, contrary to the court's ruling, Ruffin's need for the evidence was great. Not only was the jury left with an incorrect impression, but the prosecutor insinuated Ruffin's alibi was nothing more than a "hail mary pass" thrown out of desperation in the face of impending conviction. Ruffin needed an opportunity to rebut this allegation of recent fabrication for his defense to have any credibility.

In light of Ruffin's relationship with King, jurors may have been hesitant to believe King's testimony Ruffin told her he did not want to involve her. But the fact Ruffin made the same statement

to defense counsel corroborated King's testimony and therefore made it more credible.

Fourth, admission of the evidence would not have involved a satellite trial. It would have involved one additional witness to testify about one statement.

Fifth, no substitution of counsel would have been required, as defense counsel asserted he could call his investigator to testify about the statement. Further, Ruffin agreed to waive any attorney-client privilege to allow the admission of the testimony. 14RP 145-150.

In short, none of the court's reasons justify the exclusion of this key defense evidence. The court erred in concluding otherwise and violated Ruffin's right to fully defend against the state's accusations.

Where evidence is material to the defendant's defense, it is a denial of due process to exclude it. State v. Austin, 59 Wn. App. 186, 194, 796 P.2d 746 (1990) (citing Taylor v. Illinois, 484 U.S. 400, 406 09, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988)). The trial court's exclusion of Ruffin's prior consistent statement constituted a denial of due process and violated Ruffin's right to fair trial. This Court should reverse his convictions.

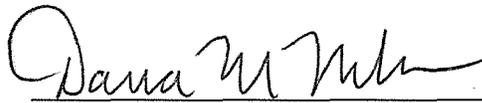
D. CONCLUSION

Ruffin asks that this court reverse his convictions and remand for a new trial because the trial court gave a constitutionally deficient instruction on reasonable doubt. This Court should also reverse because prosecutorial misconduct deprived Ruffin of his right to a fair trial, and because the court's erroneous ruling excluding key defense evidence deprived him of his right to present a defense.

Dated this 11th day of May, 2015

Respectfully submitted

NIELSEN, BROMAN & KOCH



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APPENDIX A

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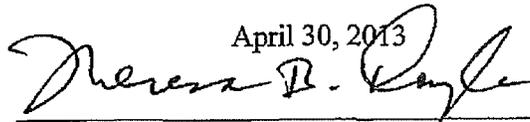
FILED
KING COUNTY, WASHINGTON
APR 30 2013
SUPERIOR COURT CLERK
LINDSEY JONES
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,)
)
Plaintiff,) No. 12-1-01162-8 SEA
vs.)
)
JACOB ANDREW MOMMER)
)
Defendant.)

COURT'S INSTRUCTIONS TO THE JURY

April 30, 2013



Theresa B. Doyle, Judge

ORIGINAL

COURT'S INSTRUCTIONS TO THE JURY

Theresa B. Doyle, Judge
King County Superior Court
516 Third Avenue
Seattle WA 98104
(206) 296-9140

No. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors

that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not

consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

No. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

No. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt: The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

No. 4

The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way.

No. 

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

No. 6

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

No. 7

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of Detective Norton's testimony regarding statements made to him by Marcus Neble and may be considered by you only for the purpose of deciding what weight or credibility to give the testimony of Marcus Neble. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

No.

8

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

No. 9

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

No. 10

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

No. 11

A person commits the crime of murder in the first degree when he or an accomplice commits or attempts to commit robbery in the first degree or robbery in the second degree and in the course of or in furtherance of such crime or in immediate flight from such crime he or another participant causes the death of a person other than one of the participants.

No. 12

A person commits the crime of robbery when he unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or to the person or property of anyone. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial. The taking constitutes robbery, even if death precedes the taking, whenever the taking and a homicide are part of the same transaction.

No. 13

Theft mean to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services or by color or aid of deception, to obtain control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services.

No. 14

A person commits the crime of robbery in the first degree when in the commission of a robbery or in immediate flight therefrom he is armed with a deadly weapon or inflicts bodily injury.

No. 15

Bodily injury means physical pain or injury, illness, or an impairment of physical condition.

No. 10

A person commits the crime of robbery in the second degree when he commits robbery.

No. 17

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

No. 10

A "participant" in a crime is a person who is involved in committing that crime, either as a principal or as an accomplice. A victim of a crime is not a "participant" in that crime.

No. 19

To convict the defendant of the crime of murder in the first degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about January 3, 2012, the defendant or an accomplice committed or attempted to commit robbery in the first degree or robbery in the second degree;

(2) That the defendant or an accomplice caused the death of Ashton Reyes in the course of or in furtherance of such crimes or in immediate flight from such crimes;

(3) That Ashton Reyes was not a participant in the crimes of robbery in the first degree or robbery in the second degree; and

(4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count I.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Count I.

No. 20

A person commits the crime of assault in the second degree when he assaults another with a deadly weapon or assaults another with intent to commit a felony.

No. 21

An assault is an intentional touching or shooting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

No. 22

A firearm, whether loaded or unloaded, is a deadly weapon.

No. 23

First-degree robbery and second-degree robbery are felonies.

No. 24

To convict the defendant of the crime of assault in the second degree, as charged in count II, each of the following two elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about January 3, 2012, the defendant or an accomplice assaulted Jason Rose

(a) with a deadly weapon; or

(b) with intent to commit robbery in the first degree or robbery in the second degree; and

(2) That this act occurred in the State of Washington.

If you find from the evidence that element (2) and either alternative element (1)(a) or (1)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that either (1)(a) or (1)(b) has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to either element (1) or (2), then it will be your duty to return a verdict of not guilty as to count II.

No. 25

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions and verdict forms for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

No. 26

You will also be given special verdict forms for the crimes charged in Counts I and II. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of these crimes, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously agree that the answer to the question is "no," you must answer "no". If after full and fair consideration of the ~~evidence you are not able to reach a unanimous decision as to the~~ answer, do not fill in the blank on that special verdict form.

No. 27

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crimes in Counts I and II.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. If one participant in a crime is armed with a firearm, all accomplices to that participant are deemed to be so armed, even if only one firearm is involved.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

APPENDIX B

FILED
KING COUNTY WASHINGTON
MAY - 1 2013
SUPERIOR COURT CLERK
ANDRE JONES
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)
) No. 12-1-01162-8 SEA
Plaintiff,)
)
vs.) VERDICT FORM A
)
JACOB ANDREW MOMMER)
)
Defendant.)

We, the jury, find the defendant JACOB ANDREW MOMMER
Guilty (write in "not guilty" or "guilty") of the
crime of Murder in the First Degree as charged in Count I.

5-1-13
Date

Michael P...
Presiding Juror

FILED
KING COUNTY
MAY - 1 2013
SUPERIOR COURT CLERK
ANDRE JONES
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)
) No. 12-1-01162-8 SEA
Plaintiff,)
)
vs.) VERDICT FORM B
)
JACOB ANDREW MOMMER)
)
Defendant.)

We, the jury, find the defendant JACOB ANDREW MOMMER
Guilty (write in "not guilty" or "guilty") of the
crime of Assault in the Second Degree as charged in Count II.

5-1-13
Date

Mark R.
Presiding Juror

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)
)
 Plaintiff,)
 vs.)
)
 Defendant.)

No. 12-1-01162-8 SEA

SPECIAL VERDICT FORM
COUNT I

FILED
KING COUNTY WASHINGTON
MAY - 1 2013
SUPERIOR COURT CLERK
ANDRE JONES
DEPUTY

We, the jury, return a special verdict by answering as

follows:

QUESTION: Was the defendant armed with a firearm at the time of the commission of the crime in Count I?

ANSWER: Yes (Write "yes" or "no")

5-1-13
Date

[Signature]
Presiding Juror

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 72514-9-1
)	
MARCUS RUFFIN,)	
)	
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 11TH DAY OF MAY 2015 I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MARCUS RUFFIN
 DOC NO. 363697
 WASHINGTON STATE PENITENTIARY
 1313 N. 13TH AVENUE
 WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF MAY 2015.

x *Patrick Mayovsky*