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COURT OF APPEALS
DIVISION TWO

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STATE OF WASHINGTON

No.37588-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY SAKELLIS,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Beverly Grant, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Sakellis' Article 1, § 21 and Sixth Amendment rights to jury unanimity were violated.

2. The prosecutor committed serious, constitutionally offensive misconduct in misstating the proper burden of proof, turning the presumption of innocence on its head and improperly shifting a burden of proof to Sakellis.

3. Sakellis was deprived of his Sixth Amendment and Article 1, § 22 rights to effective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Sakellis was convicted of second-degree assault with a firearm of Luis Bernal. At trial, the prosecution argued that Sakellis was guilty of that crime either a) when he pointed a gun at Bernal, b) when he hit Bernal in the head with the gun or c) as an accomplice when Abel Contreras hit Bernal in the head with the gun. The jury was not instructed that it had to be unanimous as to which assault Sakellis had committed in order to convict and the state failed to clearly elect one act.

a) Were Sakellis' rights to jury unanimity violated and is reversal required where there was insufficient evidence to prove that Sakellis was an accomplice to the assault committed by Contreras?

b) Were Sakellis' rights to jury unanimity violated and is reversal required where there was conflicting evidence about whether he had committed each of the remaining two acts?

c) Is the prosecution unable to meet the heavy burden of proving the failure to instruct the jury on the constitutionally mandated

unanimity requirement?

d) Further, was counsel prejudicially ineffective where he failed to propose an instruction on jury unanimity?

2. In closing argument, the prosecutor told the jury, “[i]n order for you to say the defendant is not guilty,” the jurors had to say, “I doubt the Defendant did this” and that they then had to “fill in the blank” with a specific reason why they believed that Sakellis was not guilty. In addition, the prosecutor projected a “powerpoint” slide which said the same thing.

a) Was this serious misstatement of the prosecutor’s constitutionally mandated burden of proof and the presumption of innocence constitutionally offensive misconduct which improperly shifted a burden of proof to Sakellis?

b) Is the prosecution unable to satisfy the heavy burden of proving the constitutional error harmless because i) the misstatement of the burden of proof affected the jury’s ability to evaluate all of the evidence and ii) there was not overwhelming untainted evidence to prove that Sakellis had committed a second-degree assault with a firearm as opposed to the fourth-degree assault to which he admitted?

c) Although the analysis for constitutional harmless error does not mandate examination of whether counsel was ineffective, was Sakellis deprived of his constitutionally guaranteed rights to effective assistance of counsel by counsel’s failure to even attempt to correct or minimize the serious, corrosive impact of the prosecutor’s misstatements of his constitutional burden?

3. Counsel failed to propose a unanimity instruction even though it was clear the prosecutor was going to rely on several different assaults in arguing that Sakellis was guilty of second-degree assault of Bernal. Counsel also failed to object to constitutionally offensive misconduct which relieved the prosecutor of the full weight of the burden of proof, turned the presumption of innocence into a presumption of guilt and shifted a burden to Sakellis to disprove the state's case. Was counsel prejudicially ineffective?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Anthony Sakellis was charged by corrected information with second-degree felony murder with a firearm enhancement, two counts of second-degree assault with firearm enhancements, first-degree unlawful possession of a firearm and intimidating a witness. RCW 9A.32.050(1)(b); RCW 9A.36.021(1)(c); RCW 9A.72.110(1)(a); RCW 9.41.010; RCW 9.94A.310; RCW 9.94A.370; RCW 9.94A.510; RCW 9.94A.530; CP 106-108. Pretrial and trial proceedings were held before the Honorable Judge Beverly Grant on May 21, September 14, November 1, 7, 15, 19, 27-29 and December 3, 2007, January 2, 8, 10, 14-17, 29-31, and February 4-7, 11-14, 2008.¹ Sakellis was acquitted of the felony

¹The verbatim report of proceedings consists of 30 volumes, which will be referred to as follows:

May 21, 2007, as "1RP;"
September 14, 2007, as "2RP;"
the 26 chronologically paginated volumes containing the proceedings of
November 1, 7, 15, 19, 27-29 and December 3, 2007, January 2, 8, 10, 14-17, 29-31,
February 5-7, 11-14 and April 11, 2008, as "RP;"
the separately paginated volume containing proceedings from the afternoon of
November 27, 2007, as "3RP;"

murder, one count of second-degree assault, the firearm possession and witness intimidation charges and convicted only of one count of second-degree assault with a firearm enhancement. CP 297-305.

At sentencing on April 11, 2008, Judge Grant imposed a standard-range sentence totaling 120 months in custody. RP 2968-2969; CP 311-22. Sakellis appealed and this pleading follows. CP 327-28.

2. Testimony at trial

On December 11, 2006, Luis Bernal (“Taco”) was shot and killed at his apartment by a man named Abel Contreras (“Lalo”). RP 2099. Anthony Sakellis was not in the apartment at the time, having fled after Lalo had hit Taco in the head with a gun, causing the gun to discharge loudly. RP 1456-57, 1619, 2179, 2402; 4RP 62, 131. After Sakellis, a woman named Kelly Kowalski, Jonathan Mayhall (“Lanky”) and Roman Atofau had run out the door, Lalo fired three shots into Taco, who was on the ground where he had fallen when Lalo had hit him in the back of the head with the gun. RP 1420, 1456-57; 4RP 131-32. Sakellis was nevertheless charged with having been an accomplice to Lalo in Lalo’s second-degree assault and ultimate murder of Taco. CP 106-108. Sakellis was also accused of having assaulted Taco and Atofau himself, unlawfully possessing a gun at the time, and trying to intimidate Kowalski into changing her testimony for trial. CP 106-108.

Sakellis was found not guilty of all of the offenses except for one count of second-degree assault of Taco, with a firearm enhancement. CP

the separately paginated volume containing proceedings from February 4, 2008, as “4RP.”

297-305.

Regarding the intimidation charge, Kowalski, who had a prior conviction for forgery, claimed that, sometime after the incident and after Sakellis was taken into custody, Sakellis had called her on her cell phone and pressured her to change her statement, saying nothing would happen to her if she did. RP 1459-61. Kowalski admitted, however, that she did not know “what to say” about the fact that all of the telephone calls from the jail were recorded and, of the 118 calls she received on her phone during the relevant time, none of them was from Sakellis. RP 1468-79, 1930-31. A detective listened to all the jail calls, which were all recorded. RP 2538, 1931. Although a jail corrections officer said it was possible for someone to make a “three-way” call from jail, he admitted he had no way to know if such a thing had occurred and no proof any such call had been made by Sakellis to Kowalski. RP 1955-56, 1963.

Kowalski admitted that she did not tell officers anything about the alleged calls when she was interviewed several times from December of 2006 through June of 2007 and only made that claim for the first time that June. RP 1466-77. She also admitted she never told the defense anything about the alleged pressuring when she was interviewed by them. RP 1466-67. She claimed the prosecutor had asked her the specific question in June so she had then answered. RP 1466-67. She claimed she had another cell phone number at the time as well but could not remember it. RP 1479.

Sakellis testified that he never called Kowalski from jail and never asked her to change her story. RP 2540. The jury found him not guilty of

the intimidation charge. CP 305.

At the time she claimed Sakellis had called her, Kowalski conceded, she was “high.” RP 1480. Kowalski was also high on December 11, 2006, when she was at the apartment and saw the incident which led to Taco’s death. RP 1464.

Kowalski explained that Lalo was a methamphetamine supplier and Taco was a dealer who got his drugs from Lalo and sold them out of his apartment. RP 1430. A woman named Andrea Rideout, who had a romantic relationship with Taco, confirmed that Taco was a dealer and that he had a dispute with Lalo over Lalo selling Rideout drugs behind Taco’s back. RP 1503-1505. Lalo and Taco had also had another argument shortly before December 11, 2006. RP 1588.

Sakellis, who was a friend of Taco’s and had an Ebay business with him, was concerned about the “pounds and pounds” of methamphetamine that Taco was selling through his apartment. RP 2446. Sakellis knew Taco was in debt to people over drugs and that those people were “not the type that you want to mess around with.” RP 2311, 2444. Sakellis had offered to help but Taco had always declined until finally, one day in November, they were at Taco’s apartment and there was a knock on the door. RP 2314. Taco said not to answer it because “it’s the Mexicans and I ain’t got the money right now.” RP 2314. Sakellis nevertheless opened the door and saw several men holding guns. RP 2314, 2480. The men demanded money and Taco said he did not have it, so Sakellis intervened, making a deal that he would give the men the \$5,000 they wanted the following day but they would have to stop selling

Taco drugs. RP 2315, 2444, 2449, 2482. Sakellis aid he gave the men the money because he was concerned that Taco was going to get himself in trouble and needed to get out of the meth business. RP 2315, 2467.

Taco kept saying he was going to quit selling and Sakellis believed his friend. RP 2473-74. A little later, however, Sakellis learned that Taco was still selling and had started getting his drugs from Lalo. RP 2217, 2326, 2467-69.

According to Kowalski, Taco apparently owed “everybody” money, including Lalo. RP 1506-1507. Atofau admitted that he knew Lalo delivered drugs to Taco and Taco was behind on his payments to Lalo, probably by about \$6,000. RP 2230.

The day of the incident, Kowalski, Taco, Atofau and a friend named Toalie Mulitauaopele (“Big T”) were at Taco’s apartment when Lalo showed up and waved a gun around. RP 1434. Kowalski said that Lalo was not angry or aggressive but seemed to be just showing off. RP 1434. Eventually, Lalo put the gun away and Kowalski left, going to the store and elsewhere. RP 1436.

After awhile, Kowalski came back to the apartment and Taco, Lanky and Sakellis were there. RP 1440-41. Kowalski agreed to go to the liquor store and Sakellis said she could take his car. RP 1442. When she walked outside, however, Kowalski saw Atofau and Lalo driving up in Taco’s car. RP 1443. Atofau said “some female” had let him use Taco’s car to go with Lalo to drop off Lalo’s car so the windshield could be replaced. RP 2038, 2039. Rideout admitted she had let Atofau use Taco’s car even though she was not supposed to because Atofau and

Kowalski had taken Taco's car "joyriding" and not returned with it the day before. RP 1516. Lalo had asked Rideout to go with them to drop off his car but Rideout had not wanted to go, because she had some "kind of funny vibes" about Lalo that day, maybe because she knew from Taco that Taco and Lalo had been arguing. RP 1626.

Kowalski asked Lalo and Atofau to take her to the liquor store so she would not be responsible for Sakellis' car. RP 1443. The two men agreed. RP 1443. During the ride, Atofau told Kowalski there was money missing out of her wallet and that Taco had taken it. RP 1445, 2230. Lalo and Atofau were upset about it and Lalo said "[w]e're all going to have a sit down. We have got to talk about this shit." RP 1465, 2230-31.

When they returned to the apartment, Kowalski said, she went out again to a different store to get some mixer for the drinks. RP 1447. Lanky, who had dropped by the apartment with Sakellis, said they were there about 15 minutes before Lalo, Atofau and Kowalski came in. 4RP 41-46. Atofau had on a "hoody" sweatshirt with the hood over his head. 4RP 84.

Lanky was aware of a "conflict" between Sakellis and Atofau. 4RP 81-87. Sakellis said that he was on bad terms with Atofau because Atofau made his money by robbing people. RP 2337. Sakellis knew this because he would see Atofau at Taco's apartment after a robbery and Atofau would be laughing, saying "look what I got" and showing off what he had stolen, then exchanging the items to Taco for drugs. RP 2337. Atofau would look on Craigslist and other places, find someone selling something that Taco wanted and could sell, arrange to meet the seller and

then rob them and bring the item back to Taco. RP 2338, 2484. When Atofau had told Sakellis about a robbery where he took “Play Station” toys brand new in the box, Atofau had made fun of how the victim looked when he was robbed and how scared he got. RP 2339. At the time Atofau was saying this, Atofau was smoking methamphetamine. RP 2339.

Atofau also told Sakellis about assaulting people. RP 2339. Atofau would rob drug dealers and a guy he had robbed who was a dealer would not give up the drugs so Atofau shot him in the leg while they were driving. RP 2339, 2484, 2488. After that, Atofau grabbed the drugs and came to Taco’s, waving the bag of drugs around, laughing and saying “I just shot that fool.” RP 2339. Atofau chose drug dealers because they would not report the crimes. RP 2340. Atofau also stole expensive jewelry as well. RP 2341.

Sakellis said that Atofau had a gun every time Sakellis saw him, nearly every day at Taco’s. RP 2341, 2490. Atofau would show Sakellis the guns he had, saying things like, “man, look[,] I got this brand-new for a hundred bucks.” RP 2342. Atofau would get dope from Taco and trade it for a new gun, then show the new gun off at the apartment. RP 2342.

Big T admitted that Atofau usually had guns with him about half the time Big T saw him. RP 1673.

Prior to the day of the shooting, Sakellis had not been to Taco’s for about three weeks because something had happened with Atofau. RP 2343. Atofau had robbed Sakellis’ then-girlfriend, Julia Kaminski. RP 2344, 2451, 2489. Atofau had known that Kaminski was Sakellis’ girlfriend and that had been a “problem” for Atofau. RP 2344. Kaminski

had called Sakellis and said she was hit with a pistol and a large Samoan girl had punched her in the face. RP 2345, 2491. They had taken money, jewelry and drugs and it was Atofau who had done it. RP 2345-46. One of the pieces of jewelry stolen was a ring that Sakellis had given Kaminski. RP 2346-47.

When Sakellis found out Atofau had robbed Kaminski, Sakellis phoned Atofau and “acted tough,” telling him “you robbed my girl, man.” RP 2347. Atofau denied it but said something about coming to “get him.” RP 2348. Everybody was aware of the robbery, including Rideout, Lanky and Kowalski, who talked to Sakellis about it. RP 2348-50.

When Sakellis told Taco about Atofau’s robbery of Kaminski, Taco did not believe it and said that Atofau would not do that. RP 2350. Sakellis then asked Taco to try to help out and Taco did, trying to get the jewelry and money back and getting the ring back from Atofau eventually. RP 2350. Atofau did not admit involvement, but after that Taco started being reluctant to let Atofau into his home. RP 2351.

Sakellis was afraid of Atofau and that was why he had avoided Taco’s apartment for about three weeks. RP 2352-55. On December 11, 2006, Sakellis had hoped things had died down a little and Taco had said they had. RP 2357, 2451, 2643. Sakellis did not know that Atofau would be at the apartment that day or else he would not have gone. RP 2358, 2477.

Atofau denied that there was a “problem” between him and Sakellis. RP 2231. He denied that he had nothing to do with Kiminski being robbed and was not even aware it had happened. RP 2263. He also

said Sakellis only “thought she was going out with him.” RP 2253, 2256. Atofau also said he “let her go with” Sakellis and declared, “[t]hat was my bitch. I gave her to him.” RP 2257.

Atofau admitted, however, that he had talked with defense counsel about a ring and that Atofau had given the ring back to Kaminski. RP 2243. While he was in Taco’s apartment the day of the incident, Atofau sent Rideout a picture of him and Julia Kiminski on the phone. RP 2244. Rideout said it seemed to her that Atofau was saying he thought it was funny he was “hugging on someone else’s girlfriend,” especially because she knew at the time that Atofau and Sakellis were both at Taco’s. RP 1530-31, 1619.

Atofau said he had never stolen anything from anyone. RP 2212. When confronted, he conceded that he had a second-degree theft conviction, an attempted first-degree theft conviction, a forgery conviction, a second-degree possession of stolen property conviction, and two separate first-degree theft convictions. RP 2213. He claimed, however, that although he was convicted of those crimes he did not steal anything. RP 2213.

When Sakellis saw Atofau at Taco’s apartment that day, Sakellis immediately put his hands down his pants like he had a gun. RP 2375, 2379, 2638. Lalo and Atofau sat down and Atofau said hi to Taco, then looked at Sakellis and said “what’s up.” RP 2379, 2638. Sakellis said Atofau was seeming “crazy.” RP 2379, 2638. Atofau had his hands in his sweatshirt pocket and said to Sakellis, “do you want to see me in the back?” RP 2379, 2508, 2638. Sakellis was sure that Atofau had a gun in

his sweatshirt pocket where Atofau was keeping his hands. RP 2638.

Lanky said Atofau indeed had a gun. 4RP 48-50. While they were all sitting there, Lalo put a gun on the coffee table and then got up and left the room. 4RP 48-50, 159. Lanky said something about an “HK” gun he had and Atofau then pulled a gun out of the pocket of his hoody. 4RP 48-50, 159. Atofau said his gun was an “HK 9,” not really showing it to anyone but just putting it back in his pocket. 4RP 55, 85.

Atofau denied having a gun that day and when asked if he was wearing a “hoody” to hide his gun in said, “I plead the Fifth.” RP 2223, 2225, 2240.

After Atofau pulled out his gun, Lanky said, the conversation “died down.” 4RP 52, 91. Lanky said that Atofau did not seem to be very “casual” at the time and had been sitting “the entire time” with his hand on his gun in his pocket. 4RP 55. Indeed, Lanky said, it was “kind of odd” but Atofau had his hand on his gun in his sweater, never leaving it, which Lanky thought “made the tension kind of build” in the room. 4RP 83.

Sakellis said that Atofau was acting “tough guy” and repeatedly tried to get Sakellis to go back into the back with Atofau. RP 2381. Atofau had a look like “I am going to get you,” directed at Sakellis. RP 2639. When Lalo put his gun down on the table and went down the hall, Atofau got up and sat down in a chair directly across from and facing Sakellis. 4RP 52, 91. Lanky thought this was odd because Atofau had moved from a comfortable couch seat to a chair, and it put Lanky a little “on edge.” 4RP 85. Sakellis was trying to ignore Atofau, starting when

Atofau had pulled out his gun, something Sakellis knew Atofau had done in order to scare Sakellis. RP 2385-87.

Atofau admitted sitting right down next to Sakellis that day even though there were other seats. RP 2231-32. Atofau also conceded that he wanted Sakellis to go into the back room with him to “talk.” RP 2231-32. He maintained, however, that there were no “problems” between them. RP 2231-32.

Sakellis desperately wanted to leave and was sure Atofau was going to rob him or worse. RP 2389, 2408. Lanky said that there was “kind of an eerie feeling in the room,” like “tension was building.” 4RP 54, 163-64. It bothered Lanky enough that he started putting his things away, getting ready to leave. 4RP 54.

Sakellis saw Atofau divert his attention to Lanky for a second, so Sakellis pretended he was reaching for the marijuana on the table, instead grabbing Lalo’s gun. RP 2389-90, 2485. Lanky said Sakellis leaned forward on the edge of his seat and “kind of like rocked back and forth, as not to draw too much attention to his movement,” then picked up the gun Lalo had left. 4RP 53. Lanky thought that Sakellis had grabbed the gun that way in an effort to surprise Atofau. 4RP 91.

In contrast, Atofau claimed that Sakellis was handed a gun in a newspaper by Lalo. RP 2169-70.

Sakellis said that he had picked up the gun because he had no other alternative. RP 2389-90, 2485. He was sure that he was going to get robbed and shot by Atofau and did not think that he could get out of the apartment safely without the gun. RP 2408, 2487, 2509.

After Sakellis picked up the gun, Lanky said, he pointed it at Taco “very briefly” and said something like, “[r]emember, Homey, just don’t fuck me off.” 4RP 53. Lanky thought that Sakellis then “slightly” hit Taco backhand in the front of the face with the hand holding the gun. 4RP 59, 92. Lanky could not say whether it was the back of Sakellis’ hand that he used or the gun itself and saw no blood on Taco’s face after Sakellis did that. 4RP 60.

Kowalski, who had returned and was in the kitchen mixing drinks, said she heard some “commotion” and then Sakellis jumped up, started yelling something about Taco owing him some money, pulled a gun out and held it to Taco’s head. RP 1448.

Sakellis said Taco did not owe him any money at the time of his death. RP 2327.

Atofau claimed that Sakellis had taken the gun from the newspaper, then stood up and pointed it at Taco, saying, “I want my shit.” RP 2169-72. According to Atofau, Sakellis then hit Taco in the head with the gun. RP 2169-72. Atofau maintained that he then saw Taco with blood dripping from his head and Taco said, “I am bleeding.” RP 2171, 2235. Atofau said he told Taco to just “give” whatever Sakellis wanted to him. RP 2171, 2235.

When he was telling police about the incident, Atofau never said that he saw blood. RP 2235. Instead, he said that Sakellis did not really “get him good on the head” when he hit Taco. RP 2235.

Atofau admitted he was smoking pot and methamphetamine that day. RP 2209.

Sakellis said that, after he grabbed the gun from the table, he waved it around and then hit Taco in the head with his hand, saying “don’t fuck me off,” which meant Taco should not give Atofau and Lalo the Ebay money. RP 2391, 2392. While the gun was in his hand at the time, Sakellis did not think it made contact with Taco’s face. RP 2393. Sakellis did not claim any justification for hitting Taco but said he did not intend to harm him. RP 2394, 2512. Sakellis also did not think he ever directed or pointed the gun at Taco. RP 2515.

According to Lanky, Taco really did not say anything, instead just kind of looking at the ground. 4RP 57, 92. Sakellis then pointed the gun at Atofau, telling Atofau he was not going to shoot him but Atofau needed to “put down the fucking gun.” RP 2392, 4RP 57, 29. Atofau was trying to move and Sakellis repeated, “put down the fucking gun now.” RP 2394. Lanky heard Sakellis also say, “I’m just trying to get me and my homey out of here.” 4RP 119. Sakellis confirmed that he said he just wanted to leave with Lanky. RP 2394, 2527, 2646.

Atofau said Sakellis was clearly scared, biting his lip and waving the gun around. RP 2172-73, 2217, 2235. Atofau claimed, however, that he did not know of any reason why Sakellis would be scared of him. RP 2236. Atofau also declared that he was not scared of Sakellis. RP 2172, 2217. Lanky and Sakellis said that, at that point, Lalo came back and said to Sakellis something about Atofau being a “homey” and that Sakellis should not shoot him. 4RP 58, 2394, 2527, 2646. Lalo told Sakellis Atofau was cool and then reached towards Atofau’s gun, which Atofau now had out in his hand. RP 2395-97, 4RP 61. Sakellis then dropped his

arm and the gun. 4RP 59, 61.

Kowalski had by then come back and said she saw Lalo then point Atofau's gun at Taco, at Sakellis, and at "the whole room pretty much." RP 1452-53. She did not recall what Lalo was saying. RP 1453.

Suddenly, Lalo screamed, "[y]ou know I didn't get my shit yesterday," meaning he did not get to "re-up" or buy more drugs from his supplier. 4RP 121, RP 2395, 2398. Lanky saw Lalo go towards Taco "at full running speed" and, using "extreme force," hit Taco in the back of the head with Atofau's gun. 4RP 61, 121. Sakellis said the hit was hard. RP 2395. Taco screamed out in pain and Lanky saw blood start coming from the back of Taco's head. 4RP 61, 120. Kowalski said she saw Taco bleeding and heard him say so and grab the top of his head. RP 1445-55. She never said anything about that to police. RP 1473.

Atofau said that Lalo had not run at Taco but had instead walked towards him after looking at Sakellis. RP 2175. Atofau said that, at that point Atofau figured he was going to get shot so he started to run. RP 2175. Atofau claimed he did so even though Sakellis had a gun pointed at him. RP 2174, 2207. Atofau also claimed that he did not see anything that followed. RP 2174, 2207.

At the moment that Lalo had hit Taco, the gun went off and a round went into the wall. 4RP 61, 122, RP 2396, 2530.

After the gunshot sounded, Sakellis, Lanky and Kowalski ran. RP 1456-57. Atofau made it out the door first, followed by Sakellis and Lanky. 4RP 62, 131. Lanky saw Atofau kind of "fumbling" with the lock and he could not tell if Atofau was trying to lock them in or unlock the

door. 4RP 131. Sakellis said Atofau tried to hold them in but eventually Sakellis pushed the door open and they all ran out. RP 2401.

Once outside, they heard several shots, close together. RP 1456-57. Atofau said he thought Sakellis was shooting at him, even claiming a bullet came “close” to him. RP 2179. Officers, however, found no evidence of any shots fired in the hall, nor did any witnesses see anything other than Sakellis and the others running. RP 1543-46, 1619, 2210, 2413. Lalo ran out last, carrying a printer and some money orders. RP 1543-46, 1619, 2413.

Kowalski claimed she never saw Atofau with a gun that night and did not sense any tension between him and Sakellis. RP 1458-59. She admitted, however, that she had smoked methamphetamine shortly before the incident occurred. RP 1464.

A bullet was found in the ceiling of the living room and Taco was shot three times, all from the same gun. RP 1742, 1999. The gunshot wounds were fatal and they were consistent with someone standing over Taco and shooting into him. RP 2107.

Atofau claimed that, the night before the shooting, he heard Sakellis on the phone with Taco saying “I will come over and tell him myself.” RP 2191. Atofau said Sakellis wanted \$10,000 in money orders and saying “fuck you.” RP 2191. Atofau did not, however, claim that Sakellis made any threats in that call. RP 2189-91.

At trial, Atofau was given partial immunity by the prosecution, meaning he was given immunity from prosecution for everything which happened on December 11, 2006. RP 2046. He already had “two strikes”

and was particularly concerned about not being housed in the same prison as Lalo because he was “not trying to get another strike” and “that’s what it’s going to come to.” RP 2216.

Rideout claimed that a couple of days prior to December 11 she had answered Taco’s phone and someone using Sakellis’ number asked to speak to Taco, told her to wake him up, and said, “I am going to kill that fat fuck.” RP 1554-69. Rideout, who admitted to using another name at times, said she did not know exactly when the call had supposedly occurred, because she had been using methamphetamine nonstop and things get “[a] little distorted.” RP 1572-73, 1585.

Sakellis made it clear he had no idea what Lalo was going to do that day. RP 2427. Lalo had assaulted Taco without Sakellis’ knowledge. RP 2427.

Kowalski admitted she did not see Lalo and Sakellis around each other very often. RP 1430. Lanky had been hanging out with Sakellis every day for about two weeks before the incident and never saw Lalo with Sakellis. 4RP 81. Lanky also made it clear that he had spent the entire day with Sakellis the day of the incident and never once saw him alone with Lalo. 4RP 132. Lanky saw no discussions between Lalo and Sakellis that day at all, and saw no interactions between them in the apartment before the incident. 4RP 132.

After the shooting, Sakellis buried the gun. RP 2412, 2533.

Lanky said he and Sakellis were both “shaken up” by what had occurred and Sakellis had broken down, crying and saying he could not believe that this crazy person had killed his friend. 4RP 72. Before Lanky

spoke to police, he met with a lawyer, borrowing the money from Sakellis' dad to pay for the consultation fee. 4RP 73. Lanky and Sakellis did not, however, discuss what they were going to say to police and Sakellis was not part of the conversation between Lanky and Sakellis' dad. 4RP 74, 2427. Sakellis was not there when his dad gave Lanky the money and Lanky chose his own lawyer himself. 4RP 128.

Sakellis spoke with police, too, but his attorney was there with him and actively involved in the interview. 4RP 1730. His attorney told him not to answer several questions and not to admit having a gun or assaulting or threatening anyone himself. 4RP 1730, 1738, 1751, 1761, 1769, 2598, 2602. Sakellis knew he was not supposed to have a gun so if he told the police anything about it he knew he would be in trouble. RP 2529.

Lalo was caught several days later after a car chase which ended when he crashed into a high school, ran on foot and was ultimately caught by a police dog. RP 1845, 1969. Sakellis was not with him. RP 1971.

The medical examiner who conducted the autopsy on Taco testified that there was blood around his nose and mouth which could have come from the right lung injury or an impact. RP 2073, 2078, 2080. It was not possible to tell where the blood originated from and it was all "a continuous pool." RP 2110. He thought it was likely, however, that the blood came from the lungs. RP 2110.

The examiner found no evidence of a broken nose or even any "blunt force impact" to the nose or face, beyond the evidence of blood which could have come from the lungs. RP 2111, 2114. There were no

visible injuries other than the gunshot wounds and a “blunt impact” head injury to the back right of Taco’s scalp, which the examiner said was caused by a hard, blunt object directly impacting the back of Taco’s head. RP 2082, 2111.

Indeed, the examiner saw no nicks, cuts, scrapes, injuries or abrasions on Taco’s face or head. RP 2111, 2113. The examiner said, however, that it would be possible to cause someone to bleed from the nose without leaving any external injuries. RP 2117.

The examiner admitted that he was aware, prior to the autopsy, of a claim that Taco had been hit in the face but he was not able to develop “any independent evidence” from the autopsy to support that. RP 2119.

Sakellis admitted that he asked Lanky to change his story and say that Sakellis only had a remote control in his hand but when Lanky said no, Sakellis said, “fine.” RP 2424, 2504, 2540. Lanky said that occurred only after Lanky had already given his statement to police. 4RP 141.

Sakellis was caught in jail trying to pass a letter to another inmate. RP 2604-2605. The letter explained that Sakellis had no part in the killing and he explained that he wrote it because people were threatening him, thinking he had killed Taco. RP 2604-2605, 2612-14, 2616. He wrote other things while in jail, musing about strategies for disrupting a trial and other thoughts. RP 2604-2616.

Sakellis asked for and received self-defense instructions and necessity instructions for all of the charges except the second-degree assault of Bernal. CP 259-96. At trial, he argued that he had only picked up the gun and pointed it at Atofau in self-defense and that he had not

known what Lalo was going to do and was not involved in it in any way. RP 2908-2927. The jury acquitted Sakellis of the charges of being an accomplice to Lalo's murder of Taco. CP 297. They also found him not guilty of assaulting Atofua and of unlawfully possessing the gun. RP 299, 301. Sakellis was only convicted of having assaulted Taco and of being armed with a deadly weapon at the time. CP 302.

D. ARGUMENT

1. SAKELLIS' RIGHTS TO JURY UNANIMITY WERE VIOLATED AND REVERSAL IS REQUIRED

Under Article 1 § 21 of our constitution and the Sixth Amendment, a defendant cannot be convicted of a crime unless the jury is unanimous in concluding that the criminal act for which he has been charged was committed. See State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Where the state presents evidence of multiple acts which could constitute the crime but brings only one charge, one of two things must happen. State v. Ortega-Martinez, 124 Wn.2d 702, 707-708, 881 P.2d 331 (1994). Either the prosecution must specifically and clearly elect the act upon which it is relying for the charge, or the trial court must instruct the jury that it has to be unanimous as to which act it finds has been proven and constitutes the crime. State v. Vander Houwen, 163 Wn.2d 25, 38, 177 P.3d 93 (2008); State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), overruled in part and on other grounds by Kitchen, supra. If neither occurs and only a general verdict is rendered, reversal is required unless the reviewing court can find the error harmless. Kitchen, 110 Wn.2d at 411.

In this case, reversal is required because the jury heard evidence of three second-degree assaults on Taco, no unanimity instruction was given and the prosecution cannot meet the heavy burden of proving the error was sufficiently “harmless” to overcome the presumption of prejudice.

a. Relevant facts

At trial, there was inconsistent evidence about whether Sakellis had pointed the gun at Taco, with Sakellis saying he had not and Lanky and Atofau saying they thought he had but Kowalski saying it was “held” to Taco’s head. RP 1448, 2169-72, 2515, 4RP 53. There was also inconsistent testimony about whether Sakellis had hit Taco in the face with the gun which was in his hand, or just with his hand. RP 2393, 4RP 59-60, 92. Atofau’s testimony about a hard hit was inconsistent with his statement to police that Sakellis did not “get a good hit” on Taco’s face. RP 2235. The state’s expert, the medical examiner, admitted there was no physical evidence to independently show a hit on the face and no nicks, cuts, scrapes or abrasions there. RP 2082, 2111-19.

In closing argument, the prosecutor argued that Sakellis was guilty of assaulting Taco with a gun in one of several ways. He argued that it was “uncontested” that Sakellis had “backhanded” Taco with the gun in his hand, and “that is an assault.” RP 2825. He also argued that a number of witnesses had told the jury that Sakellis was armed with a gun “when he backhanded and pointed the gun” at Taco. RP 2829. The prosecutor admitted that Sakellis had said at trial at one point that he did not ever point a gun at Taco but argued that this claim was not believable. RP 2830. The prosecutor also said there were “really two assaults” on Taco

committed directly by Sakellis; both the pointing of the gun and the backhanding. RP 2833, 2838, 2891.

In addition, the prosecutor noted that a person was guilty of assault “if you or an accomplice assault another with a deadly weapon.” RP 2829. The prosecutor argued that Sakellis was “an accomplice to Lalo’s assault” on Taco. RP 2841. The prosecutor said it was “clear” that Sakellis was acting as an accomplice to that second-degree assault and that there was “no doubt about it” that both Sakellis and Lalo were “assisting one another as principals and accomplices on these offenses.” RP 2850.

According to the prosecutor, Lalo and Sakellis were encouraging each other “as they are building up to the offense as they are in the middle of this Assault in the Second Degree on either one of these victims.” RP 2852-53. Sakellis was an accomplice in the assault on Taco, the prosecutor said, which had occurred when Lalo “took the handgun and cracked” Taco on the head. RP 2853. The prosecutor claimed that Lalo and Sakellis “shared the intent to assault” Taco. RP 2855, 2891. Indeed, the prosecutor declared, “[w]e know Lalo assaulted Luis with the gun, that the Defendant assisted him in doing that, and the evidence is quite clear on that.” RP 2855, 2891. The prosecutor also said “[t]here was an Assault in the Second Degree that the Defendant and Abel Contreras were participating in.” RP 2856. The prosecutor concluded that Sakellis participated in Lalo’s assault on Taco. RP 2863.

During the prosecutor’s argument, he projected a “powerpoint” presentation with multiple slides which talked about accomplice liability

and the assaults on Taco. One of the slides said that, to prove counts IV and X, the assaults against Taco and Atofau, the jury was instructed that “[a] person commits the crime of ASSAULT IN THE SECOND DEGREE when they or an accomplice assaults another with a deadly weapon.” CP 241. Another slide said “Defendant pointed a gun at Luis and Rome = Assault 2” but also again repeated the accomplice liability language of guilt for second-degree assault. CP 242. Not only did slides refer to Sakellis assaulting Taco himself by pointing a gun and having “backhanded/pistol whipped” Taco with the gun in his hand (CP 242-43), they also repeated the prosecutor’s theory that Sakellis was “an accomplice to Lalo’s assault on Luis.” CP 244-48.

Further slides told the jury when someone was an accomplice and that the “Lalo assaulted Luis with gun that defendant assisted him in obtaining.” CP 248. Another reminded the jury that Lalo had “[s]truck Luis in the head with [the] dark gun. CP 249. The prosecutor then projected a slide which said, “Did the defendant participate in Lalo’s assault on Luis?” and again restated the instruction which provided “A person commits the crime of ASSAULT IN THE SECOND DEGREE when he or an accomplice assaults another with a deadly weapon.” CP 249. A slide asked “Did the defendant participate in Lalo’s assault on Luis?,” reiterating the events the prosecutor said occurred. CP 250.

The jury instructions did not include an instruction on unanimity, nor did counsel propose one. CP 230-38, 259-96. The “to convict” instruction on the assault of Taco did not identify the specific assault the state said had occurred, and the definition of assault included several

different types (i.e. placing someone in reasonable apprehension of harm, etc.). CP 268-69, 283-94. The jury was given an instruction which mirrored the “he or an accomplice assaults another” instruction that the prosecutor used repeatedly in his powerpoint presentation, and was given an instruction that a person is liable for the acts of another/accomplice liability instruction not once but twice. CP 268-69, 283-94.

In his closing argument, counsel noted that Sakellis had admitted to hitting Taco with his hand. RP 2913. Counsel disputed the state’s powerpoint slide declaration that Sakellis “assisted in the Assault II on Taco,” arguing that Sakellis did not in any way promote or facilitate Lalo’s assault and that Lalo had grabbed the gun without any discussion, announcement, plan or encouragement from Sakellis. RP 2920-22.

In rebuttal closing argument, the prosecutor declared that “the truth of the matter is the Defendant engaged in criminal behavior as an accomplice,” including as an accomplice to second-degree assault. RP 2944. The prosecutor declared “I know and you know” that Sakellis was guilty of assaulting Taco. RP 2928.

- b. Sakellis’ right to jury unanimity was violated and the state cannot meet the heavy burden of showing the error was harmless

Reversal of the conviction for second-degree assault against Taco is required, because that conviction was obtained in violation of Sakellis’ right to jury unanimity.

As a threshold matter, this issue is properly before the Court. It is well-settled that, even absent counsel’s proposal of a unanimity instruction or objection below, the issue may be raised for the first time on

appeal as a manifest error affecting a constitutional right. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991), cert. denied, 501 U.S. 1237 (1991), overruled on other grounds by, In re the Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 982 (2002); State v. Fiallo-Lopez, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995); RAP 2.5(a)(3).

On review, this Court should reverse. Because it is constitutional error, the failure to give a unanimity instruction in a multiple acts case is presumed to be prejudicial. See State v. Coleman, 159 Wn.2d 509, 512, 150 P.3d 1126 (2007). That presumption is not overcome if a rational juror could have a reasonable doubt about whether one of the incidents supporting the charge occurred. Id. Put another way, the presumption is not overcome if could have a reasonable doubt “as to whether each incident established the crime beyond a reasonable doubt.” Kitchen, 110 Wn.2d at 409, 412. As the Supreme Court has noted:

[W]here the evidence tends to show two separate commissions of the crime, unless there is an election it would be impossible to know that either offense was proved to the satisfaction of all of the jurors beyond a reasonable doubt. The verdict could not be conclusive on this question, since some of the jurors might believe that one of the offenses was so proved and the other jurors wholly disbelieve it but be just as firmly convinced that the other offense was so proved.

State v. Workman, 66 Wn. 292, 294-95, 119 P. 751 (1911). Without an election or instruction, the jurors therefore may each “arrive at a guilty verdict by responding to testimony about discrete incidents - incidents which, if an election were made, the jury may not all agree occurred.” Coleman, 159 Wn.2d at 512.

In this case, there are two reasons a rational juror could have had a

reasonable doubt about whether one of the second-degree assaults with a firearm occurred. for two reasons. First, there were three separate alleged second-degree assaults of Taco upon which the jurors could have relied, one of which was not supported by sufficient evidence. Second, there was conflicting evidence about whether Sakellis committed the “gunpointing” assault or the “backhanding” assault as alleged.

Regarding the insufficiently supported act, Sakellis was accused of assaulting Taco with a firearm. See CP 106-108. At trial, the prosecution presented evidence and argued that Sakellis was guilty of assaulting Taco with a firearm in three ways: 1) pointing the gun at Taco, 2) hitting Taco in the face with his hand while holding the gun, or 3) being an accomplice to Lalo’s assault when Lalo hit Taco in the head with the gun.

But there was not sufficient evidence to prove that Sakellis was an accomplice to the second-degree assault with a firearm committed by Lalo. Accomplice liability requires more than just being present when someone else commits a crime, even if that presence somehow makes the crime easier to commit. See State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981). Instead, a person may only be found guilty as an accomplice if there is proof that he did something in association with the principal to accomplish the crime. State v. Boast, 87 Wn.2d 447, 455-56, 553 P.2d 1322 (1976).

Thus, in State v. Luna, 71 Wn. App. 755, 862 P.2d 620 (1993), a defendant who was with another person who stole a truck and then raced with him in another car could not be held liable as an accomplice to the truck theft because he had not “associated with and participated in the

venture as something he wished to happen and which he sought by his acts to make succeed.” 71 Wn. App. at 759. There was no evidence the defendant knew of or “even suspected” that the other person would steal a truck, nor did the racing amount to “promoting or facilitating” that theft, which was already completed at the time. 71 Wn. App. at 759-60.

Similarly, in State v. Amezola, 49 Wn. App. 78, 741 P.2d 1024 (1978), disagreed with on other grounds by State v. McDonald, 138 Wn.2d 680, 981 P.2d 443 (1999), there was insufficient evidence to support the defendant’s conviction for possession with intent to deliver heroin as an accomplice when she was a live-in companion of a man who had been seen dealing drugs and had quantities of the drug and other contraband in his closet. It was not enough, the Court said, that the defendant was physically present in the home; she must also be proven to have associated with the enterprise in some way. 49 Wn. App. at 88-89. Even though the defendant had performed domestic tasks which made it easier for her boyfriend to commit his crimes, and even thought she might have known that her boyfriend was involved in such criminal activity, that was not sufficient to hold her liable as an accomplice. 49 Wn. App. at 89-90.

And in In re Wilson, 91 Wn.2d 487, 588 P.2d 1161 (1979), a defendant who was with others who stole weatherstripping from office building windows, made it into a “rope” and then strung it across a road was not guilty as an accomplice to the reckless endangerment the others engaged in just by being there and “being involved in the whole atmosphere of what was going on.” 91 Wn.2d at 490. Just being there,

being friends with the perpetrators and even knowing that they were engaging in the illegal conduct was insufficient for accomplice liability, because the state failed to provide any evidence that the defendant sought to associate with or participate in any way. 91 Wn.2d at 491-92.

Here, there was no evidence whatsoever that Sakellis had in any way intentionally aided, assisted, planned or agreed with Lalo's assault on Taco. Indeed, the jury specifically so held, finding Sakellis not guilty of having been an accomplice to that very assault and thus acquitting him of the felony murder predicated on that assault. Thus, there was insufficient evidence to support a conviction for second-degree assault with a firearm enhancement based upon being an accomplice to Lalo's assault on Taco. The presumption of prejudice thus cannot be overcome in this case.

The second reason the presumption of prejudice cannot be overcome in this case is that there was conflicting evidence about whether Sakellis committed the other two acts of second-degree assault. Where there are multiple acts and the testimony is inconsistent as to whether one of the acts occurred, the jury could very well be split as to whether to rely on that act, thus leading to a risk of conviction without unanimity as to the specific act amounting to the crime. See Coleman, 159 Wn.2d at 513-14; State v. York, 152 Wn. App. 92, 95, 216 P.3d 436 (2009). Here, there was inconsistent evidence about whether Sakellis had pointed the gun at Taco, with Sakellis saying he had not and Lanky and Atofau saying they thought he had but Kowalski saying it was "held" to Taco's head. RP 1448, 2169-72, 2515, 4RP 53. There was also inconsistent testimony about whether Sakellis had hit Taco in the face with the gun which was in his hand, or

just with his hand. RP 2393, 4RP 59-60, 92. And Atofau's testimony about a hard hit was inconsistent with his statement to police that Sakellis did not "get a good hit" on Taco's face. RP 2235. Further, the state's expert, the medical examiner, admitted there was no evidence to independently show a hit on the face and no nicks, cuts, scrapes or abrasions there. RP 2082, 2111-19.

In addition, although much of the inconsistency is from testimony by Sakellis himself, the jury clearly found Sakellis' version of other events credible, because it found *for* Sakellis on all of the other charges - something it would not have done if it believed Kowalski and Atofau about what had occurred that day. Thus, because there was conflicting testimony about whether Sakellis committed the gunpointing or backhanding with a gun acts which the prosecution argued were second-degree assault with a firearm, the presumption of prejudice which arises from the failure to give the unanimity instruction cannot be overcome.

Nor is that presumption overcome because of any clear "election" by the prosecution as to the specific act it relied on for this conviction. Even where the trial court record indicates that the state emphasized a particular act over others, where the prosecutor presents evidence about more than one act and refers to more than one act in closing argument, there has been no clear "election" and unanimity is required. See State v. Williams, 136 Wn. App. 486, 497, 150 P.3d 111 (2007). Here, the jury instruction on the second-degree assault of Taco did not identify the act upon which the prosecutor relied, and, in closing, the prosecutor focused primarily on two acts: the "gun pointing" and "backhanding," both of

which involved conflicting evidence. At the same time, however, the prosecutor also used the “accomplice” language in his powerpoint presentation and in his closing in a way which could easily have led a reasonable juror to rely on the alleged act of being an accomplice to Lalo’s second-degree assault of Taco in convicting Sakellis for that assault. The prosecution did not clearly “elect” one specific act for this conviction and the presumption of prejudice thus cannot be overcome.

Because there was therefore insufficient evidence to support one of the second-degree assaults upon which jurors could have relied in finding guilt, and because there was conflicting evidence about the other two acts, Sakellis’ right to jury unanimity was violated and reversal is required.

In response, the prosecution may attempt to argue that the acts were a “continuous course of conduct” so that no unanimity instruction was required. Any such theory should be rejected. As this Court has recently noted, the “continuous course of conduct” exception to the unanimity requirement applies only where the evidence “supports several criminal acts” as part of the same course of continuous conduct, which would support the conviction. See York, 152 Wn. App. at 96; State v. Love, 80 Wn. App. 357, 361, 908 P.2d 385, review denied, 129 Wn.2d 1016 (1996). Where there is such continuous conduct, if the jury is unanimous as to that alleged conduct it is unanimous as to guilt. York, 152 Wn. App. at 96. But the conduct must all have the same purpose or objective, and “one continuing offense must be distinguished from several distinct acts, each of which could be the basis for a criminal charge.”

Petrich, 101 Wn.2d at 571; Love, 80 Wn. App. at 361.

Here, even assuming that pointing the gun at Taco and later hitting him in the head with the hand holding the gun could be seen as a “continuing offense,” the separate conduct by Lalo of hitting Taco in the head, to which Sakellis was allegedly an accomplice, could not be seen as part of that offense. The assaults by Sakellis were allegedly committed with the intent of preventing Taco from giving Lalo and Atofau the money belonging to both Sakellis and Taco. The assault by Lalo, in contrast, was done in punishment of Taco for being the reason that Lalo could not “re-up,” i.e., buy more drugs. The “continuing course of conduct” theory thus does not save the prosecution here.

Finally, this is not a case where the jury was presented with testimony from only one witness about all of the various acts which could have made up the relevant crime. In such cases, like State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990), the failure to give a unanimity instruction may be deemed constitutionally “harmless” because the issue is solely whether the jury believed the victim witness or the defendant and a rational trier of fact who believes the victim’s testimony on the incident would have found guilt for all the possible acts. Put another way, where there is a single victim witness whose testimony is clear, unequivocal and uncontradicted save for the testimony of the defendant, the Supreme Court has found the lack of unanimity instruction harmless because the jury either believed all of that witness’ testimony - and thus guilty for all of the alleged acts - or not. 115 Wn.2d at 70-71.

Here, in contrast, the jury obviously did *not* believe Atofau and

Kowalski on all of their testimony, because it clearly believed Atofau had a gun and threatened Sakellis so that Sakellis was acting in self-defense and with necessity, despite Atofau's claims. And the jury clearly did not believe Kowalski's claims that Sakellis had threatened her and tried to get her to change her testimony, because it acquitted Sakellis of that alleged conduct.

Sakellis' state and federal rights to jury unanimity were violated and the state cannot prove this error harmless. This Court should so hold and should reverse.

c. Counsel was ineffective in failing to request a unanimity instruction

Although it is not necessary for this Court to find counsel ineffective in order to address this issue for the first time on appeal, it is Sakellis' position that the failure to propose a unanimity instruction in this case was, in fact, ineffective assistance and that, on remand, new counsel should be appointed.

Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (___); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a "strong presumption" that

counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

The first question in examining this issue is whether the defendant was entitled to the missing instruction. See, e.g., State v. Kruger, 116 Wn. App. 685, 692-93, 67 P.3d 1147, review denied, 150 Wn.2d 1024 (2003). Here, because there were multiple acts upon which the conviction could be based, Sakellis was so entitled. See Coleman, 159 Wn.2d at 512.

The second question is whether a reasonable attorney should have proposed an instruction under these facts. Kruger, 116 Wn. App. at 692-93. Again, the answer is yes. Sakellis' defense was that he was not guilty of being an accomplice to Lalo's second-degree assault with a firearm of Taco. As a result, obviously, counsel was aware of - and even argued - that there was insufficient evidence as to that act. See RP 2899, 2920-22, 2926-27. Counsel also argued that there was insufficient evidence to prove the "pointing" and the "backhanding with a gun" acts, too. See RP 2913-14.

Thus, counsel was well aware that there were multiple acts upon which the prosecution was relying in arguing Sakellis' guilt. And he was well aware that there were serious problems with the prosecution's evidence on all of the alleged "second-degree assault with a firearm" acts upon which the prosecution was going to rely. There could be no legitimate tactical reason to fail to request a unanimity instruction under these circumstances.

Further, while reversal is required under the constitutional harmless error standard, reversal is also required because counsel's failure to request the unanimity instruction clearly prejudiced his client. As noted above, there was not sufficient evidence to support a conviction on one of the acts and there was conflicting evidence on the other two. Had the jury been informed it had to be unanimous as to the specific act upon which it relied in convicting, it likely would not have convicted Sakellis of the second-degree assault and firearm enhancement but would instead likely have convicted only of the fourth-degree assault which Sakellis said he had committed. Ineffective assistance of counsel also compels reversal in this case.

2. THE PROSECUTOR COMMITTED SERIOUS,
CONSTITUTIONALLY OFFENSIVE MISCONDUCT
AND COUNSEL WAS AGAIN INEFFECTIVE

Reversal is also required because the prosecutor committed constitutionally offensive misconduct in misstating and minimizing his burden of proof and the presumption of innocence and shifting a burden to Sakellis to disprove guilt. Further, counsel was again ineffective in his handling of this misconduct.

a. Relevant facts

In closing argument, in arguing about the standard of reasonable doubt, the prosecutor said he would not read the jurors the instruction because it was "an instruction created by lawyers, and sometimes not very helpful because it uses the words to define itself." RP 2893. He then went on to describe what he said the instruction meant:

In order for you to say the Defendant is not guilty you have to ask yourself, or answer this question. You have to say I doubt the Defendant did this. **For you to find the Defendant not guilty you have to fill in that blank because to have a reasonable doubt, it's one for which a reason exist[s], and you should be able to articulate the doubt which you have,** nor does it say beyond any doubt, beyond a shadow of a doubt, beyond a hundred percent certainty, or beyond all doubts.

RP 2894 (emphasis added). At the same time, the prosecutor projected a “powerpoint” computer display for the jury, first showing the definition of reasonable doubt contained in the instructions and then projecting an image which “explained” the reasonable doubt instruction:

WHAT IT SAYS:

A doubt for which a reason exists

In order to find the defendant not guilty, you have to say:

“I doubt the defendant is guilty, and my reason is _____.”

And you have to fill in the blank.

CP 257.

In his closing argument, counsel argued that the prosecutor had misstated the law of accomplice liability in saying that a person could be found guilty as an accomplice if, “but for” their conduct, the crime would not have occurred. RP 2916.

In rebuttal closing argument, the prosecutor said that “it felt like counsel wanted you to focus your attention on the State and accuse the State of misleading you,” but that “every piece of argument” that he put into the powerpoint and “every reference to the law” that he made in closing was “based on the recollections of” himself and the other prosecutor on the case. RP 2930. He then said that he “didn’t

misinterpret or mislay out the law.” RP 2930.

- b. The arguments were constitutionally offensive misconduct and the prosecution cannot meet the burden of proving it “harmless” beyond a reasonable doubt

The prosecutor’s argument that the jury had to come up with a reason to doubt Sakellis’ guilt and had to be able to “fill in the blank” with that reason in order to find Sakellis not guilty was constitutionally offensive misconduct.

Under both the state and federal due process clauses, the prosecution bears the constitutional burden of proving every element of the crime charged beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991). It is misconduct for a public prosecutor, with all of the weight of his office behind him, to misstate the applicable law when arguing the case to the jury, and this is especially true where the misstatements affect the defendant’s constitutional rights. See, e.g., State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

Further, due process not only requires the prosecution to carry the full weight of its burden of proof but also protects the defendant’s right to a fair trial, which can be violated by improper statements of a prosecutor which mislead the jury as to the law. Davenport, 100 Wn.2d at 763.

Here, both those due process protections were violated by the prosecutor’s “fill in the blank” argument below. With this argument, the prosecutor turned the concept of proof beyond a reasonable doubt, the

prosecutor's burden, the presumption of innocence and the jury's proper role on their heads. The argument told the jury they were required to *convict* unless they could find a specific reason not to do so. Further, the argument plainly implied that Sakellis was responsible for supplying such a reason to the jurors in order to avoid being convicted.

These arguments were clear misconduct. It is not the jurors' duty to presumptively *convict*; it is their duty to presumptively *acquit*, unless and until they find that the state has met its constitutionally mandated burden of proof. See State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995).

Further, "[j]urors may harbor a valid reasonable doubt even if they cannot explain the reason for the doubt." See State v. Medina, 147 N. J. 43, 52, 685 A.2d 1242 (1996), cert. denied, 519 U.S. 1135 (1997). Telling the jurors that they need to come up with a specific reason they believed Sakellis was not guilty was the same as saying that there is a presumption of guilt, rather than a presumption of innocence. See, e.g., State v. Boswell, 170 W. Va. 433, 442-43, 294 S.E.2d 287 (1982); State v. Banks, 260 Kan. 918, 926-28, 927 P.2d 456 (1996). Such argument "fundamentally misstates the reasonable doubt standard" and "impermissibly risks" causing the jury to apply a standard of proof less than that mandated by the constitution. See Chalmers v. Mitchell, 73 F.3d 1262, 1274 (2nd Cir.), cert. denied, 519 U.S. 834 (1996) (Newman, J., dissenting).

In addition, this misconduct was especially egregious because of the way in which the argument was presented. Not only did the

prosecutor tell the jurors they had to “fill in the blank;” he also showed them a visual representation of this same concept, projecting a slide which specifically described the “reasonable doubt” instruction and the language “[a] doubt for which a reason exists” as mandating that:

In order to find the defendant not guilty, you have to say:

“I doubt the defendant is guilty, and my reason is _____.”

And you have to fill in the blank.

CP 257. Thus, the jurors did not just hear the improper argument briefly in passing; they saw it. It is well-recognized that use of such “demonstrative aids” ensures heightened retention of the concepts demonstrated by the jurors. See Caldwell, et. al, *The Art and Architecture of Closing Argument*, 76 Tul. L. Rev. 961, 1042-44 (2002). Indeed, studies have revealed just how effective, noting that “juries remember **85 percent of what they see as opposed to only 15 percent of what they hear.**” Chatterjee, *Admitting Computer Animations: More Caution and a New Approach Are Needed*, 62 Def. Couns. J. 34, 36 (1995) (emphasis added).

Put another way, “[i]nformation that jurors are merely told, they will likely forget; information they are told and shown, they will likely remember. It is that simple.” Caldwell, supra, at 1043. And visual aids such as the powerpoint presentation used in this case communicate to and resonate with the jurors in ways “no amount of verbal description by itself could.” Belli, *Demonstrative Evidence: Seeing is Believing*, Trial, July 1980 at 70-71. Such images are more easily recalled during deliberations and are more memorable for jurors, thus lending more weight to whatever

they portray. Caldwell, supra, at 1044-45.

Thus, the prosecutor's misconduct in this case was magnified a hundredfold and its corrosive impact extreme. The jury was not just *told* the wrong standard; it was *shown* it in a way which ensured that the jurors would believe that the prosecution's burden was far less than the constitution required. Even worse, the jury was told that it had to find Sakellis guilty unless it had a specific, definable reason not to do so. The mere giving of the general reasonable doubt instruction could not have mitigated the prosecutor's "explanation" of what that instruction meant. And no curative instruction could have remedied the pervasive corroding effect of the prosecutor's arguments, as they were cemented in jurors' minds by the images.

Reversal is required. Unlike other misstatements of the law, misstatement of the correct standard of proof beyond a reasonable doubt is especially egregious because of its impact on the constitutional rights of the defendant and the very core of our criminal justice system. The correct standard of proof beyond a reasonable doubt is the "touchstone" of that system. Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), overruled in part and on other grounds by Estelle v. McGuire, 502 U.S. 62, 73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Indeed, as the Supreme Court has recognized, correct application of the standard is the primary "instrument for reducing the risk of convictions resting on factual error." Id.

Further, as this Court noted in State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), the correct standard of reasonable doubt is the

means by which the presumption of innocence is guaranteed, so that it absolutely essential to ensure that the jury is not misled as to the correct standard. Anderson, 153 Wn. App. at 431; see State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). Indeed, the standard has been subject to so many years of litigation and is now so carefully defined that our Supreme Court has recently warned against the “temptation to expand upon the definition of reasonable doubt,” because such expansion may well result in improper dilution of the prosecution’s constitutional burden and the presumption of innocence. Bennett, 161 Wn.2d at 317-18.

The prosecutor’s arguments misstating and minimizing his burden of proof, turning the presumption of innocence on its head and requiring the jury to convict unless they came up with a specific reason not to was serious, constitutionally offensive misconduct which shifted a burden of proof to Sakellis. As such, it is subject to the constitutional harmless error standard. See State v. French, 101 Wn. App. 380, 386, 4 P.3d 857 (2000), review denied, 142 Wn.2d 1022 (2001); State v. Contreras, 57 Wn. App. 471, 473, 788 P.2d 1114, review denied, 115 Wn.2d 1014 (1990); State v. Traweck, 43 Wn. App. 99, 107-108, 715 P.2d 1148 (1986), overruled on other grounds by, State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991). That standard requires the prosecution to shoulder a very heavy burden, which the prosecution cannot meet unless it can convince this Court that *any* reasonable jury would have reached the same result absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

The prosecution cannot meet that burden here. To prove that any

jury would have reached the same result absent the error and the constitutionally offensive misconduct was thus “harmless,” the prosecution has to show that the untainted evidence against Sakellis was so overwhelming that it “necessarily” leads to a finding of guilt. Guloy, 104 Wn.2d at 425.

The first difficulty for the prosecution here is that *none* of the evidence in this case was “untainted” by the prosecutor’s misstatements and minimizing of his constitutionally mandated burden of proof. The proper standard of proof beyond a reasonable doubt is the means of providing the “concrete substance for the presumption of innocence” guaranteed to all the accused. Winship, 397 U.S. at 363. Unless the jury properly understands the correct standard of proof beyond a reasonable doubt, the entire trial is affected, because a “misdescription of the burden of proof” will vitiate all the jury’s findings. See Sullivan v. Louisiana, 508 U.S. 275, 280-81, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

In addition, even if there had been some “untainted” evidence here, the constitutional harmless error test could not be met. The standard of finding “overwhelming untainted evidence” is far different than the standard of establishing that there was “sufficient evidence” to support a conviction challenged for insufficiency on review. See State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002). In Romero, shots were fired in a mobile home park, Romero was seen in the area by officers and other witnesses, he ran from officers just after the crime, officers found a shotgun inside the mobile home where Romero was hiding, shell casings were found on the ground next to the mobile home’s front porch,

descriptions of the shooter identified Romero, and an eyewitness was “one hundred percent” positive the shooter was Romero. Romero, 113 Wn. App. at 783-84. There were a few minor problems with the identification and Romero himself denied being the shooter. 113 Wn. App. at 784. That evidence was sufficient, the Romero Court found, to uphold the conviction against a challenge for insufficiency of the evidence. 113 Wn. App. at 797-98.

But that same evidence was not sufficient to satisfy the constitutional harmless error test, which applied because an officer made comments about Romero not speaking to police, in violation of Romero’s Fifth Amendment rights. Despite the strong evidence supporting the conviction, the Court found, there was not “overwhelming evidence” of guilt, because there was conflicting evidence on certain points. Romero, 113 Wn. App. at 793. The Court could not “say that prejudice did not likely result due to the undercutting effect on Mr. Romero’s defense.” 113 Wn. App. at 794. Because the evidence was disputed, the jury was “[p]resented with a credibility contest,” and “could have been swayed” by the sergeant’s comment, “which insinuated that Mr. Romero was hiding his guilt.” 113 Wn. App. at 795-96.

Here, there was even less evidence supporting the relevant conviction than in Romero. Not only was there insufficient evidence to prove that Sakellis had committed the crime as an accomplice to Lalo’s second-degree assault with a firearm of Taco, the evidence of the other alleged second-degree assaults was conflicting, contradictory and questionable. The “strongest” evidence of the gun pointing and the hitting

came from Atofau, whom the jury clearly did not believe and whose own statement to police belied his testimony about the alleged hitting. Lanky's testimony did not establish that Sakellis had hit Taco with the gun, and Kowalski did not see it. Further, the state's own expert admitted that the physical evidence of Taco's body did not provide independent evidence to verify that any hit on the face had occurred. In this context, given that Sakellis himself testified that he did not point the gun at Taco and did not hit Taco with the gun, there was not "overwhelming untainted evidence" to support guilt for second-degree assault with a firearm, as opposed to the admitted fourth-degree assault. The state cannot prove this constitutional error harmless.

Notably, although this Court does not look at whether constitutional misconduct could have been cured by instruction when the constitutional harmless error standard is applied, it is worth noting that the error could not have been so cured in this case. The concept of reasonable doubt is so complex that even learned judges have difficulty defining it. See State v. Castle, 86 Wn. App. 48, 51-56, 935 P.2d 656, review denied, 133 Wn.2d 1014 (1997), disapproved on other grounds by Bennett, supra. The prosecutor's misstatement of his burden, using an evocative and easy-to-understand phrase ("fill in the blank") and a compelling visual aid, were extremely likely to stick with the jury, as was the idea that the jury must find a specific reason in order to acquit. No curative instruction could have remedied the pervasive corroding effect of the prosecutor's lengthy arguments here. The prosecutor's constitutionally offensive misconduct could not have been cured.

c. In the alternative, counsel was ineffective

In the unlikely event this Court finds that the prosecutor's compelling misstatements of his constitutionally mandated burden of proof, misstating the presumption of innocence and shifting a burden to Sakellis could have been cured if counsel had objected and requested curative jury instructions, this Court should nevertheless reverse based on counsel's ineffectiveness. While in general, the decision whether to object or request instruction is considered "trial tactics," that is not the case in egregious circumstances if there is no legitimate tactical reason for counsel's failure. State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989); see also Hendrickson, 129 Wn.2d at 77-78. In such cases, counsel is shown ineffective if there is no legitimate tactical reason for counsel's failure to object, an objection would likely have been sustained, and an objection would have affected the result of the trial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Again, an examination of ineffectiveness is not necessary in order to grant Sakellis relief based upon this misconduct, because the state cannot prove the constitutional error harmless. But counsel's ineffectiveness is yet another reason reversal is required. There could be no "tactical" reason for failing to object to the prosecutor's complete misstatement of his constitutionally mandated burden of proof, or his creation of a presumption of guilt, or his shifting a burden to Sakellis to effectively disprove guilt. An objection to the misstatement would likely have been sustained, because any reasonable trial court would have

recognized that the prosecution's argument was clearly improper and minimized the constitutional protections to which Mr. Sakellis was entitled.

As a result of counsel's ineffectiveness, the jurors' minds were tainted with an evocative image and idea which allowed them to convict Sakellis based on something far less than proof beyond a reasonable doubt. And given the lack of evidence to prove Sakellis had committed second-degree assault with a firearm instead of fourth-degree assault, the improper argument obviously affected the jury's verdict. Counsel's ineffectiveness provides yet another ground upon which the constitutionally infirm conviction in this case should be reversed.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 20th day of April, 2010.

Respectfully submitted,


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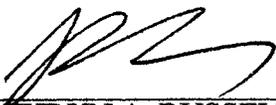
BY _____
DEPUTY

I hereby declare under penalty of perjury under the laws of the State of Washington that I deposited a true and correct copy of the attached brief, first class postage prepaid, to opposing counsel and the defendant at the following address on this date:

TO: Kathleen Proctor, 946 County City Building, 930 Tacoma Ave. S,
Tacoma, WA. 98402;

TO: Anthony Sakellis, DOC 756967, Washington State Penitentiary,
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DATED this 20th day of April, 2010.



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