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A. ARGUMENT IN REPLY

1. The evidence was insufficient to convict Dawn Cooper of conspiracy to commit robbery in the first degree. First degree robbery is defined as follows:

- (1) A person is guilty of robbery in the first degree if:
 - (a) In the commission of a robbery or of immediate flight therefrom, he or she:
 - (i) Is armed with a deadly weapon; or
 - (ii) Displays what appears to be a firearm or other deadly weapon; or
 - (iii) Inflicts bodily injury; or
 - (b) He or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 35.38.060.
- (2) Robbery in the first degree is a class A felony.

RCW 9A.56.200.

The robbery first degree statute provides two relevant alternate means of committing robbery first degree. Therefore, the jury must be unanimous on the issue of guilt, but it need not be unanimous on the way the crime was committed as long as the State presents substantial evidence supporting each charged alternative. State v. Brown, 145 Wn. App. 62, 79, 184 P.3d 1284 (2009).

Here, there was evidence presented that Ms. Cooper believed that Mr. Reading, Mr. Afo, and Mr. Waller might beat up Nathan Hoffman, (RP 390-391); but, there was no evidence presented that Ms. Cooper knew that one of the men had a pistol or intended to use it. Thus, there was not

sufficient evidence presented to support the firearm means of committing robbery first degree, and the conviction must be reversed.

A handgun was found in the car that Mr. Reading, Mr. Afo, and Mr. Waller were riding in, (RP 129-130), but there was no evidence that Ms. Cooper knew of the gun's existence. Witness Kristinna Whitt testified that Mr. Afo implied to her that he had a gun. (RP 299-300). But, Mr. Afo's implication was made to Ms. Whitt; not to Ms. Cooper, and there was no testimony that Ms. Cooper was aware of it in any manner.

WPIC 110.01 defines criminal conspiracy; it reads as follows:

A person commits the crime of robbery 1st degree, when, with intent that conduct constituting the crime of robbery one be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct and any one of them takes a substantial step in pursuance of such agreement.

Thus, the State was required to present evidence that Ms. Cooper intended to commit robbery with a firearm and agreed with one or more persons to engage in robbery with a firearm. But no evidence was presented that Ms. Cooper knew that there was a firearm, much less that she intended that it be used to rob Nate Hoffman.

Ms. Cooper's conviction for robbery first degree must be reversed.

2. The defendants were not joined for trial by the charging documents; the order of joinder was void for lack of basic due

process; Ms. Cooper did not receive a trial within the time requirements of the rule.

The State claims that “even though the trial court, as well as defense counsel for Waller and Reading, apparently believed the charging documents joined the defendants, it is quite possible that they did not.” (Brief of Respondent at 17).

Thus, the State for the first time acknowledges that the defendants were not joined by the charging documents. That concession is completely correct despite the State’s repeated insistence to the contrary in the trial court.

The charging documents here did not meet any part of the rule on joinder, CrR 4.3, or even GR 3. The State points to no other authority for the joinder of defendants for trial and Ms. Cooper found none. Therefore, the charging documents did not join Ms. Cooper’s case for trial with the other defendants. But, Ms. Cooper was tried jointly with Mr. Reading and Mr. Waller, despite her repeated motions and objections to the trial court. The State must show on appeal some legitimate basis for the joinder; yet, there is none. There was an order of joinder entered without due process to Ms. Cooper on January 17, 2008, despite the trial court having that same day granted Ms. Cooper a week’s continuance of that issue, as discussed in Ms. Cooper’s opening brief to this Court.

Apparently, after the continuance was granted, the prosecutor signed an order of joinder, handed it up to the judge, and the judge signed it and entered it. All of this was done without the presence or knowledge of Ms. Cooper or her counsel, and the trial court record contains nothing about how the order was presented, signed, or entered. The only signatures on the order are those of the deputy prosecutor and the judge. (CP 21).

But, that order is void. “Basic due process and the governing rules require notice of court proceedings to counsel of record.” State v. Pruitt, 145 Wn. App. 784, 792, 187 P.3d 326 (2008).

The State claims that the record does not reflect that Cooper or her attorney were ever present on January 24th. It is unknown to Ms. Cooper why the State feels that is important; moreover, the State’s position is disingenuous, as it knows full well that Ms. Cooper’s counsel was present. The deputy prosecuting attorney assigned to the case, David Bruneau, spoke directly to Ms. Cooper’s counsel, Bruce Finlay, in the courtroom on January 24th, as shown by the record. Mr. Bruneau told Mr. Finlay that the matter was not on the calendar by someone’s mistake, that the case would not be called, and that Mr. Finlay could just leave and it would be handled at a later time. (CP 24-25; CP 27). The State has never disputed those facts, nor could it honestly do so.

The State claims that Ms. Cooper's motion to vacate the void order of joinder can be treated as a motion to sever; that the arguments would be the same as a motion to sever or as a motion to vacate joinder.

The State is not correct. A motion to sever assumes that joinder was proper; here, joinder was most definitely neither proper nor ever achieved. The defendants were not joined by the joinder rule, CrR 4.3, and the order of joinder is void for lack of basic due process. Besides the rule and the void order, there is no other method by which the defendants could have been joined for trial.

A void order can be vacated at any time. "Due process of law, orderly procedure, and a decent regard for the rights of individuals, alike require the giving of notice and an opportunity to be heard; and to depart from this universally recognized principal is to disregard . . . a principal as old as the law itself." In re Estates of Smaldino, ___ Wn. App. ___, 212 P.3d 579 (2009), quoting In re Green, 22 Wash. 53, 56, 60 P. 123 (1900).

A first principal of our jurisprudence is that court action must follow, not precede, notice and opportunity to be heard. Smaldino, 212 P.3d at 586. An order entered without notice or opportunity to be heard is void from its inception. State ex. rel. Turner v. Briggs, 94 Wn. App. 299, 305, 971 P.2d 581 (1999); In re Marriage of Leslie, 112 Wn.2d 612, 618-19, 772 P.2d 1013 (1989) (relief granted beyond that requested in

complaint is void); Doe v. Fife Municipal Court, 74 Wn. App. 444, 874 P.2d 182 (1994) (order requiring defendants to pay costs beyond authority of deferred prosecution statutes and therefore void).

Finally, Ms. Cooper sat in jail from November 30, 2007 (CP 6) until her case went to trial on June 18, 2008. (RP 7 6/18/08). She never once waived her right to speedy trial; she repeatedly made her objections to joinder and continuances clear. For many of the continuances, the trial court made no record of the reasons that it granted the State's continuance requests.

3. The trial court erred when it refused to allow Ms. Cooper to call Nate Hoffman in her defense.

The State argues that the trial court was correct to refuse to allow Ms. Cooper to call the victim of her alleged robbery, Nathan Hoffman, in her defense. But, the State makes this argument with unclean hands. The State listed Hoffman on the first three of its six witness lists and it told the jury in opening statement that Mr. Hoffman was the victim in the case. The State knew that Mr. Reading's counsel had a conflict of interest in that he represented both Mr. Reading and Nathan Hoffman for the same incident – the incident for which Dawn Cooper and David Reading were on trial – and chose not to tell either the court or Ms. Cooper's or Mr. Waller's counsel about the conflict.

The State chose to hide this conflict from counsel and from the court. This Court should condemn the State's actions and refuse to allow the State to gain a conviction by taking advantage of its own subterfuge. The records shows that the trial court ruled that Hoffman's testimony was irrelevant in order to avoid a mistrial. The trial court would be in an untenabl position should it allow reading's attorney to cross-examine Mr. Hoffman; it chose to avoid that by yelling at counsel for Ms. Coouer even though eh had nothing to do with the conflict and did not know about it before speaking to Mr. Hoffman in the jail during trial. This entire problem could have been avoided, and should have been, by both Mr. Reading's counsel and the deputy prosecutor informing the court and counsel of the conflict of interest in advance.

Mr. Hoffman's testimony would have been drastically different than Reading's testimony, and would have resulted in Reading and Cooper having inconsistent defenses. The trial court should have granted Ms. Cooper severance and a mistrial when the issue was raised during trial.

The State appears to argue that Hoffman's testimony would be irrelevant because it was contradictory to Mr. Reading's testimony. There is no authority for such a position, nor does it make sense.

Indeed, a trial court has the authority to sever defendants' cases on its own motion, CrR 4.4 (e), and severance should be granted where

defenses among the defendants are irreconcilable. State v. George, 150 Wn. App. 110, 206 P.3d 697 (2009).

Antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive may prejudice a defendant such that the cases should be severed. The defendant must demonstrate that the conflict is so prejudicial that the jury will unjustifiably infer that the conflict alone demonstrates that both defendants are guilty. For defenses to be irreconcilable, they must be mutually exclusive to the extent that one defense must be believed if the other defense is disbelieved. State v. Johnson, 147 Wn. App. 276, 286-87, 194 P.3d 1009 (2008).

Here, if the jury believed Mr. Reading's claim that Hoffman owed him money for a car, it would necessarily have to disbelieve Cooper's defense, through Nate Hoffman's testimony, that Hoffman had borrowed the money to bail a friend out of jail, and had not yet been asked to repay it. The two defenses were mutually exclusive and severance was required.

But, the trial court avoided severance by refusing to allow Ms. Cooper to call Mr. Hoffman to the stand. That decision is not supported by law and greatly prejudiced Ms. Cooper's ability to defend herself. This one error is sufficient for reversal since the right to present a defense is constitutional in nature and origin. "Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v.

Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973);
Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972);
Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019
(1967).

4. The Appearance of Fairness Doctrine was violated.

The State spends a fair amount of time mischaracterizing the record, unfortunately. The State claims that Ms. Cooper's counsel "tried the patience" of the trial judge and the judges who heard pretrial motions, apparently as an excuse for those judges' behavior that was detailed in Ms. Cooper's opening brief and in her emergency appeal to this Court.

But, all persons are entitled to be treated with courtesy and respect by the judge. CJC 3(A)(3) reads in pertinent part as follows:

Judges should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers . . .

Further, the trial judge was not "occasionally impatient" (Brief of Respondent, p. 29) with Ms. Cooper's counsel. The trial judge was well over the line of acceptable conduct as delineated in Ms. Cooper's opening brief; openly displaying anger toward counsel on several occasions, and openly displaying bias toward the prosecutor on one occasion. (RP 837 – Judge: I know him [Mr. Bruneau] by reputation).

Ms. Cooper submits that the record does not disclose any legitimate reason for this behavior; nor does it show that counsel did anything but attempt to represent his client. This argument by the State is not supported by the record and appears to be interposed to draw this Court's attention away from the real issues.

5. The doctrine of cumulative error requires reversal.

But, the record does show cumulative error that deprived Ms. Cooper of a fair trial. The cumulative error doctrine mandates reversal when the cumulative effect of non-reversible error materially affects the trial outcome.

a. "Castle" Instruction. Both parties have discussed the trial court's error in giving a disapproved jury instruction on reasonable doubt when initially charging the jury. The State argues that even though the court should not have given the instruction, it was harmless error. But, that argument was rejected in State v. Castillo, 150 Wn. App. 466, 208 P.3d 1201 (2009).

The court in Castillo held that a conviction must be reversed where trial was held after our Supreme Court's directive to use solely the WPIC instruction on reasonable doubt, but either the Castle instruction or a derivative of it was given. Our Supreme Court had unambiguously directed trial courts to use solely WPIC 4.01 as the reasonable doubt

instruction and neither said nor implied that trial courts were free to ignore the directive if they could find the error of not using WPIC 4.01 harmless beyond a reasonable doubt. The Castillo court was referring to the Supreme Court's opinion in State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007), wherein the Court found the so-called "Castle" instruction on reasonable doubt to be erroneous and directed trial courts to use solely WPIC 4.01.

In Bennett, the Supreme Court reasoned that "[e]ven if many variations of the definition of reasonable doubt meet minimal due process requirements, the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction." Castillo, 150 Wn. App. at 472, discussing Bennett, 161 Wn.2d 303.

Thus, the trial court here erred when it ignored the Supreme Court's directive in Bennett and gave a disapproved jury instruction. That the trial court gave the WPIC instruction later does not help the State, because our Supreme Court unambiguously directed trial courts to use *solely* WPIC 4.01 as the reasonable doubt instruction. Here, Bennett was published about 10 months prior to trial; thus, there can be no argument that the trial court had insufficient time to learn of the Supreme Court's directive. Ms. Cooper's conviction must be reversed.

b. Prosecutorial Misconduct.

The State claims that Ms. Cooper has taken the prosecutor's statements of his own opinion of the veracity of witness Afo "out of context". But, the State fails to explain how the statement was taken out of context or how the context would in some way change the undeniable, unambiguous fact that the prosecutor told the jury his personal opinion of the credibility of a witness. Ms. Cooper submits that the trial deputy, David Bruneau, was blatantly trying to enhance his personal credibility with the jury by showing the jury that he recognized the contradictions in his own witness's testimony; testimony that the State had gained by giving Mr. Afo a deal.

Where a prosecutor commits misconduct, but the defendant does not object, reversal is required if the misconduct is so flagrant and ill-intentioned that it prejudices the defendant. A prosecutor's misconduct is flagrant and ill-intentioned so as to require reversal, even where the defendant does not object, where the prosecutor violates a rule of conduct that is well established by case law. For example, where a prosecutor argued that the jury would have to find that a witness was either mistaken or lying to acquit the defendants, reversal was required even without an objection because the rule against this type of burden shifting argument was at least two years old. Since the rule was well established, the

prosecutor's conduct was flagrant and ill-intentioned. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996).

Here, the rule that a prosecutor may not give his personal opinion of the credibility of a witness or of the guilt of the accused has been established for many, many years; certainly for many more years than the rule in Fleming. See, State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956); State v. Allen, 57 Wn. App. 134, 142, 787 P.2d 566 (1990); State v. Sandoval; 137 Wn. App. 532, 540, 154 P.3d 271 (2007). Therefore, the prosecutor's conduct was so flagrant and ill-intentioned and prejudiced Ms. Cooper. Ms. Cooper's conviction must be reversed.

Nor was this the first time in the trial that Mr. Bruneau attempted to enhance his personal credibility with the jury: his response to an objection that he was leading a witness on direct examination was, "**Your Honor, I have been accused of leading the witness. I wish to hear from the witness so that the whole world knows that I was not leading the witness.**" (RP 288-89).

A leading question suggest to the witness the answer. B. Bergman, N. Hollander, Wharton's Criminal Evidence, s. 8:15 (15th Ed.) ER 611 (c) states generally that leading questions should not be used on direct examination. Moreover, Mr. Bruneau full well knew his bold statement was false, in that the witness' answer could not prove he was not leading

the witness. Mr. Bruneau is a very skilled and experienced trial lawyer; he does not need these tactics; yet he was also the trial lawyer reversed for prosecutorial misconduct in State v. Henderson, 100 Wn. App. 794, 998 P.2d 997 (2000).

Finally, the State routinely ignored the rules of evidence and procedure at trial. As detailed in Ms. Cooper's opening brief, the State led every single witness on direct examination, save one, and continued to do so despite repeated objections from Ms. Cooper and direction to stop from the court. The State stood silently as its police officer witness intentionally turned an un-admitted photograph to full view of the jury. The State ignored and repeatedly violated foundational rules; the deputy prosecutor told Mr. Reading before the jury he should just behave himself. (RP 555); and repeatedly misstated a witness' criminal history, suggesting she was convicted of three separate crimes of dishonest that he knew she was not convicted of. The manner in which the deputy prosecutor asked these questions is revealing, in that Ms. Miller (the witness) repeatedly denied that convictions, yet the deputy prosecutor did not even pause or confront her, as he surely would have, if she'd denied a conviction that he could prove she had. (RP 489, 507, 510, 511). It is no answer at all to claim that the deputy prosecutor "misread" the witness' criminal history.

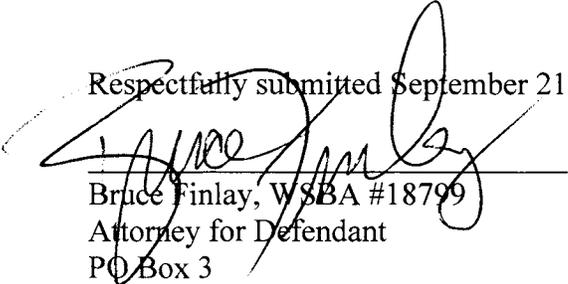
B. CONCLUSION

Several trial errors require reversal by themselves. These include the trial court's ruling that the defendants' cases were joined by operation of the court rule; the trial court's refusal to vacate the void order of joinder; the trial court's refusal to allow Ms. Cooper to call the alleged victim of the robbery in her defense; prosecutorial misconduct that included the prosecutor stating his personal opinion of his own witness' credibility, the prosecutor's statement that he wished the witness to answer the question so that "the whole world" could see he was not leading the witness, and the trial court's use of the disapproved "Castle" instruction on reasonable doubt.

Additionally, the doctrine of cumulative error requires reversal. Assuming for the sake of argument that none of the above errors singly require reversal, this case contained so many errors that Ms. Cooper was deprived of a fair trial.

Therefore, Ms. Cooper requests that this Court reverse her conviction and order either dismissal of the case or that she receive a new trial in front of a different judge.

Respectfully submitted September 21, 2009.



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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY ON
DEPUTY

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

STATE OF WASHINGTON)
Respondent,) No. 38008-1-II
) (Thurston County Superior Court
vs.) #07-1-02074-1)
) DECLARATION OF
DAWN M. COOPER,) SERVICE BY MAIL – REPLY BRIEF OF
Appellant.) APPELLANT
)

I, Pat Lewis, on September 22, 2009, mailed via the United States
Postal Service, first class and postage prepaid from Shelton, Washington,
the following document:

Reply Brief of Appellant

to:

David Bruneau, Deputy Prosecuting Attorney, and to Appellant
Dawn Cooper.

DECLARATION OF SERVICE BY
MAIL-1

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

DATED: September 22, 2009, at Shelton, Washington.

Pat Lewis

Pat Lewis, legal assistant for
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DECLARATION OF SERVICE BY
MAIL-2

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