

No. 38570-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DARRIS STOKES,

Appellant.

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STATE OF WASHINGTON  
BY [Signature]  
IDENTITY

COURT OF APPEALS  
DIVISION II

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

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The Honorables Thomas J. Felnagle (trial), Katherine M. Stolz, Ronald  
Culpepper and Bryan Chuschcoff (motions and continuances), Judges

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APPELLANT'S OPENING BRIEF

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60-8-01 WH

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A. ASSIGNMENTS OF ERROR

1. The prosecution failed to present constitutionally sufficient evidence to prove all the essential elements of the two counts of attempted second-degree assault.

2. The trial court erred in instructing the jury on the attempted second-degree assault counts in the absence of sufficient evidence to support those counts.

3. Appellant's state and federal constitutional due process rights were violated when the trial court allowed the prosecution to use what amounted to a mandatory presumption as part of its proof of the attempted assault cases.

4. In the alternative, the sentencing court erred in counting the attempted second-degree assault counts separately because they were the same under double jeopardy principles and should have been merged with the first-degree robbery and dismissed with prejudice.

5. Mr. Stokes was deprived of his Sixth Amendment and Article I, § 22, rights to effective assistance of counsel at sentencing.

6. The prosecutor committed repeated prejudicial misconduct in closing argument and there is more than a substantial likelihood that misconduct affected the verdicts.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Appellant Darris Stokes was alleged to have gone into an apartment where he pointed a gun at a woman and demanded her money. The prosecution's theory was that Stokes had also committed two counts of attempted second-degree assault of two children inside the apartment.

To prove those counts, the prosecution was required to prove that Stokes had taken a significant step towards causing a reasonable apprehension of bodily injury in the children with the gun and that he had done so with the specific intent of creating that apprehension in the children.

a. Did the prosecution fail to prove that Stokes had the required specific intent where Stokes never pointed the gun at the children and never threatened to use the gun on them and where the children had their eyes covered and then left the room almost immediately after the incident began?

b. In allowing the attempted second-degree assault charges to be submitted to the jury despite a defense motion to dismiss, the trial court relied on the belief that the defendants could be presumed to have had the required specific intent to create an apprehension of harm of everyone who was inside the apartment, because there would be no other reason to bring a gun into the apartment to commit a robbery. The prosecutor argued that same theory in arguing guilt.

Was this an improper, unconstitutional mandatory presumption which relieved the prosecution of its burden of proving the required specific intent? Did the court err in relying on that presumption and in allowing the prosecution to do so?

c. Did the trial court err in giving instructions on attempted second-degree assault when there was insufficient evidence to support submitting those charges to the jury?

2. In the alternative, is reversal and remand for resentencing and dismissal with prejudice of the attempted assault convictions required

because those convictions merged with the first-degree robbery for double jeopardy purposes as they were based upon the conduct enhancing the robbery to first-degree and had no purpose or injury other than furthering the robbery?

Further, was counsel prejudicially ineffective in failing to argue double jeopardy and merger at sentencing?

3. A jury's duty is solely to decide whether the state has proven its case beyond a reasonable doubt, which does not require the jury to decide the "truth" or vindicate "justice." Did the prosecutor commit serious misconduct in repeatedly telling the jury that it had to decide the "truth" and render a verdict which "represents the truth" and were there to "ensure that justice happens?"

Further, did the trial court err in overruling counsel's multiple objections to the prosecutor's misstatement of the jury's role and the prosecution's burden?

4. The prosecutor also told the jury that it had to "find" a reasonable doubt, that it had to decide if the defense evidence created reasonable doubt, and that the jurors could convict if they had a "belief" in guilt despite having "some doubts." Did these arguments misstate the crucial standard of the prosecution's constitutionally mandated burden of proving its case beyond a reasonable doubt?

Further, did the trial court err in overruling counsel's multiple objections to this serious misconduct?

5. Is reversal required because there is more than a substantial likelihood that the misconduct affected the jury's verdicts?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Darris Stokes was charged, together with Charles Tynes, with first-degree robbery with a “firearm and/or deadly weapon” enhancement and two counts of second-degree assault, one against “T.B.” and one against “N.B.” CP 1-2; RCW 9A.36.021(1)(c); RCW 9A.56.190, RCW 9A.56.200(1)(a)(ii). Pretrial proceedings were held before the Honorable Judge Katherine Stolz on July 17, August 27, November 8 and December 6, 2007, March 12, April 8, April 25, July 25, August 14, 2008, before the Honorable Judge Ronald E. Culpepper on October 1, 2008, and before the Honorable Judge Bryan Chuschcoff on August 20, 2008, and a jury trial was held before the Honorable Thomas J. Felnagle on October 29, 30, November 3, 4, 5, 10, 12 and 13, 2008.<sup>1</sup> Before the case was submitted to the jury, the trial court held that there was insufficient evidence to support submitting the two second-degree assault charges to

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<sup>1</sup>The verbatim report of proceedings consists of 21 volumes, which will be referred to as follows:

July 17, 2007, as “1RP;”  
August 27, 2007, as “2RP;”  
November 8, 2007, as “3RP;”  
December 6, 2007, as “4RP;”  
March 12, 2008, as “5RP;”  
April 8, 2008, as “6RP;”  
April 25, 2008, as “7RP;”  
July 25, 2008, as “8RP;”  
August 14, 2008, as “9RP;”  
August 20, 2008, as “10RP;”  
October 1, 2008, as “11RP;”  
October 29, 2008, as “12RP;”  
October 30, 2008, as “13RP;”  
November 3, 2008, as “14RP;”  
the chronologically paginated volumes containing November 4, 5, 10, 12 and 13, 2008, as “15RP;”  
November 6, 2008, as “16RP;”  
the sentencing of November 14, 2008, as “SRP.”

them, instead allowing the prosecution to submit as “lesser includeds” two charges of attempted second-degree assault. 15RP 326,462-63; 16RP 26-30. The jury acquitted Tynes of all charges and found Stokes guilty of the first-degree robbery and the two attempted second-degree assault charges. 15RP 554-59; CP 205-209.

On November 14, 2008, Judge Felnagle ordered Stokes to serve sentences at the high end of the standard ranges for each offense, based upon an offender score of “six.” SRP 3, 16; CP 228-40.

Mr. Stokes appealed and this pleading follows. See CP 245.

2. Testimony at trial

At about 1 p.m. on April 15, 2006, Misty Martinez was at her apartment with her sons T.B., who was 8, and N.B., who was 5, when there was a knock on the door. 15RP 28-37. Martinez, who was on the phone, looked through the peephole on the door and saw a man outside. 15RP 34, 66. She opened the door and the man said, “[e]xcuse me, ma’am.” 15RP 35. Two other men then came up and started pushing on Martinez’ door. 15RP 35. Martinez pushed back but the three men made it inside, knocking the phone from her hand with the door. 15RP 35, 40, 75. All of the men had gloves on their hands, like “white surgical type gloves.” 15RP 47.

Martinez described the first man as “not really heavy set, but a little more broader,” with a lot of acne on his face, short hair and a “medium” complexion for a black man. 15RP 35, 68, 73. At trial, she thought he was in his late teens or early 20s. 15RP 35. She did not remember saying in a pretrial interview that he was probably middle aged

and said it “could have been” a mistake if she said that. 15RP 68, 76. She later explained he was the middle in age of the three people. 15RP 133.

Martinez did not get a good look at the other two men until they were inside the apartment. 15RP 38-40. Once inside, she said, she noticed that one of the men was a lot taller than the others, seemed like the youngest, was a “darker complected” black man and had short hair. 15RP 41, 74. The other one was also black, had a “caramel complexion” and had “cornrow” braids going down the side of his head. 15RP 41, 73. He was in his late teens or early 20s. 15RP 41.

Martinez had never seen any of the three men before. 15RP 39-41.

According to Martinez, the one with the braids had a gun and all three men were “hollering” in loud voices, saying things like, “[b]itch, get on the floor.” 15RP 42. Martinez hollered back at them, “[m]y children are here,” because N.B. and T.B. were sitting on the couch in the living room. 15RP 42.

At that point, Martinez said, they were in the hallway and the man with the gun put it to her head, demanding money. 15RP 43. At about the same time, the taller, darker man grabbed a Halloween cape from the nearby coatrack, threw it to the kids in the living room and told them to cover their faces. 15RP 43. This happened only a few seconds after the men were inside. 15RP 91.

Martinez kept focusing on the gun because the man who had it kept pushing or hitting the tip of it at her eye or temple, asking, “[w]here’s the money? Where’s the money?” 15RP 45, 47. The man was standing to Martinez’ side and she was on the ground. 15RP 46. Martinez said that

every time she tried to look at the man he told her things like “don’t look over here.” 15RP 46. Martinez nevertheless said she saw his face “more or less when he came in.” 15RP 47.

After only a few moments, the man with the gun pulled a blue bandanna-type handkerchief over his face. 15RP 49. The other two men had something that looked like “beanies” on their heads, which they rolled down “into like a ski mask-type thing.” 15RP 51-52. Martinez did “not really” notice what the men were wearing because she was “just more or less looking at their faces, like their eyes and their hands.” 15RP 52.

Martinez had her purse on the love seat next to where she was kneeling and she told them to take the money from it. 15RP 53. The younger, taller man did so. 15RP 53. There was “a couple hundred dollars.” 15RP 55. The man with the gun did not seem satisfied with that and asked again, “[w]here is the money.” 15RP 53. Martinez said she did not have more, reminding the men that her children were there and saying it was her son’s birthday. 15RP 53.

By that point, Martinez’ children had taken the cape off their faces and were standing up. 15RP 53. One of the men told the kids to go to the bathroom and Martinez agreed. 15RP 53-54. Martinez’ oldest son, T.B., “kind of paused for a minute” and stood next to Martinez. 15RP 54. At that point, the one with the gun “kind of grabbed” T.B.’s shirt and asked “[w]here is the money at?” 15RP 54. T.B. “just ignored him,” walking away into the bathroom. 15RP 54.

Martinez estimated that, at that time, only “[m]aybe a few minutes” had passed since the men had first entered the home. 15RP 55, 77.

The men went through Martinez' work bag, dumping stuff out on the ground. 15RP 55. The guy with the gun told the other two to check Martinez' room and they did so, flipping up her mattress. 15RP 56. The taller, darker man said, "[s]he gave us the money. Let's go." 15RP 56. To Martinez, the one with the gun did not seem sure and it seemed he thought there was more money somewhere. 15RP 56. The other men then started searching more and ultimately took her camcorder, cell phone and cigarettes. 15RP 56. They did not, however, take her jewelry. 15RP 57.

Once the men had been there for a total of at most 5 or 10 minutes, they left. 15RP 57. Martinez said she then went to the bathroom to get her kids. 15RP 58. After that, she ran to the door to see if she could see a car leave. 15RP 59, 83. There was no car but she saw two men running one direction and one running a different way. 15RP 59, 83. Martinez grabbed her phone and called the police emergency telephone number, 9-1-1. 15RP 59. When police arrived few minutes later, Martinez gave a description of the men involved. 15RP 61.

At trial, during direct examination, Martinez was fairly sure the first time she was asked to identify any potential suspects was a couple of days later, not the same day. 15RP 62-63. By the time of cross-examination, however, she had changed her mind and decided that the police had showed her pictures the same day as the incident, as well as a few days later. 15RP 81, 94.

When shown a montage on the day of the incident, Martinez picked out Darris Stokes as the man she thought had the gun. 15RP 102-107, 231. When the officer asked if she was 100% sure, however,

Martinez said she was not. 15RP 99-107. Instead, she was only “about 90, 95 percent” sure the man she picked out looked like the person that did it. 15RP 99.

The officer who showed Martinez the montage said that, within 15 or 20 seconds of seeing it, she was focusing on Stokes’ picture and said “he may be the person” but that “his mouth was open when the incident occurred.” 15RP 232. The officer said that they did not have pictures with people’s mouth’s open so Martinez looked at the photo again, after which she said, “[w]ell, I believe that’s him.” 15RP 232, 284.

A few days later, Martinez was shown another montage by the same officer, and she identified Charles Tynes as also involved in the incident. 15RP 104-105, 233-38. The officer who showed her the montage admitted that Martinez got highly emotional, had a “physical reaction” of fear and cried when she saw Tynes’ picture. 15RP 239. In fact, she was so “shook up” that the officer had to ask if she was okay. 15RP 239-40. The officer told Martinez that they did not have to do the montage viewing that day if she was “confused or whatever,” but Martinez wanted to continue. 15RP 240. She said “I believe that’s him,” the officer asked, “[i]s that him,” and she said “[t]hat’s him.” 15RP 240. This time she was 95 percent sure. 15RP 240.

At that point, Martinez paused and put her head in her hands. 15RP 240. The officer asked what was the matter and Martinez said she had thought that the other guy she had previously identified had been the man who had the gun but upon seeing Tynes’ picture she was not sure and thought it might have been Tynes who had the gun, instead. 15RP 240.

Martinez was still crying and repeated that she did not know if Tynes or Stokes had the gun. 15RP 241, 249, 271, 295. She was concerned that she may have misidentified Stokes as having the gun when he had not. 15RP 295.

At trial, Martinez first denied telling the officer she had made a mistake in identifying Stokes as the one who had the gun. 15RP 107. She said she did not recall telling the officer that she was worried that she might have misidentified the person in the previous montage as the one who had the gun. 15RP 107. A moment later, however, Martinez testified that she had, in fact, been unsure which of the men had the gun towards her. 15RP 108.

In the courtroom, however, when asked to state who she thought was the man who had the gun that day, she said "I am pretty sure that I do." 15RP 50-51. She then pointed out Darris Stokes and Charles Tynes, the two defendants, saying Stokes "looks like the one that had the gun with the rag over his face" that day, while Tynes "looks very familiar as the one that was at my door. 15RP 50, 51.

Martinez' stolen cell phone was later used but officers were not able to find any link between that usage and either Stokes or Tynes. 15RP 78, 250.

T.B. testified that he had forgotten where he was living at the time of the incident and what the apartment looked like but recalled that his room was messy and there were bunk beds. 15RP 143-46. Regarding the incident, he said that someone had knocked on the door, his mom had looked through the "little hole in the top" of the door and seen no one, and

she had then opened the door. 15RP 147. T.B. was on the couch with his brother watching TV at the time and said after the men broke in, his mom fell on the ground and they put a gun to her head and kept asking “[w]here is the money?” 15RP 148.

When asked if he remembered the person who was holding the gun, T.B. said, “[p]robably.” 15RP 148. He then described that man as “a little bit like dark-skinned,” having braids and a mustache and brown eyes. 15RP 148. The other two guys were darker than the guy with the gun. 15RP 149.

T.B. said the men had thrown not a Halloween cape like his mom had said but rather that two “like black bags, like leather bags” over the heads of the kids. 15RP 149. T.B. also did not say the bandanna one was later wearing was blue as his mom had described; he said it was black with white markings. 15RP 150, 155. T.B. and his brother took the bags off their heads and went into the bathroom at some point because they wanted to go there to cry. 15RP 151. They got there by walking through the guys and his mom and, once there, they closed the door. 15RP 151. They were not in there for very long, maybe 30 seconds, before they came out on their own to find Martinez getting up from the floor. 15RP 151-52.

An officer testified that, nearly a year after the incident at Martinez’ apartment, he went to an apartment full of ten men and five children and two of the people there were Tynes and Stokes. 15RP 297-300. The officer was not there investigating anything regarding Tynes or Stokes but said that both Tynes and Stokes had black bandannas on their waistbands at that time. 15RP 319.

Joyce Humphries, Tynes' older sister, testified that her brother had never had his hair braided, did not have bad acne, was living with her at the time and had gone shopping with her, getting back around 1:45, after which he took his girlfriend to work about 2. 15RP 328-35. She also said that he was with her from about 2:45 on that day. 15RP 336. Tynes' girlfriend confirmed that Tynes had driven her to work at about 2 that day. 15RP 336, 342-47. The girlfriend also said she had not seen Stokes that day, and that Stokes and Tynes were friends. 15RP 320-48. Tynes testified along the same lines as his sister and girlfriend, denying involvement with the incident at Martinez' apartment. 15RP 423-437.

Dr. Geoffrey Loftus, an expert in human perception and memory, testified that people under stress like Martinez can perceive themselves as being sure of an identification and even have high confidence in their memory but if they had a poor opportunity to actually memorize what was happening, their memory cannot be deemed accurate. 15RP 362-78.

The doctor said that, if a witness did not have much time to perceive something, had their focus directed on something else or was under high stress, they would not form a good memory and could be influenced by any post-event information such as pictures of people who looked similar to those they thought they had seen. 15RP 378-88. This could lead to misidentification. 15RP 378-88. Indeed, it could lead to a witness not being aware that they were recognizing someone from seeing them in a photo montage but actually reconstructing their memory to believe that the person they saw in the montage was the person they had originally seen, even if they were not. 15RP 401-402. Dr. Loftus also

noted that, when there is a weapon involved, people often focus on that rather than other information around them. 15RP 383-86.

Martinez admitted the incident was “very stressful” and that she was focused on the gun when the men came in. 15RP 83. She said that, every time the gun hit her head, it caused her more and more stress. 15RP 126. In addition, she admitted having a physical reaction to the pictures she was shown in the montages, which she said “affected” her. 15RP 130. After the incident, Martinez was upset enough that she did not stay at the apartment and ended up moving away. 15RP 96-103.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE TWO COUNTS OF ATTEMPTED ASSAULT

Under both the state and federal due process clauses, the prosecution bears the burden of proving all the essential elements of every crime, beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980), overruled in part and on other grounds by, Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); Sixth Amend.; Fourteenth Amend.; Article I, § 3. When the prosecution fails to meet that burden, reversal and dismissal is required. State v. Smith, 155 Wn.2d 496, 504-505, 120 P.3d 559 (2005).

In this case, this Court should reverse and dismiss the two convictions for attempted second-degree assault, because the prosecution failed to present constitutionally sufficient evidence to prove those convictions. Further, this Court should hold that the trial court erred in

allowing the state to go forward with the attempted assault charges and in instructing the jury on those offenses, over Stokes' objection. Finally, because the improper attempted assault convictions were counted in the offender score for the first-degree robbery, resentencing is required.

a. Relevant facts

Stokes was initially charged with, *inter alia*, two counts of second-degree assault, alleged to have been committed when he “did . . . intentionally assault” T.B. and N.B. “with a deadly weapon, to-wit: a handgun.” CP 1-2. After the prosecution rested, the trial court held that there was insufficient evidence to prove the second-degree assaults, because the prosecution had failed to show that either T.B. or N.B. had experienced any reasonable apprehension or fear of bodily injury. 15RP 326,462-63; 16RP 26-30. The prosecutor then argued that there was sufficient evidence to prove attempted second-degree assault of both T.B. and N.B., based upon the theory that Stokes and Tynes had the “intent. . . to go in there, take over, basically, this apartment at gunpoint in order to facilitate the robbery.” 15RP 360-61, 441-46, 456. According to the prosecutor, by bringing a gun to the apartment, the defendants had effectively committed attempted second-degree assault against all the occupants, because that was “circumstantial evidence” that they meant “to put every single person in there on notice by their actions . . . that they must comply or else. They are putting them in fear and apprehension of, in fact, bodily harm, not just fear and apprehension.” 15RP 445.

Counsel for the codefendant argued that there was no indication of any fear of bodily injury on the part of the children and that there had been

absolutely no threat to shoot them at all. 15RP 450. The court agreed but said there was “clearly” a “goal in mind of forcing compliance with everybody” in the apartment because “that’s what the gun implies, that you’re going to do what I tell you to do or you see this gun? The result is going to be you are going to get shot.” 15RP 450. Regarding the lack of evidence of any threat to the children, the court stated, “[w]hy does one produce a gun if one doesn’t want to either use it - - or use it to shoot somebody or use it to scare somebody?” 15RP 450. Counsel for Stokes objected that the prosecution’s theory was essentially that “some general intent to rob encompasses an intent to assault.” 15RP 459-60.

In ruling, the court said the question was “interesting,” stating it was “struck by the argument” that entering a house with a gun, masks and “the intent to rob” meant “you are prepared to force compliance out of anybody in there, and your intent is to do just that.” 15RP 461. The court found that “[b]y producing a gun, you have the implement to create the fear and apprehension that you will need to force compliance” and it could be assumed that the defendants “would have been ready to take stronger steps to force compliance” if necessary and would have, if needed, “been ready to create a reasonable apprehension of imminent fear.” 15RP 462. The court was not sure about the “line” between preparation and “an actual substantial step” but concluded that by entering the house with the gun and masks and “taking the steps to get the kids into another location” that was “certainly sufficient.” 15RP 462. The court decided to instruct on attempted assault in the second-degree. 15RP 463.

Counsel later excepted to the court’s giving all of the instructions

on the attempted assaults, specifically 15, 16, 17, 18 19, 20, 21, 22, verdict form B and verdict form C. 15RP 467-69.

In closing argument, the prosecutor argued that Stokes and Tynes were guilty of attempted second-degree assault of T.B. and N.B. based upon simply being in the apartment with the gun. 15RP 484-86. The prosecutor said that the attempted assaults were committed with “the use of a deadly weapon,” i.e., the gun pointed at Martinez, and that the crimes occurred when Stokes went into the apartment with the gun, because by doing so he “places everybody in that apartment in fear of bodily injury, apprehension and fear of bodily injury.” 15RP 484. The prosecutor admitted there was no testimony of the children having any “reasonable apprehension or fear” as required for completed assaults but argued that, by holding the gun to Martinez and telling the kids to sit still and not look, the implication was that the kids would get hurt if they did not do what they were told. 15RP 486. According to the prosecutor, that was sufficient to prove the required intent for the attempted second-degree assaults. 15RP 486.

Later, in rebuttal closing argument, the prosecutor again argued that he had proven the attempted assaults because anyone going into an apartment with a gun could have only “one reason” for doing so and that was “to scare everyone into submission, so that they can accomplish what they are doing.” 15RP 540.

- b. The evidence was insufficient to prove the attempted second-degree assault charges and the court erred both in allowing the charges to go to the jury and in giving instructions on those charges over defense objection

The court erred in its rulings and reversal and dismissal of the attempted second-degree assault convictions is required, because the prosecution failed to present constitutionally sufficient evidence to prove all of the essential elements of those crimes. Evidence is only sufficient to support a criminal conviction when, taken in the light most favorable to the prosecution, a rational trier of fact could have found all of the elements of the crime, beyond a reasonable doubt. Green, 94 Wn.2d at 221; see Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Where the evidence does not meet that standard, that error may be raised for the first time on appeal and reversal and dismissal is required. See, e.g., State v. Hickman, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998).

In this case, the evidence did not meet that standard for the essential element of the specific intent to cause in T.B. and N.B. a reasonable apprehension or fear of bodily injury with the gun. The base crime, second-degree assault, can be proven in a number of ways, but the way in which it was alleged here was by having assaulted T.B. and N.B. with a deadly weapon. CP 1-2; see RCW 9A.36.021(1)(c). Under RCW 9A.36.021(1)(c), second-degree assault as relevant here occurs when, under circumstances not amounting to first-degree assault, a person assaults another with a deadly weapon. In the jury instructions, this was the only means of committing second-degree assault presented, and assault was defined only as follows:

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

CP 187-88 (Instruction 16, 17).

Thus, the type of second-degree assault Stokes was alleged to have attempted to commit on T.B. and N.B. was using a deadly weapon to create in T.B. and N.B. a reasonable apprehension of fear of bodily injury. Under this means of committing assault, the prosecution must prove that the defendant had the specific intent to create in the particular victim a reasonable apprehension of fear of bodily injury. See State v. Daniels, 87 Wn. App. 149, 155, 940 P.2d 690 (1997), review denied, 133 Wn.2d 1031 (1997); State v. Eastmond, 129 Wn.2d 497, 500, 919 P.2d 577 (1996), overruled in part and on other grounds sub silentio by Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). “Specific intent” means the intent to produce the result, not just the intent to commit the physical act required in order to commit the crime. See State v. Esters, 84 Wn. App. 180, 184, 927 P.2d 1140 (1996), review denied, 131 Wn.2d 1024 (1997), overruled in part and on other grounds sub silentio by Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). This is in contrast with “general intent,” which is the intent to do the relevant physical act. See State v. Nelson, 17 Wn. App. 66, 72, 561 P.2d 1093, review denied, 89 Wn.2d 1001 (1977).

Attempt also requires a specific intent. Under RCW 9A.28.020, to prove a defendant attempted to commit a crime, the prosecution must prove that he or she did an act which amounted to a “substantial step”

towards the commission of the crime and that the act was done with the intent to commit that specific crime. See, e.g., State v. Chhom, 128 Wn.2d 739, 742, 911 P.2d 1014 (1996). As a result, because second-degree assault as relevant here requires the specific intent to place someone in reasonable apprehension of bodily injury with a gun, to prove attempted second-degree assault the prosecution had to prove specific intent to create such an apprehension in T.B. and N.B. with that gun See State v. Dunbar, 117 Wn.2d 587, 590, 817 P.2d 1360 (1999); see CP 190-91 (instructions 19, 20).<sup>2</sup>

The prosecution failed in its burden of proving that specific intent. Simply having a gun - or even showing it - is not sufficient to prove the specific intent to create a reasonable apprehension of fear of bodily injury in a person with it. See Eastmond, 129 Wn.2d at 499; State v. Byrd, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995), reversed in part and on other grounds sub silentio by Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Instead, as this Court has noted, “[t]he display of a gun [alone] cannot support the inference that the defendant had the specific intent to create fear in the victim” with that gun. State v. Callahan, 87 Wn. App. 925, 930 n. 1, 943 P.2d 676 (1977). Such intent may be inferred from the presence of a gun only if the gun is pointed at the alleged victim and that victim is not aware that the gun is unloaded. See Eastmond, 129 Wn.2d at 500; see also, State v. Murphy, 7 Wn. App. 505,

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<sup>2</sup>Although Stokes and his codefendant were charged as accomplices and principals, the prosecutor specifically argued that Stokes had been the person with the gun who had committed the actual attempted assaults. 15RP 480-81.

511, 500 P.2d 1276, review denied, 81 Wn.2d 1008 (1972).

Indeed, the requirement that the gun be directed at a person in order to amount to second-degree assault is what prevents there from being an equal protection violation in allowing the prosecution to choose to charge either the “gun” and “reasonable apprehension” prong of second-degree assault or the separate, less onerous crime of unlawful display of a weapon. State v. Karp, 69 Wn. App. 369, 374-75, 848 P.2d 1304, review denied, 122 Wn.2d 1005 (1993). As this Court noted in Karp, the “reasonable apprehension” type of assault, committed with a gun,

requires, among other things, that the defendant commit an intentional act, directed at another person. For example, it is well settled in this state that second degree assault is committed when, within shooting distance, one points a loaded gun at another.

In contrast, the unlawful display statute may be violated even if the actor’s conduct is not directed at any person. It is enough that the weapon is displayed under circumstances, and at a time and place that warrants alarm for the safety of other persons.

69 Wn. App. at 374-75 (citations omitted). “Simply put,” this Court concluded, “general menacing behavior may violate the unlawful display statute,” but unless that menacing is specifically directed at the victim, there can be no conviction for assault. 69 Wn. App. at 375.

Here, there was no evidence that the gun was ever pointed at the children. Nor was there evidence Stokes, Tynes or the unidentified third man ever said anything about using the gun on the kids. Indeed, the prosecution never alleged that such acts occurred. Instead, the prosecution’s theory was that Stokes was per se guilty of attempted second-degree assault of the children - and would be guilty of that crime

against anyone else inside the apartment - simply because he came into the apartment with a gun, intended to commit a robbery. 15RP 439-61; see also, 15RP 484-86. In refusing to dismiss the charges and allowing the state to go forward with them, the trial court relied on this theory, reasoning that by entering the apartment with “intent to rob” and having a gun, it could be *assumed* that the defendants *would have* the required intent, because there was no other reason to have that gun. 15RP 461-62. And the prosecutor repeatedly invoked this theory in closing argument, stating that Stokes was guilty of the attempted assaults by going into the apartment with the gun because doing so “places everybody in that apartment in fear of bodily injury” and because it can be assumed that entering the apartment the gun included the intent to put “every single person he found in that apartment in fear” (15RP 484-85), that there was “only one reason” someone would go into an apartment with a gun to commit a robbery, “and that’s to scare everybody in there into submission, so that they can accomplish what they are doing” (15RP 539), and that, as a result, there was “no issue” that the attempted second-degree assaults had occurred. 15RP 539.

Thus, the prosecutor - and the court - effectively applied a mandatory presumption that anytime anyone enters a home with a gun and the intent to rob someone inside, by definition they have committed attempted second-degree assault against everyone else in the apartment, regardless whether the gun is ever pointed at those other people or threatened to be used against them.

The problem, however, is that this amounts to a mandatory

presumption. A mandatory presumption violates a defendant's due process rights, because it allows the state to argue that, based upon one fact, another fact is necessarily proven, thus relieving the state of its burden of proving every essential element of a crime. See State v. Cantu, 156 Wn.2d 819, 821, 825, 132 P.3d 725 (2006). While the state is entitled to use evidentiary devices such as presumptions and inferences to assist it in meeting its burden of proof, it may not use a mandatory presumption as "sole and sufficient" proof of an essential element of its case. Id.; see State v. Deal, 128 Wn.2d 693, 699-700, 911 P.2d 996 (1996).

Here, that is exactly what the prosecutor - and the court - did. They applied a mandatory presumption that anyone who goes into an apartment with a gun is automatically assumed to intend to commit attempted second-degree assault against everyone inside, regardless whether he points the gun at them or threatens to use it against them. As the trial court declared, "[w]hy does one produce a gun if one doesn't want to either use it - - or use it to shoot somebody or use it to scare somebody"? 15RP 450. And it stated that "by producing a gun," the defendants could be assumed to have "been ready to create a reasonable apprehension of imminent fear" if that apprehension was later needed. 15RP 450, 461. The prosecutor's closing arguments mirrored this theory. 15RP 484-86.

Thus, the implication was that, absent an alternative explanation by Stokes, it could be presumed that Stokes had the specific intent to create in T.B. and N.B. an apprehension or fear of bodily injury merely because he brought the gun into the apartment to commit the robbery against Martinez. Under Eastmond, supra, Byrd, supra, and Callahan, supra,

however, bringing the gun inside, without more, *does not* prove such specific intent. Further, Stokes was not required to provide an alternative explanation for having the gun; as a defendant in a criminal case, he was constitutionally entitled not to present testimony or evidence at all. See, e.g., State v. Barrow, 60 Wn. App. 869, 872, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991).

The court erred in relying on an improper mandatory presumption and allowing the charges of attempted second-degree assault to be submitted to the jury, because there was insufficient evidence to support them. The prosecutor's argument, relying on that presumption, invited the jury to convict Stokes of the attempted assaults, even though there was not sufficient evidence to support them. Because the prosecution failed to present sufficient evidence to prove all of the essential elements of the two counts of attempted second-degree assault, reversal and dismissal of those convictions, with prejudice, is required. Further, because those convictions were counted in the offender score for the first-degree robbery, remand for resentencing within a corrected standard range is required. This Court should so hold.

2. IN THE ALTERNATIVE, THE ATTEMPTED ASSAULT  
CONVICTIONS MERGED WITH THE FIRST-DEGREE  
ROBBERY UNDER DOUBLE JEOPARDY PRINCIPLES  
AND COUNSEL WAS INEFFECTIVE

In the unlikely event that the Court concludes that there was sufficient evidence to support the two counts of attempted second-degree assault, reversal and remand for resentencing and dismissal with prejudice of the attempted assault convictions is nevertheless required because those

convictions merged with the first-degree robbery under both the state and federal double jeopardy clauses. Under those clauses, while the prosecution may bring multiple charges arising from the same acts, courts may not enter multiple convictions or impose multiple punishments for those acts unless the legislature meant to punish them as separate crimes. State v. Freeman, 153 Wn.2d 765, 769, 770-71, 108 P.3d 753 (2005); In re Personal Restraint of Orange, 152 Wn.2d 795, 818, 100 P.3d 291 (2004); Fifth Amend.; Art. I, § 9.

Where the relevant crimes are second-degree assault and first-degree robbery, the Supreme Court has held that the Legislature did not mean for an assault which raised a robbery to first-degree to amount to a separate offense. Freeman, 153 Wn.2d at 776-78. The Court noted that the merger doctrine applies when the Legislature “has clearly indicated that in order to prove a particular degree of crime. . . the State must prove not only that a defendant committed that crime. . . but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes.” 153 Wn.2d at 777-78, quoting, State v. Vladovic, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983).

As a result, the Court held, second-degree assault will usually merge with first-degree robbery under double jeopardy and merger principles. Freeman, 153 Wn.2d at 769-70. And the Court has recently reaffirmed this conclusion, declaring that, “when an assault elevates a robbery to first degree, generally the two offenses are the same for double jeopardy purposes.” State v. Kier, 164 Wn.2d 798, 802, 194 P.3d 212 (2008).

Thus, in Freeman, the assaults elevated the robbery crime to first-degree and merged in both cases on review. 153 Wn.2d at 769-70. In one case, the a defendant pulled a gun on someone, demanded valuables, said, “[w]hat, you think I won’t shoot you,” shot the victim, then robbed him and left for dead. 153 Wn.2d at 759. In the other, the defendant agreed to meet a woman to arrange to sell drugs to her, changed his mind, punched her in the head, caused serious injuries, then robbed her of money. 153 Wn.2d at 770. In holding that the assaults and robberies merged for double jeopardy purposes, the Court noted that, without the acts amounting to the assaults, the robberies would only have been second-degree robbery, not first. 153 Wn.2d at 778. The assaults thus would merge into the robberies unless it was shown that the assaults had “an independent purpose or effect.” Id. To meet that standard, the assaults had to cause an injury and have a purpose separate and distinct from and not merely incidental to the robberies. Id. Because the evidence in both cases showed that the assaults were simply part of the robbery incidents, merger was required. 153 Wn.2d at 779-80.

Similarly, here, merger of the attempted assaults of T.B. and N.B. is required under double jeopardy principles. Neither of the attempted assaults had any independent purpose or effect. Instead, as the prosecution itself repeatedly argued, the purpose of the conduct the prosecution claimed amounted to the attempted assaults, i.e., the bringing of the gun into the apartment *to commit the robbery*, was the robbery. See 15RP 484-85, 539. Indeed, the prosecutor argued, coming into the apartment with the gun and disguises was done for “only one reason,” which was “to scare

everybody there into submission, so that” the defendants “can accomplish what they are doing” - the robbery. 15RP 539.

Further, it is not significant that the assaults were attempted and the robbery completed. The attempted assaults were alleged to have been committed with the gun, and the required specific intent to place T.B. and N.B. in fear or apprehension of bodily injury was alleged to have been proven by having the gun. But it was the having of the gun - the very same act - which was the basis for elevating the robbery here to first-degree. See, e.g., CP 1-2.

Nor is it significant that T.B. and N.B. were not specifically argued to have been victims of the robbery. Kier, supra, is instructive. In Kier, the defendant approached a man, Hudson, when he got out of a car. 164 Wn.2d at 802. Hudson got away and the defendant then pointed a gun at Ellison, who was still in the car. Id. The defendant demanded money from Ellison and ordered him out of the car before driving the car away. Id. Kier was charged with first-degree robbery, with Hudson and Ellison named as victims, and second-degree assault, with the only named victim being Ellison. 164 Wn.2d at 803. After Freeman was decided, Kier sought relief, arguing that the second-degree assault should have merged into the robbery under Freeman. Kier, 164 Wn.2d at 803.

On review, the Supreme Court reaffirmed its holding of Freeman despite the state’s invitation to hold that Freeman was “decided incorrectly.” Kier, 164 Wn.2d at 805. The Court declared itself “persuaded” that Freeman had “correctly analyzed” the relevant statutes and properly reached its conclusion that second-degree assault which

elevates a robbery to first-degree will usually merge into the robbery. Id.

Next, the Kier Court examined the issue of whether the analysis was changed by the fact that the prosecutor had argued, in closing, that Hudson was the victim of the robbery while Ellison was the victim of the assault. Id. The Court first noted that Kier had been convicted of first-degree robbery under the means of the a crime which occurs when someone “is armed with a deadly weapon or displays what appears to be a firearm or deadly weapon, during the commission of a robbery.” 164 Wn.2d at 805-806. For the assault, the Court noted, Kier was accused of having assaulted someone with a deadly weapon, with the common law definition of assault of “putting another in apprehension of fear or harm” having been given to the jury. Id. The Court then concluded the assault and the robbery were the same:

[I]t is clear that both charges required the State to prove that Kier’s conduct created a reasonable apprehension of fear or harm. Because Kier was also charged with being armed with or displaying a deadly weapon, this was the means of creating that apprehension or fear. The merger doctrine is triggered when the second degree assault with a deadly weapon elevates the robbery to the first degree because being armed with or displaying a firearm or deadly weapon to take property through force or fear is essential to the elevation.

164 Wn.2d at 806.

The Court also rejected the state’s efforts to argue that there was no merger because of the theory that the crimes “were committed against separate victims.” 164 Wn.2d at 808. In reaching its conclusion, the Court first looked at the jury instructions, noting that the robbery “to-convict” instruction said only that the victim was “a person” or “another,” while the assault “to-convict” specifically referred to Ellison. 164 Wn.2d

at 809. The Court then noted that both Ellison and Hudson were referred to during testimony as “the victims” and that Ellison had the gun pointed at him when he was ordered out of the car. 164 Wn.2d at 809. Even though the prosecutor specifically argued that the robbery was against Hudson and the assault was against Ellison, the Court found, because the robbery instruction did not identify Hudson as the sole victim of the robbery, the jury could have been led the jury to conclude the robbery instruction applied equally to Hudson, or Ellison, or both. Kier, 164 Wn.2d at 812.

Further, the Court noted, proof of robbery did not “require the specific identity of the victim or victims,” so that the prosecution did not have to show exactly who was robbed. Id. In addition, the Court found, because “the unit of prosecution allows only one robbery where a single taking of property places multiple victims in fear of harm,” the robbery victim could have been either man, or both. Id. Because the jury heard evidence describing both men as victims of the robbery and the instruction did not specify the victim, the jury’s verdict was ambiguous and, despite the prosecutor’s closing statement, the ambiguity remained. 164 Wn.2d at 813. As a result, the Court concluded, because the evidence and the instructions allowed the jury to consider Ellison as a victim of the robbery as well as the assault, the ambiguous verdict would be construed under the rule of lenity to require merger of the assault and robbery convictions. 164 Wn.2d at 814.

In this case, as in Kier, the prosecution charged *all* of the people present - Martinez, T.B. and N.B. - as victims of the first-degree robbery.

CP 1-2. The information alleged that the robbery was committed taking the “personal property belonging to another with intent to steal from the person or in the presence of M. Martinez and her family.” CP 1-2 (emphasis added). It also alleged that the taking was “by use or threatened use of immediate force, violence, or fear of injury “to M. Martinez and her family,” by displaying “what appeared to be a firearm or other deadly weapon, to-wit: a handgun.” CP 1-2 (emphasis added).

Further, just as in Kier, here the jury instructions did not identify a specific victim of the robbery. Instruction 8 described the crime of first-degree robbery as occurring “when in the commission of a robbery or in immediate flight there[]from” a person “is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon.” CP 179. The “to-convict” for Stokes, Instruction 13, did not name the victim of the first-degree robbery, instead just describing them as “another” or “the person,” and repeating the language of Instruction 8 about being armed with a deadly weapon or what appeared to be a firearm or deadly weapon. CP 184.

Notably, unlike as in Kier, here the prosecutor *specifically argued* that the victims of the burglary were all of the people present, including T.B. and N.B., the putative victims of the attempted assaults. In closing, the prosecutor argued that the robbery had been committed when the items were taken from the person and in the presence of “another,” defined by the prosecutor as “Ms. Martinez and her children,” 15RP 482 (emphasis added).

Thus, the victims of the attempted assaults *were* victims of the

robbery, both under the charging document and the prosecutor's argument, and any ambiguity by failing to name them as such in the instructions is without moment.

Nor is there any evidence to support a claim that the attempted assaults had any independent purpose or effect. Instead, they were solely to facilitate the robbery. The attempted assaults were allegedly committed when Stokes entered the apartment with the gun, which the prosecutor said placed "everybody in that apartment in fear of bodily injury, apprehension and fear of bodily injury." 15RP 360, 441-46, 456, 484. Indeed, the prosecutor specifically argued to the court that the attempted assaults were proven by Stokes going into the apartment with intent to "take over, basically, this apartment at gunpoint, to facilitate the robbery." 15RP 444 (emphasis added). To the jury, the prosecutor argued that the purpose of having the gun and other items was "to scare everybody there into submission" so that the men could "accomplish" the robbery. 15RP 539. And it was the use of the gun in the apartment which elevated the robbery to first-degree. See CP 1-2.

Thus, the prosecution's own arguments at trial admit that the attempted assaults were simply done in furtherance of the robbery and had no independent purpose or effect.

Under Freeman and Kier, the attempted second-degree assault convictions in this case, committed as part of the commission of the robbery, solely to further that robbery and based upon the use of the gun which elevated the robbery to first-degree, should have merged for double jeopardy and thus sentencing purposes. If this Court finds that there was

sufficient evidence to uphold the convictions for attempted second-degree assault, it is Stokes' position that reversal and remand for a new trial is required for all of the counts, based upon prosecutorial misconduct, as argued, *infra*. If that occurs and there are subsequent convictions for the robbery and attempted assaults, at the subsequent sentencing, merger and double jeopardy would apply. If the Court does not agree that the misconduct compels reversal and remand for a new trial, reversal and remand for resentencing is nonetheless required, because the attempted assault convictions should have merged with the first-degree robbery. Further, in order to vindicate Stokes' double jeopardy rights, dismissal with prejudice of the two attempted assault convictions would then be required. See State v. Womac, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007).

If this Court orders remand for resentencing, or even for a new trial based upon the misconduct argument, *infra*, this Court should order new counsel appointed on Mr. Stokes' behalf, because counsel was ineffective in failing to raise the merger/double jeopardy issue at sentencing. Both the state and federal constitutions guarantee the accused the right to effective assistance. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); 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).

If Mr. Stokes can show that, but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different, reversal is required. Strickland, 466 U.S. at 694.

Counsel's failure to argue merger of the two attempted second-degree assaults at sentencing was clearly deficient performance which prejudiced Stokes. An attorney's failure to cite the court to relevant precedent or know the law applicable to his client's case is not "tactical" and can be the basis for a claim of ineffective assistance. See, e.g., State v. Ermert, 94 Wn.2d 839, 850-51, 621 P.2d 121 (1980). Freeman was decided in 2005, well before the trial in this case. See Freeman, 153 Wn.2d 765. Even Kier was decided before the trial, although only just. See Kier, 164 Wn.2d at 798. At the least, reasonably competent counsel should have known that merger was a very real issue under Freeman, even if he could not be expected to keep up on current law. And had he made the double jeopardy/merger argument at sentencing, the court would have erred in failing to dismiss the attempted assault convictions and sentencing Stokes based accordingly. On remand, new counsel should be appointed in order to ensure that Stokes receives effective assistance at either the new trial or his resentencing.

3. REVERSAL IS ALSO REQUIRED BECAUSE THE  
PROSECUTOR COMMITTED SERIOUS, PREJUDICIAL  
MISCONDUCT

As noted above, this Court should reverse and dismiss the attempted assault conviction for insufficiency of the evidence. If the Court decides not to do so, reversal and remand for retrial of those counts as well as the first-degree robbery count is required, based upon the flagrant,

prejudicial and repeated misconduct of the prosecutor. Unlike other attorneys, prosecutors are “quasi-judicial” officers, who have a responsibility to ensure that justice is done, rather than just seeking to win a conviction at all costs. See State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993). The prosecutor here failed in that responsibility, committing multiple acts of repeated misconduct which compel reversal.

a. Relevant facts

In initial closing argument, the prosecutor started by telling the jury that the case was an “identity” case and the issue was whether Martinez was right about who committed the crime. 15RP 477. The prosecutor then asked whether there was “built-in reasonable doubt” when the defendant denies that he committed the crime and presents testimony from an expert saying that people under stress can make misidentification. 15RP 477. The prosecutor asked the jury to look at “the broad picture of justice,” asking what they would need in order to be convinced beyond a reasonable doubt. 15RP 477.

At that point, the prosecutor referred to people who are wrongfully convicted and said that the jury was here to “ensure that justice happens.” 15RP 477 (emphasis added). Counsel objected “[t]his is not proper argument,” but the objection was overruled, with the court stating it did not believe counsel was correct in stating that the prosecutor was trying to “dilute” the burden of proof or the presumption of innocence. 15RP 477, 478. The court did, however, tell the jury that the arguments of counsel were not evidence or the law. 15RP 478.

The prosecutor then said, “[w]hat I was saying was, in the context

of *To Kill a Mockingbird* in this justice and the concept that you are the people who make sure justice happens.” 15RP 478 (emphasis added).

Next, the prosecutor declared that “the State is not up here asking you to convict merely because someone said these defendants did it,” and that he was interested in having the jury analyze the facts and make a decision jurors “believe in your heart is an accurate, truthful decision.”

15RP 478. He then went on:

I talked about truth in the very beginning when I called on the very first juror and what does that mean to you as a juror? Is it important in this process? And of course, it is. And in no way is the State attempting to dilute the standard of proof or the burden. In fact, to emphasize it.

But in this case, the State believes that the evidence in this identity case supports that these two defendants are guilty.

15RP 479 (emphasis added).

A few moments later, in arguing about the “to convict” instructions for the crime of robbery, the prosecutor returned to the theme of “truth:”

When I mentioned originally this issue of the truth and is it important for you to return a verdict that represents the truth about what happened, everybody said, “Yes, that’s what we are here for.” There is slight variation or twist to that when you talk about what really you are here for in the sense of your function as jurors as regards the truth. There are two concepts of the truth as applied to this case. One is to determine factually, truthfully what happened, so that you can then apply that to these elements. But ultimately, the State doesn’t have to prove the truth of every single thing that any witness said. The State has to prove the truth of the charges. And what that means is the truth of these elements in these to-convict instructions.

For example, under No. 1, . . . the State has to prove the truth of that. . . .

15RP 481-82. Counsel then objected, “It’s not the truth, Your Honor. It’s proof beyond a reasonable doubt.” 15RP 482. The court overruled the

objection. 15RP 482.

The prosecutor then went on, “[t]he truth of the charges, when you are talking about truth, which I discussed earlier, is the truth of the elements. Are you convinced beyond a reasonable doubt in the truth of these elements?” 15RP 483 (emphasis added). A few moments later, he again returned to the theme of the “truth,” declaring “[b]ut the truth is, what I am discussing right now, is focus[]ed on the truth of these elements.” 15RP 483 (emphasis added).

Finally, in ending his initial closing argument, the prosecutor said, “[t]he State believes strongly and fairly that the evidence in this case supports guilty on all counts.” 15RP 495. He also said that, after weighing the testimony of the defense witnesses, “[i]f you find that that creates a sufficient doubt for you to negate the strength of the circumstantial evidence and direct evidence of Ms. Martinez, if that doubt persists then, of course, you must acquit.” 15RP 495 (emphasis added).

In his closing argument, counsel for Stokes told the jury that the prosecutor was wrong when he said the defendants needed “to create reasonable doubt” because the constitution does not mandate that. 15RP 523. He questioned the evidence linking Stokes to the crime, noting that Martinez had made an identification which was at most 95 percent. 15RP 524. Counsel also noted that the state “speaks to the issue of the truth, the truth is the only truth that we do in any criminal case. We answer the one proposition, has the State proven its charges beyond a reasonable doubt? We are not talking about absolute moral truth.” 15RP 533.

In rebuttal closing argument, the prosecutor said that the defense

attorneys had done “an excellent job in defending their clients” but that they were “just flat out wrong in many, many areas they discussed,” including whether the state had proven its case beyond a reasonable doubt. 15RP 534. The prosecutor declared that he had never said the defense had to create reasonable doubt and that if he had, it would not be accurate.

15RP 534. He then went on:

The issue is, focus on the evidence. Through the evidence or lack of evidence, do you find a reasonable doubt in considering whether the State has met its burden?

15RP 534 (emphasis added).

The prosecutor also told the jury that they should not be swayed by the emotional aspects of Tynes’ witness’ testimony, to “let that override your common sense or your approach to deciding factually the truth” of whether Tynes was with the witnesses. 15RP 546-47.

A moment later, the prosecutor said:

Beyond a reasonable doubt, the very last thing that I am going to say is the standard, and this is sort of a tie-it-all-up kind of issue. When you first came into the courtroom, you knew nothing about the case, nothing. Clean slate. I asked you in voir direct how interested are you in returning verdicts that represent the truth about what happened? You’ve heard the evidence. That fills up your slate, of course. You no longer have a clean slate. You’ve got evidence to consider. And now you are going back there and focus[ing] on this truth issue.

15RP 547 (emphasis added). The prosecutor said the issue was whether the jurors would “believe” that “you got it right” in deciding the case.

15RP 547. He declared that he had “no stake in the sense of trying to convict people just so we can mark something up and say these two people accounted for this crime. Move on.” 15RP 547. Instead, he said “[j]ustice requires. . .that the right people be convicted” and that “nobody

is standing here in front of you asking you to convict these two individuals on anything less than the proper standard and evidence.” 15RP 547. He next told the jury, “the proper standard to consider is when you come to decisions, despite some doubts that you may have, do you always come back to that same belief, to that same conclusion?” 15RP 547-48 (emphasis added). Counsel’s objection was overruled. 15RP 548.

Finally, the prosecutor concluded, “[d]o you always come back to that same conclusion in the truth of the charge? And if you don’t come back to that, then they are not guilty.” 15RP 548 (emphasis added).

b. The arguments were repeated, flagrant misconduct

All of these arguments were misconduct, and reversal is required. Where counsel objects below, this Court will reverse based upon misconduct if there is a reasonable probability the outcome of the trial would have been affected by that misconduct. See State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Where counsel failed to object below, reversal is still required if the misconduct was so flagrant and prejudicial that it could not have been cured by instruction. Id.

Both standards are met in this case. First, the repeated arguments telling the jurors their job was to decide and declare the “truth” about what happened and to ensure that “justice” happened were highly improper. 15RP 478, 479, 481-82, 485, 544, 547, 548. The jury’s role is not to decide the “truth” or declare who is telling the truth; it is to determine whether the state has met its constitutional burden of proving guilt beyond a reasonable doubt. See, e.g., State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995); Barrow, supra.

Further, the jury's role is not to vindicate "justice;" it is solely to determine if the state has proven its case.

Casting the jurors' role as deciding and declaring the "truth" and "ensuring justice" not only misstates that role but also improperly dilutes the prosecution's constitutionally mandated burden of proving guilt beyond a reasonable doubt. When the jury is told that their job is to decide the "truth," that invites a decision improperly based not upon the constitutional standard but rather on the jury's conclusion of which side - the prosecution or the defense - the jurors believed. See, e.g., United States v. Pine, 609 F.2d 106, 108 (3<sup>rd</sup> Cir. 1979). Such arguments suggest the jury's role requires "determining whose version of events is more likely true, the government's or the defendant's." See United States v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5<sup>th</sup> Cir.), cert. denied, 511 U.S. 1129 (1994). As a result, the jury is misled into thinking they simply must decide which version of events is more likely and then base their decision on that determination, based upon a preponderance of the evidence. Id.

Thus, by repeatedly invoking the idea that jurors were supposed to decide and declare the "truth," the prosecutor not only misstated the jury's role but also his own burden of proof.

Further, by declaring that the jury's role was to ensure "justice," the prosecutor effectively argued for them to engage in decisionmaking based upon the emotional need to satisfy the desire to vindicate the victim or society. It is improper for a prosecutor to try to incite the jury to decide a case on an emotional basis. Belgarde, 110 Wn.2d at 507-508; State v. Powell, 62 Wn. App. 914, 918-19, 816 P.2d 86 (1991), review denied, 118

Wn.2d 1013 (1992). Such argument is improper because it may lead the jury to decide to convict not based upon the evidence properly before it but rather on how the jury *feels*. State v. Echevarria, 71 Wn. App. 595, 598-99, 860 P.2d 420 (1993). Further, it is misconduct for the prosecutor to in any way suggest that he would not have brought the charges unless the defendant was guilty. See, e.g., U.S. v. Bess, 593 F.2d 749, 753 (6<sup>th</sup> Cir. 1979); Hall v. U.S., 419 F.2d 582, 587 (5<sup>th</sup> Cir. 1969).

Here, the prosecutor made just such a suggestion in telling the jury he had “no stake” in trying to convict the wrong people and that he was not trying to do so. The obvious inference was that, because he was trying to convict Stokes, Stokes was the “right” person, and justice would only be done if the jury rendered verdicts of guilt.

The prosecutor further committed misconduct and misstated his burden of proof, despite his protestations to the contrary, by making his arguments regarding reasonable doubt. First, he told the jury that it should ask whether the testimony of the defense witnesses (all of whom testified for Tynes) “creates a sufficient doubt” to negate the state’s evidence. 15RP 495. Then, he denied having made such a statement, properly telling the jury such a statement would be inaccurate. 15RP 534. But after that, he returned to the same concept, telling the jury the “issue” was “do you find a reasonable doubt” after considering the evidence or lack of evidence. 15RP 534 (emphasis added). And finally, he told the jury, “the proper standard” was that they should convict if they had a “belief” in guilt, “despite some doubts that you may have.” 15RP 547-48 (emphasis added).

All of these arguments completely misstated the prosecutor's burden of proof, turning the presumption of innocence and the standard of reasonable doubt on their heads. Jurors are not required to "find a reasonable doubt" or determine that the defense witness created a reasonable doubt in order to find that the state has not proven its case; that is akin to saying that there is a presumption of guilt. Instead, jurors are required to presumptively acquit unless they find the state has proven its case beyond a reasonable doubt. See Wright, 76 Wn. App. at 826; State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). Further, the jury should *not* convict if its doubts meant that it did not believe the prosecution had proven its case beyond a reasonable doubt. And no attorney, especially a public prosecutor, is permitted the jury as to the relevant law. See, State v. Davenport, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984).

Indeed, misstatements of the law are especially egregious when done by the prosecutor, because of the potential for such misconduct to have a very significant effect on jurors. Davenport, 100 Wn.2d at 763.

Reversal is required: The prosecutor's arguments violated his duties as a "quasi-judicial" officer, to act "impartially and in the interests of justice and not as a 'heated partisan.'" See State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1989); Stith, 71 Wn. App. at 18.

More importantly, there is more than a reasonable probability that the prosecutor's improper arguments affected the jury's verdict. The prosecution had no physical evidence whatsoever linking Stokes to the

crime. Instead, the entire case was based upon Stokes being identified in the montage by Martinez, along with the innocuous facts that Stokes was friends with Tynes and he and Tynes had been seen nearly a year later wearing black bandanas around their waists, when the man with the gun was described by Martinez as wearing a *blue* bandana and by her son as wearing one which was black and white.

Further, Martinez was not 100% sure in her identification. And she was clearly unsure at the time of the montages who exactly she thought had the gun.

The prosecutor's misconduct in repeatedly misstating the jury's role, in misstating his burden over and over, in telling the jury they had to decide the "truth," in telling the jurors they had to "find" reasonable doubt and should convict "despite some doubts" if they have a "belief" in guilt, in exhorting them to do "justice" and then implying that justice would only be done if Stokes was convicted was extremely serious. And counsel's repeated objections to the misconduct were all overruled.

Indeed, counsel's failure to raise objections to the other arguments is forgivable because of the court's refusal to sustain any of the objections counsel *did* make. Counsel specifically objected to the argument that the jury was there to "ensure that justice happens," stating that was an effort to "dilute" the burden of proof. 15RP 477-78. The court's overruling of that objection clearly signaled that the court would not have sustained a later objection when the prosecutor returned to the theme of "justice" (15RP 547). Similarly, the court's overruling of counsel's objection to the "truth" arguments and stating that was not the standard and the proper one

was proof beyond a reasonable doubt indicated that the court would not have sustained objections to the repeated “truth” arguments the prosecutor later made. 15RP 481-82, 483, 547, 548. And although counsel did not initially object to the prosecutor’s declarations about deciding whether the defense evidence had created reasonable doubt, when counsel finally did object to the prosecutor’s later argument that the jury could convict despite having “some doubts,” that was also overruled. 15RP 548.

In short, counsel made repeated efforts to rein in the prosecutor’s pervasive misconduct. All of those efforts were rebuffed. Counsel’s failure to then engage in the fruitless act of raising further objections to essentially the same offensive misconduct when it was later repeated should not be held against Mr. Stokes, because those further objections would simply have been overruled again. Further, the court had already lent an aura of legitimacy to the prosecutor’s repeated acts of misconduct by failing to sustain the objections. See Davenport, 100 Wn.2d at 764; see State v. Perez-Mejia, 134 Wn. App. 907, 919, 143 P.2d 838 (2006).

Because there is more than a substantial likelihood that the prosecutor’s repeated, flagrant and prejudicial misconduct affected the jury’s verdicts against Stokes in this case, this Court should reverse and remand for a new trial on the first-degree robbery count, if it dismisses the attempted assaults. If it does not dismiss the attempted assaults despite the lack of sufficient evidence to prove the required specific intent, reversal and remand for a new trial on the robbery and attempted assaults is required, and, if there are subsequent convictions, merger and dismissal of those assaults is required under double jeopardy law.

E. CONCLUSION

The prosecution failed to present sufficient evidence to prove the essential specific intent required for the two attempted second-degree assault convictions, and reversal and dismissal of those convictions with prejudice is required. Reversal and remand for a new trial on the first-degree robbery is also required, because the prosecutor's misconduct so permeated the trial and prejudiced Stokes that he was deprived of a fair trial. In the event the Court does not reverse and dismiss the attempted assaults, those charges should be retried as well and, if there are subsequent convictions for them and the robbery, merger and double jeopardy requires dismissal of those attempted assault convictions. If the Court disagrees that the misconduct mandates a new trial and holds the evidence sufficient to support the attempted second-degree assaults, reversal and remand for resentencing and dismissal of those assaults is required, because they violated double jeopardy and merger.

DATED this 8th day of October, 2009.

Respectfully submitted,



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CERTIFICATION OF SERVICE BY MAIL

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 document to opposing counsel and appellant by placing it in the United States Mail first-class postage prepaid to the following addresses:

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

TO: Darris Stokes, DOC 325075, Larch Corr. Center, 15314 NE Dole  
Valley Rd., Yacolt, WA. 98675-9531.

DATED this 8<sup>th</sup> day of October, 2009.

  
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