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STATE OF WASHINGTON

BY CM
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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JENNIFER HOLMES, APPELLANT
JAMES LEROY LINDSAY, SR., APPELLANT
(consolidated)

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 06-1-01432-6

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Was defendants' right to a public trial preserved when the court accepted the jury's verdict after posted business hours as neither the courtroom nor the courthouse was closed? ... 1

2. Have defendants failed to show that their convictions violated double jeopardy where the crimes were not the same in law or fact and each crime served an independent purpose?..... 1

3. Has Lindsay failed to show that his right to counsel was violated when the jail staff unknowingly disposed of a notebook which he claimed contained his notes for trial?... 1

4. Did the trial court properly exercise its discretion when it declined to admit evidence of the victim's alleged drug use when such use occurred years prior to the night of the crime? 1

5. Did Holmes receive due process at the restitution hearing where she had the opportunity to rebut the evidence presented by the State? 1

6. Has Holmes failed to show that she is entitled to a new trial based on prosecutorial misconduct where the prosecutor's behavior did not result in prejudice? 1

7. Has Holmes failed to show that her trial was rife with error warranting reversal under the doctrine of cumulative error?..... 1

B. STATEMENT OF THE CASE..... 1

1. Procedure 1

2. Facts..... 4

| | | |
|----|---|----|
| C. | <u>ARGUMENT</u> | 10 |
| 1. | THE DEFENDANTS’ RIGHT TO A PUBLIC TRIAL WAS NOT VIOLATED WHEN THE COURT ACCEPTED THE JURY’S VERDICT AFTER POSTED BUSINESS HOURS WHEN THE COURTROOM AND THE COURTHOUSE WERE BOTH OPEN | 10 |
| 2. | DEFENDANTS’ CONVICTIONS FOR ROBBERY, KIDNAPPING, AND ASSAULT DO NOT VIOLATE DOUBLE JEOPARDY WHERE THE CRIMES ARE NOT THE SAME IN LAW AND EACH CRIME SERVED AN INDEPENDENT PURPOSE..... | 16 |
| 3. | THE SEIZURE OF LINDSAY’S NOTE PAD BY JAIL STAFF DID NOT VIOLATE HIS RIGHT TO COUNSEL..... | 24 |
| 4. | THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO ADMIT EVIDENCE OF THE VICTIM’S ALLEGED DRUG USE WHEN SUCH USE OCCURRED YEARS PRIOR TO THE NIGHT OF THE CRIME NOR DID IT AFFECT HIS ABILITY TO REMEMBER THE CRIME OR TO TESTIFY. | 28 |
| 5. | THE TRIAL COURT DID NOT VIOLATE HOLMES’S RIGHT TO DUE PROCESS AT THE RESTITUTION HEARING WHERE SHE HAD THE OPPORTUNITY TO REBUT THE EVIDENCE PRESENTED..... | 31 |
| 6. | HOLMES IS NOT ENTITLED TO A NEW TRIAL BASED ON PROSECUTORIAL MISCONDUCT | 34 |
| 7. | HOLMES HAS FAILED TO SHOW THAT HER TRIAL WAS RIFE WITH ERROR WARRANTING REVERSAL UNDER THE DOCTRINE OF CUMULATIVE ERROR | 49 |
| D. | <u>CONCLUSION</u> | 53 |

Table of Authorities

State Cases

| | |
|--|----------------|
| <i>Allied Daily Newspapers v. Eikenberry</i> , 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)..... | 14 |
| <i>City of Seattle v. Orwick</i> , 113 Wn.2d 823, 830, 784 P.2d 161 (1989)..... | 24 |
| <i>Cunningham v. Town of Tieton</i> , 60 Wn.2d 434, 436-37, 374 P.2d 375 (1962)..... | 32 |
| <i>In re Bybee</i> , 142 Wn. App. 260, 175 P.3d 589 (2007)..... | 20, 21 |
| <i>In re Lord</i> , 123 Wn.2d 296, 332, 868 P.2d 835 (1994)..... | 50 |
| <i>McCurdy v. Union Pac. R.R.</i> , 68 Wn.2d 457, 468-69, 413 P.2d 617 (1966)..... | 32 |
| <i>State v. Alexander</i> , 64 Wn. App. 147, 822 P.2d 1250 (1992)..... | 52 |
| <i>State v. Anderson</i> , 153 Wn. App. 417, 428, 220 P.3d 1273 (2009)..... | 41, 42, 45, 46 |
| <i>State v. Avendano-Lopez</i> , 79 Wn. App. 706, 712, 904 P.2d 324 (1995), <i>review denied</i> , 129 Wn.2d 1007 (1996)..... | 47 |
| <i>State v. Badda</i> , 63 Wn.2d 176, 385 P.2d 859 (1963)..... | 51 |
| <i>State v. Baldwin</i> , 150 Wn.2d 448, 454, 78 P.3d 1005 (2003)..... | 16, 17 |
| <i>State v. Bennett</i> , 161 Wn.2d 303, 306, 165 P.3d 1241 (2007)..... | 44 |
| <i>State v. Binkin</i> , 79 Wn. App. 284, 902 P.2d 673 (1995), <i>review denied</i> , 128 Wn.2d 1015 (1996)..... | 34 |
| <i>State v. Bone-Club</i> , 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995)... | 13, 14 |
| <i>State v. Brett</i> , 126 Wn.2d 136, 175, 892 P.2d 29 (1995)..... | 40 |

| | |
|---|------------|
| <i>State v. Brown</i> , 132 Wn.2d 529, 572, 940 P.2d 546 (1997)..... | 28 |
| <i>State v. Bryant</i> , 89 Wn. App. 857, 950 P.2d 1004 (1998)..... | 40 |
| <i>State v. Bush</i> , 34 Wn. App. 121, 123-24, 659 P.2d 1127 (1983)..... | 31 |
| <i>State v. Calle</i> , 125 Wn.2d 769, 776, 888 P.2d 155 (1995)..... | 16, 17 |
| <i>State v. Castillo</i> , 150 Wn. App. 466, 467, 208 P.3d 1201 (2009)..... | 44 |
| <i>State v. Charlton</i> , 90 Wn.2d 657, 661, 585 P.2d 142 (1978)..... | 43 |
| <i>State v. Coe</i> , 101 Wn.2d 772, 789, 681 P.2d 1281 (1984)..... | 50, 52 |
| <i>State v. Coleman</i> , 151 Wn. App. 614, 620, 214 P.3d 158 (2009)..... | 11 |
| <i>State v. Cory</i> , 62 Wn.2d 371, 382 P.2d 1019 (1963)..... | 26, 27 |
| <i>State v. Duggins</i> , 68 Wn. App. 396, 401, 844 P.2d 441, <i>aff'd</i> , 121 Wn.2d 524, 852 P.2d 294 (1993)..... | 24 |
| <i>State v. Easterling</i> , 157 Wn.2d 167, 174, 179, 137 P.3d 825 (2006)..... | 10 |
| <i>State v. Echevarria</i> , 71 Wn. App. 595, 598, 860 P.2d 420 (1993)..... | 35 |
| <i>State v. Fleming</i> , 75 Wn. App. 270, 274-75, 877 P.2d 243 (1994)..... | 32 |
| <i>State v. Freeman</i> , 153 Wn.2d 765, 775-76, 108 P.3d 753 (2005)..... | 17, 22, 23 |
| <i>State v. Garza</i> , 99 Wn. App. 291, 295, 994 P.2d 868 (2000). 24, 25, 26, 27 | |
| <i>State v. Gocken</i> , 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)..... | 16 |
| <i>State v. Gonzales</i> , 111 Wn. App. 276, 45 P.3d 205 (2002) <i>rev. denied</i> , 148 Wn.2d 1012, 62 P.3d 890 (2003)..... | 36 |
| <i>State v. Graham</i> , 153 Wn.2d 400, 404, 103 P.3d 1238 (2005)..... | 17 |
| <i>State v. Gregory</i> , 158 Wn.2d 759, 810, 147 P.3d 1201 (2006)..... | 39 |
| <i>State v. Greiff</i> , 141 Wn.2d 910, 921, 10 P.3d 390 (2000)..... | 25 |
| <i>State v. Johnson</i> , 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998)..... | 50, 51 |

| | |
|---|------------|
| <i>State v. Kinard</i> , 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979) | 51 |
| <i>State v. King</i> , 113 Wn. App. 243, 299, 54 P.3d 1218 (2002) | 31 |
| <i>State v. Kisor</i> , 68 Wn. App. 610, 620, 844 P.2d 1038 (1993) | 32 |
| <i>State v. Kitchen</i> , 110 Wn.2d 403, 409, 756 P.2d 105 (1988) | 49 |
| <i>State v. Korum</i> , 120 Wn. App. 686, 86 P.3d 166 (2004), <i>reversed on other grounds</i> , 157 Wn.2d 614, 141, P.3d 13 (2006) | 19, 20, 21 |
| <i>State v. Lillard</i> , 122 Wn. App. 422, 431, 93 P.3d 969 (2004) | 28 |
| <i>State v. Lohr</i> , 130 Wn. App. 904, 910-11, 125 P.3d 977 (2005) | 32 |
| <i>State v. Louis</i> , 155 Wn.2d 563, 568, 120 P.3d 936 (2005) | 16, 17, 18 |
| <i>State v. Mak</i> , 105 Wn.2d 692, 726, 718 P.2d 407, <i>cert. denied</i> , 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986) | 34 |
| <i>State v. Manthie</i> , 39 Wn. App. 815, 820, 696 P.2d 33 (1985) | 39 |
| <i>State v. McKenzie</i> , 157 Wn.2d 44, 53, 134 P.3d 221 (2006) | 40, 41 |
| <i>State v. Michielli</i> , 132 Wn.2d 229, 240, 937 P.2d 587 (1997) | 24 |
| <i>State v. Moen</i> , 150 Wn.2d 221, 226, 76 P.3d 721 (2003) | 24 |
| <i>State v. Momah</i> , 167 Wn.2d 140, 149, 217 P.3d 321 (2009, <i>cert. denied</i>) ___ U.S. ___, 131 S. Ct. 160, 178 L.Ed.2d. 40 (2010) | 11 |
| <i>State v. Pirtle</i> , 127 Wn.2d 628, 672, 904 P.2d 245 (1995) | 34 |
| <i>State v. Pollard</i> , 66 Wn. App. 779, 785, 834 P.2d 51 (1992) | 32 |
| <i>State v. Riley</i> , 34 Wn. App. 529, 535-36, 663 P.2d 145 (1983) | 32 |
| <i>State v. Russell</i> , 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), <i>cert. denied</i> , 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995) | 29, 40, 50 |
| <i>State v. Stevens</i> , 58 Wn. App. 478, 498, 795 P.2d 38, <i>review denied</i> , 115 Wn.2d 1025, 802 P.2d 38 (1990) | 51, 52 |

| | |
|---|------------|
| <i>State v. Strode</i> , 167 Wn.2d 222, 225, 217 P.3d 310 (2009) | 11 |
| <i>State v. Thomas</i> , 142 Wn. App. 589, 593, 174 P.3d 1264, <i>review denied</i> , 164 Wn.2d 1026 (2008) | 47 |
| <i>State v. Thomas</i> , 150 Wn.2d 821 863, 83 P.3d 970 (2004) | 29, 30 |
| <i>State v. Tigano</i> , 63 Wn. App. 336, 344, 818 P.2d 1369 (1991), <i>rev. denied</i> , 118 Wn.2d 1021, 827 P.2d 1392 (1992) | 29, 30 |
| <i>State v. Tobin</i> , 132 Wn. App. 161, 173, 130 P.3d 426 (2006), <i>aff'd</i> , 161 Wn.2d 517, 166 P.3d 1167 (2007) | 31, 32 |
| <i>State v. Torres</i> , 16 Wn. App. 254, 554 P.2d 1069 (1976) | 52 |
| <i>State v. Wade</i> , 133 Wn. App. 855, 871, 138 P.3d 168 (2006) | 22 |
| <i>State v. Wall</i> , 52 Wn. App. 665, 679, 763 P.2d 462 (1988) | 51 |
| <i>State v. Warren</i> , 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008) | 35, 36, 43 |
| <i>State v. Weekly</i> , 41 Wn.2d 727, 252 P.2d 246 (1952) | 39 |
| <i>State v. Whalon</i> , 1 Wn. App. 785, 804, 464 P.2d 730 (1970) | 51 |
| <i>State v. Yates</i> , 161 Wn.2d 714, 763, 168 P.3d 359 (2007) | 40 |

Federal and Other Jurisdictions

| | |
|---|--------|
| <i>Beck v. Washington</i> , 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962) | 39 |
| <i>Blockburger v. United States</i> , 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932) | 17, 19 |
| <i>Brown v. United States</i> , 356 U.S. 148, 154, 78 S. Ct. 622, 2 L.Ed.2d 589 (1958) | 39 |
| <i>Brown v. United States</i> , 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973) | 49 |

| | |
|---|--------|
| <i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966)..... | 8 |
| <i>Missouri v. Hunter</i> , 459 U.S. 359, 366, 103 S. Ct. 673, 74 L.Ed.2d 535 (1983)..... | 16, 17 |
| <i>Neder v. United States</i> , 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999)..... | 49 |
| <i>Press-Enterprise Co. v. Superior Court</i> , 478 U.S. 1, 7, 106 S. Ct. 2735, 92 L.Ed.2d 1 (1986)..... | 10 |
| <i>Rose v. Clark</i> , 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)..... | 49 |
| <i>Viereck v. United States</i> , 318 U.S. 236, 247-48, 63 S. Ct. 561, 87 L. Ed. 734 (1943)..... | 35 |
| <i>Washington v. Recuenco</i> , 548 U.S. 212, 218-19, 126 S. Ct. 2546, 165 L.Ed.2d 466 (2006)..... | 11 |
| <i>Weatherford v. Bursey</i> , 429 U.S. 545, 97 S. Ct. 837, 51 L.Ed.2d 30 (1977)..... | 25 |

Constitutional Provisions

| | |
|--|--------|
| Article I, section 10 of the Washington Constitution | 10, 13 |
| Article I, section 22 of the Washington Constitution | 10, 13 |
| Article I, section 9..... | 16 |
| Fifth Amendment | 16 |
| Sixth Amendment | 10, 24 |

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was defendants' right to a public trial preserved when the court accepted the jury's verdict after posted business hours as neither the courtroom nor the courthouse was closed?
2. Have defendants failed to show that their convictions violated double jeopardy where the crimes were not the same in law or fact and each crime served an independent purpose?
3. Has Lindsay failed to show that his right to counsel was violated when the jail staff unknowingly disposed of a notebook which he claimed contained his notes for trial?
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7. Has Holmes failed to show that her trial was rife with error warranting reversal under the doctrine of cumulative error?

B. STATEMENT OF THE CASE.

1. Procedure

On March 29, 2006, the State charged defendants Jennifer Holmes (Holmes) and James Leroy Lindsay, Sr. (Lindsay), with one count each of first degree burglary, first degree robbery, first degree kidnapping, and

first degree assault. CPH¹ 1-3; CPL 1-3. On June 16, 2008, the State filed a second amended information for each defendant, adding alternative means of committing first degree robbery and first degree kidnapping, and adding four counts of theft of a firearm. CPH 53-58; CPL 70-75.

Trial commenced March 19, 2008, before the Honorable Brian Tollefson. RP (1) 1. The parties indicated that they expected the trial to take approximately four weeks. RP (1) 2. Due to scheduling issues, the jury heard opening statements on June 16, 2008. RP (18) 958.

The case recessed several times throughout the trial due to preplanned vacation issues, courtroom scheduling issues, and various health issues. *See generally*, RP (14) 772, (26) 1994-95, (27) 2059, (28) 2072, (32) 2269, (41) 3389, (46) 3983, (58) 5012, (63) 5637, (66) 5952, (74) 6566, (79) 6969, (82) 7340, (88) 8122. Because of the number of times Holmes failed to appear, the court threatened to sign a warrant for her arrest to ensure her continued presence. RP (86) 7995-96.

Throughout the trial, Holmes made twenty-two motions for mistrial, generally based on alleged prosecutorial misconduct, all of which were denied by the court. RP (2/24/09) 6, 12; RP (3/6/09) 18, 23; RP (20) 1339, 1345; RP (35) 2705, 2728-29; RP (38) 3023-24, 3029; RP (43)

¹ Citations to Clerk's Papers for Holmes will be to CPH and for Lindsay will be to CPL. As the verbatim report of proceedings consists of over 98 volumes, some of which are numbered sequentially and some are not, the State refers to citations to the transcript as RP followed by the volume number or date of the hearing and the page number, e.g. the final jury panel was chosen at RP (15) 825 (volume 15, page 825).

3574, 3664; RP (44) 3828; RP (45) 3894; RP (47) 4085; RP (51) 4305, 4312, 4325, 4329, 4358, 4371; RP (52) 4560; RP (53) 4569, 4581; RP (56PM) 19, 26; RP (61) 5431, 5464-65; RP (65) 5864, 5865; RP (71) 6329; RP (72) 6329; RP (87) 8075, 8104; RP (93) 8601; RP (94) 8633, 8664; RP (95) 8683-84, 8889, 8895; RP (96) 8919.

The jury returned verdicts after business hours on March 6, 2009. RP (3/6/09) 27-28. Over the defendants' objection, the court took the verdicts as two of the jurors would be unable to return. RP (3/6/09) 35. While the court was in session, two members of the prosecutor's office were stationed at the front door of the courthouse and held the door open so the public could have access to the courtroom. CPH 856-59, 860-64; CPL 480-82, 483-87; RP (3/6/09) 78-81.

The jury found Holmes guilty of first degree burglary, first degree robbery, the lesser-included crime of unlawful imprisonment, the lesser-included crime of second degree assault, and only one count of theft of a firearm. CPH 708, 712, 719, 721, 724-27. The jury found Lindsay guilty of first degree burglary, first degree robbery, the lesser-included crime of second degree kidnapping, the lesser-included crime of second degree assault, and only one count of theft of a firearm. CPL 382-89. The jury found that neither defendant was armed with a firearm during the commission of the crimes. CPH 728-31; CPL 728-31.

The court sentenced Holmes to the middle of the standard range for each crime, for a total sentence of 89.5² months. CPH 828-41; RP (97) 9015. The court also sentenced Lindsay to the middle of the standard range, giving him a total sentence of 102³ months. CPL 451-64; RP (98) 9041-42. The court ordered both defendants to pay restitution. CPH 282-41; CPL 451-64.

Holmes was released from custody after posting an appellant bond. CPH 865.

Defendants filed timely notice of appeals. CPH 847; CPL 466.

2. Facts

In 1998, Holmes began dating Lawrence Wilkey. RP (24) 1751. The couple originally lived in Vaughn, Washington, but moved to Idaho in 2004. RP (24) 1752, 1767-68. While living in Idaho, Holmes opened a massage business where she met Lindsay as one of her customers. RP (24) 1813, 1815.

² Due to the use of multipliers, Holmes had an offender score of four for the crimes of unlawful imprisonment and theft of a firearm, and an offender score of 6 for the remaining crimes. CPH (judgment). Holmes' standard range for each crime was: 57-75 months for the burglary, 77-102 months for the robbery, 12-16 months for the unlawful imprisonment, 33-43 months for the assault, and 31-41 months for the theft of a firearm. CPH (judgment).

³ Due to the use of multipliers, Lindsay had an offender score of 7 for the burglary, robbery, kidnapping, and assault convictions, and an offender score of 4 for the theft of a firearm conviction. CPL (judgment). Lindsay's standard range for each crime was: 67-89 months for the burglary, 87-116 months for the robbery, 51-68 months for the kidnapping, 43-57 months for the assault, and 31-41 months for theft of a firearm. CPL (judgment).

In October, 2008, shortly after opening her business, Holmes informed Mr. Wilkey that she did not love him any more and that she was getting married to Lindsay. RP (24) 1818, 1821. A few days later, Mr. Wilkey began packing in preparation to move out, but he did not plan to leave until mid-November. RP (24) 1823-24, 1862.

On October 22, 2005, Holmes, her three daughters, and Lindsay took a day trip. RP (24) 1863. While they were gone, Mr. Wilkey moved out and went back to Washington State. RP (24) 1862-63. Mr. Wilkey took many items of personal property with him when he moved. *See* RP (24) 1843.

When Holmes returned home, she saw that property was missing which she did not believe Mr. Wilkey was entitled⁴ to take. *See* RP (75) 6707-15. Holmes called the Bonner County Sheriff's department to report the missing items as a burglary, but the deputies ultimately concluded that it was not a criminal matter based on the past relationship between Holmes and Mr. Wilkey. RP (61) 5346-48, 5352, (67) 5999. The Sheriff's Department advised Holmes to contact a civil attorney. RP (67) 5983.

⁴ Whether Mr. Wilkey was entitled to any of the property was a major source of contention throughout the entire trial. According to Mr. Wilkey, he had purchased some of the property and discussed with Holmes how to divide the remainder when he moved out. *See* RP (24) 1823-24, 1843-44. According to Holmes, Mr. Wilkey purchased nothing and she never discussed dividing property with him. *See* RP (75) 6617, 6700-07, (82) 7367, 7399.

During the evening of March 27, 2006, Mr. Wilkey was at his new home in Lakebay, Washington, when he heard his dogs start to bark. RP (25) 1897-98. When he looked outside, he saw Holmes standing at his door. RP (25) 1898. Mr. Wilkey was upset by Holmes's presence and went to his phone to call for help. RP (25) 1899-1901. Before he could finish dialing the phone, his front door burst open to reveal Lindsay with a pipe in his hand. RP (25) 1901-02.

Lindsay hit Mr. Wilkey on the head with the pipe and the two men began to struggle. RP (25) 1902. Lindsay eventually placed the pipe against Mr. Wilkey's throat and choked him into unconsciousness. RP (25) 1903.

When Mr. Wilkey regained consciousness, he was "hog-tied" with his hands tied to his feet behind his back. RP (25) 1905-06. The defendants used zip ties, a telephone cord, and a dog leash to restrain him. RP (25) 1920. While he was restrained, Holmes and Lindsay kicked him and demanded to know where guns and jewelry were located. RP 1906. Holmes eventually left to retrieve a trailer she had brought from Idaho, and Lindsay stayed to look through the house. RP 1907.

Lindsay took several items of property, including \$40.00 from Mr. Wilkey's wallet. RP (25) 1908. When Holmes returned with the trailer, she and Lindsay began loading it with items from Mr. Wilkey's house. RP (25) 1913-14. Lindsay continued to menace Mr. Wilkey with the pipe and would not let him look at Holmes. RP (25) 1915.

Lindsay partially untied Mr. Wilkey and forced him toward a coffee table. RP (25) 1918. At that time, Lindsay and Holmes directed Mr. Wilkey to write an apology letter to Holmes's daughters. RP (25) 1922. When defendants did not like what he wrote, they made him write it again. RP (25) 1926, 1927. While Mr. Wilkey was writing, Lindsay continued to remove items from the house. RP (25) 1922, 1927. Lindsay directed Holmes to break Mr. Wilkey's ankles with the pipe if he moved. RP (25) 1922, 1927.

After Mr. Wilkey was done writing the letters, he was forced to sign over the titles to his truck and trailer; then Lindsay propped him against the wall and began hitting his back with a hard object. RP (25) 1928; RP (29) 2091. Holmes directed Lindsay to hit lower on Mr. Wilkey's back as Mr. Wilkey had a pre-existing lower-back injury. RP (25) 1928. This beating caused Mr. Wilkey to lose control of his bowels. RP (25) 1929.

Lindsay tied a bathrobe around Mr. Wilkey's head, which affected his ability to breathe. RP (25) 1941-42. Lindsay then poured alcohol on the robe and said he was going to light it on fire. RP (25) 1944. While the robe was around his head, Mr. Wilkey felt himself being thrown against a wall. RP (25) 1947.

Mr. Wilkey heard defendants getting ready to leave. RP (25) 1948. He heard Holmes ask Lindsay if he was still alive. RP (25) 1948. Lindsay

responded, “fuck him,” causing Holmes to laugh; then they left Mr. Wilkey’s house. RP (25) 1949.

Defendants took with them many items of personal property which Mr. Wilkey believed were his, including his truck, a horse trailer, and a Dish Network receiver which Mr. Wilkey purchased and installed while he was in the Lakebay house. RP (29) 2091; RP (42) 3414, 3470-71; RP (91) 8386; RP (92) 8509-10, 8515.

Mr. Wilkey eventually freed himself and made his way to his neighbor’s house for help. RP 1950. His neighbor called 9-1-1. RP 1950-51. Mr. Wilkey was taken to the hospital where he was treated for cuts, bruises, pain, and complications with his diabetes. RP (25) 1958.

Defendants were arrested by Bonner County Sheriff’s deputies shortly after they arrived back home. RP (36) 2767-68, 2770, 2772, 2775-76. James Loeffelholz, a detective with the Pierce County Sheriff’s Office, went to Idaho and interviewed Lindsay while he was in custody. RP (37) 2947. Lindsay waived his *Miranda*⁵ rights and agreed to give Detective Loeffelholz a statement. RP (37) 2948-51.

In his statement to Detective Loeffelholz, Lindsay admitted to driving to Mr. Wilkey’s house, but claimed that the confrontation turned physical only because he thought Mr. Wilkey was going to get a gun. RP (37) 2959, 2970. Lindsay stated that he had wanted to avoid

⁵ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

unpleasantness, but Mr. Wilkey kept kicking and grabbing at him so he tied up Mr. Wilkey with zip ties and a dog leash. RP (37) 2974-75. Lindsay denied hitting or kicking Mr. Wilkey after he was restrained, but did admit that he threatened him with a pipe. RP (37) 2977-78. Mr. Wilkey kept asking if they were going to kill him. RP (37) 2985. Lindsay responded, "may be you deserve it, but no, we're not gonna kill you." RP (37) 2985, 2989-90. Lindsay also admitted that he may have hit Mr. Wilkey once more toward the end of the incident "because he started calling some names." RP (37) 3002-03.

At trial, Lindsay did not testify, but Holmes testified on her own behalf. RP (72) 6429. According to Holmes, the Bonner County Sheriff's deputies advised her to hire a private investigator to find Mr. Wilkey and repossess the items Mr. Wilkey had taken. RP (76) 6777. Holmes claimed Mr. Wilkey was happy to see her, and did not object to her taking back her property. RP (80) 7127-28. Holmes stated that, aside from a possible scuffle when she first arrived, there was no altercation with Mr. Wilkey and he was not restrained in any way. RP (80) 7073, 7118, 7120-22, 7127, (81) 7234-37.

C. ARGUMENT.

1. THE DEFENDANTS' RIGHT TO A PUBLIC TRIAL WAS NOT VIOLATED WHEN THE COURT ACCEPTED THE JURY'S VERDICT AFTER POSTED BUSINESS HOURS WHEN THE COURTROOM AND THE COURTHOUSE WERE BOTH OPEN.

An accused's right to a public trial is protected by both the state and federal constitutions. The Sixth Amendment provides, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. Similarly, article I, section 22 of the Washington Constitution provides "[i]n criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury." Wash. Const. art. 1, § 22. Article I, section 10 of the Washington Constitution also provides that "[j]ustice in all cases shall be administered openly." Wash. Const. art. 1, § 10. This provision has been interpreted as protecting the right of the public and the press to open and accessible court proceedings, similar to the public's right under the First Amendment. *State v. Easterling*, 157 Wn.2d 167, 174, 179, 137 P.3d 825 (2006) (citing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7, 106 S. Ct. 2735, 92 L.Ed.2d 1 (1986)). These constitutional provisions "assure a fair trial, foster public understanding and trust in the judicial system, and give

judges the check of public scrutiny.” *State v. Coleman*, 151 Wn. App. 614, 620, 214 P.3d 158 (2009).

If this Court determines that the defendant’s right to a fair public trial has been violated, it devises a remedy appropriate to that violation. *State v. Momah*, 167 Wn.2d 140, 149, 217 P.3d 321 (2009, *cert. denied*) ___ U.S. ___, 131 S. Ct. 160, 178 L.Ed.2d. 40 (2010). If the error is structural in nature, automatic reversal of the conviction and remand for a new trial are required. *Momah*, 167 Wn.2d at 149. An error is structural when it “necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” *Momah*, 167 Wn.2d at 149 (*quoting Washington v. Recuenco*, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 165 L.Ed.2d 466 (2006)). However, in each case the “remedy must be appropriate to the violation.” *Momah*, 167 Wn.2d at 150, 155-56.

Whether a defendant’s right to a public trial has been violated is a question of law, subject to de novo review. *State v. Strode*, 167 Wn.2d 222, 225, 217 P.3d 310 (2009).

No Washington court has addressed whether these constitutional provisions apply to courtrooms which remain open after posted business hours and the facts of this case do not warrant such consideration.

Here, it is undisputed that both the courtroom and the courthouse were not closed. No one in the building was denied access to the courtroom nor was any hearing held outside the courtroom. Defendants

and counsel were present in courtroom as well as their family members. *See* CPH 860-64; CPL 483-87. Several prosecutors not involved with the case, as well as their family members, were also present. *See* CPH 853-55, 856-59, 860-64; CPL 477-79, 480-82, 483-87; RP (3/6/09) 55-56, 82. The proceedings were on the record; no witness, evidence, examination or argument was presented that did not relate to the closure. RP (3/6/09) 27-87.

During the taking of the verdict, the courthouse itself was not closed. Two prosecutors were stationed at the first-floor⁶ door of the courthouse holding the outer doors open. *See* CPH 853-55, 856-59, 860-64; CPL 477-79, 480-82, 483-87. Any person wanting to hear the verdict could have entered the building at that time. The record shows that no person requested access, which is not the same as access being denied.

Defendants contention that they were denied a public trial and that the public was denied access to the trial is without merit. Defendants completely ignore the fact that both the courtroom and the courthouse were open to any person who wished access. Defendants provide no authority, nor can the State find any, that the right to a public trial also requires advance notice to the public of when special sessions would be

⁶ The second-floor doors were inaccessible at that time, even during business hours. *See* RP (03/06/09) 28. A sign on the second-floor doors directed visitors to the courthouse to enter on the first floor. RP (03/06/09) 28, 33.

heard. Even Holmes's objection⁷ to taking the verdict after hours supports a finding that the courtroom was not closed so long as the doors to the courthouse remained open. *See* RP (03/06/09) 33. Simply put, neither the courtroom nor the courthouse was closed, the public was not denied access to the court, and defendants' right to a public trial was not violated.

- a. Because the courtroom was not closed, the court was not required to perform a *Bone-Club* analysis.

In *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995), the Washington Supreme Court set out the standards for closing all or any portion of a criminal trial. The Court adopted a five part analysis that applies to protect both the public's right under article I, §10, and the defendant's right under article I, § 22:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

⁷ "We don't know who was there where [the prosecutor] was not there, and so it is a public courtroom as long as the prosecutor is there to open the door." RP (03/06/09) 33.

4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.”

Bone-Club, 128 Wn.2d at 258-59 (quoting *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

In the present case, the *Bone-Club* factors do not apply as the courtroom was not closed. The trial court did not exclude any person from the courtroom, it did not conduct any hearing outside the view of the spectators within the courtroom, nor did it seal any records from public scrutiny.

The court carefully considered whether to take the verdict after hours and made a record that shows that several of the *Bone-Club* factors were, in fact, met. In an effort to ensure that defendants’ right to a jury trial were protected, the court accommodated the jury’s after-hour deliberations for three days. RP (95) 8914-15; (96) 8931-32.

Once the jury indicated it had reached a verdict, the court inquired whether the jury would be available the following Monday. RP (03/06/09) 34-35. If the jurors could have returned, the court would have sealed the verdicts and reconvened during regular business hours. *See* RP (03/06/09) 34-35. Two jurors indicated that they would be unable to return, and one of those jurors was going to be unavailable for the following two months. RP (03/06/09) 35. Having jurors absent to present the verdict would have

violated defendants' right to a jury trial and they would not have been able to determine if the verdict had been unanimous.

Both defendants had the opportunity to object to the court's taking of the verdict.

The court's attempts to ensure that the building and courtroom remained open was certainly the least restrictive means of ensuring defendants' right to a jury trial. Two jurors indicated that they could not return, and the court risked a mistrial⁸ after an 11-month trial if it had waited until the following Monday. *See* RP (03/06/09) 35.

The court balanced the competing interests of defendants' right to a jury trial and the public's right to access to the courts by ensuring that the public had access to the building and the courtroom.

Finally, the hearing took no longer than necessary to ensure the courtroom was open, noting the defendant's objections, taking the verdict, and polling the jury. The hearing served its purpose of preserving both defendants' right to a jury trial.

⁸Because the trial lasted for 11 months, the court no longer had any alternate jurors. *See* RP (26) 2009, RP (27) 2070, RP (32) 2279-80, 2284-85.

2. DEFENDANTS' CONVICTIONS FOR ROBBERY, KIDNAPPING⁹, AND ASSAULT DO NOT VIOLATE DOUBLE JEOPARDY WHERE THE CRIMES ARE NOT THE SAME IN LAW AND EACH CRIME SERVED AN INDEPENDENT PURPOSE.

The Washington State Constitution, article I, section 9, and the Fifth Amendment to the federal constitution prohibit multiple prosecutions or punishments for the same offense. *State v. Baldwin*, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003). The state constitution provides the same protection against double jeopardy as the federal constitution. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Beyond these constitutional restraints, the Legislature has the power to define criminal conduct and to assign punishment. *State v. Louis*, 155 Wn.2d 563, 568, 120 P.3d 936 (2005); *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). "The Double Jeopardy Clause does no more than to prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L.Ed.2d 535 (1983). When a claim of improper multiple punishments is

⁹ Holmes adopted Lindsay's double jeopardy law and argument. Because Holmes was not convicted of second degree kidnapping, Lindsay's arguments relating to the kidnapping charge do not apply to Holmes. Holmes does not supply any additional argument or authority to support her claim that her convictions for assault and unlawful imprisonment violate double jeopardy. As Holmes failed to properly brief that issue, the State is not responding here.

raised, the appellate court must determine that the lower court did not exceed the punishment authorized by the legislature. *See Calle*, 125 Wn.2d at 776.

Double jeopardy is not violated simply because two charges arose from the same incident. Where a defendant contends that he has been punished twice for a single act under separate criminal statutes, two questions arise. The first is whether the Legislature intended to punish each crime separately. *State v. Freeman*, 153 Wn.2d 765, 776, 108 P.3d 753 (2005). The second is “whether, in light of legislative intent, the charged crimes constitute the same offense.” *State v. Graham*, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005).

Only if the relevant statutes do not expressly authorize multiple punishments, courts should apply the *Blockburger* or “same evidence” tests. *Graham*, 153 Wn.2d at 404, citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932), *see also, Hunter*, 459 U.S. at 368-69. Washington courts use the “same evidence” test, which mirrors *Blockburger*. *Louis*, 155 Wn.2d at 569.

Under the *Blockburger* test, double jeopardy arises if the offenses are identical both in law and in fact. *Baldwin*, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003). Under the same evidence test, offenses must be identical in law to invoke double jeopardy. *Baldwin*, 150 Wn.2d at 454. If each offense requires proof of an element not required in the other, where proof of one does not necessarily prove the other, the offenses are

not the same, and multiple convictions are permitted. *Louis*, 155 Wn.2d at 569.

In the present case, none of defendants' crimes violate double jeopardy as they are each different in law and fact.

A person commits robbery when he or she unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property, and such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking. RCW 9A.56.190; CPH 593-707; CPL 269-381 (Jury Instruction 36).

A person commits kidnapping in the second degree when he or she intentionally abducts another person under circumstances not amounting to kidnapping in the first degree. RCW 9A.40.030; CPH 593-707; CPL 269-381 (Jury Instruction 64). Abduct means to restrain a person by using or threatening to use deadly force. RCW 9A.40.010(2); CPH 593-707; CPL 269-381 (Jury Instruction 60). Restraint or restrain means to restrict another person's movements without consent and without legal authority in a manner that interferes substantially with that person's liberty. RCW 9A.40.010(1); CPH 593-707; CPL 269-381 (Jury Instruction 60).

A person commits second degree assault when, under circumstances not amounting to first degree assault, he or she intentionally assaults another, and thereby recklessly inflicts substantial bodily harm, or

assaults another with a deadly weapon, or assaults another with intent to commit a felony. RCW 9A.36.021(a), (c), (e); CPH 593-707; CPL 269-381 (Jury Instruction 76).

As each of these statutes do not expressly authorize multiple punishments, the legislative intent must be discerned by using the *Blockberger* test. Under *Blockburger*, none of these crimes are the same in law because each requires proof of an element not contained in the other crimes. The crime of robbery requires proof of an unlawful taking of personal property from another; kidnapping requires an abduction of a person, and assault requires an intent to cause bodily harm.

As more fully articulated below, defendants' convictions are also not the same in fact.

- a. The State presented sufficient evidence to prove that Lindsay's conviction for kidnapping was distinct from the robbery.

Lindsay relies on *State v. Korum*, 120 Wn. App. 686, 86 P.3d 166 (2004), *reversed on other grounds*, 157 Wn.2d 614, 141, P.3d 13 (2006) for his contention that his convictions for robbery and kidnapping violate double jeopardy because the kidnapping was incidental to the robbery. Lindsay misconstrues the court's holding in *Korum*.

In *Korum*, the defendant planned a series of night time, armed, home-invasion robberies of known drug dealers' homes. *Korum*, 120 Wn.

App. at 690. In each of the robberies, Korum or an accomplice restrained the people present in the homes with duct tape while he stole drugs, money, or other valuables. *Korum*, 120 Wn. App. at 691-92. In one instance, the robbers yelled at, kicked, hit, and threatened to burn the victim with acid if she did not tell them where the money and drugs were located. *Korum*, 120 Wn. App. at 691. In another instance, the robbers attempted to unbind the victims after the robbery, but stopped when they realized the police were outside. *Korum*, 120 Wn. App. at 707 n. 19. This court held that, as a matter of law, the kidnappings in *Korum* were incidental to the robberies for the following reasons:

(1) The restraints were for the sole purpose of facilitating the robberies-to prevent the victims' interference with searching their homes for money and drugs to steal; (2) forcible restraint of the victims was inherent in these armed robberies; (3) the victims were not transported away from their homes during or after the invasions to some remote spot where they were not likely to be found; (4) although some victims were left restrained in their homes when the robbers left, the duration of the restraint does not appear to have been substantially longer than that required for commission of the robberies; and (5) the restraints did not create a significant danger independent of that posed by the armed robberies themselves.

Korum, 120 Wn. App. at 707.

Three years later, this court clarified its ruling in *Korum* when it decided *In re Bybee*, 142 Wn. App. 260, 175 P.3d 589 (2007). In *Bybee*, the defendant filed a personal restraint petition claiming his petition was not time-barred because his convictions for kidnapping and robbery

violated double jeopardy as per *Korum. Bybee*, 142 Wn. App. 261. The *Bybee* court denied the petition as untimely, clarifying that the *Korum* court's reversal of the defendant's convictions for kidnapping was because there was insufficient evidence of independent kidnappings distinct from the robberies, not because the convictions violated double jeopardy. *Bybee*, 142 Wn. App. at 267.

Here, there was sufficient evidence to prove that the kidnapping was a separate and distinct act because the restraint was not performed for the sole purpose of facilitating the robbery.

Lindsay was charged with first degree kidnapping. CPL 76-81. The jury found him guilty of the lesser included crime of second degree kidnapping. CPL 384. To convict Lindsay of second degree kidnapping, the State was required to prove that Lindsay or an accomplice "intentionally abducted Lawrence Wilkey[.]" CPL 267-381 (Jury Instruction 66).

Lindsay burst through Mr. Wilkey's front door, struck him with a pipe, and choked him into unconsciousness. *See* RP (25) 1901-03. This force prevented Mr. Wilkey from resisting the taking of his property and the robbery was complete. It was only after Mr. Wilkey had already been subdued that defendants tied him up. *See* RP (25) 1905-06. Even after restraining Mr. Wilkey, the defendants did not merely leave him while they removed property from the house. Rather, they conspicuously poured his medications down the toilet, beat him, and wrapped a robe around his

head which affected Mr. Wilkey's breathing, and poured alcohol on the robe while threatening to light Mr. Wilkey on fire, all while he was restrained. RP (25) 1916, 1928, 1941-42, 1944. These acts prove that Mr. Wilkey's continued restraint was not for the purpose of facilitating the robbery, but to satisfy defendants' desire to humiliate and demean him in punishment for taking property from Holmes. See RP (95) 8698-701.

Mr. Wilkey's restraint was not incidental to the robbery as he was not restrained for the sole purpose of facilitating the robbery, the restraint was not inherent in the nature of the robbery, and the restraint caused a significant danger independent of that posed by the robbery.

- b. Defendants' convictions for robbery and assault do not violate double jeopardy where the assault did not elevate the robbery to first degree.

Robbery elevates from second to first degree if, in the commission of the robbery or in immediate flight therefrom, the defendant inflicts bodily injury, which is an assault. *State v. Wade*, 133 Wn. App. 855, 871, 138 P.3d 168 (2006); RCW 9A.56.200(1)(a)(iii), .210. In *State v. Freeman*, 153 Wn.2d 765, 775-76, 108 P.3d 753 (2005), the Washington Supreme Court concluded that the legislature intended to punish separately both a robbery elevated to first degree by a first degree assault and the assault itself; the convictions therefore did not violate double jeopardy. Where second degree assault furthers a robbery, however, the

court found no evidence that the legislature intended to punish the crimes separately. *Freeman*, 153 Wn.2d at 776. Those offenses generally will merge unless the assault has an independent purpose or effect. *Freeman*, 153 Wn.2d at 778-80.

As noted above, defendants' committed first degree robbery when Lindsay struck Mr. Wilkey on the head with a pipe. Mr. Wilkey was then assaulted by both defendants when he was hit repeatedly on the back. RP (25) 1928. This constituted an assault which did not elevate the robbery to first degree.

- c. Lindsay's convictions for kidnapping and assault do not violate double jeopardy where the assault was not the force necessary for the abduction.

As noted above, Mr. Wilkey was restrained after he was hit on the head with a pipe and rendered unconscious. RP (25) 1902-03. When he woke, his wrists and ankles were bound with zip ties. RP (25) 1920. When the zip ties around his ankles broke, Lindsay used a dog leash to rebind him. RP (25) 1920. Defendants engaged in beating Mr. Wilkey after he was restrained. RP (25) 1928. As defendants assaulted Mr. Wilkey after he was restrained, such force was obviously not necessary for the abduction.

3. THE SEIZURE OF LINDSAY'S NOTE PAD BY JAIL STAFF DID NOT VIOLATE HIS RIGHT TO COUNSEL.

Pursuant to CrR 8.3(b), a court “in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution.” The denial of a motion to dismiss is reviewed for abuse of discretion. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997); *State v. Garza*, 99 Wn. App. 291, 295, 994 P.2d 868 (2000). To support dismissal, the defendant must show two things: (1) arbitrary action or governmental misconduct, and (2) prejudice affecting the defendant's right to a fair trial. *Michielli*, 132 Wn.2d at 239-40. Because dismissal of charges is an extraordinary remedy, it is available only in truly egregious cases of mismanagement or misconduct by the prosecutor and when prejudice to the defendant materially affected the right to a fair trial. *Garza*, 99 Wn. App. at 295 (citing *City of Seattle v. Orwick*, 113 Wn.2d 823, 830, 784 P.2d 161 (1989)); *State v. Duggins*, 68 Wn. App. 396, 401, 844 P.2d 441, *aff'd*, 121 Wn.2d 524, 852 P.2d 294 (1993). A trial court's decision on a motion to dismiss under CrR 8.3(b) is reviewed for manifest abuse of discretion. *State v. Moen*, 150 Wn.2d 221, 226, 76 P.3d 721 (2003).

The fact of any government intrusion into the defendant's private communications with his attorney will not automatically be deemed a per se prejudicial violation of the defendant's Sixth Amendment right to

counsel. *State v. Garza*, 99 Wn. App. 291, 298, 994 P.2d 868 (2000); *Weatherford v. Bursey*, 429 U.S. 545, 97 S. Ct. 837, 51 L.Ed.2d 30 (1977). The constitutional validity of a conviction in these circumstances will depend on whether the improperly obtained information has “produced, directly or indirectly, any of the evidence offered at trial.” *Weatherford*, 429 U.S. at 552.

Prejudice is presumed where the government’s actions are purposeful and without justification. *Garza*, 99 Wn. App. at 300-01. Even if there is no presumption of prejudice, the defendants still may demonstrate prejudice by demonstrating (1) that evidence gained through the intrusion will be used against them at trial; (2) that the prosecution is using confidential information pertaining to defense strategies; (3) that the intrusions have destroyed their confidence in their attorneys; or (4) that the intrusions will otherwise give the State an unfair advantage at trial. *Garza*, 99 Wn. App. at 301.

Here, Lindsay moved for a mistrial rather than a dismissal under CrR 8.3(b), but the standard of review for denial of a motion for mistrial is also an abuse of discretion. See *State v. Greiff*, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). A review of the record shows that Lindsay’s contention that jail staff interfered with his right to counsel is without merit.

During the course of the trial, jail staff performed a routine search of an entire tier of the jail, including Lindsay’s cell. See RP (60) 5180-81. Jail staff disposed of “nuisance contraband,” such as old newspapers, extra

clothing, food, and extra hand soap. RP (60) 5189-90. Jail staff specifically did not throw away any legal or hand-written documents, but agreed that if a document had been hidden inside one of the old newspapers it may have been inadvertently disposed of. RP (60) 5189; 5304. The officer who cleared Lindsay's cell did not see any legal documents, notepads, or notebooks. RP (60) 5304, (62) 5582-83.

The following day, Lindsay claimed to be missing a portion of his trial notes. *See* RP (60) 5178. Out of the two, four-inch expand files containing his trial materials, Lindsay was missing one small notebook. RP (60) 5304. The notebook contained Lindsay's notes on witnesses as well as notes by his counsel. RP (60) 5305; (62) 5582.

Nothing in the record shows there was any government intrusion on Lindsay's communication with counsel. The jail staff did not see any legal documents or notes, let alone read and destroy them. If the jail staff did dispose of his notebook, such action was not purposeful because it would have taken place only if the notebook had been hidden within old newspapers. In addition, Lindsay never claimed that he saw jail staff seize the notebook. It is sheer conjecture that the jail staff either seized or disposed of Lindsay's notebook, and there is no support in the record that any such act was purposeful.

Lindsay relies on *State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019 (1963) and *Garza*, 99 Wn. App. 291 for his contention that the government's seizure and destruction of his attorney-client

communications violated his right to confer with counsel. His reliance on these cases is misplaced as neither is factually similar to the case at bar.

In *Cory*, jail staff eavesdropped on defendant and his counsel when they surreptitiously recorded their confidential conversations. *Cory*, 62 Wn.2d at 372. The court correctly found that such conduct was “shocking and unpardonable” and dismissed the charges against the defendant. *Cory*, 62 Wn.2d at 378.

In *Garza*, jail officials seized and examined inmates’ legal documents in the process of investigating an escape attempt. *Garza*, 99 Wn. App. at 293. The court held that the jail officials’ actions were purposeful and may have been justified. *Garza*, 99 Wn. App. at 300-01. Because the record was silent on whether the security concerns justified such an extensive intrusion into the defendants’ attorney-client privilege, the court remanded the case for an evidentiary hearing. *Garza*, 99 Wn. App. at 301. On remand, the court directed the trial court to fashion an appropriate remedy if it found that the jail officers’ actions violated the defendants’ right to counsel but admonished the trial court that dismissal was an “extraordinary remedy, appropriate only when other, less severe sanctions” would be effective. *Garza*, 99 Wn. App. 301-02.

Clearly the facts in the present case do not arise to the level of outrageous governmental conduct as seen in *Cory*. Nor is *Garza* on point as here it is mere conjecture that jail officials had any part in Lindsay’s loss of his notebook and, even if they had disposed of it, the disposal was

not purposeful. Nothing in the record supports a finding that jail officials seized the notebook at all, let alone purposefully seized, examined, or read correspondence between Lindsay and his counsel.

As government officials did not intrude on Lindsay's right to counsel or his private attorney-client relationship, defendant's argument fails.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO ADMIT EVIDENCE OF THE VICTIM'S ALLEGED DRUG USE WHEN SUCH USE OCCURRED YEARS PRIOR TO THE NIGHT OF THE CRIME NOR DID IT AFFECT HIS ABILITY TO REMEMBER THE CRIME OR TO TESTIFY.

A trial court has wide discretion in admitting evidence. *State v. Lillard*, 122 Wn. App. 422, 431, 93 P.3d 969 (2004). The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Lillard*, 122 Wn. App. at 431. A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

Under ER 607, any party may attack any witness's credibility. A party may not introduce extrinsic evidence of specific instances of conduct of a witness, for the purpose of attacking or supporting the witness's credibility. ER 608(b). But if specific instances of a witness's conduct

are probative of truthfulness or untruthfulness, the court may allow inquiry into those specific instances “on cross examination of the witness (1) concerning the witness’s character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.” ER 608(b).

Generally, a defendant can impeach a witness with evidence of his drug use only when there is a reasonable inference that the witness was under the influence of drugs either at the time of the events in question, or while testifying at trial. *State v. Thomas*, 150 Wn.2d 821 863, 83 P.3d 970 (2004) (citing *State v. Russell*, 125 Wn.2d 24, 83, 882 P.2d 747 (1994)); *State v. Tigano*, 63 Wn. App. 336, 344, 818 P.2d 1369 (1991), *rev. denied*, 118 Wn.2d 1021, 827 P.2d 1392 (1992). Evidence of drug use on other occasions is generally inadmissible because it is impermissibly prejudicial. *Tigano*, 63 Wn. App. at 344-45.

Here, Holmes claims the trial court abused its discretion when it prohibited her from introducing evidence of Mr. Wilkey’s alleged drug use which occurred six years prior to the crime. *See* Brief of Appellant (Holmes) at 55. Yet the trial court did not base its ruling on untenable grounds or for untenable reasons.

The trial court noted that evidence of drug use is normally allowed if it occurs on the day of the incident or the day the witness testifies. RP (14) 761-62. The court later clarified its earlier ruling and allowed

Holmes to inquire about Mr. Wilkey's drug use if it occurred during the relevant times at issue in the trial. RP (34) 2503. The court determined that the relevant times were:

[W]hen [Mr. Wilkey] and Ms. Holmes broke up and there was a division of the property and him leaving Idaho and during the time frame concerning the allegations of the home invasion robbery and also during his times on the witness stand, there's no question that he gets asked about that, but that's it.

RP (34) 2503. There was no evidence in the record that Mr. Wilkey was using drugs during the time the court determined were relevant.

The trial court's determination of the relevant times at issue in the trial was consistent with *Thomas* and *Tigano*. Whether Mr. Wilkey was using drugs at the time the couple had acquired property in their relationship had no relevance on whether Holmes had the right to unlawfully enter Mr. Wilkey's house and take back the items by force, six years later. Instead, evidence of drug use would have merely created impermissible prejudice, suggesting to the jury that Mr. Wilkey could not be believed, even about the events in question, because he was a "cocaine addict" and six years earlier he had been a "crack head" and a "drug rat" with a "raging cocaine habit."¹⁰ RP (14) 751, (52) 4558, (90) 8278, 8322, (97) 8939.

¹⁰ As these were the words used by Holmes's counsel to describe Mr. Wilkey's prior cocaine usage, it is not unreasonable to infer that her attempts to introduce such evidence was merely for its prejudicial effect.

Because evidence of Mr. Wilkey's drug use six years prior to the incident and eight years prior to trial was not relevant and would have been impermissibly prejudicial, the trial court's refusal to allow such evidence was reasonable and not an abuse of discretion.

5. THE TRIAL COURT DID NOT VIOLATE HOLMES'S RIGHT TO DUE PROCESS AT THE RESTITUTION HEARING WHERE SHE HAD THE OPPORTUNITY TO REBUT THE EVIDENCE PRESENTED.

"[R]estitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury." RCW 9.94A.753(3). This statute must be broadly interpreted to accomplish the legislature's purpose, which is to require the defendant to face the consequences of his criminal conduct. See *State v. Tobin*, 132 Wn. App. 161, 173, 130 P.3d 426 (2006), *aff'd*, 161 Wn.2d 517, 166 P.3d 1167 (2007); *State v. King*, 113 Wn. App. 243, 299, 54 P.3d 1218 (2002).

"Easily ascertainable" damages are those tangible damages that are proven by sufficient evidence to exist. The amount of loss does not need to be shown with mathematical certainty. *Tobin*, 132 Wn. App. at 173; *State v. Bush*, 34 Wn. App. 121, 123-24, 659 P.2d 1127 (1983). The evidence is sufficient "if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture."

State v. Fleming, 75 Wn. App. 270, 274-75, 877 P.2d 243 (1994) (quoting *State v. Pollard*, 66 Wn. App. 779, 785, 834 P.2d 51 (1992)).

Information pertaining to the amount of loss can be provided in the form of letters and declarations. *Tobin*, 132 Wn. App. at 175; *State v. Lohr*, 130 Wn. App. 904, 910-11, 125 P.3d 977 (2005). And the owner is always qualified to provide that information. *McCurdy v. Union Pac. R.R.*, 68 Wn.2d 457, 468-69, 413 P.2d 617 (1966); *Cunningham v. Town of Tieton*, 60 Wn.2d 434, 436-37, 374 P.2d 375 (1962). In a criminal case, the value of an item is proven in the same manner as in a civil case. See *State v. Riley*, 34 Wn. App. 529, 535-36, 663 P.2d 145 (1983).

A trial court has discretion to determine the amount of restitution. *Pollard*, 66 Wn. App. at 785. If substantial credible evidence supports the amount ordered, there is no abuse of discretion. *Pollard*, 66 Wn. App. at 785. Although traditional evidence rules do not apply at restitution hearings, due process requires that the defendant have an opportunity to rebut the evidence presented. *State v. Kisor*, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993). Accordingly, when “evidence is comprised of hearsay statements, the degree of corroboration required by due process is not proof of the truth of the hearsay statements ‘beyond a reasonable doubt,’ but rather, proof which gives the defendant a sufficient basis for rebuttal.” *Kisor*, 68 Wn. App. at 620.

Here, the State presented Mr. Wilkey's declaration where he described each item of property stolen or damaged, provided his opinion of its value, and included receipts in support. Exhibit 1. During Holmes's cross-examination of Mr. Wilkey at the restitution hearing, the State indicated that it would strike several items off of Mr. Wilkey's list, as the prosecutor believed they were improperly included. RP (08/07/09) 28. Holmes then informed the court that she wished to submit her objections to the restitution in writing. RP (08/07/09) 28-29. The State filed a redacted restitution request and both defendants submitted detailed objections, generally refuting Mr. Wilkey's claims to the items. CPH 866-76, 877-83; CPL (supplemental¹¹) 1-11, 12-19.

The court reviewed the materials presented by the parties as well as RCW 9.94A.750. RP (11/13/09) 3. The court struck several additional items, leaving only those items which it found to be "amounts that were easily ascertainable and fit within the case law requirements and were based on actual losses that were easily ascertainable. CPH 884-96; CPL (supplemental) 20-32; RP (11/13/09) 6.

Clearly Holmes had a sufficient basis to rebut Mr. Wilkey's claims for restitution, as she did so through cross-examination and written

¹¹ Lindsay's first designation of clerk's papers was filed under COA 39103-1. CPL 467-70. It appears that Lindsay's later filing of supplemental clerk's papers under COA 40153-3 caused the numbering to start over from "1." See CPL (supplemental) 47-48. When referencing these documents, the State will cite to CPL (supplemental) for clarity.

motion. Mr. Wilkey's declaration was detailed enough to permit the court, as fact finder, to reasonably conclude that the items actually existed and to provide some basis for an objective valuation. The values asserted were not clearly excessive. That is adequate credible evidence to support the award and there was no denial of due process.

6. HOLMES IS NOT ENTITLED TO A NEW TRIAL
BASED ON PROSECUTORIAL MISCONDUCT

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks are both improper and prejudiced the defense. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); *State v. Binkin*, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996). Prejudice is established only if there is a substantial likelihood that the instances of misconduct affected the jury's verdict. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

Here, Holmes alleges the prosecutor engaged in continuous misconduct which affected her right to a fair trial. *See* Brief of Appellant (Holmes). Many of the challenged instances occurred outside the presence of the jury. Holmes has utterly failed to show that any of the challenged conduct which occurred outside the jury's presence resulted in

prejudice. Because Holmes has not shown prejudice, her claims fail and the State will limit its response¹² to those activities which took place in front of the jury.

- a. The prosecutor did not engage in denigration of counsel when he responded to counsel accusations of unethical behavior.

Comments that demean the role of defense counsel are improper. *State v. Warren*, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008). They impugn the integrity of the adversary system and are inconsistent with the prosecutor's obligation to ensure a verdict is free from prejudice and based on reason rather than passion. *Viereck v. United States*, 318 U.S. 236, 247-48, 63 S. Ct. 561, 87 L. Ed. 734 (1943); *State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993).

In *Warren*, the Court held that the prosecutor committed misconduct when it told the jury that there were a number of mischaracterizations in defense counsel's argument as "an example of what people go through in a criminal justice system when they deal with defense attorneys." 165 Wn.2d at 29. The prosecutor also described defense counsel's argument as a "classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not

¹² The State does not concede that any of the challenged statements or conduct which occurred outside the presence of the jury constituted misconduct.

smart enough to figure out what in fact they are doing.” *Warren*, 165 Wn.2d at 29. Despite finding that these remarks were improper, the Court determined that the defendant’s failure to object precluded review, as they were not so flagrant or ill-intentioned that no instruction could have cured them. *Warren*, 165 Wn.2d at 29-30.

Similarly in *State v. Gonzales*, 111 Wn. App. 276, 45 P.3d 205 (2002) *rev. denied*, 148 Wn.2d 1012, 62 P.3d 890 (2003), the Court of Appeals found misconduct when the prosecutor implied that his job was to seek justice, and the defense attorney’s was not. The court found the comment rose to the level of prosecutorial misconduct because it disparaged defense counsel and sought to “draw a cloak of righteousness” around the State’s position. *Gonzales*, 111 Wn. App. at 282. In addition, because the trial court repeatedly overruled defense counsel’s objection to the comments and allowed the prosecutor to further develop this theme, the court found that it had the potential to affect the jury’s verdict. *Gonzales*, 111 Wn. App. at 284.

Upon reading the trial transcript of the present case, there can be no doubt that this was a contentious legal battle in which the attorneys¹³ engaged in unprofessional conduct. On pages 17-18 of her appellant brief,

¹³ As this issue was raised solely by Holmes, the State does not intend to include counsel for Lindsay in its assessment of the attorneys’ conduct. Notably, Lindsay does not raise any issue of prosecutorial misconduct and the record is devoid of any suggestion that the prosecutor and counsel for Lindsay did not behave in a completely professional manner toward each other.

Holmes lists a series of challenged statements which she claims were misconduct in the presence of the jury. Holmes asks this Court to review each statement in isolation. While the State does not condone the behavior of the prosecutor, when his remarks are taken in context of the surrounding circumstances, Holmes cannot show that the prosecutor's behavior resulted in prejudice. There was not a single instance where the prosecutor's statement was an appeal to the passion of the jury, or was it an attempt to "draw a cloak of righteousness" around the State's position.

The record shows that each instance of the prosecutor's behavior was precipitated by the actions of opposing counsel. For example, Holmes alleges that the prosecutor's statement "I can't respond politely" was misconduct. *See* Brief of Appellant (Holmes) at 18. During cross-examination of Mr. Wilkey, the prosecutor observed him take out a pen and write the question down in a notebook while he was on the stand. RP (51) 4341. During redirect, the prosecutor asked Mr. Wilkey why he would write down a question. RP (51) 4341. In the presence of the jury, counsel objected as she had not been "blessed with discovery of any of the writings of Mr. Wilkey during this trial...." RP (51) 4341. The prosecutor stated that he could not respond politely to counsel's objection. RP (51) 4341. When properly taken in context, the prosecutor's refusal to make an impolite response to counsel's sarcastic comment was neither improper nor prejudicial.

The only logical conclusion that can be drawn from this record is that Holmes was seeking a dismissal based on outrageous governmental conduct and was attempting to goad the prosecutor into such behavior. While the State admits that it is unfortunate that the prosecutor was, at times, unable to ignore counsel's antics, the record shows that the prosecutor endured repeated accusations of unethical behavior, attempted for several months to move the trial along, and encouraged the court to control counsel's repeated personal attacks where the court was unwilling to do so. *See* RP (24) 1854, (29) 2140-41, (42) 3564-65, (51) 4362-64.

Significantly, the court rarely admonished either attorney their behavior. *See generally* RP (24) 1858, (42) 3568-69, (76) 6813. When the situation finally became vitriolic to the point where the court threatened sanctions, the only attorney he noted that was free of blame was counsel for Lindsay. RP (53) 4579-81. This belies Holmes's claim that the prosecutor's behavior were the baseless attacks of a prosecutor "run amok." Brief of Appellant's (Holmes) at 40. If the prosecutor had so taken leave of his professionalism, it would have been directed toward both defendants, not just Holmes.

As to Holmes's accusations of denigration for the prosecutor's alleged non-verbal behavior, nothing in the record except Holmes's and counsel's self-serving statements support the accusations. For example, Holmes takes issue with the prosecutor "tapping his pen and rolling his eyes." Brief of Appellant (Holmes) at 20. Despite her assertions that this

was corroborated by Lindsay, all counsel for Lindsay admitted to hearing was a pen “put down loudly.” RP (51) 4306.

Holmes has not shown that the prosecutor’s behavior resulted in prejudice and her claim must fail.

b. The prosecutor did not commit prejudicial misconduct during closing argument.

A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). Where a criminal defendant testifies in his own defense, “his credibility may be impeached and his testimony assailed like that of any other witness....” *Brown v. United States*, 356 U.S. 148, 154, 78 S. Ct. 622, 2 L.Ed.2d 589 (1958).

To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require “that [the] burden of showing essential unfairness be sustained by him who claims such injustice.” *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the

argument and the instructions given. *State v. Bryant*, 89 Wn. App. 857, 950 P.2d 1004 (1998). A prosecutor is allowed to argue that the evidence doesn't support a defense theory. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87.

Here, Holmes challenges several statements made by the prosecutor in closing argument. See Brief of Appellant (Holmes) at 20-27, 45-51. Her objections to the prosecutor's alleged misstatement of the evidence were answered by the court instructing the jury that "all issues of fact will be decided by the jury." See RP (95) 8710, 8711, 8713, 8718-19, 8878, 8879, 8880, 8881. A jury is presumed to follow the court's instructions. *State v. Yates*, 161 Wn.2d 714, 763, 168 P.3d 359 (2007).

- i. **The prosecutor's arguments regarding Holmes's credibility was based on the evidence presented at trial and did not result in prejudice.**

Although it is improper for a prosecutor to assert a personal opinion about a witness's veracity, the prosecutor may argue an inference of credibility if it is based on the evidence. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). To determine whether the prosecutor is expressing a personal opinion about the defendant's guilt, independent of the evidence, courts view the challenged comments in context. *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006).

It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, ... it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.

State v. Anderson, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009) (citing *McKenzie*, 157 Wn.2d at 53-54).

In *Anderson*, the prosecutor argued in closing that the defendant's testimony was "made up on the fly," "ridiculous," and "utterly and completely preposterous." 153 Wn. App. 430. When reviewed in context, this court found the statements were intended to clarify the law and argue inferences from the evidence. *Anderson*, 153 Wn. App. at 431. The court held that the statements did not convey the prosecutor's personal opinion about the case. *Anderson*, 153 Wn. App. at 431.

Here, the prosecutor argued that Holmes's testimony was not credible. Specifically, he stated that Holmes's testimony that she was not mad at Mr. Wilkey for taking all of her property was "the most ridiculous thing" he had ever heard. RP (95) 8708. The prosecutor also discussed Holmes's testimony that Idaho police officers and her lawyer advised her to repossess her property herself was "a little ridiculous." RP (95) 8711.

As in *Anderson*, when reviewed in context, the prosecutor's statements were intended to clarify the evidence. After stating that Holmes's assertion she was not mad at defendant was the most ridiculous thing he had ever heard, he went on to explain:

She sat there and told you she wasn't mad at him when he took the stuff; she wasn't mad that he took the kids' computer; she wasn't mad that he took the blender; she wasn't mad that he took the food; she wasn't mad that he took the entertainment center; she wasn't mad that he took the bed; she wasn't mad when the police told her it was a civil action and she should go hire an attorney; she wasn't mad when the insurance company wasn't paying out; she wasn't mad after six-plus hours of driving over here on her horribly bad back that had to be in excruciating pain, she still wasn't mad at Lawrence. She gets into that house and then she has to go get that trailer and she has to fight with that trailer hitch and her bad back for half an hour and she's still not mad at him.

RP (95) 8708. Clearly the prosecutor was arguing an inference based on the evidence presented at trial.

The prosecutor's second statement, that Holmes's testimony that her attorney and the Idaho officers advised her to engage in self-help was ridiculous, was also an inference based on the evidence when reviewed in context. The prosecutor argued that all of the Idaho officers advised her that Mr. Wilkey's alleged theft of her property was a civil matter and to hire a lawyer. RP (95) 8711. The prosecutor noted that police would never advise someone to repossess their own property because of the chance of someone getting hurt. RP (95) 8710-11. The prosecutor also

argued an attorney would not have turned down payment and risk their license by encouraging someone to reacquire their property in the middle of the night. *See* RP (95) 8711-12. The prosecutor noted that the State had the burden of proof for each element of each crime, but noted that Holmes did not call the attorney who gave her that advice. RP (95) 8712. Clearly, the prosecutor's statement was a reasonable argument based on the evidence presented and not a personal opinion of Holmes's credibility or guilt.

- ii. **The prosecutor's arguments regarding reasonable doubt were not attempts to shift the burden from the State nor were they so flagrant or ill-intentioned that any potential prejudice could not have been cured by instruction.**

Absent a proper objection and a request for a curative instruction, the defense waives a prosecutorial misconduct claim unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. *State v. Charlton*, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

Due process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt. *Warren*, 165 Wn.2d at 26. In 2007, the Washington Supreme Court expressly directed trial courts to use Washington Practice: Washington Pattern Instruction: Criminal (WPIC) 4.01 to inform juries of the State's burden to prove

beyond a reasonable doubt every element of a charged crime. *State v. Castillo*, 150 Wn. App. 466, 467, 208 P.3d 1201 (2009) (citing *State v. Bennett*, 161 Wn.2d 303, 306, 165 P.3d 1241 (2007)). WPIC 4.01 reads in relevant part:

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

Here, the court instructed the jury on the definition of reasonable doubt and the State's burden of proof. CPH 593-707; CPL 267-381 (Jury Instruction 2). During closing argument, the prosecutor explained the concept of reasonable doubt and quoted, verbatim, the trial court's instructions to the jury. RP (95) 8725-26. The prosecutor then went on to argue that the case was about the evidence, and whether the State proved the elements of the crimes beyond a reasonable doubt. RP (95) 8726. The prosecutor used a puzzle analogy to describe how beyond a reasonable doubt was a subjective level of proof for each individual. RP (95) 8726-27. The prosecutor did note that cases were more complicated than putting together puzzles since, "cases don't come to us from a box from the store, our cases come to us with people." RP (95) 8728. The prosecutor completed his reasonable doubt argument by stating that proof beyond a reasonable doubt was not an impossible standard to meet and

likened it to a standard the jurors use every day when they cross a busy street. RP (95) 8728-29. Holmes did not object to any of these arguments. *See* RP (95) 8725-29.

The prosecutor did not misstate the burden of proof by telling the jury that they were convinced beyond a reasonable doubt if they had an abiding belief in the truth of the charge and that an abiding belief is one where the jury is convinced of guilt, not only at the time of the verdict, but would remain convinced into the future. RP (95) 8725. The prosecutor's argument mirrors the WPIC and is a correct statement of the law. This argument is not misconduct.

In the light of recent case law, the prosecutor's argument that individuals consider proof beyond a reasonable doubt in every day situations, such as crossing the street, is more problematic. In *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), the prosecutor discussed the reasonable doubt standard in the context of everyday decision making, such as choosing to have elective surgery, leaving children with a babysitter, and changing lanes on the freeway. This Court held that those arguments were improper because they "trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing" the State's case against the defendant and because they implied, by "focusing on the degree of certainty the jurors would have to have to be willing to act, rather than that which would cause them to hesitate to act," that the jury should convict the defendant unless it found a

reason not to do so. *Anderson*, 153 Wn. App. at 431-432. Yet this Court declined to reverse Anderson's convictions because the jury had been properly instructed and the defendant failed to show that the statements were so flagrant or ill-intentioned that an instruction could not have cured any potential prejudice. *Anderson*, 153 Wn. App. at 432.

Here, because Holmes did not object to the prosecutor's argument, she is required to show that the statement was so flagrant and ill-intentioned that any prejudice could not have been cured by instruction. The State's conduct was neither flagrant nor ill-intentioned as the prosecutor directed the jury to look to the court's instruction for the definition of reasonable doubt. There is no indication that the State was attempting to hide or minimize its burden of proof or shift its burden to Holmes.

In addition, this Court held that similar statements did not constitute flagrant or ill-intentioned misconduct in *Anderson*. Because the arguments in this case were made in May 2009, seven months *prior* to this court's decision in *Anderson*, the State's use of the argument was not a flagrant violation of this Court's direction. The jury received instructions from the court which properly defined reasonable doubt and the jury is presumed to have followed the court's instruction.

Finally, the prosecutor's statement in closing argument that Holmes should "own" her conduct was not an attempt to shift the State's burden of proof, but a reasonable argument regarding the credibility of her

testimony. *See* RP (95) 8714-15. The prosecutor noted that when evidence was introduced that Holmes was dating both Lindsay and Mr. Wilkey at the same time, rather than admit that she had human faults, she changed her story to avoid any negative perception of her behavior. The prosecutor noted that dating two men at once was not criminal, but that her inability to admit to anything that might portray her in a negative light called into question her credibility. This was a reasonable argument based on the evidence presented at trial and was not an attempt to convince the jury to convict on any basis less than proof of the each element of the charged crimes beyond a reasonable doubt.

- c. Even if this Court finds that the prosecutor engaged in misconduct, the verdicts returned by the jury show that it held the State to its burden of proof beyond a reasonable doubt and there was no prejudice.

In instances of prosecutorial misconduct, prejudice occurs where there is “a substantial likelihood that the misconduct affected the jury’s verdict.” *State v. Thomas*, 142 Wn. App. 589, 593, 174 P.3d 1264, *review denied*, 164 Wn.2d 1026 (2008). Reversal is required only if there is a substantial likelihood that the misconduct affected the jury’s verdict. *State v. Avendano-Lopez*, 79 Wn. App. 706, 712, 904 P.2d 324 (1995), *review denied*, 129 Wn.2d 1007 (1996).

Here, Holmes was charged with first degree burglary, first degree robbery, first degree kidnapping, first degree assault, and five counts of theft of a firearm, together with firearm enhancements for each crime. *See* CPH 110-15. If the State had so trivialized its burden of proof that the jury would have convicted on less than evidence beyond a reasonable doubt, it would have convicted Holmes as charged. Rather, the jury considered each charge, the evidence admitted at trial, and whether that evidence overcame the defendants' presumption of innocence beyond a reasonable doubt when it found Holmes guilty of first degree burglary, first degree robbery, and two lesser-included crimes: unlawful imprisonment and second degree assault. CPH 708, 712, 719, 721. The jury also found that the State did not prove beyond a reasonable doubt that Holmes committed three of the four allegations of theft of a firearm. CPH 724-27. Finally, the jury was not convinced beyond a reasonable doubt that Holmes was armed with a firearm during the commission of any crime. CPH 728-31. This jury, despite having been empanelled for eleven months¹⁴ in an unpleasant and contentious trial, clearly took its duty seriously when it followed the court's instructions and held the State to its burden of proof of guilt beyond a reasonable doubt.

¹⁴ The jury was chosen June 6, 2008, and began deliberations May 4, 2009. RP (15) 825, (95) 8908.

7. HOLMES HAS FAILED TO SHOW THAT HER TRIAL WAS RIFE WITH ERROR WARRANTING REVERSAL UNDER THE DOCTRINE OF CUMULATIVE ERROR

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that “an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Neder v. United States*, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). “[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” *Brown v. United States*, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973) (internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also, State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error

rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also, State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal....”). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court's weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

There are two dichotomies of harmless error that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *See Russell*, 125 Wn.2d at 93-94. Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *Russell*, 125 Wn.2d at 93-94. Second, there are errors that are harmless because of the strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to

cumulative error. *See, e.g., Johnson*, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. *Compare, State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors amounted to cumulative error and required reversal), *with State v. Wall*, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (holding that three errors did not amount to cumulative error), *and State v. Kinard*, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979) (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see, e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant’s confession against Badda, (2) to disregard the prosecutor’s statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State’s sole, uncorroborated

witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see, e.g., State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, *see, e.g., State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See Stevens*, 58 Wn. App. at 498.

In the instant case, for the reasons set forth above, defendant has failed to establish any prejudicial error, much less that her trial was so flawed with prejudicial error as to warrant relief.

STATE OF WASHINGTON
BY C DEPUTY

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this Court to affirm the defendants' convictions and the Court's award of restitution for the victim.

DATED: March 29, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Kimberley DeMarco
Kimberley DeMarco
Deputy Prosecuting Attorney
WSB # 39218

Certificate of Service: Cover
The undersigned certifies that on this day she delivered by U.S. mail or Kummerow ABC-LM delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3-29-11 [Signature]
Date Signature