

NO. 39119-8-II

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

---

STATE OF WASHINGTON,

Respondent,

v.

AARON OLSON,

Appellant.

10 JUN 25 2015  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
COURT OF APPEALS  
PIERCE COUNTY



---

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

---

BRIEF OF APPELLANT

---

LILA J. SILVERSTEIN  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1

C. STATEMENT OF THE CASE ..... 3

D. ARGUMENT ..... 13

1. THE STATE FAILED TO PROVE EACH ALTERNATIVE MEANS PRESENTED TO THE JURY ON THE ROBBERY AND RAPE CHARGES, REQUIRING REVERSAL AND REMAND FOR A NEW TRIAL ON THOSE CHARGES..... 13

    a. The State must prove every alternative means presented to the jury..... 13

    b. The robbery conviction must be reversed because the State failed to prove Mr. Olson was armed with a deadly weapon, and the rape convictions must be reversed because the State failed to prove Mr. Olson used or threatened to use a deadly weapon. .... 14

2. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT BY MISSTATING THE BURDEN OF PROOF AND BY VOUCHING FOR HIS WITNESS..... 20

    a. The prosecution commits misconduct if it shifts the burden of proof to the defendant or implies that in order to acquit, the jury must believe the State’s witnesses are lying. .... 20

    b. In this case, the prosecution made the same improper remarks that this Court held constituted prosecutorial misconduct in *State v. Anderson*. .... 22

3. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MR. OLSON’S REPEATED MOTIONS TO SEVER DEFENDANTS, BECAUSE THE TWO DEFENDANTS HAD ANTAGONISTIC, MUTUALLY

EXCLUSIVE DEFENSES WHICH PREJUDICED MR.  
OLSON .....29

a. The court should grant severance of defendants when  
necessary to achieve a fair trial. ....29

b. The trial court abused its discretion in denying  
severance because the two defendants presented  
antagonistic, mutually exclusive defenses and  
severance was necessary to achieve a fair trial for Mr.  
Olson.....30

E. CONCLUSION .....33

## **TABLE OF AUTHORITIES**

### **Washington Supreme Court Decisions**

<u>State v. Bennett</u> , 161 Wn.2d 303, 165 P.3d 1241 (2007) .....	26
<u>State v. Crane</u> , 116 Wn.2d 315, 804 P.2d 10 (1991).....	14
<u>State v. Grisby</u> , 97 Wn.2d 493, 647 P.2d 6 (1982) .....	32
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998) .....	17
<u>State v. Kitchen</u> , 110 Wn.2d 403, 756 P.2d 105 (1988) .....	13, 14

### **Washington Court of Appeals Decisions**

<u>State v. Anderson</u> , ___ Wn. App. ___, ___ P.3d ___, 2009 WL 4639643 (No. 37325-4-II, filed 12/8/09).....	2, 25, 26, 29
<u>State v. Barrow</u> , 60 Wn. App. 869, 809 P.2d 209 (1991).....	28
<u>State v. Casteneda-Perez</u> , 61 Wn. App. 354, 810 P.2d 74 (1991)	29
<u>State v. Cleveland</u> , 58 Wn. App. 634, 794 P.2d 547 (1990) .....	21
<u>State v. Fernandez</u> 89 Wn. App. 292, 948 P.2d 872 (1997)....	18, 20
<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.2d 1076 (1996)	21, 26, 29
<u>State v. Gillespie</u> , 41 Wn. App. 640, 705 P.2d 808 (1985) .....	19
<u>State v. Henderson</u> , 100 Wn. App. 794, 804, 998 P.2d 907 (2000) .....	27
<u>State v. Jackson</u> , 150 Wn. App. 877, 209 P.3d 553 (2009).....	21, 22
<u>State v. Johnson</u> , 147 Wn. App. 276, 194 P.3d 1009 (2008).....	30
<u>State v. Jones</u> , 144 Wn. App. 284, 183 P.3d 307 (2008). .....	20, 22
<u>State v. Larry</u> , 108 Wn. App. 894, 34 P.3d 241 (2001).....	30, 31

State v. Medina, 112 Wn. App. 40, 48 P.3d 1005 (2002) ..... 30, 32

**United States Supreme Court Decisions**

Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394 (1895).....21

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)  
.....21

**Statutes**

RCW 69.50.402..... 19

RCW 9.41.010..... 17

RCW 9A.44.040 ..... 14, 16

RCW 9A.56.200 ..... 14, 15

**Rules**

CrR 4.4.....29

**A. ASSIGNMENTS OF ERROR**

1. The State failed to prove the “actual deadly weapon” alternative means of committing first-degree robbery, as charged in count two

2. The State failed to prove the “actual deadly weapon” alternative means of committing first-degree rape, as charged in count three.

3. The State failed to prove the “actual deadly weapon” alternative means of committing first-degree rape, as charged in count four.

4. The prosecutor committed misconduct in closing argument.

5. The trial court abused its discretion in denying multiple motions to sever defendants.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. If the State fails to elect one of multiple alternative means of committing a crime, sufficient evidence must support each alternative means in order for a conviction to stand. Here, the jury was instructed, and the prosecution argued, that Mr. Olson could be found guilty of first-degree robbery and two counts of first-degree rape if he wielded something that was either an actual

deadly weapon or something that appeared to be a deadly weapon. Although the complainant testified that the defendants displayed something that looked like a black revolver, no gun was ever found and Mr. Olson's codefendant testified that there was no gun. Must the robbery and rape convictions be reversed for insufficient evidence that the crimes were committed with an actual deadly weapon?

2. Under State v. Anderson, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2009 WL 4639643 (No. 37325-4-II, filed 12/8/09) , it is misconduct for a prosecutor in closing argument to shift the burden of proof by stating that if a jury thinks they have a reasonable doubt, they are required to "fill in the blank" stating their reason for having a doubt. Under Anderson, it is also misconduct for a prosecutor to tell a jury that its job is to "speak the truth." Furthermore, it is misconduct for a lawyer to vouch for his or her witnesses. Where the prosecutor in this case used the same closing argument as the prosecutor in Anderson, and also told the jury the complainant had no reason to lie, did his actions constitute prosecutorial misconduct?

3. A trial court should grant a motion to sever defendants if necessary to achieve a fair determination of the guilt or innocence

of a defendant. Where a defendant demonstrates that the prejudice inflicted by a joint trial outweighs concerns of judicial economy, severance is appropriate. Specific prejudice may be demonstrated by showing antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive. Where Mr. Olson's defense was that the prosecution "got the wrong guy" and he was not involved at all, but his co-defendant's defense was that both he and Mr. Olson committed the acts in question but the victim consented, did the trial court abuse its discretion in denying multiple motions to sever defendants?

C. STATEMENT OF THE CASE

On February 28, 2006, G.C., a woman who worked in the pharmacy at Walgreens, told police she had been attacked by two men the night before. Her shift ended at 11:00pm, and as she walked to her car in the parking lot, two men approached her, took her cell phone, and asked for money. One of the men held something black that looked like a gun and pointed it at her stomach. She told the men she had no money. The men told her to get inside the car with them. The three went to another location and parked. Each man told G.C. to perform oral sex on him, and she complied. The three then drove to Safeway, and the men got

out of the car and walked away. 1/8/09 RP 91-92, 95, 100, 102, 104, 107, 113; 1/12/09 RP 133, 138.

G.C. described one assailant as a thin white male with blond hair about 5'9", and the other as a Filipino man with earrings. 1/12/09 RP 139, 173. A few weeks later, police officers showed G.C. photographic montages containing suspects. Appellant Aaron Olson – a 6'6" man with red hair – was in the montage of white suspects, but G.C. did not select him. 1/12/09 RP 144-45; 1/13/09 RP 348; 1/20/09 RP 710. G.C. selected Tony Emery from a second montage. 1/12/09 RP 144-45; 1/13/09 RP 346.

After a victim from a different crime selected both Mr. Olson and Mr. Emery in montages, the two were arrested not only for that crime, but for the crimes against G.C. 1/12/09 RP 262-63. According to tests performed at the Washington State Patrol Crime Lab, DNA from Mr. Olson and Mr. Emery matched semen samples collected from G.C.'s clothing. 1/14/09 RP 547. No gun was ever found. 1/22/09 RP 862.

Mr. Olson and Mr. Emery were each eventually charged with four crimes against G.C.: one count of first-degree kidnapping, one count of first-degree robbery, one count of first-degree rape as a

principal, and one count of first-degree rape as an accomplice. CP 72-73, 252-94.

On December 28, 2008, Mr. Olson moved to sever defendants. CP 110. At the subsequent hearing on the motion, Mr. Olson argued that severance was required to prevent prejudice because he and Emery had conflicting, mutually exclusive defenses. 1/6/09 RP 40-41. Emery's counsel told the court that his defense would be that both Emery and Aaron Olson committed the acts in question, but that there was no gun. 1/6/09 RP 40, 45-46. Emery did plan to testify and to implicate Mr. Olson in the crimes. 1/6/09 RP 46, 55. Mr. Olson's defense, in contrast, was that he was not there at all and that they had charged the wrong person. 1/6/09 RP 41. According to Mr. Olson, the crime lab made a mistake. Furthermore, G.C. described someone who looked nothing like him, and did not identify him during the montage process (or during the later trial). But the jury could not believe Mr. Olson's defense if they believed Emery's, and therefore severance was required to prevent prejudice. 1/6/09 RP 47.

The court agreed that the two defenses "at least appear to be mutually exclusive." 1/6/09 RP 48. But it determined that Emery "is not really offering a defense" because he was

challenging only the degree of the offenses and not claiming complete innocence. 1/6/09 RP 49. Mr. Olson disagreed and explained that arguing for a lesser crime is a defense. 1/6/09 RP 51. He pointed out that there could not be a more prejudicial conflict than the one in this case, where a co-defendant is saying “yes, we did it.” 1/6/09 RP 52. The trial court nevertheless denied the motion to sever. 1/6/09 RP 58.

Mr. Olson renewed his motion to sever following jury selection, and the court again denied the motion. 1/8/09 RP 84. After the State rested its case, Mr. Olson again moved to sever his case from that of his co-defendant. 1/15/09 RP 621-22. Mr. Emery’s attorney stated that his case could proceed with the same jury after severance, thereby mitigating the impact on judicial economy. 1/15/09 RP 623. The court denied the motion. 1/15/09 RP 623. Mr. Olson rested his case. 1/15/09 RP 629-30.

The co-defendant, Emery, then testified on his own behalf. 1/15/09 RP 630-31. He stated that he was with Aaron Olson, with whom he had been best friends since high school, on the night in question. 1/15/09 RP 631, 642. He said, “We confronted a woman that was coming out of Walgreens. I thought that Aaron might have knew her.” 1/15/09 RP 632. He testified that Mr. Olson and the

woman had a conversation that he could not hear because he was wearing headphones. 1/15/09 RP 633-34. He said, "After the conversation was over, Aaron motioned me over to the car." 1/15/09 RP 635. They drove to Market Place, and then, according to Emery, Mr. Olson said "that we might be able to get oral sex from her." 1/15/09 RP 638. Mr. Emery stepped outside the car while Mr. Olson had oral sex with the woman, and then Mr. Emery returned to the car and had oral sex with the woman. 1/15/09 RP 638-40; 1/20/09 RP 692, 704-05. According to Emery, he thought G.C. and Mr. Olson knew each other and had an "agreement" regarding sex, and that G.C. "wasn't being forced into anything that she didn't want to do." 1/15/09 RP 632, 637, 642. Mr. Emery testified that although the two committed the acts in question, neither had a gun. 1/15/09 RP 634-35.

On cross examination, the prosecutor confirmed, "You agree that the only person that was with you during this entire interaction with [G.C.] was Aaron Olson, right?" 1/15/09 RP 652. Mr. Emery responded, "Yes." 1/15/09 RP 652.

Mr. Olson testified in rebuttal. 1/20/09 RP 724. He stated that on the night in question he was at home recovering from a foot injury. 1/20/09 RP 725. He denied being with Mr. Emery at the

Walgreens or Market Place stores, and denied all involvement with the crimes in question. 1/20/09 RP 726. He said, "I was not there on February 27<sup>th</sup>, 2006. ... I have never met [G.C.] before in my life." 1/20/09 RP 731. He said, "I was not there that night. I have been wrongly accused of this crime." 1/20/09 RP 733.

At the conclusion of evidence, Mr. Olson renewed his motion to sever. 1/21/09 RP 777. His attorney noted, "Clearly, Mr. Olson could not receive a fair trial based upon the highly prejudicial testimony of his codefendant." 1/20/09 RP 777. The trial court noted that Mr. Emery's testimony was a little different than expected, in that he implied that the sex was consensual in addition to stating that there was no gun. 1/20/09 RP 778-79. But the trial court adhered to its prior ruling denying severance. 1/20/09 RP 780-81.

The court then read the jury instructions. The "to convict" instructions for Count II, robbery in the first degree, and Counts III and IV, rape in the first degree, included both the "actual deadly weapon" alternative means and the "appears to be a deadly weapon" alternative means. CP 274, 284, 286.

During closing argument, the prosecutor supplemented his oral statements with a PowerPoint presentation. CP 217-49. He

told the jury that “[G.C.] has no reason to lie to you. No reason to lie to any of the people that she has talked to about this case.”

1/21/09 RP 827. He acknowledged that the burden of proof in criminal trial is beyond a reasonable doubt, but explained it as follows:

What it means is, in order for you to find the defendant not guilty, you have to ask yourselves or you’d have to say, quote, I doubt the defendant is guilty, and my reason is blank. A doubt for which a reason exists. If you think that you have a doubt, you must fill in the blank.

1/21/09 RP 830. While saying the above to the jury, the prosecutor presented them with the following slide:

**WHAT IT SAYS**

A doubt for which a reason exists

In order to find the defendant not guilty, you have to say:  
“I doubt the defendant is guilty, and my reason is \_\_\_\_\_.”

And you have to fill in the blank

CP 246.

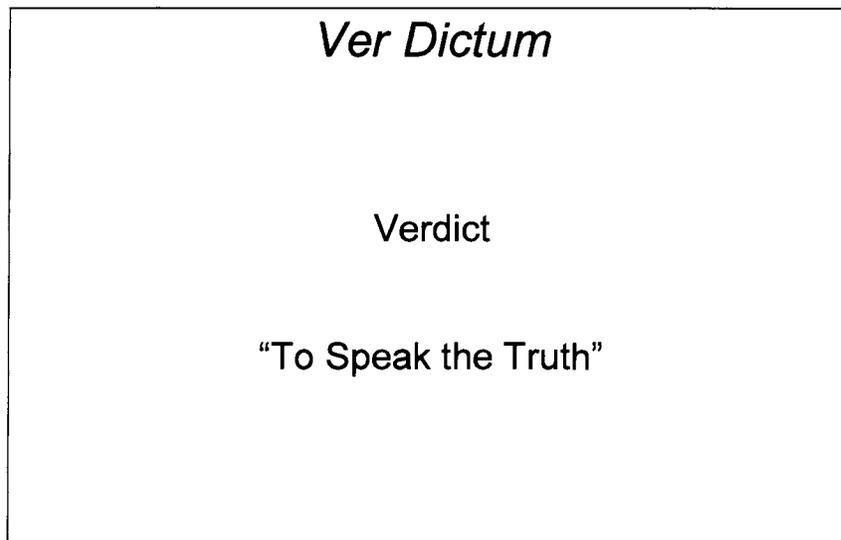
The prosecutor closed his argument by saying:

I want to talk to you right now about a Latin term, “verdictum.” The Latin term “verdictum” I’m told is the Latin root for the English word “verdict.” The literal translation of “verdictum” into the English language is to speak the truth. Your verdict should speak the truth.

In this case, the truth of the matter, the truth of these charges, are that Aaron Olson is guilty of Robbery in the First Degree, Kidnap in the First Degree, Rape in the First Degree, and Rape in the First Degree, which is the same for Tony Emery, for the offenses that he committed on February 27<sup>th</sup>, 2006, against [G.C.].

Members of the jury, I ask you, go back there to deliberate, consider the evidence, use your life experience and common sense, and speak the truth by holding these men accountable for what they did.

1/21/09 RP 831-32. While delivering this “truth” speech, the prosecutor presented his last three slides to the jury:



THE TRUTH

GUILTY

CP 248-49.

Mr. Olson argued in closing that the wrong person was being prosecuted, and that he was not at the scene of the crime on the night in question. 1/22/09 RP 840-58.

In his closing argument, Mr. Emery repeatedly referred to actions he and “the white guy” had taken on February 27, 2006. But he occasionally let it slip that “the white guy” was Aaron Olson: “He thought that Aaron – the white guy, excuse me – the white guy, knew her. ... He said that he thought they were going to Aaron’s – to Aaron’s house.” 1/22/09 RP 867.

In rebuttal closing argument, the prosecutor stated, “Make no mistake, the white guy is Aaron Olson. ... We know that because Tony Emery told you so ....” 1/22/09 RP 897. The prosecutor argued that the jury could find the defendants guilty of first-degree robbery and first-degree rape on either of two alternative bases: that the defendants had an actual gun or that the defendants had something that appeared to be a gun. 1/22/09 RP 898-99. And he again admonished the jury to “do your job and to speak the truth, and, again, find Aaron Olson guilty of the crimes that he committed.” 1/22/09 RP 906.

Mr. Olson renewed his motion to sever in light of the closing arguments of Mr. Emery and the State which emphasized Mr.

Emery's testimony implicating Mr. Olson in the crimes. 1/22/09 RP 907. Mr. Olson noted that the defenses were "very antagonistic" resulting in "serious prejudice to Mr. Olson." 1/22/09 RP 907. The court again denied the motion.

Mr. Olson was convicted on all four counts as charged. CP 339.

D. ARGUMENT

1. THE STATE FAILED TO PROVE EACH ALTERNATIVE MEANS PRESENTED TO THE JURY ON THE ROBBERY AND RAPE CHARGES, REQUIRING REVERSAL AND REMAND FOR A NEW TRIAL ON THOSE CHARGES.

a. The State must prove every alternative means presented to the jury. "In an alternative means case, where a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the single crime charged." State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). Although unanimity is not required as to the means by which the crime was committed, substantial evidence must support each alternative means presented to the jury. Id. "In reviewing an alternative means case, the court must determine whether a rational trier of fact could have

found each means of committing the crime proved beyond a reasonable doubt.” Id. at 410-11.

b. The robbery conviction must be reversed because the State failed to prove Mr. Olson was armed with a deadly weapon, and the rape convictions must be reversed because the State failed to prove Mr. Olson used or threatened to use a deadly weapon.

Alternative means cases “usually involve a charge under a statute which contains several alternative ways of committing one crime.” State v. Crane, 116 Wn.2d 315, 326, 804 P.2d 10 (1991). Both the first-degree robbery statute and the first-degree rape statute contain several alternative ways of committing the respective crimes. RCW 9A.56.200 (first-degree robbery); RCW 9A.44.040 (first-degree rape); State v. Whitney, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987) (first-degree rape statute is an alternative means statute). Thus, the State was required to prove each of the alternative means presented to the jury. Kitchen, 110 Wn.2d at 410. The State failed to do this, so the convictions on counts two, three, and four should be reversed and the case remanded for a new trial.

The first-degree robbery statute provides:

(1) A person is guilty of robbery in the first degree if:

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

RCW 9A.56.200 (emphasis added). The trial court instructed the jury on both alternative means highlighted above. The “to convict” instruction for Count II provided:

- To convict the defendant, Aaron Edward Olson, of the crime of ROBBERY IN THE FIRST DEGREE, as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:
- (1) That on or about the 27<sup>th</sup> day of February, 2006 the defendant, or an accomplice, unlawfully took personal property, not belonging to the defendant, from the person of another;
  - (2) That the defendant intended to commit theft of property;
  - (3) That the taking was against the person’s will by the defendant’s use or threatened use of immediate force, violence or fear of injury to that person;
  - (4) That the force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
  - (5) **That in the commission of these acts or in immediate flight therefrom the defendant, or an accomplice was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon; and**
  - (6) That any of the se acts occurred in the State of Washington.

...

CP 274 (emphasis added).

The first-degree rape statute provides:

(1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory:

**(a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon; or**

(b) Kidnaps the victim; or

(c) Inflicts serious physical injury, including but not limited to physical injury which renders the victim unconscious; or

(d) Feloniously enters into the building or vehicle where the victim is situated.

(2) Rape in the first degree is a class A felony.

RCW 9A.44.040 (emphasis added). As with the robbery count, the instructions for the rape counts included both the “actual weapon”

alternative and the “apparent weapon” alternative:

To convict the defendant, Aaron Edward Olson, of the crime of RAPE IN THE FIRST DEGREE, as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 27<sup>th</sup> day of February, 2006 the defendant engaged in sexual intercourse with [G.C.];

(2) That the sexual intercourse was by forcible compulsion

(3) **That the defendant or an accomplice used or threatened to use a deadly weapon or what appears to be a deadly weapon; and**

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

...

CP 284 (emphasis added); see also CP 286 (similar instruction for first-degree rape alleged in Count IV).

The State did not elect a specific alternative means. During closing argument, the prosecutor told the jury it could find the defendants guilty of first-degree robbery and first-degree rape on either of two alternate bases – that the defendants had an actual gun or that the defendants had something that appeared to be a gun. 1/22/09 RP 898-99.

However, for both the robbery and rape counts, the State failed to prove the “actual deadly weapon” alternative. The jury instruction defining “deadly weapon” was Instruction 18, which reads, “A firearm, whether loaded or unloaded, is a deadly weapon.” CP 273. Thus, under the law of the case, the State was required to prove Mr. Olson wielded an actual firearm during the events in question. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). “Firearm” means “a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.” RCW 9.41.010(7). The State did not prove Mr. Olson had a firearm.

Although G.C. testified that she “saw two guys point a gun” at her stomach, 1/8/09 RP 95, no gun was ever found or introduced

into evidence, and the co-defendant testified that there was no gun. 1/15/09 RP 634-35. Mr. Olson's mother told police and the court that a B.B. gun had "gone missing" from her house at some point, but she said although it may have looked like a real gun, it was not actually a deadly weapon. 1/14/09 RP 423, 480-81, 487-88. The court did not allow this evidence to go to the jury because it was more prejudicial than probative. 1/14/09 RP 490.

Thus, although the State certainly proved, through C.G.'s testimony, that her attackers threatened her with something that appeared to be a firearm, this is insufficient to sustain a conviction on the actual deadly weapon prong. The only alternative means supported by the evidence was the "appears to be" alternative. Accordingly, the convictions on Counts 2, 3, and 4 should be reversed and remanded for a new trial.

State v. Fernandez is instructive. 89 Wn. App. 292, 948 P.2d 872 (1997). There, the defendants were convicted of operating a drug house. Id. at 294. The statute at issue provided:

It is unlawful for any person ... knowingly to keep or maintain any ... dwelling ... which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for keeping or selling them in violation of this chapter.

Id. at 299 (citing RCW 69.50.402(a)(6)). In other words, there were two alternative means of committing the crime: maintaining a dwelling (1) where people use drugs, or (2) to sell or store drugs. Id. at 300. The State did not elect a means, so even though there was sufficient evidence to find the defendants maintained a house to sell or store drugs, this Court reversed the convictions because there was insufficient evidence to support a finding that drug users resorted to the house for the purpose of using drugs. Id. This Court concluded:

The State did not elect between the alternative means, and the general verdict form does not reveal which prong the jury used to convict. Because it may have convicted the defendants under the unsupported prong, we must reverse the defendants' convictions and remand for retrial on the drug house charges.

Id.

Similarly, in State v. Gillespie, this Court reversed a theft conviction because two alternative means were submitted to the jury but only one was supported by sufficient evidence. State v. Gillespie, 41 Wn. App. 640, 705 P.2d 808 (1985). The defendant had been charged in the alternative with theft by deception under RCW 9A.56.020(1)(b) and theft by embezzlement under RCW 9A.56.020(1)(a). Id. at 642. Even though the State proved the

former, this court reversed the conviction and remanded for a new trial because there was a deficiency of proof as to the alternative means of theft by embezzlement. Id. at 645-46.

Here, as in Fernandez and Gillespie, even if the State proved one alternative means of committing the crimes, it did not prove each alternative means presented to the jury, because it did not prove Mr. Olson had an actual deadly weapon. Accordingly, the convictions on counts 2, 3, and 4 should be reversed and remanded for a new trial only on the theories that were supported by sufficient evidence in Mr. Olson's first trial. Fernandez, 89 Wn. App. at 300.

2. THE PROSECUTOR COMMITTED  
MISCONDUCT IN CLOSING ARGUMENT BY  
MISSTATING THE BURDEN OF PROOF AND BY  
VOUCHING FOR HIS WITNESS.

a. The prosecution commits misconduct if it shifts the burden of proof to the defendant or implies that in order to acquit, the jury must believe the State's witnesses are lying. Every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial. State v. Jones, 144 Wn. App. 284, 290, 183 P.3d 307 (2008).

It is misconduct for a prosecutor to suggest a shift in the burden of proof during a criminal trial. State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 547 (1990) (holding prosecutor committed misconduct by stating defense attorney “would not have overlooked any opportunity to present admissible, helpful evidence”). “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” Coffin v. United States, 156 U.S. 432, 453, 15 S.Ct. 394 (1895). To overcome this presumption, the State must prove every element of the charged offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

It is also misconduct for a prosecutor to assert his or her personal opinion as to the credibility of a witness. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The State may not argue that in order to acquit a defendant, the jury must find that the State’s witnesses are either lying or mistaken. State v. Jackson, 150 Wn. App. 877, 888, 209 P.3d 553 (2009); State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996).

Where a prosecutor commits misconduct, an appellate court will reverse and remand for a new trial if there is a substantial likelihood that the misconduct affected the jury's verdict. Jackson, 150 Wn. App. at 883. Even if a defendant does not object to improper remarks at trial, reversal is required if the remarks are so "flagrant and ill-intentioned" that they cause prejudice that a curative instruction could not have remedied. Jones, 144 Wn. App. at 290.

b. In this case, the prosecution made the same improper remarks that this Court held constituted prosecutorial misconduct in *State v. Anderson*. During closing argument, the prosecutor explained the beyond-a-reasonable-doubt standard as follows:

What it means is, in order for you to find the defendant not guilty, you have to ask yourselves or you'd have to say, quote, I doubt the defendant is guilty, and my reason is blank. A doubt for which a reason exists. If you think that you have a doubt, you must fill in the blank.

1/21/09 RP 830. While saying the above to the jury, the prosecutor presented them with the following slide:

## WHAT IT SAYS

A doubt for which a reason exists

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

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

And you have to fill in the blank

CP 246. The prosecutor then said:

I want to talk to you right now about a Latin term, “verdictum.” The Latin term “verdictum” I’m told is the Latin root for the English word “verdict.” The literal translation of “verdictum” into the English language is to speak the truth. Your verdict should speak the truth.

In this case, the truth of the matter, the truth of these charges, are that Aaron Olson is guilty of Robbery in the First Degree, Kidnap in the First Degree, Rape in the First Degree, and Rape in the First Degree, which is the same for Tony Emery, for the offenses that he committed on February 27<sup>th</sup>, 2006, against [G.C.].

Members of the jury, I ask you, go back there to deliberate, consider the evidence, use your life experience and common sense, and speak the truth by holding these men accountable for what they did.

1/21/09 RP 831-32. While delivering this “truth” speech, the prosecutor presented his last three slides to the jury:

*Ver Dictum*

Verdict

“To Speak the Truth”

**THE TRUTH**

GUILTY

CP 248-49. In rebuttal, the prosecutor again admonished the jury to “do your job and to speak the truth, and, again, find Aaron Olson guilty of the crimes that he committed.” 1/22/09 RP 906.

This court has held that all of the above argument is improper and constitutes misconduct. State v. Anderson, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2009 WL 4639643 (No. 37325-4-II, filed 12/8/09).<sup>1</sup> First, “[t]he prosecutor’s repeated requests that the jury ‘declare the truth’ ... were improper” because the “jury’s job is not to ‘solve’ a case,” but “to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt.” Id. at ¶ 22.

---

<sup>1</sup> Indeed, the misconduct in this case is even greater, because amplified by PowerPoint slides.

Second, “[t]he prosecutor’s statement that ‘in order to find the defendant not guilty you have to say I don’t believe the defendant is guilty because and then you have to fill in the blank’ was improper.” Id. at ¶ 28.

The jury need not engage in any such thought process. By implying that the jury had to find a reason in order to find [the defendant] not guilty, the prosecutor made it seem as though the jury had to find [the defendant] guilty unless it could come up with a reason not to. Because we begin with a presumption of innocence, this implication that the jury had an initial affirmative duty to convict was improper. Furthermore, this argument implied that [the defendant] was responsible for supplying such a reason to the jury in order to avoid conviction.

Id. “Misstating the bases upon which a jury can acquit may insidiously lead, as it did here, to burden-shifting.” Fleming, 83 Wn. App. at 214; see also State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007) (“The presumption of innocence can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve”).

In sum, under Anderson, the prosecutor committed misconduct by telling the jury it “must” list a reason for doubting guilt, by repeatedly admonishing the jury that its job was to “speak the truth,” and by amplifying these misstatements of the law on PowerPoint slides.

The prosecutor committed further misconduct by stating his opinion as to guilt. After improperly informing the jury that its duty was to “speak the truth,” the prosecutor stated, “In this case, the truth of the matter, the truth of these charges, are that Aaron Olson is guilty.” 1/21/09 RP 831; see also CP 248-49 (PowerPoint slides say “THE TRUTH: GUILTY”). This is like the improper statement held to be misconduct in Reed, 102 Wn.2d at 144-46. There, the prosecutor stated: “He’s a cold murder two. It’s cold. There is no question about murder two.” Id. at 144. The supreme court held that these statements constituted misconduct because a prosecutor may not assert his personal opinion of the guilt of the accused. Id. at 145-46. Similarly, in Henderson, this Court held it was improper for the prosecutor to state, “This was not an altercation. It was a robbery.” State v. Henderson, 100 Wn. App. 794, 804, 998 P.2d 907 (2000). Here, by stating that “the truth of the matter [is] that Aaron Olson is guilty of Robbery in the First Degree, Kidnap in the First Degree, Rape in the First Degree, and Rape in the First Degree,” and by presenting slides displaying the words “THE TRUTH” followed by the word “GUILTY,” the prosecutor committed misconduct.

The prosecutor committed further misconduct by telling the jury that “[G.C.] had no reason to lie.” 1/21/09 RP 827. State v. Barrow is instructive. 60 Wn. App. 869, 809 P.2d 209 (1991). There, the defendant’s theory was mistaken identity, and in closing argument he sought to undermine an officer’s testimony by emphasizing her inexperience and her likely frustration with the case. Barrow, 60 Wn. App. at 871. The prosecutor in closing argument asserted that by giving testimony contradictory to the police officers’ testimony, the defendant effectively called the officers liars. Id. at 874. The prosecutor also stated, “in order for you to find the defendant not guilty, you have to believe his testimony and you have to completely disbelieve the officers’ testimony. You have to believe that the officers are lying.” Id. at 874-75.

This Court held that the prosecutor’s argument was misconduct, even though “[w]hen a defendant advances a theory exculpating him, the theory is not immunized from attack.” Id. at 872, 875. Similarly here, although the prosecutor was allowed to attack Mr. Olson’s theory of mistaken identity, the prosecutor’s vouching and implication that the jury could not acquit unless the complaining witness was lying constituted misconduct. See State

v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991)

("it is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying").

All of the statements discussed above constituted flagrant and ill-intentioned misconduct, given this Court's prior holdings that such argument is improper. Anderson, at ¶¶ 22- 28; Fleming, 83 Wn. App. at 214. Accordingly, Mr. Olson's convictions should be reversed, and his case remanded for a new trial.

3. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MR. OLSON'S REPEATED MOTIONS TO SEVER DEFENDANTS, BECAUSE THE TWO DEFENDANTS HAD ANTAGONISTIC, MUTUALLY EXCLUSIVE DEFENSES WHICH PREJUDICED MR. OLSON.

a. The court should grant severance of defendants when necessary to achieve a fair trial. CrR 4.4 provides, in relevant part:

(c) Severance of Defendants.

...

(2) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (i), should grant severance of defendants whenever:

(i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or

(ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.

Trial courts properly grant severance motions where a defendant demonstrates that the prejudice inflicted by a joint trial outweighs concerns of judicial economy. State v. Johnson, 147 Wn. App. 276, 283-84, 194 P.3d 1009 (2008). “Specific prejudice may be demonstrated by showing antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive.” State v. Medina, 112 Wn. App. 40, 52-53, 48 P.3d 1005 (2002).

This Court reviews a trial court’s decision on a motion to sever for abuse of discretion. State v. Larry, 108 Wn. App. 894, 911, 34 P.3d 241 (2001).

b. The trial court abused its discretion in denying severance because the two defendants presented antagonistic, mutually exclusive defenses and severance was necessary to achieve a fair trial for Mr. Olson. Here, Mr. Olson and Mr. Emery clearly presented antagonistic, mutually exclusive defenses. Mr. Olson’s defense was mistaken identity. He testified that he was at home on the night in question and was not involved in the incident in any way. Mr. Emery, on the other hand, testified that he and Aaron

Olson were the perpetrators of the acts in question, but that Mr. Emery thought the sex was consensual and there was no gun. Mr. Emery repeatedly implicated Mr. Olson in his testimony and in closing argument, and the prosecutor repeatedly referenced Mr. Emery's testimony to support Mr. Olson's guilt. No juror could believe both Mr. Emery's defense and Mr. Olson's defense, because Mr. Olson's defense was that he was not there at all. Thus, the trial court abused its discretion in refusing to sever defendants.

Other cases are instructive. In Larry, for example, this Court held the trial court did not abuse its discretion in denying a motion to sever because the defenses were not mutually exclusive. Larry, 108 Wn. App. at 911-12. In that case, both defendants acknowledged they were present at the scene. One admitted committing a kidnapping, but argued that there was "no evidence to show that [he] wanted [the victim] to get shot." Id. The other argued that he was not the shooter but that a fourth person shot the victim, that the victim was lying, and that police intimidated witnesses. Id. at 912. Thus, it was possible for the jury to believe both defenses. In contrast, Mr. Olson's and Mr. Emery's defenses were mutually exclusive because Mr. Emery testified that Mr. Olson

participated in the events of February 27 and Mr. Olson's defense was that he was not involved at all.

In State v. Grisby, both defendants agreed that they went to the victims' apartment armed with two pistols to resolve a drug dispute. State v. Grisby, 97 Wn.2d 493, 508, 647 P.2d 6 (1982). The sole disagreement was "who killed which victims." Thus, the supreme court held, "in this case the defenses do not appear to be inherently antagonistic." Id. In contrast, Mr. Olson did not agree that he was at the scene of the crime, as Mr. Emery indicated, and his defense of mistaken identity was in direct conflict with Mr. Emery's defense that he and Mr. Olson were there but there was no gun and the woman consented to sex. Unlike in Grisby, the defenses were inherently antagonistic.

In Medina, two defendants stated that they were involved in the incident in question, but only to the extent that they held the victim down while others hit him. Medina, 112 Wn. App. at 53. Because there were six other people involved apart from these two defendants, the defenses were not mutually antagonistic. The jury could have believed that both defendants held the victim down while one or more of the six others in the group punched him. Id. Again, this is distinguishable from Mr. Olson's case, in which his

defense and that of his co-defendant were antagonistic and mutually exclusive.

The trial court abused its discretion in denying Mr. Olson's repeated motions to sever defendants. Mr. Olson's convictions should therefore be reversed and his case remanded for a new trial.

**E. CONCLUSION**

For the reasons set forth above Mr. Olson respectfully requests that this Court reverse his convictions and remand for a new trial.

DATED this 22nd day of January, 2010.

Respectfully submitted,

  
Lila J. Silverstein – WSBA 38394  
Washington Appellate Project  
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 39119-8-II
v.	)	
	)	
AARON OLSON,	)	
	)	
APPELLANT.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22<sup>ND</sup> DAY OF JANUARY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KATHLEEN PROCTOR PIERCE COUNTY PROSECUTING ATTORNEY 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] AARON OLSON 327076 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 22<sup>ND</sup> DAY OF JANUARY, 2010.

X \_\_\_\_\_ 

  
10 JAN 25 2010 10:05 AM  
CLERK OF COURT  
STATE OF WASHINGTON  
COURT OF APPEALS - DIVISION TWO  
1511 THIRD AVENUE  
SEATTLE, WA 98101

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
☎(206) 587-2711