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STATE OF WASHINGTON
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DEPUTY

No. 39598-3-II
(Consolidated)

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

STATE OF WASHINGTON,

Respondent,

v.

CARL SMITH,

Appellant.

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

The Honorable Brian Tollefson

APPELLANT SMITH'S REPLY BRIEF

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A. STATEMENT OF THE CASE IN REPLY

In its response, the prosecution sets forth as “fact” several declarations unsupported by the record, even under the forgiving standard of taking the record in the light most favorable to the state. To the extent the relevant “facts” the prosecution declares are directly relevant to the issues, and in order to avoid needless repetition, they are discussed in more detail, *infra*. In addition, pursuant to RAP 10.1(g), Smith adopts and incorporates by reference the arguments in reply presented on behalf of his codefendants regarding those misstatements, with the exception of codefendant Ford’s reaffirmation of his misstatement of the “facts” about Smith allegedly having “confessed” to stabbing Beaudine. See Ford Reply, at 5, 38; see SRP 46.

B. ARGUMENT IN REPLY

1. THIS COURT SHOULD NOT BE MISLED BY THE PROSECUTION’S MISSTATEMENT OF SMITH’S ARGUMENTS

Under RAP 10.1(g), in consolidated cases, parties may adopt and incorporate by reference arguments of parties similarly situated, in order to “facilitate shared briefing related to shared issues.” C.J.C. v. Corp. of Catholic Bishop of Yakima, 138 Wn.2d 699, 728 n. 18, 985 P.2d 262 (1999). Further, in this Court’s Order of Consolidation, the Court encouraged defense counsel on appeal to avoid duplication of arguments in their briefing. That is why, in Assignment of Error 17 and in his briefing, Smith adopted and incorporated by reference “**all of the arguments** presented in the opening briefs on appeal filed by Ford, McCreven and Nolan which are relevant to Mr. Smith.” Appellant’s Opening Brief

(Smith) (hereinafter “AOBS”), at 2-3, 35, 47, 54, 59, 66, 73, 81, 98, 104-105 (emphasis added). In addition, Smith referred the Court to the specific facts relevant to Smith in relation to several of the adopted arguments. AOBS at 104-105.

In response, the prosecution appears to ignore these parts of Smith’s brief. See Brief of Respondent (hereinafter “BOR”) at 1-167. Beginning with its “ISSUES PERTAINING TO APPELLANT’S [SP] ASSIGNMENTS OF ERROR,” the prosecution’s response declares that certain assignments “pertain” to only particular defendants, excluding Smith from, *inter alia*, the jury questionnaire, unanimity, severance and juror misconduct issues. BOR at 1-5. Further, the prosecution appears to exclude Smith from certain portions of other assignments, for example declaring an issue relating to “McCreven’s assignment of error #10, Issue #10, adopted by Nolan,” thus implying that this argument had not been adopted by Smith. BOR at 1-2. This parsing out and excluding Smith from arguments is mirrored throughout the prosecution’s entire brief. See, e.g., BOR at 30 (referring only to “Defendant McCreven” regarding the jury questionnaire issue); BOR at 128 (“Defendant Ford” re: the lesser included issue).

Thus, it appears that the state either does not understand RAP 10.1(g) or is attempting to mislead the Court about Smith’s arguments.

Regardless whether made mistakenly or with intent, however, the prosecution’s repeated mischaracterizations of Smith’s briefing and arguments should be soundly rejected. Smith specifically, deliberately

adopted and incorporated by reference all of his codefendants' arguments which pertain to him under RAP 10.1(g). AOBs at 2-3, 35, 47, 54, 59, 66, 73, 81, 98, 104-105. As a result, under that Rule, Smith is entitled to the same consideration of those arguments in relation to his case and the same relief as if he had briefed it himself; "[n]o more was required." See Davenport v. Elliot Bay Plywood Machines Co., 30 Wn. App. 152, 153-54, 632 P.2d 76 (1981).

The prosecution's misunderstanding of or misrepresentation of the law on this point does not serve it well, as it ignores the very purposes of this important appellant rule. RAP 10.1(g) is one of the few tools used for reducing the sheer volume of briefing through which this Court must wade in cases of this magnitude and complexity. See C.J.C., 138 Wn.2d at 728 n. 18; see also, Litho Color, Inc. v. Pacific Employers Ins. Co., 98 Wn. App. 286, 991 P.2d 538 (1999). Were this Court to be swayed by the prosecution's apparent attempts to exclude Smith from arguments he so clearly adopted under RAP 10.1(g), the Court would not only run afoul of that rule. It would also cause all appellate counsel to start filing massive briefs raising and thoroughly briefing every single issue in a codefendant case, even if it was already addressed in other briefing.

Aside from appearing not to understand RAP 10.1(g), the prosecution's misstatements do not reveal their source, and the response brief thus provides no argument or explanation why RAP 10.1(g) should not be followed, especially given its strong purpose of conserving scarce judicial and criminal justice resources and avoiding needless duplication.

This Court should not be misled by the prosecution's mistaken claims. Smith is entitled to relief on any one of the arguments presented by the other defendants in this case, provided those arguments apply to the facts and circumstances of his case. Further, just to reiterate, Smith again adopts and incorporates by reference, pursuant to RAP 10.1(g), all of the arguments of his codefendants, including those made in their opening and reply briefs, which pertain to his case.

2. THE PROSECUTION'S ARGUMENTS REGARDING EXCLUSION OF SMITH'S STATEMENT ARE ALL MERITLESS

In his opening brief, Smith argued that his rights to present a defense and to a fundamentally fair trial were violated, *inter alia*, when the trial court prevented him from admitting the relevant, material evidence of his statements to police. BOAS at 21-30. In response, although the prosecution initially cites caselaw reflecting the constitutional right to present a defense and generally declares that the right may be "limited by compelling government purposes," the prosecution then fails to present any argument that such purposes were at work here. BOR at 45-48. Instead, the prosecution applies only evidentiary standards and declares that the evidence was not admissible because "[t]he rules of evidence do not allow" for it and it was not relevant to "state of mind." BOR at 46. According to the prosecution, this issue is controlled by State v. Sanchez-Guillen, 135 Wn. App. 636, 145 P.3d 406 (2006), a case the prosecution declares "addressed the very same situation as the one presented in the instant case." BOR at 46-47.

These arguments fall with the barest scrutiny. As a threshold matter, it is important to note what the prosecution has not disputed and what it has abandoned. Below, the prosecutor declared that this evidence would be admissible as evidence which “goes to the **Defendant’s state of mind**,” but only if Smith took the stand. RP 1371-74, 2510 (admitting relevant to “whether or not they felt that they had to defend themselves”), 2650 (emphasis added). Put simply, the prosecution’s position was that a person could not claim self-defense unless and until they waived their rights against self-incrimination and testified, and, since Smith had not yet done so, his “state of mind” was not relevant. RP 1371-74, 2650.

On appeal, however, the prosecution does not appear to renew this claim and does not dispute Smith’s arguments that this position was a misapprehension of the law. BOAS at 27-28; BOR at 45-48. Nor does the prosecution dispute Smith’s claim that the law does not require a defendant to testify in order to claim self-defense and instead allows self-defense to be raised regardless whether the defendant exercises his rights to be free from testifying. BOAS at 27-28; BOR at 45-48. And the prosecution does not dispute that it would be violation of the defendant’s rights under the Fifth Amendment and Article I, § 9, to require Smith to make a Hobson’s choice between his rights to present a legally available defense and his rights to be free from self-incrimination. BOAS at 26-28; BOR at 45-48. Instead, the prosecution simply declares that the statements are not relevant to “state of mind” and not admissible under the relevant rule of evidence, relying wholly on Sanchez-Guillen as if it controlled. BOR at 48.

The prosecution's decision not to address most of the arguments of Smith amounts to an "apparent concession" that Smith's position on those issues is unassailable. In re Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) (failure in response to respond to an argument raised on in opposing party's opening brief amounts to an apparent concession).¹

Further, the prosecution's reliance on Sanchez-Guillen is misplaced, for several reasons. First, that case did not involve any constitutional claims regarding the rights to present a defense and to a fundamentally fair proceeding. See Sanchez-Guillen, 135 Wn. App. at 639-41. Thus, the case does not control on those issues, raised in this case.

Second, the prosecutor is simply wrong in declaring that Smith has "not shown why the evidence rules should not apply to him." BOR at 48. While Smith argued that the evidentiary ruling was wrong, Smith also pointed out the many, many cases in which it has been held by the highest Court of this state and others that those rules are not the ultimate arbiter of admissibility when the defendant's rights to present a defense and to a fundamentally fair proceeding are involved. BOAS at 28-30. And this included a recent Washington Supreme Court case, State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010), which Smith discussed in some detail. BOAS at 28-30. The prosecution has not addressed any of this argument, let alone provided a persuasive reason why these cases should be ignored, although that is exactly what the prosecution is effectively asking this Court

¹To the extent the prosecution might attempt to remedy this failure by presenting new arguments in any oral argument which might occur, this Court should preclude such an effort. See *infra*.

BOAS at 28-30. The prosecution has not addressed any of this argument, let alone provided a persuasive reason why these cases should be ignored, although that is exactly what the prosecution is effectively asking this Court to do. BOR at 45-48. In fact, the prosecution has not even cited to - let alone addressed - the Supreme Court's recent decision in Jones. See BOR at vii-xviii (listing of all Washington cases cited in response).

In Jones, however, the Court specifically held that even evidence inadmissible under Washington's strong "rape shield" law should be admitted at trial and the failure to do so violated the defendant's constitutional rights to present a defense when the evidence had "high probative value" to the defendant's defense. Jones, 168 Wn.2d at 720. That is exactly the kind of evidence as was excluded here. The prosecution's failure to present any meaningful argument about why this evidence did not meet that standard is telling.

So is the prosecution's total reliance on Sanchez-Guillen, a case which did not involve any constitutional claims and in fact did not even involve a claim of self-defense. Sanchez-Guillen, 135 Wn. App. at 640. In Sanchez-Guillen, a Division Three case, the defendant claimed he had "accidentally" shot an officer with whom he was scuffling - shooting the victim right between the eyes and using the victim's own gun. Id. The defendant then wanted to admit the evidence of what he said to a police officer about the incident in order "to bolster his defense of accident." 135 Wn. App. at 640. In that context, Division Three relied on a case it said held that a statement made by the defendant after the event was not

admissible under the “state of mind” exception, State v. Ammlung, 31 Wn. App. 696, 644 P.2d 714 (1982). Sanchez-Guillen, 135 Wn. App. at 646. Division Three concluded that, under Ammlung, the defendant’s later statements were not admissible to prove his “state of mind” at the time of the crime. Sanchez-Guillen, 135 Wn. App. at 646.

Ammlung, however, did not so hold. In Ammlung, a case from this Court, the relevant defendant was convicted of first- and second-degree robbery and wanted to introduce a statement she made to police in which she claimed she was afraid of her codefendant, which was why she could not talk to police. 31 Wn. App. at 703. The same defendant argued, *inter alia*, that the statement was admissible to show her “state of mind” at the time of the arrest. Id. This Court disagreed, however, because the defendant had not raised any defense or made any claim making her “state of mind” at that time relevant to anything. 31 Wn. App. at 703. As a result, the Court held, the evidence was “therefore not admissible under the existing mental state exception to the hearsay rule.” 31 Wn. App. at 703.

Thus, Ammlung did not involve a case where the defendant’s state of mind was relevant because he was raising self-defense. 31 Wn. App. at 703. And the holding of Ammlung was that the defendant’s state of mind at the time of her statement was not admissible because her state of mind was not relevant to any issue at trial. The holding was not that a defendant’s later statements are never relevant to a defendant’s earlier state of mind, as Sanchez-Guillen seemed to hold. Notably, no court other

than Division Three in Sanchez-Guillen appears to have cited Ammlung for this proposition, before or since, nor has Sanchez-Guillen been cited for this same proposition by any other case.²

And again, neither Ammlung nor Sanchez-Guillen involved the same claim as here i.e., self-defense, which is what made the statement here so relevant and admissible. See State v. Stockmyer, 83 Wn. App. 77, 81, 920 P.2d 1201 (1996).

The prosecution's arguments ignore the very defense in this case, asking this Court to rule based on only part of the analysis and apparently conceding on several arguments under Cross. Because Smith's statements were relevant, material and necessary to Smith's defense of self-defense, the trial court's decision preventing Smith from admitting that evidence violated his rights to present a defense and to fundamental fairness. This Court should so hold.

The Court should also reject the prosecution's argument that counsel was not ineffective. The prosecution does not dispute that failure to argue or cite to relevant caselaw may fall below the standards of effective assistance of counsel if that failure prevents the court from making an informed decision in light of that law. BOR at 48, 145; see, e.g., State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (2002); see also, State

²It has been cited in two unpublished cases for an unrelated proposition regarding conspirators. See State v. Merino, 155 Wn. App. 1039, 2010 WL 1687734, review denied, 170 Wn.2d 1007 (2010); State v. Harrell, 161 Wn. App. 1009, 2011 WL 1417167; see also, State v. Bays, 90 Wn. App. 731, 736 n. 3, 954 P.2d 301 (1998) (while it is improper to cite unpublished cases as precedential authority, it is proper to note they do not involve the same issue as presented in a particular case).

v. Ermert, 94 Wn.2d 839, 850, 621 P.2d 121 (1980). Instead, the appellate prosecutor says that counsel *did* provide briefing, although, to her credit, she admits, in a footnote, that briefing is not anywhere in the court file and she could not locate it. BOR at 48, 145 n. 30. It does appear, however, that the prosecutor is correct that counsel referred to “Defendant’s Smith memorandum that I submitted” in passing on the record, thus indicating that, in fact, he at least thought he presented something. RP 2647-48.

But that does not change the currency of Smith’s argument. All it shows is that counsel thought he submitted something but failed to get that document into the file. It does not show what the contents of that document were, nor does it establish that counsel somehow cited the relevant caselaw - especially because the record indicated that he did **not**, at least in orally arguing. Instead, he orally cited only to a completely distinguishable case which involved not a defendant’s state of mind and a claim of self-defense but a victim’s state of mind introduced by the state for a different purpose. RP 2656; see State v. Redmond, 150 Wn.2d 489, 78 P.3d 1001 (2003). Given that there was, in fact, authority to support introduction of the evidence in this case, counsel’s failure to cite that caselaw in the argument is inexplicable. And given that this failure resulted in the trial court’s continued exclusion of crucial evidence which was material and necessary for Smith’s defense, counsel was prejudicially ineffective and this Court should so hold.

Finally, the prosecution’s arguments about the trial prosecutors’ exploitation of the successful motion to exclude fall with the barest

scrutiny. The prosecution declares that “the State did not interfere with defendant’s Smith’s right to present a defense,” because 1) Smith’s “self-serving hearsay” was not admissible and 2) the prosecution did not specifically refer in closing to the evidence it had successfully moved to exclude. BOR at 114.

This Court should reject each of these arguments in turn. First, the statement was not hearsay. It was not offered for the truth of the matter asserted, i.e., to prove that Beaudine was the one with the knife and attacked Smith first. It was offered to show Smith’s state of mind, i.e., his **belief** that Beaudine was armed and that Smith had to act in self defense. That state of mind was relevant because of the self-defense claim. See State v. Walker, 136 Wn.2d 767, 776, 96 P.2d 883 (1998). And indeed, the relevant evidence rule specifically declares that such evidence is admissible as **non-hearsay**. ER 803.

Second, as noted, *infra*, the evidence should have been admitted.

Most important, however, and most troubling, is the prosecution’s cursory attempt to dismiss the relevant caselaw as “not at all similar.” BOR at 114. The prosecution declares that this case does not fall under State v. Kassahun, 78 Wn. App. 938, 952, 900 P.2d 1109 (1995), because, in that case, “the prosecutor specifically referred to evidence in closing that it had successfully moved to exclude,” something the prosecutor claims did not happen here. BOR at 114.

These claims are unfathomable. That is **precisely** what the prosecutors did in this case. Repeatedly, the prosecutors faulted Smith for

having failed to present any evidence that he reasonably believed he was in imminent danger, that he reasonably believed that Beaudine was going to commit a felony, and for presenting “no evidence” to support his claim of self-defense, i.e., that he reasonably feared harm. RP 2934, 2935, 2936, 2937.

But had the prosecution had not specifically and successfully moved to exclude Smith’s statements he **would have** presented such evidence. And at the time the prosecutors made these arguments, they knew full well that Smith had not “failed” to present evidence because it did not exist but instead that Smith **had** such evidence and it was the prosecution’s own motion that had prevented the jury from hearing it.

That is exactly the same as in Kassahun. In that case, the prosecutor moved to exclude evidence that the victim and witness were gang members and had been involved in gang activity outside the defendant’s store. 78 Wn. App. at 952. Just as here, the prosecutor then argued in closing that the defendant’s claims of fear and self-defense were not credible because there was “no evidence” of such activity or fear presented at trial. 78 Wn. App. at 952.

The Kassahun Court found that it was misconduct, because the prosecutor’s argument implied to the jury that the absence of the evidence was because the evidence did not exist, when the prosecutor knew in fact that it **did**. 78 Wn. App. at 952. Further, the prosecutor knew that the only reason the jury was not hearing that evidence was not because the defendant’s claims were meritless but rather because the prosecution had

successfully moved to exclude it. 78 Wn. App. at 952. Here, the prosecutors more than “implied” that the absence of evidence to support a claim of self-defense was because such evidence did not exist - they specifically **declared** it. RP 2935, 2936, 2937, 2938. More offensive, they made that argument knowing that the evidence **did** exist, and that the only reason the jury had not heard about it was because the prosecutors had **prevented** it.

The appellate prosecutor’s declaration that the prosecutor’s arguments somehow did not amount to the same kind of improper exploitation of the exclusion of the evidence which occurred in Kassahun is simply wishful thinking but does not reflect the actual state of the record. Because these arguments of the trial prosecutors were flagrant, prejudicial misconduct which went directly to the heart of Smith’s defense, and this Court should reverse.

3. THE PROSECUTION’S OTHER ARGUMENTS ABOUT SMITH’S RIGHTS TO PRESENT A DEFENSE AND TO A FUNDAMENTALLY FAIR PROCEEDING SHOULD BE REJECTED

In its response, the prosecution also argues that 1) the trial court did not abuse its discretion in excluding evidence of Beaudine’s reputation for violence (BOR at 53-55), 2) this Court should hold that the evidence was not sufficient to establish the relevant “community” for admission of reputation under the rules (BOR at 56-57) and 3) “defendants were still able to present a defense and testimony was still admitted” which allowed that. BOR at 48. Further, the prosecution declares that there was **no**

“good character” evidence except the testimony of Shannon Ford that Beaudine’s demeanor the night of the incident was that he was “happy and social, and that’s how he is.” BOR at 59. The prosecution then portrays that declaration as the woman’s “asserting that defendant was happy and social **that night**” - presumably meaning the victim, Beaudine, not Smith, despite referring to “the defendant.” RP 59 (emphasis added). Because there was evidence from which the defendants could argue that Beaudine might not have been acting so “social” that night, the prosecution posits, the defendants were able to present a defense. BOR at 59.

These arguments not only miss the point - they depend upon misstatements of the record. First, the prosecution’s attempt to claim that the only “good character” evidence the prosecution elicited was evidence about whether the victim was “happy and social” **that night** is almost indefensible. See BOR at 59. In fact, the very testimony the prosecution cites makes it clear that Ms. Ford was **not** limiting her testimony to how Beaudine was that night. Her testimony was that Beaudine “**was**” “happy and social” not just that night but that “that’s how he is”, i.e., that it was a **character trait**. RP 999-1000 (emphasis added).

Further, it is difficult to conceive how the prosecution could have somehow missed all of the other improper bolstering and the trial prosecutors’ repeated and almost relentless efforts to continually introduce “good character” evidence of Beaudine but keep all “bad character” evidence out, while at the same time introducing as much “bad character” evidence against the defendants as possible. But again, the record belies

That evidence, which the prosecution now forgets in its haste to minimize the gaping chasm of the open door it created below, included 1) a highly emotional color photo showing Beaudine with young, happy kids, smiling and wearing silly hats (RP 60), 2) testimony elicited, over defense objection, about Beaudine's children, how many he had, whose birthday party was portrayed in the photo, etc., (RP 60, 973) 3) testimony from Ford that the picture of the happy, smiling, friendly Beaudine depicted how Beaudine "appeared at the time of his death," (RP 60, 973), 4) testimony that Beaudine was responsible and would not let a friend drive when he had been drinking (RP 979) and 5) distancing of Beaudine from the motorcycle group he was associated with by eliciting testimony from Ms. Ford that he was not in such a group, coupled with the prosecutor's successful motion to exclude that he was a member (RP 658, 976).

And at the same time, the prosecution vigorously worked to exclude any "bad character" evidence about Beaudine, i.e., 1) evidence from the bartender, Hutt, and another witness which would have established that Beaudine caused problems nearly every time he was in the bar and was "loud and obnoxious," 2) evidence of Beaudine's wearing of a "Hell's Angels" jacket at the time he was alleged by the defendants to have acted aggressively in relation to his status with the Hell's Angels, 3) testimony about whether he was a member of that gang and 4) photos which would have shown Beaudine as he actually looked in life, including his detailed tattoos which the medical examiner described as including one with a "demon" appearance.

Nor does the prosecution dispute that there is a qualitative difference between the limited testimony about Beaudine's menacing tattoos and the visual, colorful images in the photo portraying Beaudine as a happy, social family man with kids, who wore goofy hats for his child's birthday, who was someone who was responsible enough to tell a friend (James) that he could not drive because he had been drinking, a man who was not in a motorcycle club, as distinguished from the men who were on trial for assaulting and killing him. See BOR at 58-59. The obvious purpose of introducing this "good character" evidence was to incite sympathy for Beaudine in an effort to convince the jury that Beaudine could not have been guilty of acting aggressively or causing Smith to need to act in self-defense. And the obvious purpose of the prosecution's repeated, concerted effort to keep out any evidence which might have cast a shadow on the portrayal of Beaudine as a happy, social, family man was to prevent the defendants from balancing the state's improper "good character" evidence in any way.

By allowing the prosecution to admit the "good character" evidence designed to bolster the state's theory that Beaudine could not have caused any need for Smith to have acted in self-defense and then excluding all of the evidence to the contrary, the trial court violated Smith's rights to present a defense and his due process rights to fundamental fairness. This is especially so once the prosecution started its dogged campaign to ensure that Beaudine was portrayed in the best possible, most sympathetic way, while ensuring that evidence of unrelated weapons, gang affiliation, etc. were admitted to prejudice the defendants. This Court should so hold. And

because these constitutional errors cannot be deemed “harmless,” this Court should reverse.

4. THE PROSECUTION’S ATTEMPTS TO DENY THAT BOTH CONSTITUTIONAL AND NONCONSTITUTIONAL MISCONDUCT OCCURRED SHOULD BE SUMMARILY REJECTED

In the section of its response regarding misconduct, the prosecution again fails to address many of the arguments Smith made, as well as many of the crucial facts. In addition, for the arguments to which the prosecution actually did respond, the prosecution’s arguments are without merit and each should be rejected in turn.

a. Misconduct in shifting the burden and commenting on the right to be free from self-incrimination

First, the prosecution admits that the trial prosecutor did make argument below which “does seem to combine the self-defense and justifiable homicide” instructions at one point. BOR at 115. The prosecution does not dispute that this combination is improper and leads to a serious confusion of the constitutional standards, sufficient to minimize the prosecutor’s burden in a highly prejudicial way. BOR at 115-16. Instead, the response tries to minimize the conduct as nothing more serious than that the “State misspoke,” as if it was an isolated slip of the tongue. BOR at 115. The prosecution then suggests that any error was essentially cured when “the State correctly stated their burden in rebuttal closing argument.” BOR at 115.

The record shows, however, that this misconduct was neither isolated nor cured. Despite the prosecution’s declaration that the error was

“not repeated” after it was made in initial closing argument, in rebuttal closing argument, the prosecutor **again** made exactly the same argument, conflating the self-defense and statutory defense instructions, referring to them as two “self-defense” instructions until after a defense objection, when the prosecutor admitted that instruction 31 was the “statutory defense” for accomplices. RP 2934.

Further, it is telling that, when counsel finally objected after the repetition of the misstatement in rebuttal, the trial prosecutor did not even **try** to argue a good faith belief that the misstatements were somehow correct. RP 2934.

In any event, it is not the quantity but also the quality of the misconduct which is important. Even for nonconstitutional misconduct, the Court does not just look at frequency alone. Instead, the Court looks at, *inter alia*, the evidence addressed in the argument. See State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). The arguments the prosecution calls “misspeaking” was the prosecutor telling the jury that the **defendants** had the burden of bringing in evidence “that they were defending themselves, or defending others” in order to prove self-defense. RP 2816-17. Even one instance of this extraordinarily serious, burden-shifting misstatement of the crucial standard of self-defense could well be enough to require reversal, let alone the repeated misstatements the prosecutor made here.

Of course, the prosecution has failed to mention the most significant fact: that **two different prosecutors** gave the initial and rebuttal closing

arguments and **both** of them made these little “slips of the tongue.” RP 2816-17 (Prosecutor Hauger); RP 2932-33 (Prosecutor Ko).

Nor was the misconduct somehow cured. The prosecution’s theory that such a cure occurred is based upon its own assertion that, after the initial misstatement, the prosecutor “went on to explain the instructions correctly” and “correctly stated the[] burden in rebuttal closing.” BOR at 115-16.

Smith does not dispute that correct statements, if sufficient to remedy the initial misstatements, might possibly be able to effect such a cure. But that is not what happened here. There is no question that, as Smith noted in his opening brief, the prosecutor declared in rebuttal that the state had the burden of disproving self-defense - a correct statement of the law - after counsel objected to the prosecutor again conflating the two instructions as “self defense” instructions and asked for a clarification that “31 is not a self-defense instruction.” RP 2934-35. But just after that, the prosecutor then repeatedly **misstated that same law** over repeated objection by the defense. Over and over, she told the jury the state **had no such burden** and did not have to “disprove self-defense” because the defendants had **failed in the burden to establish having acted in self-defense**. RP 2935 (“for the State to disprove self-defense, first there must be proof of self-defense”), RP 2936 (asking how the state could “disprove” self-defense when the defendants had failed to present evidence to establish self-defense in the first place), RP 2937 (no evidence of self- defense, questioning why defense was even allowed to argue it), RP 2938 (no

evidence that Beaudine took a knife out from the passenger side and “no one has testified about it). The prosecution’s declarations - without citation to any authority - that these arguments were not improper do not make it so.

Nor does the prosecutor’s efforts to dismiss a part of this misconduct as simply “inartful” bear fruit. BOR at 117. With this label, the prosecution attempts to avoid the damaging fact that the trial prosecutor asked the jury “how is it that they [the defense] even get to argue it” (self-defense), because “they” had failed to prove self-defense at trial. RP 2937.

But the prosecution does not dispute that it is the judge, not the prosecutor, who is vested with the authority to decide whether the evidence is sufficient to support giving a self-defense instruction, at which point the burden shifts to the prosecution to disprove self-defense. BOR at 115-18; see State v. Walden, 131 Wn.2d 469, 473-74, 932 P.2d 1327 (1997), disapproved of in part and on other grounds by State v. O’Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). Nor does it dispute that, in deciding to give the self-defense instructions in this case, the trial court made a determination that there was such evidence, i.e., that the defense had met their burden of proof and the burden had shifted to the prosecution. BOR at 115-18. As a result, the defendants **had no more burden of proof regarding self-defense**, based upon the trial court’s judicial determination. The fact that the trial prosecutors did not like that determination or believe it was correct does not entitle them to argue to the jury that it should not have been made and, by making that argument, shift the burden back as if the trial court had not ruled. By arguing that the defendants were not entitled to claim self-

defense because they had not presented any evidence to support that claim, the prosecutor thus infringed upon the trial court's decision to the contrary, in violation of the doctrine of the separation of powers.

And again, the prosecution has not disputed a crucial fact: that the prosecutor **did not even object** to the court's decision to give the self-defense instructions in the first place. See RP 2781-83; BOR at 115-17. Instead, the prosecutors waited until rebuttal closing argument to again raise the specter of the defendants somehow failing in a burden of proof.

Even more unpersuasive are the prosecution's claims that none of these arguments were improper comments on Smith's right to remain silent or to penalize him for exercise of that right. See BOR at 111-14. Essentially, the prosecution's argument is boiled down as follows 1) the prosecutor did not comment on the defendant's right to remain silent when looking at those arguments in full (citing only one or two places where such argument occurred) and 2) the jury was properly instructed so any problem was "cured" under State v. Ashby, 77 Wn.2d 33, 459 P.2d 403 (1969). BOR at 112-14.

Both of these arguments should be soundly rejected. First, it is interesting that the prosecution is declaring in this part of its briefing that **anyone** could have provided this evidence and thus the argument about the defendants' "failure" to present testimony was not a comment on their failure to testify. Below, the prosecution argued that Smith could not raise self-defense without testifying because he was the only one who could provide any evidence of self-defense at all. RP 1371-74, 2510.

The prosecution is wrong on both fronts. Self-defense is not so narrow or limited that a defendant is the only one who can provide evidence to support it; the testimony of other witnesses can clearly establish facts surrounding self-defense, for example if they hear someone in a bar taunting and threatening others and there is a later fracas, or if they are an officer who heard statements from the defendant which were directly relevant to prove the defendant's state of mind at the time, etc. But self-defense does require jurors to decide applying both objective and subjective standards, because "evidence of self-defense must be assessed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." State v. Janes, 121 Wash.2d 220, 238, 850 P.2d 495 (1993). Put another way, the subjective portion requires the jury to stand in the defendant's shoes and consider all the facts and circumstances known him while the objective portion requires the jury to determine what a reasonably prudent person similarly situated would do. Id.

Thus, the defendant's actual beliefs are important and relevant to the issue of self-defense - which is why the prosecutors were making these comments about those beliefs. And aside from circumstantial evidence such as the very same evidence the prosecution kept out of the trial here in excluding Smith's statements to police, the only way to present evidence of someone's "belief" would clearly be their testimony.

On this point, the record speaks for itself. After telling the jurors the state only had to disprove self-defense if there was first admitted some

“proof of self-defense,” the prosecutor then went on:

How does the State disprove when **there is no evidence that the Defendant reasonably believed that Dana was going to commit a felony**, or he was going to inflict death or personal injury? How do I disprove it when there is no evidence of it? **How do I disprove that the Defendant reasonably believed that there was imminent danger, when there has been no evidence that the Defendant reasonably believed that there was imminent danger?**

Ladies and gentlemen, there is nothing to disprove because there is no evidence of it.

RP 2936 (emphasis added). After the court overruled a defense objection, the prosecutor then declared that Smith’s counsel was asking jurors to make “[a]ssumptions of fact **that was not introduced, that no one testified about**” in order to argue that Smith was defending himself. RP 2937 (emphasis added). After further objection and a request to excuse the jury were denied, the prosecutor then told the jurors that Smith’s counsel wanted jurors to assume that Beaudine took a knife from the passenger side of the SUV “[a]nd you have heard no evidence of it, **no one has testified about it**, but that’s what he wants you to assume.” RP 2938 (emphasis added).

There can be no question that these arguments were comments on the decision of Smith - and his codefendants - to exercise their rights to remain silent and decide not to testify. Smith was the only one who could have testified to **Smith’s belief** that Beaudine was about to commit a felony or that Smith **believed** he was in imminent danger at the time of the incident. See State v. Fiallo-Lopez, 78 Wn. App. 717, 729, 899 P.2d 1294 (1995) (where only the defendant can provide the testimony the prosecution declares “missing,” the prosecutor’s argument about its absence is a

comment on the exercise of the right to remain silent). The only other evidence which could have established Smith's belief might have been something like statements Smith made to police reflecting such a belief - but those, of course, were successfully excluded by the prosecution.

Nor does Ashby hold that the error here was "cured." In that case, decided in the 1960s well before most of the caselaw on the issue, the defendant was charged with receiving stolen property and the prosecutor pointed out that a witness' testimony that he had sold the property to the defendant was "undisputed." 77 Wn.2d at 37-38. Because the Court found that people other than the defendant could have given the testimony, the Court found no error. Id. Further, because the jury was given an instruction not to draw a negative inference from the defendant's failure to testify, the Court also declared in *dicta*, the non-error would have been cured. Id. Here, unlike in Ashby, there were multiple arguments by the prosecution on this point - not to mention the multiple misstatements of the relevant law on reasonable doubt. The prosecution's attempts to minimize the serious, prejudicial nature of this misconduct should be rejected. Because the prosecution has not even attempted to argue that any of the constitutionally offensive misconduct was harmless under the constitutional harmless error test, reversal is required.

b. Other flagrant, prejudicial misconduct

The prosecution's arguments trying to minimize or dismiss the nonconstitutional misconduct are equally without merit and equally ignore or are unsupported by the record. This is especially so in the prosecution's

claims about misstating the jury's role and function.

According to the prosecution, there was no misconduct, because the trial prosecutor "did not tell the jury to ignore the burden or that their job was to discern the truth." BOR at 118. Although acknowledging the relevant line of cases, the prosecution then misstates their holdings by saying that it is only prohibited to say that guilt or innocence depends upon a determination that a witness is lying "when it is possible that the testimony. . . could be 'unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved.'" BOR at 119-20, quoting, State v. Castaneda-Perez, 61 Wn. App. 354, 810 P.2d 74 (1991), and State v. Barrow, 60 Wn. App. 869, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). The argument here was proper, the prosecution asserts, because it was merely argument about "conflicting versions of facts" and thus there is "nothing misleading or unfair in stating" that "if the jury accepts one version of the facts, it must necessarily reject the other." BOR at 120.

First, the prosecution misstates the law. It is **not** that comments that deciding guilt or innocence depends upon deciding if someone is lying are permissible sometimes and only prohibited if there is some evidence that the testimony could be unconvincing for other reasons besides deliberate misrepresentation. It is that such comments are **always** impermissible **because**, as a matter of law, it is "misleading and unfair" to lead jurors to believe that they have to find a witness is lying in order to decide the case. Castaneda-Perez, 61 Wn. App. at 363. And it is not only **some** testimony

which can be unconvincing for reasons besides deliberate misrepresentation - it is **all** testimony. As the Barrow Court noted, “[t]he testimony of two witnesses can be in some conflict, even though both are endeavoring in good faith to tell the truth.” Id. And jurors need not decide who is telling the truth in order to decide a case because that is not their role; instead their role is simply to decide whether the state has proven its case beyond a reasonable doubt. Barrow, 60 Wn. App. at 874-75.

Again, resort to the record and the relevant caselaw answers the prosecution’s meritless claims. And again, the prosecution has failed to address many of the circumstances in which the misconduct occurred and does not provide the actual language that was used. For example, the prosecution says the prosecutor argument simply “addressed language in the jury instruction about abiding belief” and was not telling jurors they had to figure out or decide the truth, at RP 2925-26. BOR at 118. But in fact, the prosecution told jurors just that, saying defendants were trying to “have it both ways” when they were arguing both that they were not there and if they were, that it was self-defense, but that they could not “have it both ways:”

Why do I say that? **Because the law says that you have to determine if you have an abiding belief in the truth of the charge. You have to do that. The truth, and what happened that night, truth in what each of these defendants did that night against Dana Beaudine.**

And that word truth, it’s not uttered because it sounds - -

RP 2925-26 (emphasis added). Counsel’s objection that this was misstating the law was overruled, and the prosecutor then said “[t]he word truth, it’s in the instructions” and that truth “doesn’t involve game play, or

loopholes or trickery” but was “the law.” RP 2926. These arguments were clearly telling the jury they had to decide the “truth” in order to decide the case, despite the prosecution’s attempts to portray them otherwise.

Further, throughout the prosecution’s entire closing argument, they emphasized this concept that the jury had to decide who was telling the truth and who was lying in order to decide the case. In both initial and rebuttal closing argument, two separate prosecutors argued about whether Diamond had “no motive to lie” and “no motive to fabricate.” See RP 2806, 2930. And ultimately the prosecutors emphasized that this requirement of “truth” was “in the instructions” and was “the law,” and that jurors had to find “beyond a reasonable doubt that the truth of what happened” was that “these defendants, each of them participated in assaulting Dana, and during that commission of the assault, Dana died.” RP 2925-26, 2951. Again, the record belies the prosecution’s claim.

Notably, completely absent from the prosecution’s discussion are the following crucial facts: 1) that the improper “declare and decide the truth” theory was established **in juror voir dire** (15RP 110-14) (asking potential jurors how they would “try to figure out who’s telling you the truth” and how they would make the determination when they “have got someone sitting on the stand there, and you have got to make that kind of judgment call, are they telling the truth or no”), 2) that there was further discussion of this same theme in opening argument when the prosecutor specifically told the jury she was going to ask them “to return a verdict of guilty that represents the **truth** of what occurred that night,” further

emphasizing the concept that jurors had to determine the “truth” in order to perform their required role. RP 158 (emphasis added). And although the prosecution makes much of saying that counsel did not object, in fact, in opening argument, a defense objection **was** made, and was overruled. RP 158.

The jury is not tasked with finding and declaring the “truth” in order to perform its essential function, as this Court has so clearly, recently made reaffirmed. See State v. Anderson, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009), review denied, 171 Wn.2d 1002 (2010). The prosecutor committed flagrant, prejudicial misconduct in making these arguments, to which counsel timely objected. This Court should so hold.

c. The prosecution still has not tried to argue a “good faith” basis for the improper, bolstering questions

In response, the prosecution claims that there was no misconduct in the questions the prosecutor asked in order to establish that some uncalled witness had talked to an officer and said 1) there was no confrontation like the one the defendants claimed had occurred between them and Beaudine in the tavern just before the fight and 2) that this lack of a confrontation was not “unusual” for Beaudine, i.e., that Beaudine was not the kind to have such confrontations. BOR at 103-104. The prosecution then addresses only one part of Smith’s argument - that the second part of this “evidence” was improper bolstering. RP 103. According to the prosecution, the bolstering was “in response to questions asked” by McCreven’s attorney during cross. RP 103.

Thus, the prosecution appears to concede that, in fact, Smith is correct in his arguments on the first point. See In re Cross, 99 Wn.2d at 379. And the failure to at least try to claim a “good faith” basis for establishing that it was proper to ask the officer about whether this witness had reported a confrontation is telling. This is especially so because **the police report made it clear that the relevant witness was not even in the bar until after the incident was over** and thus there is no way that he would have any personal knowledge of any “confrontation.” See RP 1750-51; Ex. 301.

Further, even on the argument the prosecution addresses it is mistaken on the facts. McCreven’s attorney asked only if the man had given a taped or written statement, not whether the man had said there was no confrontation, or whether the man, “who knew Dana Beaudine,” had reported any “unusual behavior” of Beaudine inside the Bull’s Eye. RP 1737-38. The prosecutor’s questioning clearly implied that the missing witness **had** been in the bar at the time of the incident and had not seen Beaudine involved in any confrontation or “unusual” (i.e. aggressive) behavior. RP 1737-38, 1751. The obvious implication was that Beaudine was not usually aggressive because acting that way would be “unusual” and the person who was being asked “knew” Beaudine. It is patently clear that the prosecutor engaged in this questioning to give the jury those impressions for the purpose of bolstering the state’s theory of the case and try to cast doubt on any idea that Beaudine might have been aggressive or acted in any way which would have triggered a right to self-defense in Smith or the

codefendants. And the prosecution does not dispute that, at the time the questions were asked, the prosecutor asking them knew that the relevant witness did not arrive until **after** the entire incident was over. BOR at 103-104. Once again, the prosecution's arguments on appeal should be rejected.

5. THE JURY INSTRUCTIONS ON SELF-DEFENSE WERE IMPROPER AND COUNSEL WAS AGAIN PREJUDICIALLY INEFFECTIVE

In his opening brief, Smith argued that jury instructions 24 ("justifiable homicide"), 25 ("act on appearances" instruction), and 29 (defining "great personal injury"), the jury instructions on self-defense, used an improperly high standard for the degree of harm Smith had to reasonably fear in order to be entitled to have acted in self defense for the felony murder, and that counsel was again prejudicially ineffective. BOAS at 73-84. In response, the prosecution mistakenly identifies the challenged instructions as "#24, 25, and 26." BOR at 125-27. The state then declares - without citation to any authority - that Smith cannot raise the issue because he did not challenge the instruction below. BOR at 125. Finally, it relies solely upon the decision in State v. Ferguson, 131 Wn. App. 855, 129 P.3d 856 (2006), review denied, 158 Wn.2d 1016 (2007), claiming that the instructions were correct and counsel thus could not have been ineffective for his failures on this issue. BOR at 125-27.

As noted in Smith's opening brief, however, Ferguson did not rely on any caselaw involving the unique situation of felony murder. AOBS at 78-80. Nor does the prosecution address any of Smith's arguments about why Ferguson should not control, i.e., that self-defense negates the mental

element of “intent;” that, in felony murder cases, because there is no separate *mens rea*, “[t]he state of mind necessary to prove felony murder is the same state of mind necessary to prove the underlying felony” (State v. Osborne, 102 Wn.2d 87, 93, 684 P.2d 683 (1984)); and that, as a result, the self-defense necessary for felony murder should be based upon the self-defense standard for the underlying felony, not the unintended result of the death. AOBS at 73-81; BOR at 125-27.

Further, the prosecution has not disputed Smith’s claim that it is patently illogical and fundamentally unfair to require a defendant to meet standard of self-defense which is far greater than the mental state the prosecution has to prove, because the whole point of self-defense is that it negates the mental element the state must prove - that is why the state bears the burden of disproving it. See BOR at 123-27.

Regarding the bald declaration that this issue cannot be addressed by the Court, the prosecution has not even mentioned Smith’s point that “errors in self-defense instructions may be raised for the first time on appeal as ‘manifest constitutional error’ if the errors are to the ‘elemental components’ of the defense.” See O’Hara, 167 Wn.2d at 105. And regarding counsel’s ineffectiveness, contrary to the prosecution’s claim, failure to request a proper jury instruction or object to an improper instruction is ineffective assistance if it prejudices the defendant. See, e.g., State v. Johnston, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007). This Court should not follow Ferguson, which ignores the fundamental structure and nature of the felony murder scheme and the defense of self-defense,

especially because the prosecution has not provided any reason to do so.

6. THE PROSECUTION HAS NOT ADDRESSED ALL OF THE ISSUES ON THE SPECIAL VERDICT AND HAS PROVIDED NO REASONED ARGUMENT TO SUPPORT ITS CLAIMS

In his opening brief, Smith also relied on State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), arguing that, under that case, jury instruction 57, the special verdict instruction, misstated the law. AOBS at 81-85. Further, Smith argued that the instruction deprived him of the presumption of innocence and of the benefit of a reasonable doubt. AOBS at 81-85. He also argued that counsel was ineffective in failing to object to the improper instruction and failing to recognize that unanimity was not required for the jury to decide that the state had not proven the special verdict, beyond a reasonable doubt. AOBS at 85.

In response, the prosecution declares that “the decision in State v. Bashaw. . . is controlling law on the challenged special verdict instruction[.]” BOR at 122. Nevertheless, the prosecution then tries to prevent this Court from granting Smith relief, based on the theory that the issue is “not constitutional” and thus cannot be raised for the first time on appeal. BOR at 125-27. Next, the prosecution declares that counsel was not ineffective for failing to be aware of the application of State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), to this case. BOR at 145-46. But at the same time, the prosecution appears to concede that this failure might be deemed error, because it then posits that “one error does not make counsel ineffective.” BOR at 145-46.

The prosecution's claims do not withstand review. At the outset, the prosecution's argument focuses solely on the holding of Bashaw, as if that controlled. BOR at 120-22. Once again, however, the prosecution has mistaken the scope of Smith's arguments on appeal. There is no question that Bashaw is a large part of Smith's argument. See AOBS at 81-84. But Smith also raised additional grounds not specifically addressed in Bashaw; that "the instruction deprived Smith of the benefit of any reasonable doubt and the presumption of innocence." AOBS at 83. And Smith noted that Bashaw had not explicitly addressed these issues. AOBS at 83.

The prosecution, however, has not addressed those arguments. BOR at 120-22. Again, it has made an apparent concession that Smith's arguments are correct and that there **was** a constitutional violation. See Cross, 99 Wn.2d at 379.

Thus, the question of whether Bashaw is constitutionally based is **not** dispositive here. Even if it were not, Smith's additional, constitutional claims - not raised in Bashaw and not disputed by the prosecution - would still be before this Court. And those claims, as argued in Smith's opening brief, support review. See BOAS at 81-85.

In any event, the prosecution's argument that Smith should be precluded from relief under Bashaw because he did not raise the issue below depends entirely on this Court simply adopting the position of Division Three rather than the position of Division One on this point. See State v. Ryan, 160 Wn. App. 944, 252 P.3d 895 (2011) (Division One); State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2001) (Division Three).

But the prosecution provides absolutely no meaningful analysis of **why** Division Three’s decision should be followed. Instead, the prosecution simply cites Nunez, then, in a footnote, “urges this [C]ourt to follow” Nunez, declaring it “well[-]reasoned, in line with. . . Bashaw and . . . a more complete review of the relevant” law. BOR at 122 n. 23.

Arguments made in footnotes, however, are neither properly brought nor usually considered. State v. Johnson, 69 Wn. App. 189, 194 n. 4, 847 P.2d 960 (1993). Further, simply declaring Nunez to be better the better decision than Ryan does not make it so. In fact, Ryan is the decision more consistent with Bashaw, because Ryan, unlike Nunez, recognized that the Supreme Court would not have used the wrong standard of review (i.e., a constitutional standard when the issue was not constitutional) and that the error was one which resulted in a “flawed deliberative process,” surely a constitutional issue. Ryan, 160 Wn. App. at __ (slip op. at 2-3). For Division One, the decision in Bashaw was clearly based in constitutional principles and the issue could be raised for the first time on appeal as manifest error affecting a constitutional right. 160 Wn. App. at __ (slip op. at 2). Division One found that the Bashaw decision “strongly suggests its decision is grounded in due process.” 160 Wn. App. at __ (slip op. at 2). Indeed, Division One noted, the fact that the Bashaw Court “refused to find the error harmless even where the jury expressed no confusion and returned a unanimous verdict in the affirmative” made it clear the error was constitutional. Ryan, 160 Wn. App. at __ (slip op. at 2).

It was obvious to Division One that Bashaw had found the issue

constitutional and that it could be raised for the first time on appeal. Id. It should be equally obvious to this Court that, even if the prosecution were correct and Bashaw addressed all of the issues Smith raised - which it does not - Bashaw was based in constitutional principles and the issues addressed by that case may be raised for the first time on appeal.

Notably, the facts of Nunez are far different. In Nunez, the instruction did not, as here, tell the jury they had to be unanimous in order to find the state had not proven the special verdict. 160 Wn. App. at 157-58; CP 1241. Instead, the instruction in Nunez just told jurors they had to “agree” in order to **answer** the special verdicts. Id. And the defendant in Nunez - unlike here - made no legitimate constitutional argument on appeal. 160 Wn. App. at 157-58.

Finally, the prosecution’s claim that counsel was not ineffective should be rejected. The prosecution’s theory that Goldberg did not address this issue - and that counsel thus cannot be responsible for knowing the relevant law - is without merit. As the Bashaw Court itself stated when addressing the question of whether the jury has to be unanimous to answer a special verdict “no,” “[w]e answered this question in . . . Goldberg, and the answer is no.” 169 Wn.2d at 145. Thus, Goldberg stood squarely for this very same proposition even before the decision in Bashaw.

7. THE PROSECUTION’S ATTEMPTS TO AVOID THIS COURT’S REVIEW OF THE SENTENCING ISSUE SHOULD BE REJECTED

In response, the prosecution does not dispute that it failed to show that Smith’s alleged out-of state convictions were “comparable” to

Washington felonies as required. BOR at 159-63. Nor does the state dispute that the sentencing court failed to follow RCW 9.94A.500(1) and set forth the alleged prior convictions upon which it relied. See BOR at 159-62. Instead, the state tries to prevent this Court from addressing the errors by claiming that Smith somehow “waived” them. BOR at 159-63.

This Court should dismiss this effort. First, the law upon which the prosecution relies - as little as it is - does not apply. See BOR at 159. State v. Shale, 160 Wn.2d 489, 495, 158 P.3d 588 (2007), for example, involved a defendant who raised a “same criminal conduct” determination for the first time on appeal when that defendant agreed to the offender score in a plea agreement. Similarly, In re Connick, 144 Wn.2d 442, 464, 28 P.3d 729 (2001), overruled by, In re Personal Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002), involved a defendant who had, again “agreed to count” his convictions as “same criminal conduct” below. And Connick was partially overruled by Goodwin, supra, on this point, when the Court rejected the idea that a defendant can “waive” an offender score issue when there is a legal error resulting in a mistaken offender score. Goodwin, 146 Wn.2d at 874.

Smith’s case does not involve a “same criminal conduct” determination. It involves the very different issue of whether the prosecution has met its burden of proving the comparability of a foreign conviction before it can be used at sentencing. That issue is not addressed by Shale or Connick but rather by State v. Lucero, 168 Wn.2d 785, 230 P.3d 165 (2010), and by this Court in State v. Jackson, 129 Wn. App. 95,

117 P.3d 1182 (2005), review denied, 156 Wn.2d 1029 (2006). In Lucero, the defendant recited a standard range sentence based on an offender score calculated by including a foreign conviction and conceded that his offender score was “at least a six,” which would require counting that foreign conviction. 168 Wn.2d at 787. No comparability analysis was conducted and, on appeal, the defendant argued the failure to do so was error. Id. Twice, the Supreme Court reversed Division One’s holding that Lucero had “waived” the issue and that he had “affirmatively acknowledged the comparability” of the foreign conviction by using the offender score which included that conviction. 168 Wn.2d at 787-88. Citing Jackson with approval, the Supreme Court held that the defendant did not waive the comparability challenge, because his “mere failure to object to the State’s assertion of criminal history is not an affirmative acknowledgment” of the comparability of the convictions counted in that criminal history. 158 Wn.2d at 178. And Ross, cited in Smith’s opening brief but not even mentioned by the prosecution, also so holds. State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004); BOAS at 91; BOR at 159-63.

Under Lucero and Ross, the prosecution’s claim of waiver here fails. The prosecution’s claims regarding counsel are equally without merit. The prosecution declares that counsel was not unprepared at sentencing, making much of counsel’s allegedly reviewing the exhibits below and declaring that counsel “represented” that he had “looked through all the separate judgment and sentences; had looked at which ones could not be verified; and made an affirmative assertion” about the offender score.

BOR at 146, 161.

Again, the record does not support the prosecution's claims. Instead, it shows that counsel had only gotten the exhibits from the prosecution **that same day**. SRP 40. He admitted as such, and that he had only had a chance to look at them "briefly" and was not sure what the correct offender score was. SRP 40. Although he declared he was "comfortable" that it was "somewhere above nine," he also admitted that, in fact, the sentencing exhibits, including multiple pages of judgment and sentence documents and other documents from out-of-state, had probably been given to him when he was appointed, contained "in the three boxes that I received somewhere." SRP 40. The state's efforts to characterize counsel as somehow "prepared and an advocate" for Smith is belied by those basic facts.

8. THE PROSECUTION'S ARGUMENTS ABOUT THE POST- ADDRESS STATUTE ARE MERITLESS

a. The prosecution's claim that RCW 9A.32.050(1)(b) is not ambiguous falls with the barest scrutiny

Under the rule of lenity, where a statute is ambiguous and thus subject to several interpretations, the Court is required to adopt the interpretation most favorable to the defendant. See State v. Roberts, 117 Wn.2d 576, 586, 817 P.2d 855 (1991). In its response, the prosecution does not cite to any language in RCW 9A.32.050 which clarifies whether that statute applies to not only assaults which are separate from the death but also assaults which specifically result in the death. BOR at 74-78. Nor does the response address any of Smith's arguments about the Supreme

Court's holdings regarding the relevant "in furtherance of" language used in the statute. BOR at 74-78. And it does not dispute that the statute still contains that same "in furtherance of" language which the Supreme Court found in In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), would be rendered superfluous by allowing conviction for felony murder based upon an assault which causes death. BOR at 74-78. Instead, the prosecution simply declares the statute is somehow not ambiguous based not upon the language of the statute but on other legislative language it claims answers the question. BOR at 76-77. And it relies, as expected, on State v. Gordon, 153 Wn. App. 516, 223 P.3d 591 (2009), review granted, 169 Wn.2d 1011 (2010), claiming that case "reviewed the exact issue" as presented here and concluded that the Gordon Court held the statute was not "ambiguous." BOR at 77-78.

But again, the prosecution has failed to address crucial parts of Smith's arguments. It has not addressed Smith's arguments that Gordon failed to properly apply the rule of lenity and failed to follow relevant, binding Supreme Court precedent. BOR at 74-78; see BOAS at 93-98. Most significant, the state has utterly failed to address the most serious flaw in Gordon, perhaps because it is a flaw from which the state's argument also suffers. That flaw is that it ignored the very language of the statute in finding it was not ambiguous. The 2003 Legislature did not clarify **which** assaults it intended to be as predicate felonies, because it still included the "in furtherance of" language in the statute. See Laws of 2003, ch. 3. Further, in its amendments the statute, the 2003 Legislature specifically

stated that the purpose of the second-degree felony murder statute was punishing those who “commit a homicide in the course **and in furtherance of** a felony,” which the Legislature said meant the death was to be “sufficiently close in time and proximity to the predicate felony.” Laws of 2003, ch. 3, § 1 (emphasis added). But it is the “in furtherance of” language which renders the assault component ambiguous, because a death simply cannot be caused in the furtherance of an assault if they are the very same act. See Andress, supra.

The amended statute does not make it clear if it applies to all assaults or only those which are separate from the act causing the death. At the same time, the amended statute still contains the “in furtherance of” language. It is thus ambiguous. Applying the rule of lenity and the rules of statutory construction against absurd results and assuming the Legislature did not intend such results, the Court is required to interpret the statute to apply only to assaults which are separate from the act causing death. This is the only way to avoid rendering superfluous the “in furtherance of” language or requiring an absurd result, and the only way to honor the Legislature’s apparent desire to include at least *some* assaults as predicate felonies for second-degree felony murder while following these mandates of statutory construction. This Court should so hold.

- b. The prosecution has not addressed a crucial part of Smith’s argument about the equal protection violation

The prosecution also fails to address all of Smith’s arguments that allowing the statute to cover all assaults including those which are the

conduct causing the death is a violation of equal protection. BOR at 68-76. Instead, as expected, the prosecution relies on the holdings of Division One on this point. Id. And it does so without addressing any of Smith's arguments that those holdings were flawed. BOR at 68-76; see AOBS at 100-102. This failure is telling, as the prosecution's position depends upon those holdings. The prosecution's failure to present meaningful response to Smith's arguments yet again reveals the shallowness of its analysis and gives this Court no proper basis upon which to rule for the State on this point.

9. CUMULATIVE ERROR COMPELS REVERSAL

In arguing that there was no cumulative error, the prosecution relies on its erroneous theory that there was no error at all. BOR at 164-66. And it relies on theories presented in Rose v. Clark, 478 U.S. 570, 577-78, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986), regarding harmless error; see BOR at 164.

Rose, however, did not involve a cumulative error issue in a direct appeal, like here. 478 U.S. at 576-79. Instead, it involved a request for collateral relief, i.e., habeas claim, and the very different question of whether certain errors could be deemed "structural" and thus never be harmless so that they would compel reversal on collateral review in the federal system. 478 U.S. at 576-79.

Notably, our Supreme Court has specifically "decline[d] to adopt the standard articulated in Rose" for cases involving such review in our state. In re Mercer, 108 Wn.2d 714, 718-19, 741 P.2d 559 (1987). The

cumulative effect of the errors in this case compel reversal even if each individual error does not. This Court should so hold and should reverse.

10. THE PROSECUTION SHOULD BE PRECLUDED FROM RAISING NEW ARGUMENTS IN AN EFFORT TO REMEDY THE DEFECTS IN ITS ARGUMENTS AND BRIEFING

As noted, *infra*, the prosecution's response is remarkable in the sheer number of defense arguments to which the prosecution failed to respond. As also noted *infra*, the Supreme Court has held that a party's failure to present any arguments to dispute a claim made in an opening brief on appeal is an "apparent concession" of the validity of those claims. Cross, 92 Wn.2d at 379. Should the prosecution now regret those failures, however, it should be precluded from attempting to remedy them at any oral argument which might be held. Under RAP 11.4(f), counsel's argument is confined to the issues raised and argued in the briefs. It would be patently unfair to allow the prosecution to raise new arguments in response at oral argument, thus depriving the defense of the same opportunity to consider and research the relevant caselaw that it would have had if the arguments were properly raised in response.

E. CONCLUSION

For the reasons stated herein, in appellant's opening brief and in the opening and reply briefs of Smith's codefendants, adopted and incorporated by reference herein as noted, this Court should reverse.

DATED this 18th day of July, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL AND ELECTRONIC MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Reply Brief to opposing counsel, counsel for codefendants and to appellant as follows:

by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Pierce County Prosecutor's Office, 946 County City Building,
930 Tacoma Ave. S., Tacoma, WA. 98402;

to Mr. Carl Smith, DOC 293917, Clallam Bay CC, 1830 Eagle
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to counsel for codefendant Nolan: c/o Nielsen, Broman and Koch
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and via email with return receipt confirmation:

to counsel for codefendant Ford, Lise Ellner, at

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DATED this 18th day of July, 2011.



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