

NO. 39598-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

BARRY FORD

Appellant.

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

The Honorable Brian Tollefson, Judge

REPLY BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant
WSBA# 20955

LAW OFFICES OF LISE ELLNER
P.O. Box 2711
Vashon, WA 98070

TABLE OF CONTENTS

| | Page |
|--|------|
| A. <u>ASSIGNMENTS OF ERROR</u> | 1 |
| <u>Issues Pertaining to Reply Arguments</u> | 1 |
| B. <u>STATEMENT OF THE CASE IN REPLY</u> | 5 |
| 2. Facts..... | 2 |
| C. <u>ARGUMENTS IN REPLY</u> | 2 |
| 1. THE PROSECUTOR IN HER APPELLATE BRIEF MAKES STATEMENTS OF "FACT" THAT ARE NOT SUPPORTED BY THE RECORD; THESE PORTIONS OF THE STATE'S BRIEF NOT SUPPORTED BY SWORN TESTIMONY MUST BE STRICKEN..... | 6 |
| 2. THE PROSECUTOR'S LEGAL CONCLUSIONS NOT SUPPORTED BY LEGAL AUTHORITY OR BY LEGAL ANALYSIS MUST BE STRICKEN..... | 24 |
| 3. THE PROSECUTOR MAY NOT THROUGH VEILED CROSS EXAMINATION TESTIFY OR BY INNUENDO ATTEMPT TO GAIN CONVICTION..... | 33 |
| 4. FAILURE TO PROVIDE LESSER INSTRUCTION SHOULD BE ADDRESSED ON ITS MERITS..... | 36 |

TABLE OF CONTENTS

| | Page |
|--|------|
| 5. ADOPTION OF CO-COUNSEL'S ARGUMENTS..... | 38 |
| 6. MR. FORD RESTATES AND INCORPORATES BY REFERENCE HIS ENTIRE OPENING BRIEF AND CO-DEFENDANT'S OPENING BRIEFS..... | 38 |
| D. <u>CONCLUSION</u> | 39 |

TABLE OF AUTHORITIES

| | Page |
|--|-------------------------------|
| <u>WASHINGTON CASES</u> | |
| <u>Bravo v. Dolsen Cos.</u> , 71 Wn.App. 769, 862 P.2d 623 (1993), <u>reversed on other grounds</u> , 125 Wn.2d 745, 888 P.2d 147 (1995)..... | 7 |
| <u>In re Dependency of K.S.C.</u> , 137 Wn.2d 918, 976 P.2d 113 (1999)..... | 10-12, 15-18, 23, 24, 27 |
| <u>In re Rosier</u> , 105 Wn.2d 606, 717 P.2d 1353 (1986)..... | 25 |
| <u>Lewis v. City of Mercer Island</u> , 63 Wn.App. 29, 817 P.2d 408, <u>review denied</u> , 117 Wn.2d 1024, 820 P.2d 510 (1991)..... | 7, 8 |
| <u>Nelson v. McGoldrick</u> , 127 Wn.2d 124, 896 P.2d 1258 (1995)..... | 8 |
| <u>Northlake Marine Works, Inc. v. City of Seattle</u> , 70 Wn. App. 491, 857 P.2d 283 (1993)..... | 7, 8, 10-13, 15-18, 23, 24 |
| <u>Sherry v. Financial Indem. Co.</u> , 160 Wn.2d 611, 160 P.3d 31 (2007)..... | 6, 7, 9, 11-13, 15-17, 23, 24 |
| <u>State v. Belgarde</u> , 110 Wn.2d 504, 755 P.2d 174 (1988)..... | 28 |
| <u>State v. Benn</u> , 120 Wn.2d 631, 845 P.2d 289, <u>cert. denied</u> , 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993)..... | 37 |
| <u>State v. Breitung</u> , 155 Wn.2d 606, 230 P.3d 614 (2010)..... | 37, 38 |

TABLE OF AUTHORITIES

| | Page |
|---|-------------------|
| <u>WASHINGTON CASES, Continued</u> | |
| <u>State v. Brett</u> 126 Wn.2d 136, 892 P.2d 29 (1995)..... | 37 |
| <u>State v. Copeland</u> 130 Wn.2d 244, 922 P.2d 1304 (1996)..... | 30 |
| <u>State v. Corbett</u> 158 Wn. App. 576, 242 P.3d 52 (2010)..... | 25, 28, 30-32 |
| <u>State v. Davenport</u> 100 Wn.2d 757, 675 P.2d 1213 (1984)..... | 18, 25-30, 32, 33 |
| <u>State v. Denton</u> 58 Wn.App. 251, 792 P.2d 537 (1990)..... | 34-36 |
| <u>State v. Elliott</u> 114 Wn.2d 6, 785 P.2d 440 (1990)..... | 25-28, 30, 32 |
| <u>State v. Garrett</u> 124 Wn.2d 504, 881 P.2d 185 (1994)..... | 37 |
| <u>Smith v. King</u> 106 Wn.2d 443, 722 P.2d 796 (1986)..... | 25 |
| <u>State v. Kirwin</u> 137 Wn.App. 387, 153 P.3d 883 (2007)..... | 34 |
| <u>State v. Krall</u> 125 Wn.2d 146, 881 P.2d 1040 (1994)..... | 8 |
| <u>State v. McFarland</u> 127 Wn.2d 322, 899 P.2d 1251 (1995)..... | 37 |
| <u>State v. Millante</u> 80 Wn. App. 237, 908 P.2d 374 (1995)..... | 28 |

TABLE OF AUTHORITIES

| | Page |
|--|-------------------------------------|
| <u>WASHINGTON CASES, Continued</u> | |
| <u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2004)..... | 25-28, 30, 32 |
| <u>State v. Wethered</u> , 110 Wn.2d 466, 755 P.2d 797 (1988)..... | 25 |
| <u>State v. Yoakum</u> , 37 Wn.2d 137, 222 P.2d 181 (1950)..... | 29, 34-36 |
| <u>Voicelink Data Service v. Datapulse</u> , 86 Wn. App. 614, 937 P.2d 1158, (1997) | 7, 10-13, 15-17, 21, 23, 24, 27, 36 |
| <u>FEDERAL CASES</u> | |
| <u>Southern Railway Company v. Sorrel</u> , 549 U.S. 158, 127 S. Ct. 799, 166 L.Ed.2d 638 (2007)..... | 34 |
| <u>In re Winship</u> , 397 U.S. 358, 90 S.Ct.1068, 25 L.Ed. 2d 368 (1997)..... | 6 |
| <u>RULES, STATUTES AND OTHERS</u> | |
| RAP 10.3..... | 7, 9-13, 15-17, 21, 23-25 |

A. ASSIGNMENTS OF ERROR

1. Mr. Ford's assigns error to the state's improper brief that fails to cite to the record.
2. Mr. Ford's assigns error to the state's improper brief that cites to the record for support of its assertions where none exist.
3. Mr. Ford's assigns error to the state's improper brief that fails to provide legal argument to support its conclusions.
4. Mr. Ford's assigns error to the state's improper brief for its repeated creation of "facts" that are not supported by the evidence.
5. Mr. Ford assigns error to the state's violation of Mr. Ford's due process rights by improperly attempting to pass of as "evidence" matters that are simply the prosecutor's unsubstantiated opinion.
6. Mr. Ford assigns error the state's assertion that ineffective assistance of counsel may not be raised for the first time on appeal.
7. Mr. Ford assigns error to the state's argument that this Court should not consider Mr. Ford's argument regarding a lesser included instruction because although well briefed, appellant failed to note an assignment of error.

Issues Pertaining to Assignment of Error

1. Must the state's improper brief be stricken?
2. Must this Court strike the portions of the state's brief which incorrectly cite to the record?
3. Must this Court strike the portions of the state's brief which fail to provide legal argument?

4. Was Mr. Ford's due process rights violated by the state's improperly attempting to pass off as "evidence" matters that are simply the prosecutor's unsubstantiated opinion?
5. May ineffective assistance of counsel be raised for the first time on appeal?
6. Should this Court consider Mr. Ford's well briefed argument regarding a lesser included instruction even though Mr. Ford failed to note an assignment of error.

B. STATEMENT OF THE CASE IN REPLY

Summary of Facts

Jim Stilton, wore a black leather jacket with insignia and drove a motorcycle and rode his motorcycle to the Tavern on April 5th with Mr. McCreven. RP 1487, 1522, 2072-73, 2085, 2132-33. Mr. Stilton is very similar in size to Mr. Ford, who is 5'10, 235 pounds. RP 2132, 2203-2204, 2811. Mr. Stilton is a 20 year friend of McCreven's and rode with him to Hildalgo's meetings. RP 1423-25.

Detective Jane McCarthy was told by several people that a man named Cameron who was built like Mr. Ford was at the bar. RP 259. Ms. Blair told the police that Mr. James told her that Cameron was at the tavern that night. RP 768. Cameron weighed 250 pounds and had short hair. RP 767.

Ms. Blair was clear that all of the men in the fight were wearing vests or jackets with Hildalgo's patches and that three of the four fighters left on motorcycles and the fourth left in a car. RP 1630-31.

Ms. Diamond could not identify who initially approached Beaudine to fight. She referred to them as "the four men", but testified that five men were in the fight. RP 388, 398, 403. Ms. Diamond indicated that all of "them", the men in the fight were dressed alike from the waist up. RP 399. Ms. Diamond was certain that Barry Ford was not one of the men in the fight. RP 411-413.

Jennifer Abbott was inside the bar at a bachelorette party. RP 545. She saw five, six or seven biker type guys wearing leathers inside the bar. RP 459-60. When Abbott was outside smoking, she saw four or five biker guys running toward a fight. RP 470-71, 482. Abbott recognized Mr. Nolan as one of the men in the fight, but could not identify the others, except to indicate that they had on leather vests and jackets, and the second man to enter the fight had hair past his ears showing from beneath a hat or bandanna and he had a goatee. RP 470-71, 485-86.

Ms. Abbott did not know if the men involved in the fight were the same men from inside the bar sitting at her table; she just assumed that they were the same. RP 470.

Ms. Abbott described another man at the bar who was wearing leathers and was wearing a hat or bandanna, who was not present at the

trial. RP 485. S. Ford also described a fifth man at the bar with the defendants who was not present at trial. RP 1010. S. Ford described this man as wearing a black leather motorcycle jacket, and was clean cut. RP 1011. S. Ford did not see this man leave, but at some point he was not sitting at the table with the four other guys. RP 1011. Ms. Abbott did not see any non-biker types involved in the fight. RP 512-13.

Mr. Ford was not wearing a vest with patch the night of the fight. RP 2538. The other men with Mr. Ford all had on leather biking wear: chaps, riding gear, and leather jackets or vests. RP 2541. There were also others in bar with riding gear and leathers. RP 2542.

Mr. Ford was not one of the men in the fight. RP 2536, 2581; RP 21, 22, 28, (January 4, 2009). When Ms. Hutt was going to call 911, Mr. Ford was standing next to the Radio Shack smoking a cigarette, he was not in the parking lot near the fight. RP 2546; RP 30-31 (January 4, 2009). Mr. Ford never had any blood on his clothing, he was not disheveled, he did not look like he had been in a fight; he was just standing outside. RP 2595.

Ms. Hutt told Detective Wood that Mr. Ford was in dress clothes and would have worn riding gear if he was on a motorcycle. RP 1510. Mr. Ford was described as being age 50, 5'10', 235 pounds with partially gray hair. RP 2183. Ms. Hutt described James Stilton to Wood as being 44 years old, 5'10' 220 pounds. RP 2132, 2203-2204. Both Mr. Ford and Mr. Stilton were also incorrectly described as being 6'2, 280 pounds with short

clean cut hair styles. (RP 12 January 4, 2009). Detective Wood conceded that Mr. Ford and Mr. Stilton have the same physical description: big, clean cut looking guys. RP 2133, 2203-2204.

The evidence indicated that Mr. McCreven, Mr. Nolan and Mr. Stilton went to the Bull's Eye on motorcycles and that all three left on motorcycles at the same time, suggesting that Mr. Stilton left with Mr. McCreven and Mr. Nolan. RP 2203. RP 2202. There was no evidence suggesting that Mr. Ford rode a motorcycle to the Bull's Eye. Mr. Ford owns a motorcycle and a Maroon pickup truck. Since he was never identified as riding a motorcycle to the bar and he was never described as wearing riding gear, it is logical to infer that he drove his other vehicle, the maroon truck, to the Bull's Eye. RP 2136. According to witness testimony, guys who ride motorcycles, wear motorcycle riding gear, this it is logical to infer that if Mr. Ford rode a motorcycle, he would have worn his motorcycle gear. RP 1510.

Katherine Baccus was at the Bull's Eye on April 5, 2008. Ms. Baccus described the men in the fight as wearing leathers and gold patches. RP 2341-2346.

Carl Smith Sentencing

During his allocution, co-defendant Carl Smith took responsibility for killing Mr. Beaudine and apologized to Mr. Ford and the other co-defendants and their spouses. RP 46 (December 11, 2009)

C. ARGUMENTS IN REPLY

1. THE PROSECUTOR IN HER APPELLATE BRIEF MAKES STATEMENTS OF "FACT" THAT ARE NOT SUPPORTED BY THE RECORD; THESE PORTIONS OF THE STATE'S BRIEF NOT SUPPORTED BY SWORN TESTIMONY MUST BE STRICKEN.

Knowledge of the actual evidence in Mr. Ford's case is exquisitely important in this case because Mr. Ford was convicted of murder in this case, based not on evidence, but based on the prosecutor's unsupported assertions throughout her response brief and throughout a very long trial. There is no evidence by which to reasonably infer that Mr. Ford was involved in the murder.

The standard of proof is beyond a reasonable doubt, not a mere possibility. Due process requires the government prove every element of a crime upon which a defendant is convicted beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct.1068, 25 L.Ed. 2d 368 (197).

The state in its Brief of Respondent makes numerous references to matters as "evidence" that are not supported by sworn testimony and refers to the verbatim report of proceedings (VRP) to support these "facts" as "evidence", when the VRP does **NOT** in fact support the state's assertions. These references are so numerous that the state's brief must be stricken in its entirety. Sherry v. Financial Indem. Co., 160 Wn.2d 611,

615, n. 1, 160 P.3d 31 (2007) RAP 10.3. RAP 10.3(b) requires the state to cite to the record and legal authority to support its factual assertions and legal conclusions. Id.

Our State Supreme Court mandates that statements and references in a brief must be supported by the record and those statements not supported by sworn testimony must be stricken from the brief. RAP10.3; Sherry, 160 Wn.2d at 615, n. 1 (Supreme Court “decline[s] to consider facts recited in the briefs but not supported by the record); Cf. RAP 10.3(a)(5), 13.4(c)”); In Re K.S.C., 137 Wn.2d 918, 932-933, 976 P.2d 113 (1999); McGoldrick, 127 Wn.2d 124; Voicelink Data Service v. Datapulse, 86 Wn. App. 614, 618, 937 P.2d 1158, (1997), citing, Northlake Marine Works, Inc. v. City of Seattle, 70 Wn. App. 491, 513, 857 P.2d 283 (1993); Lewis v. City of Mercer Island, 63 Wn.App. 29, 32, 817 P.2d 408, review denied, 117 Wn.2d 1024, 820 P.2d 510 (1991).

Assertions by counsel are not evidence. See Bravo v. Dolsen Cos., 71 Wn.App. 769, 777, 862 P.2d 623 (1993) (unsworn allegation of fact in appellate brief falls outside materials that court can consider), reversed on other grounds, 125 Wn.2d 745, 888 P.2d 147 (1995).

In Voicelink, Voicelink made allegations about a contract that would be unreasonable to enforce. The Court struck those allegations of Voicelink’s brief because they were not supported by sworn testimony. Voicelink, 86 Wn. App. at 618-618. In re Dependency of K.S.C., 137

Wn.2d 918, 976 P.2d 113 (1999), a parent-child dependency case, the mother successfully moved to strike several portions of the State's supplemental brief which contained factual material not submitted to or considered by the trial court. The Court citing, Nelson v. McGoldrick, 127 Wn.2d 124, 896 P.2d 1258 (1995), held that “[t]he representations misstate the facts, and should be stricken”. K.S.C., 137 Wn.2d at 932-933. State v. Krall, 125 Wn.2d 146, 149, 881 P.2d 1040 (1994);

In Northlake, 70 Wn. App. at 513, Northlake's owner submitted affidavits discussing his concern over the disputed agreement's effect on development by Fremont Dock and Quadrant Corporation. The Court of Appeals held that because Northlake did not provide the court with any evidence, the Court was precluded from considering the information provided in the affidavits. Northlake, 70 Wn. App. at 513; citing, Lewis v. Mercer Island, 63 Wn.App. 29, 32, 817 P.2d 408, review denied, 117 Wn.2d 1024, 820 P.2d 510 (1991) (factual allegations not supported by the record are not considered by the Court of Appeals.).

In Nelson, 127 Wn.2d at 140, a case challenging the enforceability of an heir finder contract, the petitioner moved to strike all or some portions of the Supplemental Brief of Respondent on the basis that it referred to evidence not supported by the record. The Supreme Court granted the motion to strike those portions of the brief not supported by sworn testimony. *Id.*

In Sherry, supra, an uninsured motorist case, citing to RAP 10.3(a)(5),¹ the Supreme Court refused to consider facts recited in the briefs but not supported by the record. Mr. Ford requests the same relief herein.

BOR p. 18: VRP 2549 and 2567.

In Mr. Ford's case, the prosecutor in her of Brief of Respondent made the following assertions as "fact" that were not supported by the record. The prosecutor in her brief at page 18, asserts as fact without support in the record that VRP 2549 and 2567 provide that "[t]he four defendants were Hildalgos and had their jackets with their patches." This is incorrect. The testimony provides that Ms. Hutt knew that the four men she served, the defendants were Hidalgo's but she does not testify that they were all wearing Hidalgo jackets. RP 2567-2568. Rather she testified at RP 2549-2550 that "[t]he other men", [not Mr. Ford], "had Hidalgo patches on their coats." "The only reason I knew Sarge was a Hidalgo was from a prior, when he would come in prior to the Cat Box, or someone [sic] [somewhere]else I worked wearing his patch." RP 2549-2550.

There was no evidence from any witness that Mr. Ford wore any

¹ RAP 10.3(a)(5):

Statement of the Case. A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

riding gear: the evidence established he wore dress clothing. RP 2570-2571. There is no testimony at VRP 2549 or 2567 indicating that Mr. Ford wore a Hidalgo jacket the night of the incident. Id. Ms. Hutt described Sarge as 6 feet, 300 pounds wearing a black leather dress coat. RP 2570-2571. Ms. Hutt testified that there were four Hidalgo members at bar wearing patches, but Mr. Ford was not one of them. RP 2571.

Shannon Ford testified that Mr. Ford was wearing dress clothes and was not one of the men in the fight. RP 433, 1108, 1125, 1170. Mr. Ford was universally described by the state's witnesses as wearing casual dress clothing that were explicitly described as not being motorcycle clothing. RP 671, 674, 1110, 1124, 1125, 1150, 1156, 2805.

Under RAP 10.3(g), Voicelink, supra, Sherry, supra, K.S.C., supra, and Northlake, supra, the prosecutor's opinion that "[t]he four defendants were Hildalgos and had their jackets with their patches", must be stricken from the record.

BOR p. 18: VRP 2553.

The prosecutor inaccurately asserts that VRP 2553 supports her statement that "[d]efendants McCreven and Nolan would always come in with defendant Ford." BOR at p. 18. Id. This is incorrect. The testimony at VRP 2553 provides that Ms. Hutt had seen Mr. Ford with Mr. Nolan and Mr. McCreven on occasion but Mr. Ford "would come in with different individuals". Id. Ms. Hutt testified that she always saw Mr. Ford at other

clubs with a tall, clean cut, nice guy” not the co-defendants. RP 2554. Under RAP 10.3(g), Voicelink, supra, Sherry, supra, K.S.C., supra, and Northlake, supra this portion of the state’s brief must at BOR p.18 must be stricken.

BOR p. 84; VRP 210.

The prosecutor cites to VRP 210 to assert that “there was also evidence that Mr. Ford held up his hand to Mr. James to discourage him from entering the fight.” BOR at p. 152. The testimony at VRP 210 does not support this assertion. Mr. Howden testified at p. 210 in response to being asked to describe the person who put up his hand to Mr. James. “That was the one that had the crew cut, the you know, tall stocky, and I believe that he had a crew cut. I am just trying to remember. It’s been a long time”. RP 210. When asked if that man had any facial hair, Mr. Howden responded, “I don’t remember”. Mr. Howden then testified that that Vince “backed off, kind of like he wanted to, you know, he backed off”. RP 210. There was no witness testimony to support the prosecutor’s assertions at VRP 210 or anywhere else in the record. Under RAP 10.3(g), Voicelink, supra, Sherry, supra, K.S.C., supra, and Northlake, supra this portion of the state’s brief must at BOR p.84 must be stricken.

BOR p. 84.

The prosecutor in her brief at BOR p.84 made the following assertion without support from the record.

Ms. Diamond as being part of the four men she saw involved in the fight. The testimony of the witnesses was that all of the men [sic] involved were punching and beating up the victim.

BOR at p. 84. Ms. Diamond testified on direct that she saw a group of four biker types sitting near her table and that she saw a group of four biker types outside the bar. Ms. Diamond admitted that she was not paying attention to the men near her table and that she went outside to smoke 3-4 times during the one hour she spent at the bar and went to the bathroom and could not identify what Mr. Ford wore the night of the incident. RP 410-411.

Ms. Diamond admitted that she could not identify anyone involved in the fight or in the group standing outside. "I was not paying that much attention to them". RP 411-412. Ms. Diamond responded "No" when asked by Mr. Ford's trial counsel, "[s]o you can't identify anyone here as being one of those first two people, certainly not my client right?" RP 412 "No" "Or the same with the two people that went out?" "Yes". Diamond agreed that the four in the group could have been any four guys dressed similarly to the men in biker garb. RP 412. During re-cross examination, Ms. Ko tried to get Ms. Diamond to say that all four men in the fight were from the defendants' table. Diamond was uncertain and could only respond "I believe so" RP 413. Under RAP 10.3(g), Voicelink, supra, Sherry, supra, K.S.C., supra, and Northlake, supra this portion of the

state's brief must at BOR p.84 must be stricken because Ms. Diamond did not identify Mr. Ford as being involved in the fight.

BOR p. 84

Without citation to the record or support from the record, the prosecutor asserted that, "[t]here was evidence that the two defendants [Mr. Ford and Mr. McCreven] were involved in the fight". BOR at p. 84. The prosecutor's claim that there was evidence that Mr. Ford was in the fight is not supported by sworn testimony; this language must be stricken from the state's brief under RAP 10.3(g), Voicelink, supra, Sherry, supra, K.S.C., supra, and Northlake, supra.

BOR p. 84.

The prosecutor in her brief states without supporting evidence:

Defendant Ford was not described as wearing his jacket in the bar but that does not mean he did not put it on when he left. It is reasonable inference that in the bar, he had his jacket off. There was evidence that defendants participated in the fight that killed the victim".

BOR at p. 84. These assertions are not supported by the record and are not reasonable inferences from the evidence provided at trial. "Reasonable" means:

Fair, proper, just, moderate, suitable under the circumstances, for and appropriate to the end in view. Having faculty of reason; rational governed by reason; under the influence of reason; agreeable to reason.

Henry Black, Black's Law Dictionary, p. 1138 (5th ed. 1979). "Inference", means:

In the law of evidence, a truth or proposition drawn from another which is supposed or admitted to be true. A process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted. . Inferences are deductions or conclusions which with the reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

Black's Law Dictionary, p. 700 (5th ed. 1979).

In State v. Ray, 130 Wn.2d 673, 680, 926 P.2d 904(1996), a child molestation case involving the corpus delecti rule, the court held that the following facts were insufficient to permit a reasonable inference of guilt:

At approximately one in the morning, three-year-old L.R. came to her parents' bedroom and asked for a glass of water. Ray, probably nude, accompanied his daughter back to her room. Ray later returned to his room upset and crying. Ray awakened his wife and talked to her. His wife became upset and rushed to check on L.R. After further discussion with his wife, Ray, who was still upset, placed an emergency call to his sexual deviancy counselor.

Id. The Court held that one could only speculate that something criminal occurred rather than reasonably infer criminality. Ray, 130 Wn.2d at 680-681. The Supreme Court dismissed the charges. Ray, 130 Wn.2d at 682.

While it is possible it is not reasonable to infer that Mr. Ford put on a jacket outside, there was no sworn testimony to support this assertion and all of the sworn testimony indicated that Mr. Ford either did not have

on a jacket, or was wearing a dress coat. RP 2549-2550, RP 2570-2571.

The prosecutor's assertions like those in Ray, supra are impermissible speculation and should be stricken under Ray, supra; RAP 10.3(g); Voicelink, supra; Sherry, supra; K.S.C., supra; and Northlake, supra this portion of the state's brief must at BOR p.84 must be stricken.

BOR p. 94

The state asserts without citation to the record and without support in the record that "[e]ach defendant was identified as some point during testimony as being at the bar and playing a role in the fight." BOR at p. 94. No witness identified Mr. Ford as playing role in the fight. Under Ray, supra, RAP 10.3(g), Voicelink, supra, Sherry, supra, K.S.C., supra, and Northlake, supra this portion of the state's brief must at BOR p. 94 must be stricken.

BOR at . 94

The state asserts without citation to the record and without support in the record that "[e]ach defendant was identified and each had a different part in the incident." BOR at p. 94. No witness identified Mr. Ford as having any role in the fight. Under Ray, supra, RAP 10.3(g), Voicelink, supra, Sherry, supra, K.S.C., supra, and Northlake, supra this portion of the state's brief must at BOR p.94 must be stricken.

BOR at p. 152: VRP 2353.

There was no sworn testimony on VRP 2353 to support the

prosecutor's assertions that: "[d]efendant Ford was only described by Ms. Hutt at trial as wearing dress clothes". BOR at 152. Shannon Ford also testified that she knew that Mr. Ford was wearing dress clothes, not biker garb and was not one of the men in the fight. RP 1108, 1125, 1170. Ms. Ford was certain that Mr. Ford man was not wearing any leather jacket of any sort. RP 433. The prosecutor's citation to VRP 2353 is incorrect and her claims are contrary to the evidence. Under RAP 10.3(g), Voicelink, supra, Sherry, supra, K.S.C., supra, and Northlake, supra this portion of the state's brief must at BOR p.152 must be stricken.

BOR p. 152: VRP 362-364

Contrary to Ms. Crick's assertion that at VRP 362-364, Ms. Diamond identified Mr. Ford as one of the men in the fight, the record provided that Ms. Diamond could **not** identify Mr. Ford as one of the fighters and had no idea what Mr. Ford wore the night of the incident. VRP 362, 411-413.

The testimony at VRP 362-364 provided that the four men standing outside the tavern as Mr. Beaudine walked by and yelled an insult were "[p]art of the four guys that were standing over by the door that also were sitting at my table that evening". RP 362. When asked if she got a look at which of the four men walked over to Mr. Beaudine, Ms. Diamond responded, "I did not" RP 262. Ms. Diamond could not identify any of the defendants as being in the fight. RP 412.

The testimony provided that, “[th]ere is a lot that come in there [Bull’s Eye] wearing leathers.” RP 2548. Kathleen Baccus a patron testified that there were six to ten other patrons in group at the bar with Mr. Ford and two women and most but not all of these people were wearing biker jackets. RP 2346. There was **no** sworn testimony that Mr. Ford wore a Hidalgo jacket and no evidence from which to infer that he could have worn one. Under RAP 10.3(g), Voicelink, supra, Sherry, supra, K.S.C., supra, and Northlake, supra this portion of the state’s brief must at BOR p.152 must be stricken.

BOR p. 93.

The state incorrectly claimed a second time that VRP 362-363 supports the assertion that “each defendant as [sic] identified as being involved in the fight.” BOR at p. 93. No witness identified Mr. Ford as playing role in the fight. Under Ray, supra, RAP 10.3(g), Voicelink, supra, Sherry, supra, K.S.C., supra, and Northlake, supra this portion of the state’s brief must at BOR p.93

BOR pp. 86, 93, 152:VRP 210, 1006, 1008, 1058, 1195.

Contrary to the evidence and without citation to the record, the prosecutor continued her argument by stating the following facts not in evidence.

Defendant Ford was identified as the man who stopped Mr. James from coming to the victim's aid in the fight. The description of a heavy set man, clean cut man with a crew cut fit the defendant Ford and no one else.

BOR at 86 and 152. There is no evidence in the record to support these assertions. The above language is no more than the prosecutor's personal opinion which has no place in an appellate brief. State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)

Mr. Howden testified that he thought the man who spoke to Mr. James might have been big and stocky guy with a crew cut or short hair. RP 208-209, 305-06. Mr. Howden could not identify this man, but was relatively certain that he was wearing patches and insignia and was one of the guys who left on a motorcycle. RP 246, 256, 260, 2226, 2248.

No sworn testimony identified Mr. Ford as the man who put up his hand. Rather a number of witnesses described other men wearing biker gear with similar builds to Mr. Ford. RP 1478, 2133, 2203-2204. The state's star witness Detective Wood agreed that Jim Stilton bore the same physical description as Mr. Ford. RP 2133, 2203-2204. Ms. Dobiash described Jim Stilton as 6' 6"1", medium build, brown hair who rode a Harley. RP 1487. Mr. Stilton was also described as being 6'2, 280 pounds with short clean cut hair styles. (RP 12 January 4, 2009).

Ms. Dobiash testified that Mr. Stilton and Mr. McCreven rode their motorcycles to the Bull's Eye the night of the incident to meet up with

other fellow bikers. Ms. Dobiash testified that the night of the incident both Mr. Stilton and Mr. McCreven wore black riding jackets with Hidalgos patches. RP 1489-90; 1495; 1509.

Ms. Hutt spoke with Detective Wood about the incident and described the four men involved. RP 2132-2133. Detective Wood mistakenly believed that Ms. Hutt had described Mr. Ford as one of the men in the fight, when in fact, Ms. Hutt never indicated that Mr. Ford was in the fight and had described someone who matched the description of Jim Stilton. Detective Wood knew that Jim Stilton rode to the Bull's Eye on his motorcycle and was built similarly to Mr. Ford Id.

Detective Wood in his sworn testimony provided, Q: "It sounds a lot like James Stilton, doesn't it?" "Well it's the same physicals". RP 2133. Throughout his sworn testimony, Detective Wood conceded that Mr. Ford and Mr. Stilton have the same physical description: big, clean cut looking guys. RP 2133, 2203-2204.

Mr. Ford was described as 5'10', 235 pounds, partially gray hair, 50 years old. RP 2203-2204. The sworn testimony provided Jim Stilton, is very similar in size to Mr. Ford. RP 2132, 2203-2204, 2811 (in closing Hauger agrees). Jim Stilton is a big man who also has a short, clean cut hair cut, a little goatee and was at the Bull's Eye on April 5, 2008. Stilton wore a black leather jacket with insignia and drove a motorcycle. RP 1487, 1522, 2072-73, 2085, 2132-33.

Ms. Hutt knew Mr. Ford as "Sarge" and referred to him as Sarge because she knew him. RP 2593. Earlier in the evening when Ms. Hutt saw Mr. Ford she gave him a hug and he showed her pictures of his grandchildren. RP 2353. Mr. Ford was not wearing a vest or a jacket with patch the night of the fight. RP 2538.

When Ms. Hutt described the four men in the fight, if she had meant to describe Mr. Ford, she would have referred to him by name. RP 2536, 2581. Ms. Hutt described to Detective Wood the four men in the fight as follows and Detective Wood mistakenly believed that one of the men described was Mr. Ford:

23 Q Okay. The description of the first individual that she gave you, what was that?

25 A That description was a white male, 6', 300 pounds, short hair, very clean cut looking, and estimated him to be approximately 50 to 55 years of age wearing a black leather jacket.

.....

.....

8 Q Now, the first individual that Ms. Hutt described to you, did she give you a name associated with that person?

10 A She did. Well, she gave a name, but it's not described as that person.

12 Q But she gave you the name of an individual involved in the incident?

14 A Yes.

15 Q What was the name she gave you?

16 A She said she -- the name she gave me was Terry.

RP 2023-2025. When asked about he description of the first big guy, Ms. Hutt testified “**No, I was not describing Sarge.**”. RP 2536. Ms. Hutt described four guys and provided Mr. Ford’s name to Detective Wood as one of the men in the bar. Id. Ms. Hutt stated that Mr. Ford was not in the fight and that he was not one of the suspects she described. RP 2536, 2581.

Detective Jane McCarthy was told by several people that a man named Cameron who was built like Mr. Ford was at the bar. RP 259. Ms. Blair told the police that Mr. James told her that Cameron was at the tavern that night. RP 768. Cameron weighed 250 pounds and had short hair. RP 767.

In a footnote, the prosecutor attempted to refute the above sworn testimony with her own personal opinion that the physical descriptions of Mr. Stilton and Mr. Ford “did not match” [BOR at p. 86, n. 11] even though Detective Wood under oath testified “[w]ell it’s the same physicals”. RP 2133. The prosecutor’s assertions are not evidence and should not be considered under Voicelink and RAP 10.3.

The prosecutor again claimed without evidence that “[d]efendant Ford was the person whoheld up his hand to keep Mr. James out of the fight.” BOR at p. 93.

The following lists the actual testimony of the witnesses at RP 210, 1006; 1008. 1058, 1195.

VRP 210

Mr. Howden testified that he believed the man who put out his hand had a crewcut, and was tall and stocky. VRP 210. Mr. Howden did not identify Mr. Ford.

VRP 1006; 1008

Shannon Ford testified that Mr. Ford made a telephone call inside the bar when Mr. Nolan was “glaring” at her table. VRP 1006; 1008.

VRP 1058

Ms. Shannon testified that Mr. Ford was the person who made the phone call as wearing a “dark gray jacket, light blue, button down shirt and glasses.” RP 1058.

VRP 1195

Ms. Ford corrected her testimony at VRP 1195 by stating that Mr. Ford did not have a jacket on. RP 1195.

The prosecutor’s claim that Mr. Ford was the person who held up his hand to keep Mr. James out of the fight must be stricken because it is contrary to the evidence and not supported by the record and the prosecutor misrepresented to the court that support for this claim could be

found at RP 210, 1006; 1008. 1058, 1195. RAP 10.3(g), Voicelink, supra, Sherry, supra, K.S.C., supra, and Northlake, supra.

BOR at 95.

The prosecutor without support from the record stated that “[a]ll four of the defendants were....identified as playing some part in the fight that lead to the victim’s murder.” BOR at 95. There was no evidence that Mr. Ford played a role in the fight. Under RAP 10.3(g), Voicelink, supra, Sherry, supra, K.S.C., supra, and Northlake, supra this portion of the state’s brief must at BOR p.93 must be stricken.

BOR p. 152: VRP 2585.

The prosecutor without support from the record claims that at VRP 2585, Ms. Hutt testified that Mr. Ford told Mr. Nolan they needed to leave. BOR p. 152. This is incorrect. The VRP at 2585 provides that Ms. Hutt testified that she did not recall ever stating that “a bigger male” told anyone to leave. Ms. Hutt testified that she told Mr. Ford when he was on the sidewalk standing in in front of Radio Shack to “leave now, because I am calling the police”. RP 2585. Ms. Hutt stated because Mr. Ford was outside, it was possible that Mr. Ford could have told Nolan to leave but she could not recall. Id. Under Ray, supra, RAP 10.3(g), Voicelink, supra, Sherry, supra, K.S.C., supra, and Northlake, supra this portion of the

state's brief must at BOR p.152 must be stricken.

BOR pp. 152-153

The prosecutor concludes her argument by stating without citation to the record that “[t]here was evidence that Mr. Ford did more than just stand and watch what happened at the bar that night”. BOR pp. 152-153. “Mr. Ford aided the fight by participating in the beating and also by preventing the victim’s friend from rejoining the fight to help him.” These comments are the prosecutor’s personal opinions; they are not supported by any sworn testimony and as such must be stricken from the state’s brief at pp. 152-153. Ray, supra, RAP 10.3(g), Voicelink, supra, Sherry, supra, K.S.C., supra, and Northlake, supra.

As argued in Mr. Ford’s Opening Brief, the evidence does not support guilt beyond a reasonable doubt. The prosecutors’ collective claims do not change this conclusion. The state’s reply brief concerning Mr. Ford is riddled with incorrect, inaccurate and simply false statements. The portions of the brief cited herein that are not supported by the record must be stricken.

2. THE PROSECUTOR’S LEGAL CONCLUSIONS NOT SUPPORTED BY LEGAL AUTHORITY OR BY LEGAL ANALYSIS MUST BE STRICKEN.

An appellate brief that does not contain argument or authority to support it, cannot be considered on appeal by the reviewing court. RAP

10.3(a)(6) (appellate brief should contain argument supporting issues presented for review, citations to legal authority, and references to relevant parts of the record); State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004), citing, Smith v. King, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986); State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984); State v. Corbett, 158 Wn. App. 576, 586-587, 242 P.3d 52 (2010).

In Corbett, counsel noted an assignment of error but abandoned the assignment by not providing argument on the issue. Citing case law and RAP 10.3, this Court refused to consider the argument. Corbett, 158 Wn. App. at 586-587.

In State v. Elliott, 114 Wn.2d 6, 15 (1990), the defendant did not adequately argue her alternate means issue. She failed to directly raise the issue of alternative means and did not present sufficient argument on it or cite to any alternate means cases. The Supreme Court held that it would not consider these inadequately argued issues. Id., citing, State v. Wethered, 110 Wn.2d 466, 472, 755 P.2d 797 (1988), citing In re Rosier, 105 Wn.2d 606, 717 P.2d 1353 (1986).

BOR pp. 96-97.

In Mr. Ford's case, the prosecutor in her response brief at 96-97 makes the legal conclusion that Mr. Ford was not denied his right to a fair trial. This legal conclusion is not supported by legal analysis or citation to authority. Because there is no argument, this portion of the state's brief

must be stricken, under Thomas, supra, Elliott, supra, Corbett, supra, King, supra, and Davenport, supra.

BOR pp. 130-133

The prosecutor at BOR pages 130-133 repeats misstatements of fact and concludes without citation to authority and without any legal analysis that Mr. Ford was not prejudiced by the juror misconduct. Without argument, this portion of the state's brief must be stricken, under Thomas, supra, Elliott, supra, Corbett, supra, King, supra, and Davenport, supra.

BOR pp. 140-144.

The prosecutor declared without citation to authority or to the record that “[d]efendant Ford’s counsel was a zealous advocate for defendant....” therefore a “review of the record does not show him to be ineffective.” BOR at pp. 143-144. This statement is no more than the prosecutor’s personal opinion. The state’s entire argument following its recitation of boiler plate language at BOR pp. 140-142 is devoid of any legal analysis or citation to the record. BOR pp. 143-144. Because there is no argument, this portion of the state’s brief must be stricken, under Thomas, supra, Elliott, supra, Corbett, supra, King, supra, and Davenport, supra.

BOR p. 146

Once again the prosecutor summarily states at BOR p. 146 that

“The defendants cannot meet their burdens in showing their counsel to be ineffective”. This is no more than the personal opinion of the prosecutor which must be stricken under Thomas, supra, Elliott, supra, Corbett, supra, King, supra, and Davenport, supra.

BOR pp. 151-152.

The state’s argument number 12 that the trial court did not err in denying Mr. Ford’s post trial motion for arrest of judgment is devoid of legal analysis. Without legal analysis or support from the record the prosecutor impermissibly concludes without argument that sufficient evidence supported Mr. Ford’s conviction. BOR pp. 152. 2 Because there is no argument, and the factual assertions are false, this portion of the state’s brief must be stricken, under Voicelink, supra, K.S.C., supra, Thomas, supra, Elliott, supra, Corbett, supra, King, supra, and Davenport, supra.

BOR at pp. 98-101.

The state sets forth the standards for prosecutorial misconduct at BOR at 96-97. Thereafter at BOR at 98-101 without legal analysis or citation to authority the prosecutor repeatedly offers her opinion that the misconduct was not intentional and therefore did not prejudice Mr. Ford. Because there is no legal authority or argument, this portion of the state’s

2 As stated supra, in argument number one of this Reply Brief of Appellant, every one of the state’s citations to the VRP at BOR p. 152 misrepresents the testimony. VRP 208, 210, 356, 362-264, 2535, 2585.

brief must be stricken, under supra, Thomas, supra, Elliott, supra, Corbett, supra, King, supra, and Davenport, supra.

BOR pp. 106-107.

The state at BOR p. 106 sets forth the argument that because Mr. Ford did not object to the state arguing facts not in evidence Mr. Ford had to prove the statements were flagrant and ill-intentioned. BOR at p. 106. The state continues by asserting without identifying the “facts” in question and without legal argument that the state was making “logical inferences” from the record. BOR at p. 107. The state does not identify the facts from which the prosecutor is making logical inferences and her argument was limited to stating that “[d]efendant may not agree with the State’s inference but that does not mean that the State argued facts that were not in evidence”. BOR at pp. 106-107.

There is no description of the facts or how the prosecutor’s offending comments could be considered “logical inferences”. The state may draw **reasonable inferences** from the evidence. State v. Millante, 80 Wn. App. 237, 250, 908 P.2d 374 (1995), but it may not under the guise of ‘a reasonable inference’ argue facts not in evidence. State v. Belgarde 110 Wn.2d 504, 509, 755 P.2d 174 (1988).

The prosecutor claims that “if any of the statements were not supported by the record the jury is presumed to disregard that statement”. BOR 107. While generally this is an accurate statement, in Mr. Ford’s

case, the jury had no way to sieve through the prosecutor's unsupported assertions from fact presented at trial because the prosecutor used her role as cross examiner to supply language which amounted to testimony by the prosecutor under the guise of cross-examination or direct examination. State v. Yoakum, 37 Wn.2d 137, 144, 222 P.2d 181 (1950); Davenport, supra.

In Davenport, the prosecutor argued over objection that the defendant was guilty as an accomplice but the state failed to charge the defendant as an accomplice. In spite of a curative instruction to disregard the argument on accomplice liability, the jury sent a note asking for a definition of accomplice. The Supreme Court recognized that the jury failed to follow the curative instruction and reversed and remanded for a new trial. Davenport, 100 Wn.2d at 761, 763.

In Davenport, the Supreme Court explained in detail when the prosecutor argues matters that are not properly before the court, the trial irregularity is so serious as to deny the defendant his right to due process. Mr. Ford's case is an egregious example of the state losing sight of the paltry evidence against Mr. Ford and resorting to offering opinion and information not supported by any sworn testimony.

While juries are presumed to follow the trial court's instructions, this is only so when there is no contradictory "evidence proving the contrary." *Id.* The evidence in this case is to the contrary. The jurors did

not disregard the offending statements. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996).

The prosecutor's failure to identify facts to support her legal conclusions and her failure to provide legal analysis renders invalid her argument at BOR pp. 106-107. Thomas, supra, Elliott, supra, Corbett, supra, King, supra, and Davenport, supra. For this reason, these portions of the state's brief at PP. 106-107 must be stricken. Id.

BOR at p. 106-107.

The prosecutor's statement that "[d]efendant has not met his burden of proving misconduct" is incorrect and not supported by legal argument. BOR at p. 106-107. The prosecutor claims that the trial prosecutor's following argument was not misconduct but she does not provide any legal analysis: she just provides her personal opinion.

Do you really have a reasonable doubt as to whether or not the State got the right four guys? Do you believe that there are four other Hidalgos members out there running around in Washington that the State has not apprehended?

RP 2932.

It is for the jury and not the prosecutor to decide whether the state met its burden of proof. The state does not cite to authority or provide legal analysis, thus this offending portion of the state's brief must be stricken. Thomas, supra, Elliott, supra, Corbett, supra, King, supra, and Davenport, supra.

BOR at p. 107.

The state again, asserts without citation to authority that “[d]efendant cannot show prejudice”. BOR at p. 107. The prosecutor merely makes this claim without any legal analysis or citation to authority. She simply states that “[t]he state was clearly responding to the arguments by defense counsel.” And moreover if the statement was improper “[d]efendant cannot show misconduct”. There is no citation to the record to identify this offending argument and there is no citation to legal authority. The prosecutor’s failure to cite to the record or to any legal authority or to provide argument requires this Court to disregard the state’s argument. Corbett, supra.

BOR at p. 109.

In sub argument 6”f” at BOR at p. 111, the prosecutor simply states “[d]efendant Ford also argues that the State disparaged defendant Ford’s attorney during rebuttal closing: RP 2929. Inexplicably the prosecutor does not identify the disparaging argument. FO the Court’s review the unannounced argument is as follows:

How could counsel stand up here and tell you that Barry Ford left in a truck, when there was absolutely no evidence of that. You know why he told you that? Do you know why he insisted on telling you that over and over? Because if you believe he got on that motorcycle, and was wearing a jacket that said Hidalgos, then Mr. Bernberg knows that Barry Ford is guilty, just as guilty as everyone else. And that’s why he has to insist, and he has to have you

believe, that Ford left in a truck, when he knows that there is no evidence of it.

RP 2929. The prosecutor does not provide legal analysis as to why this argument was not misconduct. Rather she claims that “as argued above, the State was entitled to make arguments in response to defense counsel’s argument” that Mr. Nolan and Mr. McCreven could not argue self-defense and lack of involvement in the fight. BOR p.at 110.

Mr. Ford did not argue self-defense, he maintained his lack of involvement in the altercation throughout trial. For this reason, the prosecutor could not have been responding to Mr. Ford’s argument with her offending argument. The state again failed to provide legal argument or facts in subsection 6(f) as it relates to Mr. Ford. For this reason, this portion of the state’s brief must be stricken, under supra, Thomas, supra, Elliott, supra, Corbett, supra, King, supra, and Davenport, supra.

BOR at pp. 163-166.

The state argued at BOR pp. 163-166 the boiler plate for the cumulative error doctrine under a harmless error standard. BOR at p. 166. The prosecutor, without any legal analysis or citation to the record states her personal opinion that “[d]efendants have failed to show that there was any prejudicial error much less an accumulation of it.” Id. Without legal argument his portion of the state’s brief must be stricken, under supra, Thomas, supra, Elliott, supra, Corbett, supra, King, supra, and Davenport,

supra.

“Attorneys, have *no right to mislead the jury*. This is especially true of a prosecutor, who is a quasi-judicial officer whose duty it is to see that a defendant in a criminal prosecution is given a fair trial.” (italics in original). “The prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury.” Id. Davenport, 100 Wn.2d at 763.

During trial and on appeal, the prosecutors in Mr. Ford’s case repeatedly misstated the law by making legal conclusions without legal authority. In this case where Mr. Ford was convicted of murder based on less than scant evidence, it is apparent that the jury could not possibly have segregated fact from the prosecutor’s fiction. The likelihood that the misconduct affected the jury is substantial. Davenport, 100 Wn.2d at 762. Under the authority provided in this argument, this Court must strike all of the offending portions of the state’s brief, disregard the prosecutor’s unsupported legal conclusions and review only the evidence and the legal authority in support of argument.

3. THE PROSECUTOR MAY NOT THROUGH VEILED CROSS EXAMINATION TESTIFY OR BY INNUENDO ATTEMPT TO GAIN CONVICTION.

Throughout its brief of the state repeatedly violated Mr. Ford’s due

process rights by asserting as fact matters not in evidence. This creation of information as fact without support from the record is similar to a line of cases involving prosecutors who ask questions of witnesses without a factual basis for the question. The Courts that have addressed this practice conclude that it violates the due process rights of the accused. Yoakum, 37 Wn.2d at 144; State v. Denton, 58 Wn. App. 251, 257, 792 P.2d 537 (1990). In the same manner, the state's practice of creating facts throughout trial and in its brief of respondent also violated Mr. Ford's due process rights.

The legal analysis in these cases is applicable to the instant case and by analogy, distinguishable only by virtue that the offending practice takes place during trial rather in the appellate brief. The United States Supreme Court has long refused to tolerate an attorney using her role to "smuggle" testimony to the jury or the court. State v. Kirwin, 137 Wn.App. 387, 389, 153 P.3d 883 (2007) (counsel attempted to introduce during oral argument, matter not previously raised in the briefs), citing, Norfolk Southern Railway Company v. Sorrel, 549 U.S. 158, 127 S. Ct. 799, 166 L.Ed.2d 638, 655 (2007).

A defendant in a criminal case can be convicted only by evidence, not by innuendo. State v. Yoakum, 37 Wn.2d 137, 144, 222 P.2d 181 (1950). When a prosecutor cross-examines a witness on matters without a factual basis the effect of the cross-examination places before the jury, as

evidence, information without the sworn testimony of any witness. The defendant is prejudiced and has no recourse without reiterating the inadmissible or in the instant case, fabricated information. Yoakum, 37 Wn.2d at 144 (citations omitted).

“Counsel is not permitted to impart to the jury his or her own personal knowledge about an issue in the case under the guise of either direct or cross examination when such information is not otherwise admitted as evidence.” State v. Denton, 58 Wn.App. 251, 257, 792 P.2d 537 (1990).

In Yoakum, during the cross-examination, the prosecutor asked the defendant about questions and answers the defendant allegedly made on a recording device. Yoakum, 37 Wn.2d at 139, 141. The prosecutor also asked a question regarding an alleged prior statement of the defendant’s that was not supported by any evidence. *Id.* In reversing the conviction our Supreme Court held that “[a] person being tried on a criminal charge can be convicted only by evidence, not by innuendo.” Yoakum, 27 Wn. 2d at 144.

The Court explained that a defendant is prejudiced when a prosecutor places before the jury information “**as evidence**” that is not supported by sworn testimony. *Id.* The result is that the jury, believing the prosecutor’s office to have an official stature, will likely accept the information “as evidence”, and not understand that the prosecutor is

impermissibly offering his or her personal opinion. The remedy is reversal of the conviction and remand for a new trial. *Id.*

In Denton, the Court of Appeals upheld the trial court's denial of defense counsel request to ask a witness about alleged admissions in using an electric cord to assault the defendant. Denton, 58 Wn. App. at 254, 257. The Court held that the evidence was inadmissible and to allow the examination of the witness to these matters "would have permitted defense counsel to, in effect, testify to facts that were not already in evidence." *Id.*, citing, Yoakum, supra.

In both Yoakum and Denton, the prosecutor's wanted to introduce inadmissible evidence to support their case by imparting their own personal knowledge to the jury under the guise of questioning a witness. The Courts in both Yoakum and Denton held that when a prosecutor engages in this practice, the defendant is denied his right to due process and this Court must reverse the conviction and remand for a new trial.

By the same analysis, when a prosecutor in a brief makes statements as purported "evidence" not supported by sworn testimony, those offending portions of the brief must be stricken because unsworn allegations of fact in an appellate brief are not matters that the appellate court can consider. Voicelink, supra, Denton, supra, Yoakum, supra.

4. FAILURE TO PROVIDE LESSER INSTRUCTION SHOULD BE ADDRESSED ON ITS MERITS.

The prosecutor argues that this Court should not consider Mr. Ford's argument that the trial court erred by failing to give a lesser included instruction on assault in the second degree and that Mr. Ford's trial attorney was ineffective for failing to make a request for a lesser included instruction. BOR at p.128. The state argues that because the issue was not raised in the trial court it was not preserved for appeal. This is incorrect. For obvious reasons, the reviewing Court regularly reviews ineffective assistance claims for the first time on appeal. "There is nothing intrinsic in a claim of ineffective assistance of counsel We regularly consider such claims on direct appeal." State v. McFarland, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995); See, e.g., State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995); State v. Garrett, 124 Wn.2d 504, 881 P.2d 185 (1994); State v. Benn, 120 Wn.2d 631, 845 P.2d 289, cert. denied, 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993).

The state also argued that this Court should not consider Mr. Ford's argument because although he briefed the issue in great detail and cited the issue in his issue statement, he failed to include an assignment of error. The Court of Appeals may review an argument where the briefing and argument are clear and the record is adequate, even when appellant fails to assign error to the issue. State v. Breitung, 155 Wn.2d 606, 619, 230 P.3d 614 (2010). In Breitung, without an assignment or error, the

appellant briefed the matter sufficiently for the State to respond thus the Supreme Court correctly exercised its discretion to reach the merits. State v. Breitung, 155 Wn.2d 619.

Notwithstanding the reasons for the omission, case law provides that under Breitung, this Court should consider Mr. Ford's argument because it is well developed. Mr. Ford dedicated six pages of analysis in his opening brief to fully arguing this issue. Moreover, RAP 2.1 requires this Court liberally interpret the rules to "promote justice and facilitate the decision of cases on the merits". And RAP 18.8(a) permits this court to "waive or alter" any provision in any rule. Mr. Ford requests this Court review his argument to promote justice and a decision on the merits.

5. ADOPTION OF CO-COUNSEL'S ARGUEMNTS

Pursuant to RAP 10.1(g)(2), Mr. Ford adopts and incorporates by reference all relevant facts and legal argument presented in Mr. Smith, Mr. Nolan and Mr. McCreven's reply briefs that are not contrary to his legal interests.

6. MR. FORD RESTATES AND INCORPORATES BY REFERNCE HIS ENTIRE OPENING BRIEF AND CO-DEFENDANT'S OPENING BRIEFS.

Pursuant to RAP 10.1(g)(2), Mr. Ford adopts and incorporates by reference all relevant facts and legal argument presented his opening brief and the relevant and applicable portions of the opening briefs of Mr. Smith,

Mr. Nolan and Mr. McCreven.

D. CONCLUSION

Mr. Ford did not commit an assault or participate in the commission of an assault that caused the death of Mr. Beaudine. Mr. Ford has never had any dealings with the law. CP 623-624. Mr. Ford was present when others committed the crime against Mr. Beaudine. The state created a case based on impermissible associational evidence and by arguing facts not in evidence to convince the jury that Mr. Ford was guilty, when no jury could reasonably infer guilt from the actual evidence presented.

The state did not establish beyond a reasonable doubt that Mr. Ford, acted as a principal or as an accomplice to assault or murder. The trial was riddled with legal error and prejudicial prosecutorial misconduct. The state's brief continued in the vein of setting forth information as fact when none existed; of making legal conclusions without citation to authority or legal analysis.

For these reasons, Mr. Ford respectfully requests this Court reverse his conviction and remand for dismissal with prejudice; strike all offending portions of the state's brief that are not supported by the record, authority or legal argument. In the alternative to reversal and dismissal with prejudice, Mr. Ford requests this court reverse and remand for a new trial.

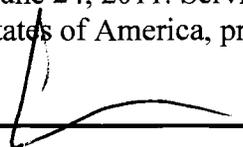
DATED this 24th day of June 2011.

Respectfully submitted
LAW OFFICES OF LISE ELLNER



Lise Ellner, WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Barry Ford DOC# 332926 WCC PO Box 900 Shelton, WA 98584 a true copy of the document to which this certificate is affixed, on June 24, 2011. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.



Signature