

No. 40593-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAYCEE FULLER,

Appellant.

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

The Honorable Katherine M. Stolz, Judge (trial)

APPELLANT'S OPENING BRIEF

KATHRYN RUSSELL SELK
WSBA No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

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A. ASSIGNMENTS OF ERROR

1. The trial court erred and violated appellant Jaycee Fuller's Article I, § 9 and Fifth Amendment rights to be free from double jeopardy by refusing to dismiss one of the first-degree murder convictions.
2. Fuller assigns error to the following findings/conclusions contained in the Order Merging Counts, as follows:

The defendant can be convicted of first degree murder committed by alternative means. . . The State alleged and proved at trial two alternative means of committing a single crime. Thus, although it appears the defendant was convicted of two "counts" of first degree murder for each victim, he was actually convicted of only one crime.

...

In order to avoid the appearance of double jeopardy and still maintain the integrity of the jury's verdict of guilty as to each of the two alternative means of first degree murder, the court finds that Count I and Count II should be merged into a single count of murder in the first degree, with both statutory citations included on the judgment and sentence.

...

The defendant will not be twice convicted of murder if the court enters the separate counts charged as to each victim merged into a single count for each victim. As such, the defendant would be convicted of first degree murder committed by alternative means, one count of murder[.]

CP 184-86.

3. The prosecutor committed serious, prejudicial and flagrant misconduct and constitutionally offensive misconduct in violation of Fuller's Article 1 § 9, Fifth and Fourteenth Amendment and due process rights.
4. The trial court abused its discretion in admitting improper ER 404(b) testimony.
5. The cumulative effect of the trial errors deprived Fuller of his due process rights to a fair trial.

6. In the alternative, the sentencing enhancement was improper under State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010) and State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), and violated Fuller's rights to the presumption of innocence and the benefit of any reasonable doubt. Counsel was prejudicially ineffective in this regard.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Mr. Fuller was charged with and convicted of two separate counts of first-degree murder for the death of the same victim. Were his rights to be free from double jeopardy violated when the trial court refused to set aside one of the two convictions and instead "merged" them for sentencing?
2. Many courts, including this one, have recognized that comparing the certainty required to find that the state has proven its case beyond a reasonable doubt with the certainty jurors need to make even important everyday decisions improperly minimizes the prosecution's constitutionally mandated burden of proof. In this case, the prosecutor compared the decision jurors faced to figuring out what picture a puzzle depicted when not all the pieces were in place. Is reversal required based upon this improper minimization and misstatement of the prosecution's constitutionally mandated burden of proof?

Further, was this argument clearly flagrant and ill-intentioned when it was made even after this Court explicitly condemned this type of argument in a case involving the very same prosecutor's office, State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010)?

3. Over defense objection, the prosecutor repeatedly elicited testimony and made arguments about how Fuller had "failed" to deny crucial facts and failed to deny guilt to police and a friend. Were these improper comments on Fuller's constitutionally protected rights under the "partial silence" doctrine? Further, because Fuller had been read his rights, were the testimony and arguments also a violation of Fuller's due process rights? Is reversal required because the prosecution cannot meet the heavy burden of proving this constitutionally offensive misconduct harmless?
4. Did the prosecutor commit further flagrant, prejudicial misconduct in repeatedly exhorting the jury to decide the case based upon sympathy for the victim and disgust for the

defendant's alleged racism, as well as telling the jury that, while they could not bring the victim back from the dead, they should convict Fuller because only such a verdict would do "justice" for the victim and community?

5. Fuller was accused of committing murder by, *inter alia*, causing the death of the victim during a robbery or attempted robbery. Over defense objection, the prosecutor elicited testimony that Fuller had told a friend several weeks before the incident that someone wanted to hire Fuller to commit a completely unrelated robbery. The prosecutor then relied heavily on this testimony as evidence of Fuller's guilt, even though the other robbery had never occurred, there was no allegation that anyone had hired Fuller to commit this robbery and the facts of the "hire" robbery were far different. Was the admission of this improper "propensity" evidence error and is reversal required where there is more than a substantial probability that the error affected the verdict?
6. Does the cumulative effect of the trial errors compel reversal where all of the errors had a direct impact on the jury's ability to fairly and impartially decide the case?
7. Under Bashaw and Goldberg and consistent with the principle that the defendant is entitled to the benefit of any reasonable doubt under the presumption of innocence, a jury need not be unanimous in answering a special verdict "no" and the failure to so inform the jury is not "harmless." Here, the jury instructions told jurors they had to unanimously have a reasonable doubt in order to answer the special verdict "no." Was the resulting special verdict invalid under Bashaw? Further, was it a violation of Fuller's rights to the presumption of innocence? Finally, was counsel ineffective in failing to object to the defective instruction?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Jaycee Fuller was charged by amended information with first-degree felony murder with a robbery predicate and first-degree premeditated murder, both with deadly weapon enhancements. CP 22-23; RCW 9A.32.030(1)(c), RCW 9A.32.030(1)(a), RCW 9.94A.125, RCW

9.94A.310, RCW 9.94A.370, RCW 9.94A.510, RCW 9.94A.533. Jury trial was held before the Honorable Judge Katherine Stolz on January 27, February 1-4, 8-11, 16 and 18, 2010, after which the jury found him guilty of both counts. See CP 138-42.¹

After a hearing on April 12, 2010, Judge Stolz “merged” the counts for sentencing and imposed a high end standard range sentence of 320 months plus 24 months of flat time for the enhancement. SRP 5; CP 166-67, 184-86. Fuller appealed and this pleading follows. See CP 187-89.

2. Testimony at trial

At about 5:20 a.m. on March 8, 2009, an officer with the Tacoma Police Department (TPD) saw a taxi cab stopped, facing the wrong way in a lane of traffic with its engine, headlights and interior lights on and the driver’s side door partially open. RP 164-67, 170-78. The body of the driver, Mohamud Ahmed, was lying next to the cab, his arm tangled in the seat belt. RP 164-67, 182, 323-24. A subsequent autopsy of Ahmed showed injury on the right side upper abdomen and two sharp injuries to the neck, one which was a “slash type of wound” and one more “superficial in size” which was just a cut. RP 384, 391. There was also a single sharp stab-type wound to his torso, several injuries to the right hand

¹The verbatim report of proceedings consists of 14 volumes, which will be referred to as follows:

May 19, 2009, as “1RP;”
September 25, 2009, as “2RP;”
October 8, 2009, as “3RP;”
the 8 volumes containing the chronologically paginated proceedings of January 27 and Feb. 1, 2010 (one volume), February 2 and February 3, 2010 (one volume), February 4, 8-11 and 16, 2010, as “RP;”
the supplemental proceedings of February 3, 2010, as “4RP;”
February 18, 2010, as “5RP;”
the sentencing of April 12, 2010, as “SRP.”

which were a little “superficial,” superficial scraping injuries on the left hand and left leg, and a more serious cut on one finger on the right hand which severed the tendon. RP 391-94. The medical examiner opined that the right hand injury was consistent with “defensive wounds.” RP 403.

It was difficult to establish the time of death because of the weather, but the medical examiner said that 3:15-3:30 a.m. was “possible.” RP 406. A “GPS” device in the cab indicated that the cab had remained in the same place at the mouth of the parking lot where it was found since 3:20 that morning. RP 469, 472, 688-89, 829. The GPS device was also used by the cab company to provide a “route map” of the cab’s travel, and it indicated that Ahmed had picked up his last fare in the 2800 block of Sixth Avenue, near or at the “Masa” restaurant. RP 469, 472, 553, 829. The surveillance camera video from that restaurant showed a man walking past the front door of the restaurant, in the direction of a liquor store, at about 1:40 a.m. RP 473, 540, 554. The liquor store video did not show that man walking by, so it was believed he was the person who might have gotten into the cab. RP 473, 540, 554. Other images from the restaurant and liquor store seemed to show a cab going by eastbound, “pulling a U-turn,” and then going by westbound, at what appeared to be about 3 in the morning but was likely 2:04, as the officers thought the cameras might not have been adjusted for daylight savings time, which had just started. RP 532-45.

No weapon was found in or near the cab, which had its meter running when found. RP 170, 177, 306. Based upon the amount on the meter and distance from the restaurant, an officer extrapolated that the cab

probably left the restaurant at about 3:05, or 2:05, as corrected for daylight savings time. RP 346.

Officers described the blood in the driver's area of the cab, "splatter" in the interior of the vehicle and "smears" of what appeared to be blood on the outside left rear door and in places on the same door and the rear left seat. RP 170, 177, 232-34, 254, 270, 283, 288. Based upon the apparent blood evidence, it was suspected that the person who committed the crime had been sitting in the back left. RP 304-305.

Much of the suspected blood, however, was not tested. RP 232-34, 253, 283. Two stains on the outside right rear door which were tested were not blood. RP 158, 303.

In the back seat on the right side floorboard was a one-dollar bill and a business card from the cab company. RP 170-71, 185. Neither had fingerprints on them. RP 239-40. Near the suspected blood on the left rear door frame was a long, light-colored hair and a short, lighter colored hair. RP 232-33, 254.

Money was found in Ahmed's right interior jacket pocket. RP 371. That money, which was cut and stained with blood, did not appear to have been rifled through. RP 371-72. Other items were also in Ahmed's outside jacket pockets, which were not "turned out" as if they had been searched. RP 415. In the center console of the cab was a wallet with Ahmed's identification. RP 299-300. The wallet, too, did not appear to have been disturbed and the items inside were all in order, although there was no money. RP 300.

A detective admitted that there was no evidence of robbery inside

the cab but also declared there was no evidence one had *not* occurred. RP 313.

The cab was found near the entrance to a parking lot and officers searching that lot found a cap on the ground at the north end. RP 358, 644. The cap, which had a logo on it from the “Keg” restaurant, had “quite a bit of debris” on and in it. RP 358, 644, 809. The hat had a “wide range of hairs” on it, too, including a human “possible transitional head hair” seven human body hairs (two coarse and five fine), five human hair fragments and “many animal hairs and hair fragments.” RP 360, 810-11. There was also some blood on the outside of the cap, which the lead detective on the case, Gene Miller, later described as “a match” for Ahmed. RP 361, 900. The lab technician who conducted the DNA testing on the cap said the small blood spots on the outside were “mixed,” i.e., came from several sources, but the major part of it gave a DNA profile that matched Ahmed. RP 849-52.

The “transitional” human hair, which was found inside the cap, was about 12 inches long, dark brown and very wavy. RP 811-18. The lab did not compare the human hair fragments to the long hair. RP 818.

Evidence was taken from Ahmed’s body, including fingernail clippings which tested positive for blood. RP 407-408, 845-46. No testing, however, was done to identify the source of that blood. RP 845-46. Fibers in the right hand clippings were compared to the fibers of the Keg cap. RP 826. They did not match. RP 826.

A King Cab owner testified that there was a “panic button” hidden in the cabs and thought that drivers for other companies knew of this

feature, which was unique to that company. RP 684-702. The button in Ahmed's cab was not pushed.

Some tire marks were on the blacktop in the parking area and, along a concrete wall, there were indentations in "bark mulch" which officers thought were from shoes. RP 212-213. The impressions were "distorted" and, while officers could have taken a plaster impression of them, they did not. RP 245. There were no identifying or individual characteristics in the indentations, such as tread marks. RP 256, 350-51. An officer admitted that such detail would not be likely in the "beauty bark" where indentations had been found. RP 646.

The indentations were about 20 feet away from the cap, in a sloped area down the hillside. RP 644-45. An officer said he thought they appeared to be from someone moving down that hill fairly quickly, by either jumping or bounding, and that it appeared they headed north. RP 352, 644-45. Five indentations were found below and a few on the side of the slope of the hill. RP 647. There was a 10-foot retaining wall where the impressions "led over." RP 653-54.

Officers photographed the indentations with a measuring tape next to them. RP 647-48. An officer admitted the indentations were not all "complete" and many were just "partial" impressions, but the full length of the shoe which made them was 13 inches. RP 648-50. A forensic technician admitted there was no way to know when the impressions were made. RP 246.

Two separate K-9 teams conducted "tracks," one looking for suspects at about 5:40 a.m. and one looking for evidence at 9:30 or 10. RP

184-88, 682-83, 829-31. The first dog was started at the cab and tracked northbound and then eastbound before losing the scent. RP 681, 832. That dog did not go into the parking lot or in the direction of the Keg cap, nor did it go near the impressions in the bark. RP 672, 682-83. An officer opined there was possibly a “loss of scent” by the time the K-9 arrived, but did not explain how the dog was still able to track for a time but went away from the cap and impressions. RP 830-32. The cap had been picked up by the time the second K-9 arrived and that dog was specifically started in the beauty bark area. RP 672, 682-83.

Officers suspected that a man named Jaycee Fuller might be involved, so they used a “pole” camera to take 400 hours of surveillance video of him at the “El Popo apartments,” the complex where he lived. RP 563-65. Evidence was tested in order to see if Fuller could be linked to the cab, and DNA testing on swabs from the door release and handle on the rear left door revealed a “mixed” sample of at least three people. RP 856-57. While Fuller and Ahmed could not be excluded from that sample, neither could 1/3 of the population. RP 856-58. In fact, so many people could be included in the sample that a forensic scientist said it would be “unethical” to say there was a “match.” RP 858.

An “unresolved” partial print of a hand was found on the front passenger seat belt. RP 250, 266, 899, 918. It did not match Fuller’s hand. RP 250, 266, 899, 918. The hair found in the door frame of the rear left door was also tested. RP 900, 927-28. It could not have been contributed by Fuller. RP 900, 927-28.

Although a forensic scientist said Fuller could not be excluded as

the contributor of the hair in the Keg cap, she admitted that, of a sample of about 1,674 people, two would statistically have the same DNA profile for this particular type of testing. RP 930-32. She did not know whether Fuller was white and conceded that, if he was not predominantly Caucasian, he could well have been excluded as the source of that hair. RP 936-39. An inside scraping of the cap gave a single source DNA profile which matched Fuller. RP 853-54.

Fuller had worked for a Keg restaurant in Tacoma in 2006-2007. RP 490-98. The caps were given to employees at a Christmas party, not only at the restaurant where Fuller worked but also another. RP 490-98, 759-60. The caps were not individual and it was not unusual to see people who did not work there at the time wearing them. RP 497.

Several people who worked with Fuller at a cab company in 2008 until January of 2009 said they had seen Fuller with a "Keg" cap on. RP 478-79, 507-509. One of those people said Fuller wore lots of different hats and they all looked similar because they were all skullcaps. RP 510. A friend of Fuller's and the friend's girlfriend said Fuller told them he had lost his cap when he was doing "collections" and had jumped out of a third-story window, landing hard, losing his hat and glasses, and messing up his foot. RP 424-26, 443, 454. The girlfriend said that Fuller had also mentioned losing it about a month after it was given to him. RP 454.

The maintenance man at the El Popo apartments recalled seeing Fuller wearing a dark, wool, knit hat but when shown the Keg cap at trial, was clear it was not the same as the hat he had seen. RP 706.

At some point towards the end of March, Miller checked on the

“pole camera” outside Fuller’s apartment at the El Popo and saw the maintenance man for the apartment removing things and taking them to the apartment dumpster. RP 879. That maintenance man, Donald Henrichsen, testified that he had cleaned out the apartment after he thought Fuller had moved out. RP 705-10. The cleaning had been done around April 1, the day before officers arrived with a search warrant. RP 707.

According to Henrichsen, the apartment was a little messy and had stuff on the floor, so Henrichsen put things from the closets into boxes and put trash, clothes and items from the floor into the garbage. RP 706-709.

He denied, however, taking any box out of the apartment and throwing it away. RP 719.

When Miller went to check the dumpster, it was empty, so the officer arranged to search the garbage truck which had picked up the trash. RP 752-55. That truck, which contained 60-65 containers full of garbage, dumped 1/3 of its load for officers to search through. RP 752-55. A box “consistent” with a box Henrichsen had been seen carrying out of Fuller’s apartment was found. RP 718, 743-46, 884. Inside were three documents which had Fuller’s name. RP 719, 743-46, 884.

Near the box, officers found some jeans and a grey sweatshirt, both of which tested negative for blood. RP 744-45. Also nearby were two folded, complete newspapers dated March 9th and 10th, both of which had stories about the crime. RP 883, 741, 911. All the sections of the papers were there and an officer admitted that it did not look like they had been read and that nothing was marked or cut out of them. RP 912, 914.

Fuller’s fingerprints were not on the newspapers. RP 747, 893-94.

There are 60 apartments in the complex and Henrichsen conceded that a number of tenants got the newspaper. RP 726.

Also found in the trash was a bag which had some hair inside. RP 883-84. The hair was 12-15 inches long and “darker” brown. RP 883-84, 915. Police never compared the hair from the bag to the hair found in the cap or in the left rear door well of the cab but Miller nevertheless stated his belief that it was Fuller’s. RP 883, 915. Miller conceded that he was just basing that belief on the hair being “consistent” with his “prior observations” of Fuller, as well as the officer’s opinion there was “no reason to believe” the hair would belong to anyone else. RP 916.

The hair was never sent for DNA or other testing which might have verified or contradicted the officer’s belief. RP 883, 915-16. Nor was testing done on hair found in the apartment in which Fuller had been living. RP 896, 915. Miller and a lab technician went into the apartment and saw a pair of scissors in the kitchen counter area which had “several hairs attached,” also finding hair in the bathroom, on the floor and in the sink. RP 895-96. Miller said that hair in the apartment was consistent with the hair in the bag and the technician said the hair in the apartment and bag were “similar.” RP 747, 895. The hair in the bathroom was “reasonably long” and dark brown. RP 750, 895-96.

When the officers entered, Fuller’s apartment had been “cleaned out” but there was a box of clothing in the living room area, none of which had anything on it looking like blood. RP 749, 894, 916.

No effort was made to gather any trace evidence from the apartment. RP 749.

Henrichsen initially admitted that he had cleaned out Fuller's apartment at the same time he was cleaning out someone else's apartment, putting the trash from each place into identical garbage bags and into the same dumpster. RP 705-11. A moment later, however, Henrichsen backtracked, saying he was not working on the other apartment "at exactly the same time" as Fuller's and that the bags from the other apartment would have been gone before Fuller's were thrown into the dumpster. RP 711. Henrichsen then admitted that he had not finished with the other apartment and was "continuing to clean up" there even after Fuller's apartment had been cleaned. RP 712. He conceded telling the defense investigator that he had taken out eight bags from the other apartment but maintained it was not at the same time that he was cleaning out Fuller's place. RP 722-23.

Miller used cell phone records to track Fuller to the home of Zakee Perry and his wife, Heather². RP 772, 901. Perry said he had seen Fuller "fairly regularly" over the previous eight years and that Fuller had moved in with them in November or December of 2008 for a short while, before he moved into the El Popo. RP 773-74, 786. At the time he lived with them and when he moved out in January of 2009, Perry said, Fuller had long hair. RP 774. Fuller had then called them in early March of 2009 to ask to store some stuff at their home, telling them he might have been evicted from the El Popo over money. RP 775. Fuller called back on March 12 or 13, saying he was actually going to also need a place to stay.

²Because her husband also shares the same last name, Heather Perry will be referred to by her first name herein for clarity, with no disrespect intended.

RP 775. Heather said Fuller told her he had no money, did not have a job and had no other place to stay. RP 790.

When he had lived with them before, Fuller had been working for Yellow Cab as a driver. RP 790. The general manager of Tacoma Yellow Cab could not recall if the cab Fuller had driven had a panic button or not and said the buttons were a big nuisance because they kept getting triggered accidentally. RP 482-83. The manager testified that Fuller had been “fired” on January 15, 2009. RP 477. On cross-examination, however, the manager admitted that Fuller was not actually employed by the cab company but had simply been an independent contractor and had paid the company \$75 a day to drive the cab on a lease. RP 481. Fuller had not been able to pay the lease, although the manager said that was not why he was not working there anymore. RP 487. A cab company owner of Farwest cabs testified that Fuller leased a cab from him on January 21, 2009, but had to give it back on February 8 because he was not able to make the lease payments. RP 549.

Perry and Heather said that Fuller had a “little pocket knife” he carried, either on his keys or in his pants pocket. RP 781, 789. While Fuller worked for Yellow Cab, he had long hair, and the manager said that Fuller had told her he carried knives. RP 478.

In March, Fuller had cut his hair, telling Perry and Heather was because he was going to look for a job. RP 776-87. Perry testified that he had seen Fuller with short hair only once before, a couple of years earlier. RP 776-77. Perry admitted, however, that he had told a detective that he had seen Fuller’s hair cut “several times” over the eight years he had

known Fuller. RP 783. At trial, Perry thought his statement to police was “slightly inaccurate” and he only remembered short hair once. RP 783. Heather remembered Fuller having cut his hair before when he was thinking of joining the military, noting he had wanted to be a Navy SEAL. RP 791-92.

Perry said Fuller appeared to have a few small healing scratches on his face but not anything that caused Perry to ask what had happened. RP 777, 788. Perry described them as “fingernail-type scratches” but then admitted they could have been from a fall. RP 783. Fuller stayed for two weeks and then moved to another place. RP 778, 787.

When Fuller was not seen by police at the Perry’s home, officers used some other records and located a man named Curtis Alm, with whom they thought Fuller might be staying. RP 901-902. Alm testified that he and his girlfriend had run into Fuller outside a Labor Ready location and had ended up inviting him to come live with them, which he did three or four days later, on about March 28, 2009. RP 421-36, 452. Alm said Fuller had said he had no job and was going to be evicted. RP 422-23. A few days after Fuller moved in, Alm helped Fuller move some things out of the El Popo and out of Perry’s home. RP 423, 438.

Fuller’s hair was shaved at the time he moved in with Alm. RP 423. Alm first declared that he only knew Fuller to have a ponytail and that it was his “pride,” but then admitted he had not seen Fuller for ten years at the time and had no idea what his hair was like before. RP 423-24, 441. Both Alm and his girlfriend said that Fuller had told them he had cut his hair because he wanted to join the Navy SEALs. RP 423-24, 452.

The girlfriend said that, at some point, Fuller said the SEALs had turned him down “for tax reasons,” and that he had cut his hair so that possible employers would take him more seriously. RP 452-56.

Alm said Fuller had a “habit” of carrying knives and had showed him one at some point that had a cord over it and hung on Fuller’s shoulder. RP 427-28. Alm did not say whether he saw this knife ten years earlier, when they had previously lived together, or in 2009, although he said Fuller had a knife at the house. RP 422-27. Alm declared that Fuller was not carrying a knife because driving a cab was dangerous work, although Alm admitted Fuller had said there was some “danger” in driving a cab. RP 444-45.

Alm had not seen Fuller for the previous ten years and had no idea if he carried a knife during that time. RP 436-37. Alm himself always carried a knife around, although he claimed it was really a “box cutter.” RP 442.

When they had lived together 10 years earlier, Alm said, they both “had some growing up to do” and Alm had ended up kicking Fuller out of the house. RP 421-24.

Alm and his girlfriend told Fuller he either had to get a job or go to school while he was living with them. RP 444. They were concerned that Fuller pay some rent because they were themselves short of money. RP 455. They discussed whether Fuller, who had previously worked as a cab driver, should try to get that type of work. RP 444. Fuller said that Ponders did not pay enough, he had already worked for Yellow Cab, and King Cab would not hire him because they only hired “Somalians.” RP

448-54. Although Alm first declared that Fuller had said he “hated” King Cab, Alm admitted it was in the context of Fuller’s belief that he could not get a job with them as he was not Somali. RP 434-36. Alm, whose girlfriend admitted talking to Fuller every day about getting a job, going to school, or doing something with his life, said Fuller told them he had tried to get a job with King cab several times. RP 434-50. An owner of King Cab, however, said Fuller had never applied to lease a cab. RP 703.

The yellow cab employee who testified about Fuller leaving on bad terms claimed that Fuller had told her he did not like foreigners because they were taking “our” jobs. RP 479. She admitted, however, that he never said anything about not liking foreigners in any other context. RP 485.

During the time Fuller worked for the Farwest he never said anything negative about foreigners at all. RP 551.

After conducting surveillance on Alm’s place, police arrested Fuller there. RP 428-29. Alm, who was obviously upset about being restrained in his own home by police during the arrest, opined that Fuller did not look “surprised” when police arrived. RP 428-29. Officers seized two pairs of boots, both of which were longer by ½ inch than the impressions that had been found in the beauty bark at the parking lot, neither of which had a tread. RP 657-67, 918. The boots were tested for traces of blood, but none was found. RP 918. One officer declared that, even though the cab was “a pretty bloody scene” with “substantial blood spatter” it was possible someone in the backseat might not have gotten much blood on their boots. RP 675-79. A detective, however, testified

that, with the wounds Ahmed had suffered there would have been a very significant blood loss over a short time and the perpetrator would very likely to have gotten blood on himself, especially transferred from the weapon. RP 309.

At Alm's, officers also seized some black jeans and ski jacket. RP 670. An officer who saw the restaurant videos admitted that the jacket in that video was not similar in style to the one Fuller had at Alm's house. RP 674. Also found was a computer which police did not initially seize. RP 656. Alm complained that Fuller's mom kept coming by and trying to get Fuller's computer, which she believed would prove his innocence. RP 429-30, 434. Alm did not give it to her, instead palming it for about \$100-\$150 dollars. RP 439-40. Police went and got the computer from the pawn shop after Miller listened to jailhouse conversations between Fuller and his mother, which had been taped. RP 877. In those conversations, Fuller's mom talked about working with defense counsel to get the computer and seemed to think it would prove that Fuller was on his computer at the time of the incident. RP 877. Miller said that Fuller agreed with his mom. RP 877. Fuller's computer was recovered and an expert said that, while the computer was running that early morning, there was no indication anyone was "on" it at the time Ahmed was believed to have been killed.

A receipt from a pawn shop also found in the room at Alm's house led police to that shop to ask for the surveillance video from March 3, 2009, the date of the receipt. RP 526, 656. The shop's records indicated that Fuller had pawned something that day and the video showed someone

thought to be Fuller engaged in that transaction. RP 462-63, 520-27, 650-56.

Grant Frederick, a forensic video analyst, testified at length about looking at the Masa, pawnshop and pole camera videos as well as a video which had been made of the Keg cap. RP 575. Frederick opined that the hats on the person in each of the videos was similar. RP 582. He admitted, however, that he could not say whether the caps in the Masa and videos said “the Keg.” RP 582. He also admitted that the caps in the Masa and pawn shop videos had different sized bands on them but claimed that something about the way video worked made it look like there was a larger white band in one video. RP 583.

Ultimately, all the expert could say was that there was “nothing about the individual in the Masa video that is inconsistent with the person in the pawnshop video.” RP 599. But while he could not “eliminate” them from being the same, he admitted that it was just not possible to know that they were. RP 599.

Frederick initially maintained that he was only asked by the police to say if the images could be used to eliminate Fuller as the person in the Masa video. RP 602-603. When confronted with his report, however, Frederick conceded that he was in fact also asked to give an opinion about whether the videos depicted the same person. RP 603. He admitted that he could not give a professional opinion on that because “not enough detail exists in the images alone that would support a definitive opinion regarding identification.” RP 605.

Miller and another detective interviewed Fuller after his arrest. RP

902-903, 921. According to Miller, when asked if he knew why he was at the station, Fuller said he had no idea. RP 904. Miller then asked if Fuller had heard about the murder of the cab driver. RP 904. After Fuller acknowledged that he had, he said he had heard about there being a Keg cap at the scene and that he had owned a cap like that but had gotten rid of it sometime before. RP 904. The officer said that Fuller then “kind of” changed what he said, now saying he had gotten the cap at a party and had gotten rid of it that night. RP 904.

At that point, the officer confronted Fuller. RP 905. Miller told Fuller the officer “knew” that Fuller had not gotten rid of his cap because Miller had “video of him on Sixth Avenue wearing the cap on the night of the incident.” RP 905. Fuller said he had been home the night of the incident but the officer told Fuller video was “everywhere” and “pictures don’t lie.” RP 906. The officer then detailed all of the stores in the area where, the officer said, “I had seen him on video[.]” RP 906. The officer said Fuller did not say anything or deny guilt in response but instead said he would like to see any such video. RP 907, 921.

Miller also testified about confronting Fuller with Miller’s “knowledge” that it was Fuller’s cap recovered at the scene, as well as Miller’s knowledge that Fuller “got into the cab at the 2800 block of Sixth Avenue.” RP 908. When the officer went on to craft a hypothetical based on Fuller’s life and circumstances as the officer believed them to be, Miller thought Fuller was “confirming” some details by nodding his head to the hypothetical. RP 908-10. The officer asked whether, if someone who was in financial trouble and had the same circumstances as police

believed Fuller was in had committed the crime, that person was “a bad guy or just someone that made a mistake?” RP 910. Fuller answered “made a mistake.” RP 910.

Michael Stafford, an acquaintance of Fuller, testified that, a few weeks before the incident, Fuller had mentioned that he needed money to keep from being evicted from his apartment. RP 795. Stafford also testified that, about one or two weeks before Fuller was actually evicted, they were at Fuller’s apartment and he said he had been approached by someone about doing a robbery for money. RP 795-96, 798, 799. The instructions Fuller was given were that he was supposed to wear a mask, it was supposed to be at night, and Fuller was going to be paid \$10,000 or they were going to steal \$10,000. RP 796-800. The crime was supposed to happen at a place Fuller knew and the person that was going to be robbed knew Fuller. RP 796.

Within a week after the conversation, however, Fuller told Stafford that the robbery was not going to happen. RP 796, 801.

D. ARGUMENT

1. FULLER’S FIFTH AMENDMENT AND ARTICLE 1, § 9 RIGHTS TO BE FREE FROM DOUBLE JEOPARDY WERE VIOLATED WHEN THE COURT REFUSED TO DISMISS ONE OF THE TWO CONVICTIONS

Both the state and federal constitutions protect against a person being twice put in jeopardy for the same offense. See State v. Linton, 156 Wn.2d 777, 782, 132 P.3d 127 (2006); Fifth Amend.; Art. I, § 9. The state and federal clauses, which are interpreted identically, prohibit being prosecuted again for the same offense after an acquittal or a conviction, as

well as multiple punishments for the same offense. State v. Turner, 169 Wn.2d 448, 454, 239 P.3d 461 (2010). Because convictions themselves carry potential adverse consequences independent of the resulting sentence, multiple convictions for the same offense may offend double jeopardy principles, even if multiple sentences are not imposed. See State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007); Turner, 169 Wn.2d at 454-55; see also Ball v. United States, 470 U.S. 856, 865, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985). In this case, this Court should reverse and dismiss one of the first-degree murder convictions, because the trial court's failure to do so at Fuller's request violated his rights to be free from double jeopardy.

a. Relevant facts

Fuller was charged with two counts of first-degree murder for Ahmed's death. 4RP 4-5; CP 22-23. One count alleged that Fuller had committed first-degree felony murder by causing Ahmed's death with a knife while committing or attempting to commit first-degree robbery. CP 22-23. The other count alleged that Fuller committed first-degree murder by committing premeditated murder, also with a knife. CP 22-23. The counts were charged separately, not in the alternative. CP 22-23.

At trial, the prosecutor argued that Fuller was separately guilty of both crimes, and the jury, which was instructed on both charges as separate crimes, agreed. 5RP 1-64; CP 108-41. Fuller moved to dismiss one of the two first-degree murder convictions, arguing that they violated his rights to be free from double jeopardy. 5RP 1-6; CP 146-65. The sentencing court denied the motion, instead "merging" the counts for

sentencing but leaving both convictions intact. SRP 5; see CP 184-86. In its order, the court entered what it called “findings of fact and conclusions of law” in which the court declared that, while Fuller could not be convicted of two counts of first-degree murder for Ahmed’s death without offending double jeopardy, he could be convicted of “alternative means.” CP 184. The court also found that, while it “appears that the defendant was convicted of two ‘counts’ of first degree murder,” he was “actually convicted of only one crime.” CP 185. The court concluded that “merging” the two counts for sentencing but including both “statutory citations” on the judgment of sentence would be proper, because “[t]he defendant will not be twice convicted of murder if the court enters the separate counts charged as to each victim merged into a single count for each victim.” CP 185.

- b. The court erred and violated Fuller’s rights to be free from double jeopardy by refusing to dismiss one of the two convictions

The trial court’s decision was in error and resulted in a clear violation of Fuller’s rights to be free from double jeopardy. As a threshold matter, this Court does not use deferential standards of review when addressing this issue. Instead, the strict de novo standard is applied. See Turner, 169 Wn.2d at 454.

On review, this Court should reverse. The state and federal prohibitions against double jeopardy both protect against not only multiple sentences but also multiple convictions for the same offense. Womac, 160 Wn.2d at 657-58; see Turner, 169 Wn.2d at 454-55. As the Supreme Court made clear in Womac, the existence of a conviction itself has a

punitive aspect to it so that the existence of two separate convictions for the same crime offends principles of double jeopardy. Womac, 160 Wn.2d at 657. Put simply, while “[t]he State may bring (and a jury may consider) multiple charges arising from the same criminal conduct in a criminal proceeding,” a court “may not, however, enter multiple convictions for the same offense without offending double jeopardy.” Womac, 160 Wn.2d at 658 (internal quotations omitted; emphasis in original).

Here, there can be no question that the felony murder and premeditated murder counts were for the “same offense” for double jeopardy purposes. Both counts were for the death of the same victim. Both were for first-degree murder, albeit different subsections of the statute defining that crime. And it is well-recognized that felony murder and intentional murder of the same victim are “the same offense for double jeopardy purposes.” State v. Johnson, 113 Wn. App. 482, 487, 54 P.3d 155 (2002), review denied, 149 Wn.2d 1010 (2003); see also, State v. Bowerman, 115 Wn.2d 794, 800, 882 P.2d 116 (1990) (felony murder and intentional murder are the same crime - first-degree murder).

The trial court nevertheless chose not to follow Womac, instead adopting the prosecutor’s request to “merge” the counts for sentencing as if that cured the constitutional infirmity. SRP 4. In addition, the court entered findings - drafted by the prosecution - in which it adopted a new theory, not argued by either party, that, although Fuller was separately charged with and convicted of each crime, double jeopardy would not be offended if the court entered the counts as “merged into a single count”

and treated the convictions as if they were “alternative means,” imposing only a single sentence. CP 184-85.

At the outset, the court’s “finding” that Fuller was “actually convicted of only one crime” under alternative means does not withstand review. See CP 185. A finding of fact will only be upheld on review if there is substantial evidence in the record to support it. State v. Echeverria, 85 Wn. App. 777, 782, 934 P.2d 1214 (1997). Substantial evidence is evidence sufficient to convince a rational, fair-minded trier of fact of the truth of the declared premise. Id.

Here, Fuller was charged with two separate counts of the same crime. CP 22-23. Jurors were instructed on two separate counts. CP 108-137. The prosecutor argued that Fuller was guilty of each separate count. SRP 1-68. The jurors entered verdicts of guilty on each separate count, as well as entering separate special verdicts, one for each count. CP 138-42. Regardless of the trial court’s desire to change those facts in order to avoid constitutional problems, the charging documents, instructions, arguments and verdict forms are clear. No rational, fair-minded trier of fact could have found that Fuller was only convicted of one crime rather than two separate counts of the same named crime.

In any event, the trial court’s attempt to rewrite the facts in order to avoid a constitutional problem did not have that result, as the Supreme Court has recently made clear in Turner. In that case, the defendant was convicted of two charges but the trial court did not “reduce to judgment” one of two convictions, instead declaring that they were “merged” and sentencing on only one. See State v. Turner, 144 Wn. App. 279, 280, 182

P.3d 478 (2008), reversed, 169 Wn.2d 448, 238 P.3d 461 (2010). The only reference to the second conviction was a written order referring to its existence so that it could be brought to sentence if the other conviction was overturned on appeal. See Turner, 169 Wn.2d at 451-52. On appeal, the defendant argued that this violated his rights to be free from double jeopardy, but a Commissioner of this Court affirmed. Id. Turner filed a Petition for Review, which the Supreme Court granted in part, remanding the case back to this Court for reconsideration in light of Womac. Turner, 144 Wn. App. at 280. On reconsideration, this Court again declined to order dismissal of one of the two charges, stating that there was no double jeopardy violation because the trial court “never reduced” the second conviction to judgment and did not refer to the second conviction in the judgment and sentence for the first. 144 Wn. App. at 282.

Again, this Court was reversed. The procedure of the trial court was an improper attempt at a “conditional vacation” which violated double jeopardy, the Supreme Court held. Turner, 169 Wn.2d at 452. While a second conviction might be reinstated if the first one was reversed, it was a violation of double jeopardy for a court to fail to fully vacate that second conviction in the first place. 169 Wn.2d at 464. Regardless whether a trial court declines to reduce a second conviction to writing, the Court held, double jeopardy prohibitions were still violated when the trial court direct, “in some form or another, that the conviction nonetheless remains valid.” 169 Wn.2d at 464. The order referring to the second conviction and attempting to keep it alive violated the defendant’s rights to double jeopardy. Id. Instead, in order to protect against such a violation, the

second conviction must be unconditionally vacated, the “judgment and sentence must not include any reference to the vacated conviction” and the second conviction must not be referred to or relied on in any way at sentencing. 169 Wn.2d at 463-64.

Further, the Court was clear that it did not matter whether the defendant was charged in the alternative or with separate counts. 169 Wn.2d at 462 n. 9, 465. Although charging in the alternative and charging as separate counts are “technically different,” the Court stated, because the practical result of both is that there are multiple convictions for the same offense, the prohibitions against double jeopardy equally apply. *Id.*

Ultimately, what concerned the Court was whether there were documents or indications - in Turner’s case, the “conditional written order” and for another defendant in a case joined with Turner’s, the language the court used at sentencing - which “openly recognized the validity of” the second convictions. 169 Wn.2d at 465. This was wrong, the Court held, because the second conviction was not “a valid conviction” or entitled to any weight at all because it violated double jeopardy and thus should be dismissed, the Court held. 169 Wn.2d at 465. The documents and language of the lower courts were an attempt to “keep the vacated convictions ‘alive’” despite their lack of validity. 169 Wn.2d at 465-66. Regardless whether the second conviction was reduced to judgment or a separate sentence imposed, the procedure of failing to dismiss one of the counts while apparently recognizing it as potentially valid was a violation of the prohibitions against double jeopardy. 169 Wn.2d at 465-66.

Notably, the Court was unanimous in this decision. See Turner,

169 Wn.2d at 466.

In this case, there can be no question that the procedure used in this case was improper under Turner Fuller was charged with and the jury entered verdicts of guilt for two counts of first-degree murder for the same death. Instead of dismissing one of those convictions, the sentencing court kept both of them as valid, engaging in the fiction that, because the counts were being “merged” for sentencing and could be seen as “alternative means” of committing first-degree murder, there was no double jeopardy violation. CP 184-85. And the court specifically included reference to each of the counts not only by including the relevant subsection for each in the judgment and sentence but in the order merging the counts. See CP 184-85.

Most significant, the trial court declared that it was taking these steps and not dismissing one of the two counts because it wanted to “maintain the integrity of the jury’s verdict of guilty as to each.” See CP 184-85. The trial court’s goal thus was clearly to retain both convictions in some form, something Turner and double jeopardy prohibitions do not allow.

Nor do the cases upon which the prosecution relied below compel a different result. The prosecutor’s request for “merger” was based upon State v. Meas, 118 Wn. App. 297, 75 P.3d 998 (2003), review denied, 151 Wn.2d 1020 (2004). See CP 146-65, 182-83. The trial court apparently accepted the prosecutor’s claim that Meas should control and that Womac “does not stand for the proposition - as suggested by the defendant - that separate counts for the same crime (first degree murder) must be

dismissed.” SRP 4; see CP 146-65, 182-83.

But Meas is no longer good law. In Meas, the Court followed Johnson, supra, and held that the “merger” procedure was proper and did not violate double jeopardy, because only one sentence was imposed. Meas, 118 Wn. App. at 302; see Johnson, 113 Wn. App. at 488. Meas and Johnson thus clearly depend upon the idea that separate convictions can only violate double jeopardy if those convictions both result in a sentence. See Meas, 118 Wn. App. at 302-304; Johnson, 113 Wn. App. at 487-88. Now that Womac has unequivocally held that the entry of multiple convictions for the same crime violates double jeopardy even if only one sentence is imposed, Meas and Johnson retain no currency.

The inclusion of both statutes for each count in the judgment and sentence, the “merging” of the two counts for sentencing without dismissing either and the order the court entered were clearly efforts to keep both counts alive, in violation of Fuller’s rights to be free from double jeopardy. Under Turner, reversal and dismissal of one of the two counts is therefore required.

2. THE REMAINING COUNT MUST BE REVERSED
BASED UPON THE PROSECUTOR’S MULTIPLE
ACTS OF FLAGRANT, ILL-INTENTIONED
PREJUDICIAL AND CONSTITUTIONALLY
OFFENSIVE MISCONDUCT

Even with dismissal of one of the convictions because of double jeopardy, reversal of the remaining conviction is also required, because the prosecutor committed flagrant, prejudicial misconduct, some of which was constitutionally offensive. Unlike other attorneys, prosecutors enjoy a position as “quasi-judicial officers,” with special duties both to ensure that

the defendant receives a fair trial and to refrain from seeking to “win” a conviction at any cost. See Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). As a result, prosecutors are required to refrain from engaging in misconduct at trial, because it is likely “to produce a wrongful conviction.” State v. Clafin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985). A prosecutor’s words carry great weight with the jury because of her role, so that when a prosecutor violates her duties and commits misconduct, it may deprive the defendant of his state and federal constitutional due process rights to a fair trial. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); Suarez-Bravo, 72 Wn. App. at 367; 5th Amend.; 6th Amend.; 14th Amend.; Art. I, § 22.

In this case, the prosecutor not only committed misconduct but violated Fuller’s Fifth Amendment, Article I, § 9 and due process rights and his rights to a fair trial by repeatedly misstating and minimizing his constitutionally mandated burden of proof, repeatedly eliciting testimony about and drawing a negative inference from Fuller’s partial silence, and invoking the passions and prejudices of the jury in an effort to gain a conviction on an improper, emotional basis.

a. Flagrant, ill-intentioned and prejudicial misconduct in misstating and minimizing his burden of proof

i. Relevant facts

Throughout closing argument, the prosecutor compared the jury's task in deciding the case to putting together a jigsaw "puzzle," with evidence as pieces of that puzzle. 5RP 21, 24-27. Then, in rebuttal closing argument, the prosecutor told jurors that the definition of reasonable doubt was that jurors had to only have "[a]n abiding belief in the truth of the charge because this is, after all, as we talked about from the beginning a truth-seeking process." 5RP 60; see Ex. 261 at 11-12. At that point, the prosecutor told the jury he was going to "use a jigsaw puzzle to illustrate the concept of beyond a reasonable doubt," apparently projecting an image of a puzzle onto the screen. 5RP 60; see Ex. 261 at 11. The prosecutor then went on:

Let's say that someone is telling us that this is a picture of Tacoma. We get a few of the pieces of the puzzle. We get a few pieces of the evidence and this is what we can see. From that we might think it looks like Tacoma, but we don't know - -

[DEFENSE COUNSEL]: Objection; argument, Your Honor. It requires a jury to fill in evidence that they may or may not have.

5RP 60. The court overruled the objection, saying that the jury would be "making the decision as to what facts support." 5RP 60. The prosecutor then said, "I ask defense counsel if he has an objection to cite a legal basis, but I will go forward. Thank you." 5RP 60. The prosecutor went on:

So we look at that portion of the puzzle and we do not have enough pieces or enough evidence beyond a reasonable doubt that it's pieces of Tacoma. But let's say we get some more pieces. Now, we have more pieces, more evidence that suggests this is Tacoma. But we may not yet have enough pieces, enough evidence to know beyond a reasonable doubt that it's Tacoma.

Now, we have more pieces, we have more evidence and we can see beyond a reasonable doubt that this is a picture of Tacoma. We can see the freeway. We can see Mount Rainier and we can see the Tacoma Dome.

A trial is very much like a jigsaw puzzle. It's not like a mystery novel or CSI or a movie. You're not going to have every loose end tied up and every question and answer. What matters is this: **Do you have enough pieces of the puzzle? Do you have enough evidence to believe beyond a reasonable doubt that the defendant is guilty?**

Beyond a reasonable doubt, you just need enough pieces of the puzzle, enough evidence to have an abiding belief in the truth of the charge; to believe in the truth that the defendant attempted to rob Mohamed [sp] Ahmed; to believe in the truth that the defendant murdered Mohamed [sp]Ahmed.

5RP 60-61 (emphasis added). A slide the prosecutor projected for jurors to see read:

Beyond a reasonable doubt:

enough pieces of the puzzle,
enough evidence,
to have an abiding belief in the
truth of the charge.

Ex. 261 at 12.

- ii. The arguments were flagrant, prejudicial also ill-intentioned misconduct

There can be no question that these arguments were misconduct. Indeed, at the time they were made, this Court had so held. See Anderson, 153 Wn. App. at 431-32. In Anderson, a prosecutor from the same office as the one here similarly described reasonable doubt as if that standard were akin to the degree of certainty people used when making everyday decisions, something this Court condemned:

The prosecutor's comments discussing the reasonable doubt standard in the context of everyday decision making were also improper because they minimized the importance of the reasonable doubt standard and of the jury's role in determining whether the State has met its burden. **By comparing the certainty required to convict with the certainty people often require when they make everyday decisions-both important decisions and relatively minor ones-the prosecutor trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case against Anderson.** This was improper.

153 Wn. App. at 431 (emphasis added). In addition, the Court found, the prosecutor's argument was also improper because it focused on the degree of certainty required to be willing to act, rather than hesitate to act, which was again a misstatement of the standard of proof beyond a reasonable doubt. 153 Wn. App. at 431-32.

Recently, this Court has again reiterated this holding of Anderson in a case where the prosecutor - again from the same office as in both this case and Anderson - used an almost identical argument as here, using a puzzle analogy. State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010). Finding that Anderson controlled on this issue, this Court declared:

the prosecutor's arguments discussing the reasonable doubt standard in the context of making an affirmative decision based on a partially completed puzzle trivialized the State's burden, focused on the degree of certainty the jurors needed to act, and implied that the jury had a duty to convict without a reason not to.

Johnson, 158 Wn. App. at 684-85.

Indeed, in Johnson, this Court reversed even though there was no objection below, finding that the misconduct was so flagrant and ill-intentioned that, even though it occurred before the decision in Anderson, the prejudice was incurable and thus compelled reversal. 158 Wn. App. at

685. In Johnson, the prosecutor not only used the puzzle analogy but also said that jurors had to be able to come up with a reason to doubt guilt in order to acquit. 158 Wn. App. at 686. This Court found both types of misconduct so egregious and prejudicial that reversal was required even though the arguments in Johnson were made before Anderson and another case controlling on the “reason to doubt” issue. 158 Wn. App. at 686.

The decisions in Anderson and Johnson brought Washington clearly in line with the many courts which have disapproved of comparing the decision-making which occurs in a criminal case with the decision-making that jurors engage in on a daily basis, even regarding important matters. More than 40 years ago, a federal court recognized that, while “[a] prudent person” acting in “an important business or family matter would certainly gravely weigh” the considerations and risks of such a decision, “such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment.” Scurry v. United States, 347 F.2d 468, 470 (U.S. App. D.C. 1965), cert denied sub nom Scurry v. Sard, 389 U.S. 883 (1967). Just a few years later, the highest court in Massachusetts found that comparing everyday decisions to the decision of a jury about whether the state had met its constitutional burden “understated and tended to trivialize the awesome duty of the jury to determine whether the defendant’s guilt was proved beyond a reasonable doubt.” Commonwealth v. Ferreira, 364 N.E.2d 1264, 1272 (Mass. 1977). Such arguments also create the impermissible risk of convictions based upon something less than the constitutionally mandated standard, even when the personal decisions referred to are “important.” See, State v.

Francis, 561 A.2d 392, 396 (Vt. 1989); see also, U.S. v. Noone, 913 F.2d 20, 28-29 (1st Cir. 1990), cert. denied, 500 U.S. 906 (1991); People v. Johnson, 119 Cal. App. 4th 976, 14 Cal. Rptr. 3d 780 (Cal. 2004); Commonwealth v. Rembiszewski, 461 N.E.2d 201, 207 (Mass. 1984).

As one court noted, even examples using important decisions, far from emphasizing the seriousness of the decision before them [the jury], detracted both from the seriousness of the decision and the Commonwealth's burden of proof. . . **The degree of certainty required to convict is unique to the criminal law. We do not think that people customarily make private decisions according to this standard nor may it even be possible to do so. Indeed, we suspect that were this standard mandatory in private affairs the result would be massive inertia. Individuals may often have the luxury of undoing private mistakes; a verdict of guilty is frequently irrevocable.**

Ferreira, 364 N.E.2d at 1273 (quotation omitted) (emphasis added).

Here, the prosecutor did not compare the certainty required to decide the case with that required to make *important* personal decisions - he compared it to the trivial matter of figuring out what picture is shown on a jigsaw puzzle. And he used that jigsaw puzzle to completely minimize his burden of proof, telling jurors they could find he had proven his case if they had "enough pieces of the puzzle" to believe Fuller was guilty.

But the burden of proof beyond a reasonable doubt is not satisfied by evidence that a defendant may have, could have or even probably committed the crime. See, e.g., Miller v. Staton, 58 Wn.2d 879, 886, 365 P.2d 33 (1961) ("may," "could," "possibly," or "might have" are less than "probably" and "probably" is only equivalent to "more likely than not"); see also, County Court of Ulster County, N.Y. v. Allen, 442 U.S. 140, 166,

99 S.Ct. 2213, 60 L. Ed. 2d 777 (1979) (reasonable doubt a more stringent test than “more likely than not”).

The prosecutor’s puzzle analogy improperly misstated the law of reasonable doubt and minimized the prosecutor’s constitutionally mandated burden of proof. This Court should so hold.

iii. Reversal is required

The trial court erred in overruling Fuller’s objection to this misconduct below. 5RP 60. Where there is such an objection, this Court uses a different standard of review than if no such objection occurred. Without an objection, this Court applies presumption of “waiver” based on the belief that the failure to object shows that the argument did not seem as objectionable to counsel in context as it is in hindsight. See, e.g., State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). To overcome the presumption, the defendant must show that the misconduct was so flagrant and ill-intentioned that it could not have been cured by instruction, had counsel objected. See State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006).

But where, as here, there is an objection below, the “waiver” presumption does not apply. See, e.g., State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). Instead, once it is established that the arguments were improper, the Court asks only if there is a substantial likelihood the misconduct affected the verdict, viewed in light of the issues in the case, the evidence addressed by the argument and the jury instructions. See State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990).

Here, there is more than a substantial likelihood the misconduct affected the verdict. With his arguments, the prosecutor told the jury to convict Fuller on far less than the proper burden of proof, i.e., if they merely thought they had “enough pieces of the puzzle” to believe in his guilt. Rather than misconduct which affects only a portion of the evidence, this misconduct affected the entire case and the jury’s ability to properly decide if the state had met its burden.

Further, the concept of reasonable doubt is one with which even learned courts have struggled. See, e.g., *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), overruled in part and on other grounds by *Estelle v. McGuire*, 502 U.S. 62, 73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). The prosecutor’s argument, using the highly evocative and simple to understand metaphor of a puzzle, was extremely likely to be persuasive and pervasive in the jurors’ minds.

Notably, it is well-recognized that visual images - such as those the prosecution used in its “powerpoint” presentation” - have an enduring, disproportionate impact on juries. See Belli, *Demonstrative Evidence: Seeing is Believing*, Trial, July 1980 at 70-71 (visual images resonate with jurors in a way “no amount of verbal description by itself could); Chatterjee, *Admitting Computer Animations: More Caution and a New Approach are Needed*, 62 Def. Couns. J. 34, 36 (1995) (noting that “juries remember 85 percent of what they see as opposed to only 15 percent of what they hear”).

In addition, the evidence against Fuller was far from

overwhelming. Fuller was not seen getting in the cab and no weapon with his fingerprints was found. Nor was he seen running from the cab or with property of Ahmed later on. The prints in the cab for which he could not be excluded could have been left by 1/3 of the population. RP 856-58. His hair was not in the cab. His fingerprints were not on the card or money found in the back seat. RP 239-40. His hair in the cap could have been left there if he lost the cap there some other day, as the debris in the cap would indicate. RP 358, 644, 809. The blood on the outside of the cap could have come as the real perpetrator ran by. Fuller's boots did not have even a trace of blood on them. RP 918. And they were longer by a half inch than the longest "indentation." RP 657-67, 918. The blood under Ahmed's fingernails was never tested to see if it was Fuller's, nor was the hair in the bag or the apartment. RP 845-46, 883, 915-16. The fibers under those fingernails did not match the cab. RP 826. The video expert admitted that it was not possible to say that the men in the Masa and pawn shop videos were the same. These are only some of the significant holes in the prosecutor's case.

In fact, reversal would be required even Fuller had the more difficult task of proving the misconduct "flagrant and ill-intentioned." The prosecutor in this case - who works in the same office as the prosecutor in Anderson - made this argument fully two months after the decision in that case condemned this very same kind of argument. See Anderson, 153 Wn. App. at 417; CP 22-23; see also, Johnson, 158 Wn. App. at 677; State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997) (fact that argument was made after a published

opinion declared it misconduct made the misconduct flagrant and ill-intentioned).

Further, this Court has recently found the making of the puzzle analogy to be flagrant, prejudicial misconduct, even when the argument was made before the decision in Anderson was issued, because of the incredible prejudice the argument engendered by so misstating the reasonable doubt standard to the jury. Johnson, 158 Wn. App. at 686. The fact that it was still made after Anderson renders the prosecutor's use of it even more flagrant and ill-intentioned. Fleming, 83 Wn. App. at 214.

Rather than reflecting the gravity of the decision the jurors had to make and the true weight of the prosecutor's constitutional burden, the prosecutor's arguments trivialized the juror's decision into something far less. As a result, the jurors were misled about the proper standard to apply, believing they only had to be as sure of guilt to convict as they were sure that it a puzzle depicted a certain picture when there was only some of the puzzle completed. The prosecutor's arguments thus told the jury that it effectively had to be convinced of guilt only by a preponderance i.e., that it was more likely than not that Mr. Fuller was guilty - the same standard they would use in deciding the incredibly trivial question of what picture was on a puzzle.

These arguments - and the misstatements - went to the heart of the entire case against Fuller. Unlike other misstatements of the law, misstatement of the correct standard of proof beyond a reasonable doubt is especially egregious because of its impact on the constitutional rights of the defendant and the very core of our criminal justice system. The correct

standard of proof beyond a reasonable doubt is the touchstone of that system. See Cage, 498 U.S. at 39-40. Indeed, as the Supreme Court has recognized, correct application of the standard is the primary “instrument for reducing the risk of convictions resting on factual error.” Id.

The remaining count of first-degree murder should be reversed, because the prosecutor’s flagrant, ill-intentioned misconduct - to which counsel objected - effectively deprived Fuller of a trial at which the state shouldered its proper, weighty burden of proving his guilt beyond a reasonable doubt.

b. Constitutionally offensive misconduct and violation of Fuller’s rights by repeatedly drawing negative inferences from his partial silence

i. Relevant facts

Before trial, Fuller moved to prohibit Detective Miller from testifying that, when accused of being the person in the video or having committed the crime, Fuller did not deny the accusations. RP 108; CP 30-21. The prosecutor argued that he was entitled to elicit this testimony under the theory that, “if the defendant chooses to waive his rights and make a statement, the State can comment on what he says and, also, on what he doesn’t say.” RP 109. The court then noted that Fuller’s failure to deny was part of what Fuller “did and didn’t do.” RP 110. Counsel pointed out that this was effectively commenting on Fuller’s right to silence. RP 110. The court disagreed, holding it proper to admit evidence that Fuller “did not either admit or deny” accusations because that was “what happened” at the time. RP 111.

Later, however, the court granted Fuller’s motion to exclude

testimony from witnesses that Fuller had “never denied” to them that he had committed the crime. RP 119. The court said that Fuller had a “right to remain silent,” adding “[y]ou don’t have to go around telling everybody, I didn’t do it.” RP 119. The prosecutor agreed. RP 119.

In opening argument, the prosecutor talked about Fuller’s failure to deny that it was him on the video wearing the cap the night of the incident and his not having admitted or denied the crime to police. 4RP 14, 15. A “powerpoint” computer presentation projected by the prosecutor during that argument contained slides which reiterated these “failures,” stating that, when confronted by Miller about being seen in the video, “[d]efendant doesn’t deny this, would like to see the video” and that he did not “really admit or deny” committing the crimes. Ex. 38 at 23-24.

Later, at trial, when Perry was testifying about Fuller calling him from jail to tell him about the charges, the prosecutor asked whether Fuller had told Perry if Fuller had committed the crime. RP 778. Counsel objected based on the “prior ruling.” RP 779. With the jury out, counsel then conducted *voir dire*, establishing that Perry had never asked Fuller if he was guilty and they did not speak about it other than to talk briefly about the charges. RP 779. The prosecutor argued that the jury would find it “relevant” that Fuller had not denied guilt to his friend, because jurors would

naturally, understand that **if you’re charged with a murder you didn’t commit**, and this is the first that you’ve ever mentioned it to your friend, **the first thing you’re going to say, if you are not guilty of it, is: They have the wrong guy; I didn’t do this; I’m innocent; I didn’t commit this crime.**

RP 779-80 (emphasis added).

Despite its previous ruling, the court overruled counsel's objection. RP 780-81. When the jury returned, the prosecutor declared, "your friend calls you. You haven't talked to him in a week, and he tells you that he's calling you from the jail and that he's been arrested for murder; and this is the first you had heard of it at all. Did he ever tell you whether or not he committed the murder?" RP 781. Perry said the only thing Fuller said was what he was charged with and they did not discuss the allegations further. RP 781.

A little later in the trial, when Detective Miller was testifying about confronting Fuller by telling him that he knew Fuller had not gotten rid of the Keg cap because he had been seen on video wearing it the night of the murder, the prosecutor asked: "And what did the defendant say to that?" RP 906. The officer answered, "[h]e didn't really say much[.]" RP 906. Defense counsel objected and moved to strike, saying "[h]e didn't say anything. That's not - -" RP 906. The prosecutor then interrupted, asking the court to allow the officer to "finish." RP 907. The court overruled counsel's objection, and the officer was allowed to testify that he had confronted Fuller about the officer's "knowing that he [Fuller] had gotten into the cab on the 2800 block of Sixth Avenue and that it was his Keg cap that was recovered at the scene." RP 907.

The following exchange then occurred:

Q: And what did the defendant say when you told him this?

A: **He didn't make any attempt to deny the information.**
His comment was - -

[DEFENSE COUNSEL]: Objection.

THE COURT: Okay. Hold on a minute. One at a time.

[DEFENSE COUNSEL]: I've already made by objections on that issue, Your Honor.

RP 907 (emphasis added). The court ruled that “[s]ubject, of course, to prior objections and subject to prior ruling, you may continue.” RP 907.

In closing argument, the prosecutor drew attention to Fuller’s “failure” to deny guilt, again pointing out his failure to deny that it was him seen on the video, wearing the Keg cap outside the Masa restaurant on the night of the crime. 5RP 58. Again, the prosecutor used a “powerpoint” computer presentation, including a slide which said, in relevant part:

Det. Miller interviews defendant

...

Det. Miller tells Fuller he saw him wearing the Keg cap on a video outside Masa.

Defendant doesn’t deny this, would like to see the video.

Ex. 260 at 23 (emphasis added). Another slide under the same heading referred to the hypothetical and the question of whether the person who did it was a “bad guy” or someone who made a mistake, followed by Fuller’s answer and “**Defendant doesn’t really admit or deny.**” Ex. 260 at 24 (emphasis added).

In rebuttal closing argument, the prosecutor then repeatedly told jurors that parts of the state’s case were “undisputed,” i.e., that it was “pretty much undisputed” that Fuller was desperate and angry,

“undisputed” that he was angry at foreigners and “undisputed” that he was financially desperate, and that there was “[n]o dispute that he was angry at foreigners for taking American jobs. 5RP 51. A slide in the powerpoint presentation also included information about Fuller and the indication “[m]ostly undisputed.” Ex. 261 at 4. Again, the prosecutor projected onto the wall the slide saying that, when Miller told Fuller he had seen Fuller on tape wearing the Keg cab the night of the incident, “[d]efendant doesn’t deny this, would like to see the video.” Ex. 261 at 9.

ii. The prosecutor committed constitutionally offensive misconduct in eliciting the testimony and making the arguments

The arguments and testimony violated Fuller’s rights to due process and to be free from self-incrimination, i.e., to remain silent, and were thus constitutionally offensive misconduct. Both the state and federal constitutions guarantee the right of the accused to remain silent in the face of accusation. See State v. Clark, 143 Wn.2d 731, 756, 24 P.3d 1006, cert. denied sub nom Clark v. Washington, 534 U.S. 1000 (2001); Fifth Amend.; Art. I, § 9. It is a violation of those rights - and misconduct - for a prosecutor to comment on the defendant’s pre-arrest or post-arrest silence. See Clark, 143 Wn.2d at 756; State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008). Further, if the defendant has been read his rights under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), due process principles of fundamental fairness mandate that no negative inference be drawn from any subsequent silence. Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); Burke, 163 Wn.2d at 216-17. Silence is “insolubly ambiguous” before Miranda rights and,

after those rights apply, could be based on the exercise of those rights, so that comment on that silence is prohibited by due process. See Burke, 163 Wn.2d at 218-19.

In Burke, the Supreme Court recently reaffirmed that, in this state, silence can never be used as substantive evidence of guilt. 163 Wn.2d at 216-17. Instead, the only permissible use of silence, whether pre- or post-Miranda, is to impeach a defendant's inconsistent testimony if he takes the stand at trial. 163 Wn.2d at 216-17.

Here, Fuller did not testify. There was no testimony to "impeach." It was thus wholly improper for the prosecution to use his partial silence at trial. See Burke, 163 Wn.2d at 218; State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

Further, even if Fuller had testified, reversal would be required, because the prosecution's use of Fuller's silence was not limited to impeachment. Impeachment evidence is "evidence, usually prior inconsistent statements, offered solely to show the witness is not truthful." Burke, 163 Wn.2d at 218. But "[a]n accused's failure to disclose every detail of an event" to law enforcement is not inherently inconsistent and thus not impeachment. Id. Further, it is not "impeachment" but rather improper substantive use of "silence" for the prosecution to draw attention to a defendant's silence as if that silence was evidence of guilt. Id.

Here, the testimony and argument were not attempts to impeach Fuller regarding some factual inconsistency. Instead, they were attempts to use Fuller's failure to deny guilt and deny being the person in the Masa video as evidence that he was, in fact, guilty. See 4RP 14, 15, RP 778-81,

906-907, 5RP 58; Ex. 38 at 23-24; Ex. 260 at 23-24; Ex. 261 at 9. Indeed, the prosecutor's argument about why Fuller's failure to deny guilt to his friend was so "relevant" makes this intent of the prosecutor - and effect on the jury - clear. RP 779-80 (evidence was relevant as jurors would "naturally" understand that someone who was not guilty would have told their friend that they were innocent).

Notably, the trial court's rulings admitting the evidence were far from nuanced analyses of the relevant question regarding Fuller's rights. Instead, they appeared to be mistakes. See RP 110-11 (finding the failure to deny guilt admissible on the basis it was "what happened" without regard to rights involved); RP 119 (court excluding testimony that Fuller did not deny to people other than police that he had committed the crime, finding it violated the right to remain silent); RP 780-81 (court inexplicably allowing testimony in violation of that ruling without giving any recognition to the prior ruling).

Even if the trial court's rulings below could be seen as having adopted the prosecution's theory, that would also have been error. That theory was that it was permissible to comment about anything Fuller failed to say in his statement because he had talked to police. See RP 102-107; CP 42-44 (relying on State v. Young, 89 Wn.2d 613, 574 P.2d 1171 (1978), cert. denied sub nom, Young v. Washington, 439 U.S. 870 (1978), and State v. Cosden, 18 Wn. App. 213, 568 P.2d 802 (1977), review denied, 89 Wn.2d 1016, cert. denied sub nom Cosden v. Washington, 439 U.S. 823 (1978)).

The caselaw upon which the prosecutor relied, however, was

decided before Anderson v. Charles, 447 U.S. 404, 100 S. Ct. 2180, 65 L. Ed. 2d 222 (1980), the seminal case establishing the relevant constitutional standards where there is “partial silence”; see Young, 89 Wn.2d at 613 (decided in 1978); Cosden, 18 Wn. App. at 213 (decided in 1977).

In Charles, the Supreme Court first addressed the issue of the rights of defendants regarding comments of the state about their “partial silence.” See Auchincloss, *Protecting Doyle Rights After Anderson v. Charles: The Problem of Partial Silence*, 69 VA. L. REV. 155 (1983). “Partial silence” occurs when a defendant waives her right to remain silent and makes a statement to police but fails to include certain claims in that statement i.e., remains “silent” about certain things. State v. Belgarde, 110 Wn.2d 504, 511, 755 P.2d 174 (1988). The Charles Court implicitly recognized that a defendant retains rights regarding comments about his silence even if he actually speaks to police. See Charles, 447 U.S. at 408-409. This makes sense, because “the defendant’s post-arrest enumeration of a few details or of a great many details does not imply that he is not exercising his constitutional right not to relate other details to the police.” Auchincloss, 69 Va. L. Rev at 168.

As a result, in such situations, under Charles, if the defendant testifies, the prosecutor may only comment on his “partial silence” by asking about his “failure to incorporate the events related at trial into the statement given police,” if certain limits are met. Belgarde, 110 Wn.2d at 511. Those limits are that the “prior silence” must be regarding critical facts and must directly conflict with the testimony, rather than just amounting to a failure to say certain things. See, e.g., State v. Seeley, 43

Wn. App. 711, 715, 719 P.2d 168, review denied, 107 Wn.2d 1005 (1986). The justification for allowing comment where there are inconsistent stories is that, while such stories might technically involve “silence” with respect to each other, that is not “silence” in the true sense of the word but rather is proper impeachment. Charles, 447 U.S. at 408-409.

Charles established that, in fact, a defendant does not lose all rights to silence even when he gives a statement to police. See United States v. Canterbury, 985 F.2d 483, 486 (10th Cir. 1983); see also, Auchincloss, 69 VA. L. REV. at 164. Contrary to the prosecutor’s belief here, the fact that a defendant has given a statement does not give the prosecutor “carte blanche authority” to use the defendant’s partial silence against him under Charles. See State v. Silva, 119 Wn. App. 422, 430, 81 P.3d 889 (2003). Instead, he is circumscribed by the limits set forth in Charles and recently reiterated in Burke. Burke, 163 Wn.2d at 219 (noting the specific limits of impeachment with silence even when partial silence exists). At a minimum, Young and Cosden and cases which have relied on them without discussion of Charles have to be harmonized with these limits to comply with constitutional mandates.³

Nor does State v. Hager, ___ Wn.2d ___, ___ P.3d ___ (March 10,

³It is actually questionable whether Cosden was so broad as the prosecution’s reliance here implied. In Cosden, the Court found no violation of the defendant’s rights when he did not make an “unequivocal post-arrest assertion of the right to remain silent” after the Miranda warnings were given and instead “volunteered a defense to the police wholly inconsistent with the one interposed at trial.” 18 Wn. App. at 213. The “partial silence” was his failure to claim the defense he raised at trial when he was talking to police at first. 18 Wn. App. at 213. Under the circumstances, the Court found, “his partial silence strongly suggests a fabricated defense and the silence properly impeaches the later defense.” 18 Wn. App. at 213. Those facts are far different than what occurs in a case where the defendant’s “partial silence” is his failure to deny guilt.

2011), compel a different result. In that case, the defendant gave a statement in which he said both that he had never lived in an apartment with the victim's mother and that, if he had lived with her, it was in a different year than the crime was alleged to have occurred. He also denied having committed the rape and suggested that the victim's father was the one who had committed the crime. A police officer described the defendant's statement as "evasive," but an objection was sustained, the jury was instructed to disregard and the comment was never discussed further, for example by the prosecutor in closing. On review, the Court distinguished a case in which the defendant had not spoken at all and the officer described him as "evasive," thus clearly drawing a negative inference from the defendant's silence. In Hager's case, however, the defendant had not exercised his right to remain silent and had that right commented on; rather he had spoken to police and the police characterization as "evasive" was the statement, not his silence. While the Court used some broad language and cited Young without discussing how that case was amended by Charles, the Court's decision was still within the parameters of Charles, because the comment was about inconsistencies in the defendant's statement - proper impeachment - not comments on a defendant's failure to use magic words of denial to police about facts and guilt and his failure to tell people like his friend that he was innocent.

Further, the facts in Hager are so different as to make that case distinguishable. Hager involved an officer's single improper characterization of what the defendant had said and its internal inconsistencies, with corrective instructions given. This case involved

repeated emphasis on a defendant's failure to specifically deny guilt to police and to a friend, and his failure to deny being the person in the cap on the video - and thus the person who committed the crime - with the conclusion being drawn that these "failures" proved Fuller's guilt. This case thus clearly involves not factual inconsistencies but a comment on partial silence, which was not at issue in Hager.

Again, here, because Fuller did not testify, there was nothing for his partial silence to impeach. The Charles exception for impeachment thus did not even apply. Nor were Fuller's "failures" to deny guilt and being in the video somehow "factually inconsistent" with Fuller's defense of denial at trial - unless, of course, they are used as substantive evidence i.e., because he did not make these denials, he must be guilty. And certainly Fuller had the right to put the state to its burden of proof without having his failure to say magic words of denial pretrial be used against him as if it was evidence of his guilt.

The prosecution's efforts here were not to point out factual inconsistencies but to "draw meaning from silence" - a purpose the Charles Court indicated would be constitutionally improper. 447 U.S. at 409. Fuller's "failures" - to deny guilt to Miller, to deny that he was on the video in his cap and outside the restaurant at the crucial time, and to deny guilt to his friend - were all elicited by the prosecutor for their "natural" propensity to incite jurors to believe in Fuller's guilt, by planting the idea that an innocent man would have made such denials.

The trial court was simply wrong in failing to recognize that Fuller retained a right to partial silence. And it was wrong in allowing the state

to use that partial silence as substantive evidence, in violation of Fuller's post-Miranda Fifth Amendment, Article I, § 9 and due process rights.

This Court should so hold.

- iii. The prosecution cannot meet the heavy burden of satisfying the constitutional harmless error standard

Where, as here, the issue is whether comments and evidence objected to below were in violation of a defendant's rights to silence, this Court applies the constitutional harmless error standard. Easter, 130 Wn.2d at 242; State v. Hudson, 150 Wn. App. 646, 656, 208 P.3d 1236 (2009). Under that test, the error is presumed prejudicial and reversal is required unless the state can show that the overwhelming, untainted evidence was such that *any* rational trier of fact would "necessarily" have found the defendant guilty. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), cert. denied sub nom Washington v. Guloy, 475 U.S. 1020 (1986).

Further, the Court must assume that the damaging potential of the evidence was "fully realized." State v. Moses, 129 Wn. App. 718, 732, 119 P.3d 906 (2005), review denied, 157 Wn.2d 1006 (2006) (quotations omitted).

At the outset, it is important to note that the overwhelming untainted evidence test is not the same as the test used when the challenge on appeal is to the sufficiency of the evidence to convict. State v. Romero, 113 Wn. App. 779, 786, 54 P.2d 1255 (2002). For a "sufficiency" challenge, this Court views the evidence in the light most favorable to the state, drawing all reasonable inferences therefrom. State v. Thompson, 69

Wn. App. 436, 848 P.2d 1317 (1993). The question for the reviewing court is not whether any reasonable trier of fact would necessarily have found the defendant guilty absent the error; it is whether any reasonable trier of fact *could have* found the defendant so guilty. See State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The focus is thus on the minimum required to uphold the conviction, i.e., whether any jury could conceivably have found guilt based upon the evidence before it. See id.

In contrast, with the “overwhelming untainted evidence” test, the focus is on whether there is so much evidence of guilt that every jury hearing that evidence would necessarily have found guilt, absent the error. Rather than asking whether the evidence met the minimum required to convict, the issue is whether every jury faced with the untainted evidence would have reached the same conclusion of guilt. See, State v. Evans, 96 Wn.2d 1, 7, 633 P.2d 83 (1981). And evidence sufficient to satisfy the more minimal “sufficiency” challenge is not necessarily sufficient to satisfy the “overwhelming untainted evidence” test. See, Romero, 113 Wn. App. at 786; Evans, 96 Wn.2d at 7.

Thus, in Romero, the same evidence which was sufficient to withstand an insufficiency challenge on review was not enough to satisfy the constitutional harmless error test. 113 Wn. App. at 783-95. The defendant had been arrested and charged with first-degree unlawful possession of a firearm after there were reports of shots fired at a mobile home park in the middle of the night. He was seen coming around the front of that mobile home holding his right hand behind his body and

refused to stop and show his hands but instead ran away. The home he was later found in had shell casings on the ground outside. Descriptions of the shooter matched him and a witness identified him, although she got the color the shirt he was wearing wrong. 113 Wn. App. at 783-95. While the Court found that a reasonable jury could have convicted based upon that evidence, the answer was far different when the question was whether the constitutional error of an officer's comment on the defendant's right to remain silent was harmless. 113 Wn. App. at 794. Because the state's evidence was disputed and the improper comments "could have" had an effect on the jury's verdict, the constitutional harmless error test was not met and reversal was required. 113 Wn. App. at 794; see also, State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997) (despite the strength of the case against the defendant, because there was some evidence in the defendant's favor, constitutional harmless error test could not be met).

Here, the prosecution's evidence was not overwhelming. There were no witnesses placing Fuller at the scene, nor was he found there. His fingerprints were not on the car. His boots had no blood traces at all. RP 657-67, 918. His clothes had no blood on them. RP 749, 894, 916. His blood was not found under Ahmed's fingernails, and the hair in the bag and apartment was never compared to his or tested to prove it was his. RP 883-16. The videos were so grainy and unclear that the state's own expert declared it impossible for even he to make a reliable identification. The cap could have been lost there the day before by Fuller (explaining his hair inside) and been on the ground (explaining the debris the state's technician found in it) but had Ahmed's blood dripped on it as the real perpetrator ran

by. And the indentations found in the dirt could have been left by somebody and were ½ inch smaller than Fuller’s shoes. RP 883, 915-16.

Regarding the robbery theory, even Miller admitted that nothing in the cab in any way indicated that a robbery or attempted robbery had occurred, i.e. money still in Ahmed’s pocket, the money not rifled through, Ahmed’s wallet intact and not appearing to have been gone through. RP 415, 371-72,

Thus, it simply cannot be said that no reasonable jury could have found that the state had failed to prove any robbery or attempted robbery and, by extension, the felony murder charge. And a reasonable juror could also certainly have found that the evidence was simply insufficient to prove, by the demanding standard of “beyond a reasonable doubt,” that Fuller was the person who had committed the crime, had that jury not been tainted by the improper, constitutionally offensive misconduct in this case. The prosecution cannot meet its burden of proving this constitutional error harmless and thus cannot overcome the presumption of prejudice. Reversal is required.

c. Inciting jurors’ passions and prejudices

i. Relevant facts

In closing, the prosecutor started by describing the crime in emotional terms, painting Ahmed as having been “left” by Fuller

to die, to bleed to death like a wounded animal, alone in the dark and cold and afraid. For what? Why did he do this? What did Mohamed [sp] Ahmed do to deserve this?

He came to the United States to seek a better life for himself from a worn [sp] torn Somalia.

5RP 6 (emphasis added). Counsel's objection to the prosecutor's attempt to incite "sympathy" from the jury was overruled, with the judge stating, "[t]he jury has just been instructed that they will not permit sympathy or prejudice to influence their decision." 5RP 6.

The prosecutor then went on to declare that, because Ahmed had come to the country for a better life, "he suffered the defendant's hatred." 5RP 6. The prosecutor then said "[t]his was a personal and very emotional thing for this defendant. He didn't like foreigners. In his mind they weren't there just to come work in America. They were there to take his job." 5RP 8. Counsel's objection, "[t]hat is not the evidence" was overruled, with the court stating the jury had been instructed "that any arguments, statements that are not supported by the evidence are not to be considered." 5RP 9.

At the conclusion of rebuttal closing argument, the prosecutor projected a picture of Ahmed for the jury, declaring that it was up there because people forget sometimes in the course of a trial that a person was killed. 5RP 62. The prosecutor then went on:

There is nothing we can do obviously to bring back Mr. Ahmed. **But you have an opportunity to bring back a verdict that is just; justice for the defendant, justice for Mr. Ahmed, and justice for the community. So I'm going to ask you to return the only verdict that will be just in this case, and that's guilty as charged.**

5RP 62 (emphasis added).

ii. These arguments were misconduct

It is flagrant, prejudicial misconduct for a prosecutor to exhort a jury to find a defendant guilty in order to do sent a message or vindicate

the community. See State v. Bautista-Caldera, 56 Wn. App. 186, 195, 783 P.2d 116 (1989), review denied, 114 Wn.2d 1011 (1990). Such arguments amount to improper appeals to the passions and prejudices of the jury, inviting them to convict based upon emotion rather than evidence. See State v. Coleman, 74 Wn. App. 835, 838, 876 P.2d 458 (1994), review denied, 125 Wn.2d 1017 (1995).

Here, the prosecutor's arguments clearly invited the jury to convict Fuller based not upon the evidence but on emotions; sympathy for the difficulties Ahmed had likely suffered and hard work he likely had to perform as an immigrant, disgust towards the defendant for the racism the prosecutor kept trying to imply Fuller had and a desire to "do justice," which the prosecutor defined as solely resulting from a conviction.

Reversal is based upon this misconduct, as well. Counsel repeatedly objected to the prosecutor's attempts to coopt the jury's ability to fairly and impartially decide the case based on the evidence, to no avail. And there is more than a substantial likelihood that this misconduct affected the verdict. As noted *infra*, the evidence in this case was far from overwhelming. In this context, with the prosecutor's case not particularly strong, the corrosive effect of inciting jurors' prejudices cannot be overstated.

Finally, reversal should be granted based upon the cumulative effect of the misconduct even if each individual act of misconduct did not already compel reversal. With the misconduct, the prosecutor 1) incited the jurors to decide the case based upon strong emotion rather than evidence, 2) repeatedly drew a negative inference from Fuller's

constitutionally protected right to partial silence and 3) misstated and minimized his constitutionally mandated burden of proof. All of this misconduct went directly to the jurors' ability to fairly and impartially decide Fuller's guilt or innocence based solely upon the evidence. As a result, Fuller's right to a fair trial before an impartial jury was violated and reversal is required.

3. FULLER'S RIGHTS TO A FAIR TRIAL WERE FURTHER VIOLATED BY IMPROPER ADMISSION OF IRRELEVANT, HIGHLY PREJUDICIAL EVIDENCE

While a "perfect trial" is not part of the state and federal due process guarantees, at a minimum any trial in a criminal case must comport with basic norms of fairness. See State v. Miles, 73 Wn. 2d 67, 70, 436 P.2d 198 (1968). Here, the trial fell far short of these standards, because of the improper admission of highly prejudicial ER 404(b) evidence.

a. Relevant facts

Before trial, counsel moved to exclude testimony from Michael Stafford that Fuller had said he had been recruited to help commit a robbery at someone else's behest. RP 119. Counsel explained that the alleged robbery was different than the scenario involved here so that it was not admissible as a "common scheme or plan." RP 120. He argued that it was "beyond prejudicial" to admit the evidence. RP 120. Put simply, he said, the fact that Fuller had thought of committing a different robbery did not mean he had committed this one but that was what the evidence would cause the jury to think. RP 120.

In response, the prosecutor admitted the facts of the two robberies

were different and that Fuller had told Stafford shortly after talking about it that the plans had fallen through and it was not going to happen. RP 120-22. The prosecutor nevertheless argued that the evidence was admissible to show that Fuller had considered robbing someone for money. RP 120-22. The prosecutor also said it was “not even a[n ER] 404(b) issue” because the witness was not going to say the robbery had happened but just that the defendant was willing to commit a robbery to avoid eviction. RP 122. He offered to sanitize it to exclude the details and just admit that Fuller was considering doing a robbery to pay for his apartment, but counsel pointed out that was “even worse” than admitting the details, which showed how different the facts were. RP 122-23. Counsel again objected that the evidence was irrelevant and that it was inadmissible as a “bad act.” RP 123.

The court said, “I think that is admissible” and that a jury might find it was relevant because Fuller was telling his “thought” to a third person and now that he has been charged with this crime, the jury was “entitled to hear it.” RP 123-25.

In opening argument, the prosecutor told the jury that the state had a witness “who said the defendant told them he was planning a robbery because he needed money” and that the robbery and murder of Ahmed was “not long after that.” 4RP 15. In the “powerpoint” presentation the prosecutor projected on the wall during opening, the prosecutor included a slide which said, in relevant part, “[w]itness says defendant told him he was planning a robbery because he needed \$. That robbery never happened, so never got the money. About a week later, Mr. Ahmed

murdered.” Ex. 38 at 24. A moment later, in “summary,” the prosecutor projected a slide which included “[d]efendant planning a robbery” as evidence of guilt for the current crimes. Ex. 38 at 25.

At trial, Stafford was allowed to testify that Fuller had told him, a few weeks before Fuller was evicted, that someone had asked Fuller to commit a robbery for money. RP 795-800. Stafford also testified to details which were far different than the details of this crime (i.e. that Fuller was being hired to commit the crime, that the potential victim knew him, that he was going to wear a mask). RP 795-800.

In closing argument, the prosecutor relied on Stafford’s testimony as a “piece of the larger puzzle” and as showing that “robbery is clearly the motive.” 5RP 10. The prosecutor also cited Fuller’s statement to Stafford as providing the proof of that motive. 5RP 26. In the “powerpoint” presentation the prosecutor projected at the same time, one of the first slides, titled “Motive,” listed “[a]dmitted to planning a robbery for money.” Ex. 260 at 3. Another slide summarized the evidence the prosecutor said proved the robbery or attempted robbery element of felony murder, which included “[p]lans to commit a robbery.” Ex. 260 at 35. The “timeline of events” included, in large type the same size only as the word “Murder,” a box with an arrow to just before “Murder” which indicated, “[a]nnounces plans to commit robbery.” Ex. 260 at 36.

A little later, the prosecutor relied on the testimony again, i.e., that Fuller was “planning a robbery,” in arguing he was guilty of this one. 5RP 52. Finally, the prosecutor relied on Stafford’s testimony as showing that Fuller was “fantasizing about a robbery” and “the next thing you know you

are doing an actual robbery.” 5RP 53.

In rebuttal closing argument, the prosecutor displayed a slide which showed Fuller’s picture and then had a list of “information” about him, including that he was “[p]lanning a robbery.” Ex 261 at 4. The prosecutor criticized the defense argument that there was no evidence of robbery or attempted robbery, projecting a slide with what the prosecutor said was the evidence to the contrary, which included, “[d]efendant **planning a robbery. “Fantasy” can become reality.**” Ex. 261 at 6 (emphasis added).

b. The trial court’s erroneous admission of the evidence was not harmless

Under ER 404(b), evidence of “other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” It may be admissible for other purposes, but, because of its tendency to prejudice the defense, is presumptively inadmissible and the state must prove it admissible for a permissible purpose before it can be used. See State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). “Propensity” or “character” evidence is not deemed inadmissible because it is irrelevant; instead, as this Court has noted, it is excluded because it is so likely to “overpersuade” jurors to decide a case based upon “propensity” or “character” and deny a defendant his constitutionally guaranteed right to a fair trial. State v. Herzog, 73 Wn. App. 34, 49, 867 P.2d 648 (1994).

If the question of whether ER 404(b) evidence is admissible is “close,” a trial court must err on the side of exclusion. See State v.

Wilson, 144 Wn. App. 166, 177, 181 P.3d 887 (2008). Further, before the court admits such evidence, it must (1) find by a preponderance of the evidence that the acts occurred, 2) identify the purpose for admitting the evidence, 3) determine the relevance of the evidence to prove an element of the crime and 4) weigh the probative value of the evidence against its prejudicial effect. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

Here, the trial court did not conduct any such balancing on the record. RP 123-25. Instead, it just declared that a jury *might* find the evidence relevant because Fuller had talked about doing a robbery and was now charged with a crime involving a robbery. RP 123-25. But that was exactly the point. The only purpose for admitting the evidence was to show that Fuller was likely the perpetrator of this crime because he mentioned *thinking* about committing another robbery - one which was markedly different. Indeed, the prosecution did not even provide an exception to ER 404(b) which it thought might apply, instead saying that the rule might not apply because the other robbery did not happen. RP 122. But ER 404(b) is not limited to prior *crimes* - it governs all acts introduced at trial which could be used as evidence of "character." See State v. Halstein, 122 Wn.2d 109, 126, 857 P.2d 270 (1993).

Further, the admission of the evidence was not "harmless." The improper evidence was exactly the kind of evidence which cannot be erased from jurors' minds, because it was "propensity" evidence under ER 404(b), highly prejudicial and likely to cause the jury to "prejudge" the defendant, thus denying him a fair opportunity to defend against the state's

case. See Michelson v. United States, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L. Ed 168 (1948). Such evidence is akin to “superglue” in jurors’ minds, so likely is it to stick in their memory and cause them to convict the defendant based upon the belief he is a bad person who is “by propensity” a probable perpetrator of the crime. Id.; see also, State v. Kelly, 102 Wn.2d 188, 199-200, 685 P.2d 564 (1984). This is especially so when the admitted evidence ties the defendant to the same crime as the one for which he is on trial - here, robbery. That is why there are such stringent requirements before such evidence is admissible even when it is actually relevant. See State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002); see, State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995) (must not just be “relevant” but in fact have “substantial probative value” to prove a necessary part of the state’s case).

Here, the offending evidence was not relevant or necessary to prove anything but propensity. But in that capacity, it was a huge part of the prosecution’s case. Over and over, the prosecutor relied on the conversation Stafford said he had with Fuller as evidence that Fuller had committed the current crimes. 5RP 26, 35, 36, 52, 53. Because he had previously indicated a willingness to commit a robbery, the prosecutor argued, he was more likely to have committed this one.

The error in admitting this evidence over Fuller’s objection was not harmless. An error in admitting ER 404(b) evidence compels reversal if, within reasonable probabilities, it had an effect on the outcome of the case. See State v. Jackson, 102 Wn.2d 689, 689 P.2d 76 (1984). There is more than such a probability here. This evidence was one of the most

significant parts of the state's case against Fuller. Without this evidence, the prosecution's case would have been even weaker than it already was. Admission of this evidence compels reversal.

4. CUMULATIVE ERROR COMPELS REVERSAL

Even if each of the individual errors in this case did not compel reversal, their cumulative effect would. See State v. Venegas, 155 Wn. App. 507, 520, 228 P.2d 813, review denied, 170 Wn.2d 1003 (2010). Thus, in Venegas, where the trial court improperly excluded evidence relevant to the defense, the prosecutor twice made arguments impinging on Venegas' presumption of innocence and the trial court admitted improper evidence without properly balancing its prejudicial effect, this Court reversed based on cumulative error. Id.

Here, although each of the errors Fuller has identified standing alone supports reversal, there can be no question that the incredible weight of the cumulative effect of all of the errors, taken together, mandate such a result. The prosecutor's misconduct minimized his burden of proof far below that constitutionally required. Fuller's rights to partial silence were repeatedly violated and the improper inference repeatedly drawn that the silence was evidence of guilt. The jury's ability to fairly decide the case was further savaged by the prosecutor's exhortations to render a verdict based upon feelings of vengeance and a desire to vindicate the community, rather than the evidence. At the same time, improper "character" evidence with a strong propensity to deprive a defendant of a fair trial was admitted.

There is no way that a fair trial could have been held, given these completely pervasive errors. Even if the Court does not reverse based

upon an individual error, reversal is required because the cumulative effect of those errors deprived Fuller of a fair trial.

5. IN THE ALTERNATIVE, THE SPECIAL VERDICT
MUST BE REVERSED

Even if Mr. Fuller was not entitled to reversal of his convictions, he would still be entitled to have the special verdict and subsequent “flat time” enhancement of the sentence dismissed. For special verdicts on such things as enhancements, “the jury must be unanimous to find the State has proven the existence of the aggravating factor beyond a reasonable doubt” but is not required to be unanimous in order to answer the same special verdict “no.” Goldberg, 149 Wn.2d at 892-93 (emphasis in original). The Court reaffirmed Goldberg in Bashaw, finding it an “incorrect statement of the law” to instruct the jury that they had to be unanimous in order to find “that the State has failed to prove the presence of a special finding increasing the defendant’s maximum allowable sentence.” 169 Wn.2d at 147.

Jury instruction 25 runs afoul of these holdings. In that instruction, jurors were told, *inter alia*,

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no.”

CP 133-34. Under Goldberg and Bashaw, this instruction was clearly improper.

Further, although Goldberg and Bashaw did not address this issue,

the improper instruction also deprived Fuller of his constitutional right to the “benefit of the doubt” under the presumption of innocence. That presumption is the “bedrock upon which the criminal justice system stands.” Bennett, 161 Wn.2d at 315-16. A defendant is constitutionally entitled to the benefit of the doubt when it comes to determining whether the state has proven its case. State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008), cert. denied, ___ U.S. ___, 129 S. Ct. 2007, 173 L. Ed.2d 1102 (2009).

In the context of a special verdict, indicating to jurors that they have to be unanimous not only to answer “yes” but also to answer “no” deprives the defendant of the benefit of the doubts some jurors may have had. As the Bashaw Court noted, where, as here, the jury is under the mistaken belief that unanimity is required, “jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result.” 169 Wn.2d at 147.

Dismissal of the enhancement is required. Bashaw, supra, controls. In Bashaw, the Supreme Court concluded that the error could not be “harmless” because of the corrosive effect it had on the deliberative process, as evidenced by the flipping of verdicts in Goldberg when the instructions were changed. Bashaw, 169 Wn.2d at 147. Because the error was “the procedure by which unanimity would be inappropriately achieved,” the Court could not “say with any confidence what might have occurred had the jury been properly instructed.” Bashaw, 169 Wn.2d at 147-48.

Further, this was so regardless of the strength of the evidence

supporting the special verdict. 169 Wn.2d at 138-42, 147-48. Indeed, the Bashaw Court did not examine the issue in the light of the strength or weaknesses of the evidence, instead focusing on how the “flawed deliberative process” was such that the Court could not determine what result the jury would have reached, had it been properly instructed. Id.

As a result, under Bashaw, reversal and dismissal of the sentencing enhancements did not depend upon whether there was evidence which the jury *could have* relied on in saying “yes” to the special verdicts, nor did the Court substitute its own belief about whether the evidence would have supported verdicts of “yes.” Id. Instead, the near-unanimous Court refused to engage in such speculation in light of the jury instruction error, finding that the error compelled reversal. Id.

Here, just as in Bashaw, there is no way to be sure that the jury instruction error was harmless beyond a reasonable doubt. As in Bashaw, the misleading, confusing and improper jury instruction tainted the entire process. And as in Bashaw, the question is not whether there was evidence from which the jurors could have entered “yes” to the special verdict, or whether the trial court - or indeed, this Court - believes that the state’s evidence is strong. Because the jury instruction was improper under Goldberg and Bashaw and deprived Fuller of his right to the presumption of innocence, reversal is required.

Finally, counsel was ineffective in failing to object to the erroneous instruction. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129

Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. Bowerman, 115 Wn.2d at 808. Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

Here, those standards have been met. Goldberg was decided in 2003. Yet counsel failed to object to an instruction contrary to Goldberg at trial in 2010. Further, that failure led to an improper instruction being given to the jurors and counsel's client, Fuller, being deprived of the benefit of the doubt and the presumption of innocence for the special verdict. There was no legitimate tactical reason for that failure and any reasonably competent attorney would not have made that mistake. Counsel was prejudicially ineffective.

In response, the prosecution may attempt to convince this Court that the issue of the improper special verdict may not be raised for the first time on appeal under, State v. Nunez, __ Wn. App. __, __ P.3d __ (2011 WL 536431) (February 15, 2011) (petition for review pending). Any such attempt should be rebuffed. In Nunez, the instructions told the jury that they all had to agree in order to answer the special verdict, and the appellate court held that the defendant, who had not objected below, could

not raise the issue for the first time on appeal, as he had not made any legitimate constitutional argument. ___ Wn. App. at ___ (slip op. at 4-5). Here, in contrast, Mr. Fuller is raising the constitutional issues that the instruction violated both his rights to the presumption of innocence and his right to the benefit of any reasonable doubt. Further, in Nunez, unlike here, the appellants did not raise an argument that counsel was ineffective in failing to object to the improper instruction. Nunez does not control.

In the unlikely event that any conviction remains after the Court addresses the other issues in this appeal, the special verdict should nevertheless be reversed and dismissed.

E. CONCLUSION

Fuller's rights to be free from double jeopardy were violated when the trial court refused to dismiss one of the two convictions for the same murder. Further, the remaining convictions should be reversed, based upon the constitutionally offensive prosecutorial misconduct, the prosecutor's misstatements of his burden of proof and the improper admission of the highly prejudicial ER 404(b) evidence. In the alternative, the special verdict must be stricken.

DATED this 14th day of March, 2011.

Respectfully submitted,



KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

CERTIFICATE OF SERVICE BY 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 Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

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

to Mr. Jaycee Fuller, DOC 341205, WSP, 1313 N. 13th Ave., Walla
Walla, WA. 99362.

DATED this 14th day of March, 2011.



KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

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