

11 JUN 17 11:13:00
STATE OF WASHINGTON
BY _____

NO. 40820-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

LAMAR BARNES

Appellant.

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

The Honorable Linda CJ Lee, Judge

BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

11/17/19 11:17

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
Issues Presented on Appeal	2
B. <u>STATEMENT OF THE CASE</u>	3
1. PROCEDURAL FACTS	3
2. SUBSTANTIVE FACTS	3
a. <u>Lamar Barnes</u>	5
b. <u>Rebuttal Closing Argument</u>	10
C. <u>ARGUMENT</u>	10
1. THE STATE’S FAILURE TO PRESENT SUFFICIENT EVIDENCE OF EACH ALTERNATE MEANS OF COMMITTING ASSAULT IN THE THIRD DEGREE IN THE COUNT AGAINST ROBERT RANSMOM AND THE FAILURE TO REQUIRE UNANIMITY AS TO EACH MEANS DENIED MR. BARNES HIS RIGHT TO A UNANIMOUS JURY VERDICT.....	10
2. THE PROSECUTOR COMMITTED REVERSIBLE ERROR DURING OPENING ARGUMENT BY PRESENTING INFLAMMATORY AND INADMISSIBLE	

COMMENTS IMPLYING THAT MR.
BARNES WAS AN ATTEMPTED KILLER.
.....17

3. MR. BARNES WAS DENIED HIS RIGHT
TO A FAIR TRIAL WHERE THE
PROSECUTOR IN REBUTTAL CLOSING
ARGUMENT OFFERED HER PERSONAL
OPINION THAT MR. BARNES WAS
GUILTY AND MISSTATED THE LAW..22

a. Prosecutor May Not State Personal
Beliefs in Closing Argument.....24

b. Prosecutor May Not Misstate Law..26

D. CONCLUSION.....28

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Application of Eng,
113 Wn.2d 178, 776 P.2d 1336, 1989 WL 86124 (1989).....10

State v. Brown,
132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied,
523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998).....22, 25

State v. Case,
49 Wn.2d 66, 298 P.2d 500 (1956).....24-26

State v. Crane,
116 Wn.2d 315, 804 P.2d 10 (1991).....12

State v. Davenport,
100 Wn.2d 757, 675 P.2d 1213 (1984).....24, 26-28

State v. Delmarter,
94 Wn.2d 634, 618 P.2d 99 (1980).....12

State v. Estill,
80 Wn.2d 196, 492 P.2d 1037 (1972).....23

Seattle v. Filson,
98 Wn.2d 66, 653 P.2d 608 (1982),
overruled on other grounds by, In the Matter of Eng,
113 Wn.2d 178, 776 P.2d 1336 (1989).....11

State v. Fry,
153 Wn.App. 235, 220 P.3d 1245,
review denied 168 Wn.2d 1025, 228 P.3d 18 (2009).....13

State v. Goodman,
150 Wn.2d 774, 83 P.3d 410 (2004).....12

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES. Continued</u>	
<u>State v. Gotcher</u> , 52 Wn.App. 350, 759 P.2d 1216 (1988).....	24
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	11, 17
<u>State v. Gregory</u> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	23
<u>State v. Grisby</u> , 97 Wn.2d 493, 647 P.2d 6 (1982) <u>cert. denied</u> , 459 U.S. 1211, 103 S.Ct. 1205, 75 L.Ed.2d 446 (1983).....	18, 22
<u>State v. Kitchen</u> , 110 Wn.2d 403, 756 P.2d 105 (1988).....	11, 12, 17
<u>State v. Kroll</u> , 87 Wn.2d 829, 558 P.2d 173 (1976).....	18
<u>State v. Lobe</u> , 140 Wn. App. 897, 167 P.3d 627 (2007).....	11, 13
<u>State v. Lyskoski</u> , 47 Wn.2d 102, 287 P.2d 114 (1955).....	18
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	22, 24
<u>State v. Robertson</u> , 88 Wn.App. 836, 947 P.2d 765, <u>review denied</u> 135 Wn.2d 1004, 959 P.2d 127 (1997).....	14

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES, Continued</u>	
<u>State v. Sang</u> , 184 Wash. 444, 51 P.2d 414 (1935).....	18, 19
<u>State v. Saunders</u> , 132 Wn.App. 592, 132 P.3d 743, <u>review denied</u> 159 Wn.2d 1017, 157 P.3d 403 (2006).....	14
<u>State v. Smith</u> , 159 Wn.2d 778, 154 P.3d 873 (2007).....	13
<u>OTHER STATE’S CASES</u>	
<u>State v. Weisberg</u> , 74 Ohio App. 91, 29 Ohio Ops. 274, 40 Ohio L. Abs. 473, 55 N.E.2d 870 (1943).....	20
<u>STATUTES, RULES AND OTHERS</u>	
Wash. Const. art. 1, § 21.....	11
RCW 9A.36.031.....	3, 4, 12, 13
RCW 9.41.270.....	4
Merriam-Webster, m-w.com.....	16
American Bar Ass'n, Standards for Criminal Justice, Std. 3–5.5 (2d ed. 1980).....	18

A. ASSIGNMENTS OF ERROR

1. Appellant was denied his right to a unanimous jury when the jury was instructed it need not be unanimous as to the means of assault in the third degree where there was insufficient evidence to support each alternate means.
2. Appellant was denied his right to a fair trial where the prosecutor made comments in opening argument about killing where there were no facts to support the comments and the charges of assault in the second degree did not contemplate the risk of death.
3. The trial court abused its discretion by failing to grant a mistrial after the prosecutor's improper and overly prejudicial comment that it was fortunate that no one was killed.
4. Appellant denied his right to a fair trial where in closing argument the prosecutor vouched for the credibility of the state witnesses.
5. Appellant was denied due process by the prosecutor offering her personal opinions and misstating the law during closing

argument.

Issues Presented on Appeal

1. Was Appellant denied his right to a unanimous jury where the jury was instructed it need not be unanimous as to the means of assault in the third degree where there was insufficient evidence to support each alternate means?
2. Was appellant denied his right to a fair trial where the prosecutor made comments in opening argument about killing where there were no facts to support the comments and the charges of assault in the second degree did not contemplate the risk of death?
3. Did the trial court abuse its discretion by failing to grant a mistrial after the prosecutor's improper and overly prejudicial comment that it was fortunate that no one was killed?
4. Was appellant denied his right to a fair trial where in closing argument the prosecutor vouched for the credibility of the state witnesses?
5. Was Appellant denied due process by the prosecutor offering

her personal opinions and misstating the law during closing argument?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Mr. Barnes was charged by amended information with three counts of assault in the second degree against three separate individuals.¹ CP 119-121. Following a jury trial the honorable Linda Lee presiding, Mr. Barnes was convicted of two counts of assault in the third degree in counts I and II, and one count of unlawful display of a weapon in count III.² CP 181-192. The trial court drafted the jury instructions and entered judgment and sentences within the standard range. CP 138-180, 241-256. This timely appeal follows. CP 230

2. SUBSTANTIVE FACTS

The instance case is about a bar fight at Galloping Gertie's, a bar with a military clientele. The fight occurred primarily between Lamar Barnes, Robert Ransom, Charlie Parraz, Helidoro Marshall, Ted Vigil, Steve Hebert and someone known as "little Bobby". RP 431-434, 454, 457, 593, 607, 613. All of these people were regulars and some worked at the bar. RP 377-378, 421, 465. _____

¹ RCW 9A.36.021(1)(a)

The witness testimony differs somewhat. Charlie Parraz testified that sometime after 9:00pm a woman named Angel called Mr. Barnes the “N” word or something racially denigrating outside in the parking lot as Mr. Barnes was walking into the bar; and that Charles Ford had a confrontation with Mr. Barnes over Mr. Barnes verbal response to Angel’s racial slurs. RP 239, 353, 382,422, 454, 575, 577. Ted Vigil, the person who operates the Karaoke machine at the bar testified that he too heard racial slurs aimed at Mr. Barnes. RP 353.

Michelle Barrett, the bartender saw little Bobby attack Mr. Barnes over the argument that Mr. Barnes had with Angel. RP 403. Ms. Barrett testified that Charlie Parraz the bar-back used “extreme measures” to physically remove Mr. Barnes from the bar and told both Mr. Barnes and little Bobby to leave. RP 435-436.

Mr. Vigil testified that Mr. Barnes and Mr. Parraz both looked upset. RP 335. Mr. Barnes was agitated and upset when Mr. Parraz did not seem to want to hear his side of the story about what happened with Angel. RP 432.-433. Nonetheless, Mr. Barnes left the bar near 9:30pm. RP ____. RP 435-436.

Four or five hours later that same evening near 1:30am, Mr. Barnes returned to Galloping Gerties. RP 255, 385. Robert Ransom “Big Bob” is a

regular at Gertie's. RP 465. Mr. Ransom was at Gertie's on July 11, 2008. RP 465, 466. Mr. Ransom did not interact with Mr. Barnes earlier in the evening but after drinking many beers, near closing time, Mr. Ransom testified that he went outside and was struck in the nose by Mr. Barnes who lunged at him. RP 474-47, 480. Mr. Ransom got a bloody nose. RP 484-484. Mr. Ransom described his injuries from being punched in the mouth as "[m]y nose got bloody....My lips wasn't too bad". RP 476. "I was swollen for about three days. Then it went away". RP 484. When the prosecutor asked Mr. Ransom if he was hurt or bothered by the punches, he responded, "Well, I was just wondering what was going on. That's what was bothering me". RP 477. There was no evidence of pain or suffering and no evidence of physical injury. Mr. Ransom had "quite a few beers" the night of the fight. RP 480.

a. Lamar Barnes

Mr. Barnes has lived at the Veteran of Foreign Wars location in Tillicum since 2003. RP 570. Mr. Barnes was the junior vice commander and head of the club ward. RP 571. On July 11, 2008 Mr. Barnes testimony follows. Mr. Barnes went to Gerties and was talking to a man outside named Charles Ford. RP 574. While talking to Mr. Ford, a woman named Angel screamed a racial epithet at Mr. Barnes. The woman was drunk and

continued to call Mr. Barnes names. RP 575-576. Mr. Parraz went outside and joined the group. Mr. Ford was angry at Mr. Barnes and did not want to talk so Mr. Barnes went inside. At the threshold, Mr. Parraz pushed into Mr. Barnes who stumbled in front of the Karaoke area. Id. Someone jumped Mr. Barnes and Mr. Parraz just watched. RP 578. Mr. Barnes tried to order a drink but was refused by the bartender Ms. Stokes. RP 580-581.

Mr. Barnes left the bar with friends being deployed. Mr. Barnes returned to the bar later and saw Mr. saw Marshall outside. RP 583-584. Mr. Barnes spoke with Mr. Marshall and then went inside to speak to Mr. Parraz. Mr. Barnes fiancé Becky stayed outside. RP 585. Both Mr. Parraz and Mr. Barnes went outside to talk where they could hear near the storage shed. No one else was around. RP 586-587. Mr. Barnes told Mr. Parraz that he was going to talk to the owner about being treated badly. RP 588. Mr. Parraz who had a bar rag with him, took the towel off shoulder and wrapped his hand around towel on right hand as the discussion became heated. Id. Mr. Parraz brought his hand up as if to fight and Mr. Barnes blocked and hit Mr. Parraz in the mouth. RP 589-590.

Mr. Parraz retreated inside and Mr. Ransom put Mr. Barnes in a choke hold. Mr. Barnes could see the bartender put up her hand to tell the guy to stop. RP 590-591. Mr. Vigil and Mr. Marshall were outside near the fight. RP

591 -592. Mr. Barnes hit Mr. Ransom- and Mr. Parraz went inside. Mr. Marshall, in an aggressive manner asked Mr. Barnes what he was going to do now. Id. Mr. Marshall got in Mr. Barnes face while Mr. Ransom, a big guy and a big time wrestler grabbed Mr. Barnes. RP 593, 606, 609.

After Mr. Ransom went outside, Mr. Marshall, Mr. Vigil, Mr. Vigil's wife and four others stood by while Mr. Ransom put up his fists and got into Mr. Barnes' face. RP 607. Mr. Ransom tried to get Mr. Barnes in a head lock, but Mr. Barnes hit Mr. Ransom to repel the attack. RP 608.

As Mr. Ransom was attacking Mr. Barnes, Mr. Vigil got in between Mr. Barnes and Mr. Ransom and grabbed Mr. Barnes. RP 609. Mr. Hebert came up behind Mr. Barnes and threatened him with a Taser gun. Mr. Barnes heard the popping of Taser and turned around and felt threatened .RP 611, 637.

Mr. Barnes backed up as Mr. Hebert advanced on him, and as Mr. Ransom too was coming towards Mr. Barnes. Mr. Barnes took out a knife and told these men "If you touch me with that thing, I'm going to use this". RP 612. 613 Mr. Ransom and Mr. Vigil charged and hit Mr. Barnes. Mr. Barnes pointed his knife away from these men because he did not want to stab them as he-flew up against cars. RP 613.

Mr. Barnes hurt his hand and wrist as Mr. Ransom grabbed him

around the neck. Someone else grabbed Mr. Barnes at the shoulder, while another person grabbed Mr. Barnes' legs RP 614 . Mr. Barnes asked if they were going to stop and everyone let go of Mr. Barnes and Mr. Barnes walked back towards his car where he told his wife that his hand was busted- and that he could see out of his eye. RP 615

Mr. Barnes walked to front of bar while his wife drove around. back to middle of parking lot. The police approached Mr. Barnes. RP 616. Mr. Barnes went to hospital. His hand was put in a sling and his face was scratched; t felt violated. RP 617.

Mr. Parraz acted as security sometimes and there was always trouble when he did act as security. RP 620. Mr. Parraz aggravated people, and got them mad and into fights. Mr. Parraz had been disrespectful to Mr. Barnes and his wife many times. Mr. Barnes believed that Mr. Parraz going to harm him. RP 621, 637.

Contrary to the testimony of other witnesses, Mr. Barnes testified that the bartender Ms. Barrett never told Mr. Barnes that he was him done for night, rather she just said she not going to serve Mr. Barnes. Mr. Barres informed Ms. Barrett that he was not coming back to bar but was going to talk to Rod the owner. RP 631. Mr. Barnes never said that he wanted to apologize to Mr. Parraz, rather Mr. Barnes looked into the bar to see if Mr.

Ford was inside so he could take Mr. Ford to breakfast as was there norm. RP 632-633, 636.

Mr. Barnes did not see Mr. Ford but he saw Mr. Parraz who informed Mr. Barnes that Mr. Ford left. At this point Mr. Barnes asked Mr. Parraz to step outside to talk about what happened, Mr. Parraz tried to punch Mr. Barnes and Mr. Barnes stopped him with a punch. RP 636. Mr. Barnes felt threatened by Ransom, Parraz, Vigil and Hebert and tried to repel them with punches feeling he had no reasonable alternative to hitting them. RP 637. Mr. Barnes pulled out his knife in self-defense but did not use deadly force with knife. RP 638, 641.

b. Rebuttal Closing Argument

Over sustained objection that the prosecutor was vouching for credibility of its witnesses, the prosecutor asserted:

So there's no doubt that there are inconsistencies when you put X number of witnesses on an incident almost two years old. State submits that is actually an indicia of reliability

RP 773. Again, but without objection the prosecutor made the following argument:

the defendant is entitled to give his version of events. Absolutely constitutionally, no argument. But no witness including the defendant is entitled to be absolutely believed,

when it flies in the face of common sense and other facts.”

RP 774.

C. ARGUMENT

1. THE STATE’S FAILURE TO PRESENT SUFFICIENT EVIDENCE OF EACH ALTERNATE MEANS OF COMMITTING ASSAULT IN THE THIRD DEGREE IN COUNT AGAINST ROBERT RANSMOM AND THE FAILURE TO REQUIRE UNANIMITY AS TO EACH MEANS DENIED MR. BARNES HIS RIGHT TO A UNANIMOUS JURY VERDICT.

In Mr. Barnes case the trial court instructed the jury on two alternate means of committing assault in the third degree against Robert Ransom:

(2)(a) That the bodily harm was accompanied by substantial pain that extended for a period of time sufficient to cause considerable suffering; or

(b) That the physical injury was caused by a weapon or other instrument or thing likely to produce bodily harm.

....

To return a verdict of guilty, the jury need not be unanimous as to which alternatives (2)(a) or (2)(b) has been proved beyond a reasonable doubt, as long as each juror finds that either (2)(a) or (2)(b) has been proved beyond a reasonable doubt.

....

CP 138-180 (Jury instruction 27).

Criminal defendants in Washington have a right to a unanimous jury

verdict. Wash. Const. art. 1, § 21. This right includes the right to an expressly unanimous verdict. Wash. Const. art. 1, § 21 states: “The right of trial by jury shall remain inviolate”. Seattle v. Filson, 98 Wn.2d 66, 70, 653 P.2d 608 (1982), overruled on other grounds by In the Matter of Eng, 113 Wn.2d 178, 776 P.2d 1336 (1989). In certain situations, the right to a unanimous jury trial also includes the right to express jury unanimity on the means by which the defendant is found to have committed the crime. State v. Green, 94 Wn.2d 216, 230-35, 616 P.2d 628 (1980).

In Washington, two separate lines of analysis apply to the jury unanimity requirement. Under one analysis, unanimity is presumed so long as the verdict was based on only one of the alternative means and substantial evidence supported that means. State v. Lobe, 140 Wn. App. 897, 167 P.3d 627 (2007).

Under the second analysis, unanimity is required as to guilt, but not as to the means by which the crime was committed, so long as substantial evidence supports each alternative means charged. State v. Kitchen, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988). The Court in Kitchen explained unanimity is not required as to means only if a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt. Kitchen, 110 Wn.2d at 410.

Thus the current standard for unanimity provides that “[u]nanimity is not required, ... as to the means by which the crime was committed so long as substantial evidence supports each alternative means.” Kitchen, 110 Wn.2d at 410, 756 P.2d 105. A court's failure to give a unanimity instruction, where required, is an error of constitutional magnitude justifying review for the first time on appeal. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991).

This Court reviews a challenge to the sufficiency of the evidence by considering the evidence in the light most favorable to the State, affording it all reasonable inferences, and asking whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). Direct evidence and circumstantial evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Assault in the third degree RCW 9A.36.031 provides in relevant part as follows:

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

(d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or

(f) With criminal negligence, causes bodily harm

accompanied by substantial pain that extends for a period sufficient to cause considerable suffering

Id. Subsections (d) and (f) constitute alternate means of committing assault in the third degree. State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007); RCW 9A.36.031(a)-(i).

In Lobe, There were three alternative means of committing the crimes of witness tampering, and the jury was instructed on all three, but the state did not present evidence of all three means. The Court in Lobe, reversed the convictions holding that unanimity could not be presumed under both analysis where there was neither “(1) substantial evidence to support each alternative means on which evidence or argument was presented, nor (2) was the evidence and argument only presented on one means.” Lobe, 140 Wn. App. at 905.

Similarly in Mr. Barnes case against Robert Ransom, there was insufficient evidence to support both means of assault presented to the jury. Mr. Barnes was charged with and the jury was instructed on assault in the third degree under the alternate means of: (1)(d) causing pain and suffering and; and (1)(f) negligent injury by a weapon. CP 138-180. A unanimity instruction was necessary because there was insufficient evidence to support the alternative means of committing assault in the third degree against Robert

Ransom by inflicting bodily harm accompanied by substantial pain that extended for a period of time sufficient to cause considerable suffering. CP 138-180.

Robert Ransom testified at trial and described his injuries from being punched in the mouth as “[m]y nose got bloody....My lips wasn’t too bad”. RP 476. “I was swollen for about three days. Then it went away”. RP 484. When the prosecutor asked Mr. Ransom if he was hurt or bothered by the punches, he responded, “Well, I was just wondering what was going on. That’s what was bothering me”. RP 477. Mr. Ransom was provided photographs of his injuries in Exhibits 4 and 5. Mr. Ransom was not bruised but got a small nick on his ear from the knife Mr. Barnes held. RP 483. Mr. Ransom had “quite a few beers” the night of the fight. RP 480. There was no evidence of pain or suffering and no evidence of physical injury. “Physical injury” means “an act that damages or hurts”. Merriam-Webster, m-w.com. The state did not present any evidence that Mr. Ransom was damaged or hurt.

Unlike in Mr. Barnes case, in the following cases, the state presented evidence sufficient to establish the element of substantial bodily harm in the assault in the third degree charge for that alternate means charged. In State v. Fry (2009) 153 Wn.App. 235, 220 P.3d 1245, review denied 168 Wn.2d 1025, 228 P.3d 18 (2009), the Court held that evidence that a wife's swollen

eye and the pain in her face lasted throughout the morning after her husband punched her in the face established that the bodily harm was accompanied by substantial pain that extended for a period of time sufficient to cause considerable suffering, as element of third-degree assault--domestic violence. Id.

In State v. Saunders , (2006) 132 Wn.App. 592, 132 P.3d 743, reconsideration denied, review denied 159 Wn.2d 1017, 157 P.3d 403 (2006), evidence that an assault victim complained of neck pain lasting for more than three hours, and that she had swelling on her cheek and abrasion on her forehead, all of which was consistent with her claim that defendant threw her against a wall and choked her, was sufficient to conclude that victim suffered substantial pain and considerable suffering to support conviction for third degree assault. Id.

In State v. Robertson, (1997) 88 Wn.App. 836, 947 P.2d 765, review denied 135 W..2d 1004, 959 P.2d 127 (1997), sufficient evidence supported a finding that victim suffered substantial pain extending for a period sufficient to cause considerable suffering, where the victim had a headache that lasted for two weeks, and had extensive bruising and black eye. Id.

Mr. Barnes case is factually distinguishable from these cases principally because the complainants in these cases described their pain and

suffering, whereas in this case, whereas in Mr. Barnes case, Mr. Ransom did not experience or describe any pain or suffering or any physical injury from the knife to support the alternate means charged.

In Mr. Barnes case, because there was insufficient evidence of each alternate means, a unanimity instruction was necessary to protect Mr. Barnes right to a unanimous jury verdict. RP 476, 477, 480, 483, 484.

a. Closing Argument

To compound the problem, the prosecutor centered her argument around the assault in the second degree charges, which the jury rejected. The prosecutor argued in closing that the jury "can pick individually which one of the two [means] that you feel the State has proven beyond a reasonable doubt or both"....you do not need to unanimously as a group agree as to which one." RP 734. The prosecutor continued by arguing that Mr. Barnes both recklessly inflicted substantial bodily harm and assaulted Mr. Ransom with a deadly weapon. RP 734. Without re-arguing the facts, the prosecutor stated that if the jury found Mr. Barnes not guilty of assault in the second degree, it must consider assault in the third degree and the deadly weapon enhancement. RP 738.

The prosecutor argued that the state provide all of the elements of the crimes charged in all of their alternate means. RP 740-741. Based on the

evidence presented a rational trier of fact could not conclude that Mr. Barnes caused Mr. Ransom substantial pain and considerable suffering because there was no such evidence. Nor could a jury find that Mr. Barnes physically injured Mr. Barnes with a weapon.

Without substantial evidence of each alternate means, the giving of the to convict instruction expressly informing the jury that it need not be unanimous as to the means of committing assault in the third degree was reversible error of constitutional magnitude. Wash. Const. art 1 sec. 21; Kitchen, 110 Wn.2d at 410; Green, 94 Wn.2d at 230-35. This Court must reverse Mr. Barnes conviction for assault in the third degree against Mr. Ransom.

2. THE PROSECUTOR COMMITTED REVERSIBLE ERROR DURING OPENING ARGUMENT BY PRESENTING INFLAMMATORY AND INADMISSIBLE COMMENTS IMPLYING THAT MR. BARNES WAS AN ATTEMPTED KILLER.

During opening argument the prosecutor argued “fortunately nobody was killed” 1RP 13 (opening argument May 11, 2010); RP 22. The defense objected and the court sustained the objection. *Id.* (counsel did not move for a mistrial during opening argument, but rather waited to make her motion outside the jury’s presence). RP 226-227. The following day, counsel moved

for a mistrial arguing that in the assault second degree case, there was no issue or facts of an attempt to kill, but rather the issue was temporary infliction of substantial bodily harm. RP 227-228. The Court agreed with defense counsel that the argument was inappropriate in opening and had no proper purpose and was designed to inflame the prejudice of the jury. The court however decided that it would not grant a mistrial, even though the argument was not part of any facts the prosecutor could establish at trial and was designed to taint the jury against Mr. Barnes as a potential killer. RP 229.

A prosecutor may in good faith present opening argument limited to a brief statement of the issues of the case, an outline of the anticipated material evidence, and reasonable inferences to be drawn therefrom. State v. Kroll, 87 Wn.2d 829, 834–35, 558 P.2d 173 (1976); 1 American Bar Ass'n, Standards for Criminal Justice, Std. 3–5.5 (2d ed. 1980). Where the prosecutor knows that evidence is inadmissible at trial, and nonetheless discusses such evidence to the jury in opening argument, the prosecutor does not have a good faith belief such testimony will be produced at trial. State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982) cert. denied 459 U.S. 1211, 103 S.Ct. 1205, 75 L.Ed.2d 446 (1983). The trial court has wide discretion in determining the good faith of the prosecutor. State v. Lyskoski, 47 Wn.2d 102, 107, 287 P.2d 114 (1955).

In State v. Sang, 184 Wash. 444, 445-446, 44851 P.2d 414 (1935), the State Supreme Court found reversible error where the prosecutor in opening argument stated that Mr. Sang, like most Chinese have a general reputation for gambling even though such facts were not in evidence. *Id.* The Court explained that the prosecutor's improper attempt to obtain a conviction based on his own influence in opening argument rather than on the facts was reversible error. Sang, 184 Wash. at 445, 447.

It is difficult to perceive any justifiable purpose in saying the state would show that the defendant 'has a general reputation as a gambler,'-a procedure not allowed the state in its case in chief. Surely, the conduct was prejudicial, especially as the impression created by it was allowed to remain in the case, notwithstanding appeal to the trial court

Id.

In the following two cases the appellate courts reversed where the prosecutor generally exaggerated in opening statement the magnitude of the crimes with which the defendant was charged, which were also not supported by admissible evidence.

In State v. Kenney, 128 NJ Super 94, 319 A.2d 232, *affd*, 68 NJ 17, 342 A.2d 189 (1974), the court held that the prosecutor's assertion in his opening statement to the jury that it would "hear in this case a story of

corruption, a story about the only way you could do business in the County of Hudson," was sufficiently prejudicial standing alone to justify a reversal. The court noted that the prosecutor went beyond the evidence and the indictment in suggesting a charge of general corruption, when the defendant was charged only with extortion and misconduct in office. Since these statements suggesting corruption throughout the county where the defendant held office were unsupported by any evidence, the court reasoned that the prosecutor must have known that testimony in support of those statements would not be admissible in the trial of the case. The court added that corruption in Hudson County was not the charge, and the defendant should not have been put in the position to defend it.

The prosecutor's suggestion in his opening statement to the jury that the defendant was engaged in a pattern of overcharging his customers was held reversible error in State v. Weisberg, 74 Ohio App. 91, 29 Ohio Ops. 274, 40 Ohio L. Abs. 473, 55 N.E.2d 870 (1943). The defendant was charged with giving short weight in the sale of meat. The prosecutor told the jury in his opening argument that in such cases, "if a person is going to overcharge, they overcharge them a little bit and put it on each customer." No evidence was ever produced at trial to justify such a statement as applied to the defendant in the general conduct of his business. The inference that the

defendant had indulged continuously in such a practice was completely outside the record, said the court, and it noted that the trial court sustained a number of objections to this line of argument which went unheeded by the trial court's rulings and admonitions. The court reasoned that the prosecutor undoubtedly made the statement for the purpose of producing a feeling in the minds of the jurors against the defendant beyond anything that could possibly result from the evidence.

In Mr. Barnes case the prosecutor acted in bad faith by arguing inadmissible facts not in evidence about killing to exaggerate the crimes charged and to exaggerate Mr. Barnes dangerousness. There is no doubt that the prosecutor knew such a comment was inadmissible and would be highly prejudicial to Mr. Barnes. Short of a mistrial, there was no possible way to cure the negative taint made the comment.

The judge in this case found that he prosecutor could not have acted in good faith when stating that it was lucky no one was killed. RP 229. The trial court agreed with the defense argument that the prosecutor knew that there were no facts to support its statement implying that Mr. Barnes was trying to kill someone, and that such statements were inappropriate and prejudicial and had no proper purpose. RP 229. By the trial judge's own findings, Mr. Barnes established the prosecutor's bad faith. The trial court

erred agreed with the prejudice but denied the motion for a mistrial, an abuse of discretion. For these reasons, this Court should reverse and remand for a new trial. State v. Grisby, 97 Wn.2d at 497.

3. MR. BARNES WAS DENIED HIS RIGHT TO A FAIR TRIAL WHERE THE PROSECUTOR IN REBUTTAL CLOSING ARGUMENT OFFERED HER PERSONAL OPINION THAT MR. BARNES WAS GUILTY AND MISSTATED THE LAW.

Twice, the prosecutor misstated the law and offered her personal opinion as to Mr. Barnes' guilt. First, over sustained objection, the prosecutor argued that state witness inconsistencies were an "indicia of reliability". RP 773. This was an impermissible expression of the prosecutor's opinion in the form of stating some non-existent legal basis. There was no expert witness to discuss indicia of reliability; and there was no legal basis for the argument. Rather the prosecutor simply and impermissibly expressed her personal opinion. RP 773. In closing, prosecutors may argue facts in evidence and draw reasonable inferences there from, but may not state a personal belief about the defendant's guilt or innocence or witness credibility. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

Second, but without objection the prosecutor argued "no witness including the defendant is entitled to be absolutely believed, when it flies in

the face of common sense and other facts.” RP 774. There is no legal basis for this argument. Rather it is simply an impermissible personal opinion of the prosecutor. Id.

The defendant bears the burden of proving a prosecutor's comments were improper and effect. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). A prosecutor's comments are prejudicial when there is a substantial likelihood the comments affected the jury's verdict. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998). The reviewing Court examines the prejudicial impact of improper prosecutorial comments, in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). When defense counsel fails to object to improper comment, to prevail on appeal, the misconduct must be so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by a curative instruction. Id.

The law of the case is set forth in the jury instructions and the prosecutor is bound by that law when addressing the jury on legal points. State v. Estill, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972). When the prosecutor mischaracterizes the law and there is a substantial likelihood that

the misstatement affected the jury verdict, the defendant is denied a fair trial. State v. Gotcher, 52 Wn.App. 350, 355, 759 P.2d 1216 (1988). A prosecutor's misstatement of the law is a serious irregularity which can deny the appellant his right to a fair trial, and require reversal and remand for a new and fair trial free of prosecutorial misconduct. State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

a. Prosecutor May Not State Personal Beliefs in Closing Argument

In State v. Reed, 102 Wn.2d 140, 147-148, 684 P.2d 699 (1984), the State Supreme Court reversed a conviction for premeditated murder where the prosecutor impermissibly offered his opinion that the defendant was guilty in a case that where the evidence suggested that the defendant did not premeditate the killing. The prosecutor argued that the defendant and his attorneys were not believable because they were from out of town. Reed, 102 Wn.2d at 147-148, 684 P.2d 699 (1984). Citing to cases from 1899, the Supreme in a strongly worded opinion informed the prosecutorial community that it is "reprehensible" for a prosecutor to offer his or her personal opinion in closing argument. Reed, 102 Wn.2d at 1456; citing, State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956).

In Case, in closing argument the prosecutor argued that he was certain

that the jury had already decided that the defendant was guilty and that in his opinion the defendant was guilty. State v. Case, 49 Wn.2d at 68. The prosecutor also referred to the defense witnesses as “his entire herd” Case, 49 Wn.2d at 70. The Supreme Court reversed the conviction without an objection during trial holding that the misconduct could not have been cured with an instruction. Case, 49 Wn.2d at 70, 74

In Mr. Barnes’ case the prosecutor’s personal opinions were aimed directly at the heart of the case which required the jury to measure the credibility of the witnesses. The prosecutor told the jury that the state witnesses were telling the truth because of their inconsistencies and that Mr. Barnes was not telling the truth because of the same inconsistencies that made the state’s witnesses credible. The prosecutor told the jury that if they possessed any “common sense”, Mr. Barnes was not entitled to be absolutely believed. RP 774. The defense attorney objected to the misconduct about the “indicia of reliability” but failed to object to the misconduct requiring the jury to consider themselves as having no “common sense” if they believed Mr. Barnes.

This later misconduct, like that in Reed and Case, occurring in rebuttal argument could not have been cured with an instruction. RP 773-774. Herein, the argument about having common sense was the same as the

impermissible argument in Case about the jury having made up their mind, that the defendant was guilty. State v. Case, 49 Wn.2d at 68. Similarly, the misconduct regarding the indicia of reliability was similar to the misconduct in Reed, where the prosecutor told the jury that the defendant was guilty because he and his out of town attorneys were not believable in a case where the evidence was not overwhelming.

In Mr. Barnes case, like in Reed and Case, the prosecutor impermissibly offered her personal opinion that Mr. Barnes was not credible, was guilty, and the state's witnesses were credible. There was no reason for these remarks other than to prejudice the jury against Mr. Barnes. The case revolved around witness credibility and the many inconsistencies should have cast doubt as to the witnesses credibility, not as the prosecutor dictated. Based on the prosecutor's misconduct there is a substantial likelihood that the comments affected the jury's verdict. State v. Brown, 132 Wn.2d at 561. For this reason, this Court should reverse and remand for a new trial.

b. Prosecutor May Not Misstate Law.

A prosecutor may not argue law that is contrary to the law set forth in the jury instructions. State v. Davenport, 100 Wn.2d 757,760, 675 P.2d 1213 (1984). In Davenport, the prosecutor argued accomplice liability when the defendant was not charged as an accomplice. In Mr. Barnes' case, the

prosecutor argued that Mr. Barnes was not entitled to be believed and that the state's witnesses were credible because of their inconsistencies. These remarks were a misstatement of the law and contrary to jury instruction number one which provide in relevant part as follows:

You are the sole judges of the credibility of each witness. You are the sole judges of the value or weight to be given to the testimony of each witness. In considering a witnesses' testimony, you may consider these things: the opportunity of the witness to observe or know the thing he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest the witness have in the outcome of the issues' any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

CP 138-180. The prosecutor's remarks told the jury that she was the sole judge of the witness's credibility and she already decided that the state's witnesses were credible because of their inconsistencies and Mr. Barnes was not credible. These remarks were contrary to the law as set forth in instruction number 1.

The standard of review is whether Mr. Barnes due process right to a fair trial was violated by the misconduct. Davenport, 100 Wn.2d at762. Prosecutorial misconduct deprives a defendant of a fair trial and "only a fair

trial is a constitutional trial.” Id.

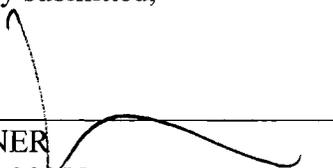
In this case where witness credibility was the sum total of the case, the prosecutor’s comments directing the jury not to evaluate that credibility was so prejudicial that it denied Mr. Barnes his due process right to a fair trial that could not be cured with an instruction. Davenport, supra, Case, supra. Because Mr. Barnes due process rights were violated this Court should reverse and remand for a new trial.

D. CONCLUSION

Mr. Barnes respectfully requests this Court reverse his convictions for denial of his right to a fair trial and remand for a new trial.

DATED this 16th day of June 2011.

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Lewis County Prosecutor’s Office Appeals Department, Lamar

Barnes 8265 Trafton Street, Tacoma, WA 98498 a true copy of the document to which this certificate is affixed, June 16, 2011. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

SECRETARY OF STATE
DIVISION II
11 JUN 17 AM 11:00
STATE OF WASHINGTON
BY  DEPUTY