

No. 44192-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Billie Jo Cross,

Appellant.

Kitsap County Superior Court Cause No. 12-1-00523-9

The Honorable Judge M. Karlynn Haberly

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Ms. Cross's conviction for third-degree assault infringed her Fourteenth Amendment right to due process because the court's instructions relieved the state of its obligation to prove essential elements of the charged crime.
2. The court's instructions failed to make the relevant legal standard manifestly clear to the average juror.
3. The trial court erred by giving Instruction No. 7.
4. The court's elements instruction relieved the state of its burden to prove that Ms. Cross acted "[w]ith intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself, herself, or another person."
5. Ms. Cross's conviction was entered in violation of her state constitutional right to a unanimous jury.
6. The trial court erred by giving Instruction No. 6.
7. The trial court erred by failing to give the jury an instruction requiring unanimity as to the means of committing third-degree assault.
8. Ms. Cross was denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel.
9. Defense counsel completely failed to subject the state's case to meaningful adversarial testing.
10. Defense counsel presented evidence and argument as to only one of three charged alternative means of committing third-degree assault.
11. The prosecutor committed misconduct that infringed Ms. Cross's Fourteenth Amendment right to due process.
12. The prosecutor improperly appealed to the jury's passions and prejudices.

13. The prosecutor committed misconduct by arguing that the jury should convict to protect the community and uphold its values.
14. The prosecutor committed misconduct by arguing that jurors should put themselves in the shoes of the alleged victim.
15. The prosecutor committed misconduct by arguing that jurors should consider how they would have reacted in Ms. Cross's situation.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A trial court's "to convict" instruction must inform the jury of the state's burden to prove every essential element of the charged crime. Here, the court's elements instruction allowed conviction of third-degree assault absent proof of Ms. Cross's "intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself, herself, or another person." Did the trial court's instructions relieve the prosecution of its burden to prove the essential elements of third-degree assault in violation of Ms. Cross's Fourteenth Amendment right to due process?
2. The state constitution requires express juror unanimity as to the accused person's means of committing a crime, unless substantial evidence supports each alternative means submitted to the jury. Here, the jury considered two alternative means of committing third-degree assault, despite the absence of substantial evidence supporting one alternative. Did the trial court's failure to give a unanimity instruction violate Ms. Cross's state constitutional right to a unanimous verdict?
3. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. In this case, defense counsel completely failed to subject the state's case to meaningful adversarial testing as to one of the two alternative means submitted to the jury. Was Ms. Cross denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel?

4. A prosecutor may not make arguments that appeal to passion and prejudice. Here, the prosecutor exhorted jurors to protect the community and uphold its standards, and to place themselves in the shoes of two participants in the incident. Did the prosecutor commit reversible misconduct in violation of Ms. Cross's Fourteenth Amendment right to due process?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Billie Jo Cross was forty years old and had no criminal history when Deputy Adams knocked on her door at 8 pm. RP (10/31/12) 20; RP (11/9/12) 2; CP 1. Adams was there to arrest Ms. Cross's husband, Minor Cross, but Adams told Ms. Cross that he was just there to serve some documents. RP (10/31/12) 20-21, 23, 41. Ms. Cross called to her husband, but there was no response. RP (10/31/12) 25, 60-62. She suggested that she could give her husband the documents, but the deputy declined her offer. RP (10/31/12) 25. She told the officer that he should come back tomorrow. RP (10/31/12) 25, 36.

Deputy Adams came back at 6 in the morning with another officer. RP (10/31/12) 26, 37, 52. They knocked on the door multiple times, waking Ms. Cross. RP (10/31/12) 27, 63. She answered the door, and asked the officers if she could see the documents, to reassure herself that they weren't there for a different purpose. RP (10/31/12) 27, 41. She reviewed the packet, which purportedly related to her husband's child support obligations. RP (10/31/12) 27-28. Ms. Cross yelled out to Minor Cross that the papers really were about his ex wanting more money, and commented that her husband was afraid they were there to arrest him. RP (10/31/12) 28. The officer "played dumb" in response. RP (10/31/12) 28.

Deputy Adams had Ms. Cross step out onto the porch, and Minor Cross came to the door. RP (10/31/12) 30, 63. Minor Cross stayed by the door, three to four feet from the deputy. Deputy Adams told him to step out onto the deck. RP (10/31/12) 30-31. Adams then grabbed Minor Cross's arm while he was slamming the door shut, and the door broke Adams's hand. RP (10/31/12) 31, 55. Adams kicked and shouldered the door to get it open. RP (10/31/12) 31, 42.

Ms. Cross was shocked that the officer was moving so forcefully to enter her house and arrest her husband. She shouted "You lied to me!" and jumped on Adams from behind. RP (10/31/12) 33, 55, 65, 69. The second deputy got her away from Adams and handcuffed her. RP (10/31/12) 33, 43, 48. Minor Cross fled the house and was not arrested that day. RP (10/31/12) 34.

The state charged Billie Jo Cross with Assault in the Third Degree. CP 1-2. The charge was in the alternative:

[T]he above named Defendant, (1) with intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself or herself or another person, did assault another; and/or (2) did assault a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault; and/or (3) [for incidents occurring on or after July 24, 2005], did assault a peace officer with a projectile stun gun; to wit: ERIC L. ADAMS; contrary to the Revised Code of Washington 9A.36.0131(1)(a) and/or (g).

CP 1-2.

At trial, she acknowledged the events but argued that she had no intent to commit an assault or prevent an arrest. RP (10/31/12) 60-72, 80-85. The prosecution did not introduce evidence establishing that the papers Deputy Adams sought to provide Mr. Cross consisted of “any lawful process or mandate of any court officer.” Nor did the prosecution prove that the officers had a valid warrant or other lawful basis for forcibly entering Ms. Cross’s home to arrest Mr. Cross. RP 17-60.

The court gave two instructions outlining the elements of third-degree assault. First, the court defined the offense as follows:

A person commits the crime of assault in the third degree when he or she assaults another with the intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself, herself, or another, or assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault.

Instruction No. 6, Supp. CP.

Second, the court gave a “to convict” instruction that included the following elements:

To convict the defendant of the crime of assault in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about May 1, 2012, the defendant assaulted Eric Adams;

- (2) That at the time of the assault Eric Adams was a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties; and
- (3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, I, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.
Instruction No. 7, Supp. CP.

Ms. Cross's attorney did not object to either instruction. Nor did he propose alternative instructions. RP (10/31/12) 74. Neither party proposed a unanimity instruction, and the court did not give the jury an instruction requiring jurors to reach unanimity as to the means by which the offense was committed. Court's Instructions, Supp. CP; Plaintiff's Proposed Instructions, Supp. CP; RP 74.

The prosecutor concluded his closing argument with the following:

If you think you can do a better job, then join up, but as the court has instructed you, when police officers are performing their duty, you can stand there and complain, you can call them names, you can write letters to their bosses or letters to the editor, you can go down to your legislature and try and get law changed, but you do not get to physically assault and attack a police officer, because down that path leads disaster. RP 77.

The community has said we have a law about that. It's called assault in the third degree. The state has given you the evidence to prove that that law has been violated, and

we ask you to hold her accountable as we would any other citizen who breaks these rules. RP 79-80.

The jury voted to convict Ms. Cross. CP 6. She timely appealed. CP 19-22.

ARGUMENT

I. THE COURT’S INSTRUCTIONS DENIED MS. CROSS A FAIR TRIAL.

A. Standard of Review.

The adequacy of jury instructions is reviewed *de novo*. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010).

Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyлло*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

Failure to instruct on an element of an offense denies the accused the right to a fair trial. *State v. Stein*, 144 Wn.2d 236, 240-41, 27 P.3d 184 (2001). Such failure creates a manifest error affecting a constitutional right and can be raised for the first time on appeal. *Id.*; RAP 2.5(a)(3).

B. The court’s to-convict instruction omitted essential elements of the charged crime.

Jury instructions must properly inform jurors of the applicable law and permit each party to argue its theory of the case. *State v. Koch*, 157

Wn. App. 20, 33, 237 P.3d 287 (2010). In a criminal case, the elements (or “to convict”) instruction holds “special weight because the jury treats the instruction as a ‘yardstick’ by which to measure a defendant’s guilt or innocence.” *State v. Mills*, 154 Wn.2d 1, 6, 106 P.3d 415 (2005). When an element is omitted, the error is not harmless unless the element is supported by uncontroverted evidence. *State v. Brown*, 147 Wn.2d 330, 349, 58 P.3d 889 (2002)¹ (citing *Neder v. United States*, 527 U.S. 1, 18, 1119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).

Alternative means offenses proscribe conduct that may be proved in a variety of ways. *State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). Assault in the third degree is an alternative means offense. *Id.*; RCW 9A.36.031.

Ms. Cross was charged with three alternative means of committing third degree assault. CP 1-2. At the start of trial, the judge read to prospective jurors the Information, which listed all three alternative means. Clerks Minutes (10/31/12), Supp CP.

The evidence presented at trial and the attorneys’ arguments in closing focused on two of the charged alternative means. *See* RP

¹ *Brown* was a plurality opinion, but its holding has been restated by the court as summarized above in subsequent cases. *See e.g. State v. Williams-Walker*, 167 Wn.2d 889, 911, 225 P.3d 913 (2010).

(10/31/12) 75-85. The two alternatives that were the focus of the trial are set forth in RCW 9A.36.031(1), which provides that a person is guilty of third-degree assault if she or he

(a) With intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself, herself, or another person, assaults another; or...

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault.

RCW 9A.36.031.

Likewise, the court's instructions outlined these two alternative means for the jury in Instruction No. 6. That instruction reads as follows:

A person commits the crime of assault in the third degree when he or she assaults another with intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself, herself, or another person, or assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault.

Instruction No. 6, Supp CP.

The court's to-convict instruction, however, failed to properly set forth some of the elements of the first of these alternative means. In particular, the instruction permitted the jury to convict if it found that Ms. Cross "on or about May 1st, 2012, assaulted Eric Adams..." without reference to the other elements required for conviction under RCW 9A.36.031(1)(a). The instruction says nothing about "intent to prevent or

resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself, herself, or another person.”²

This was error: Ms. Cross was charged with both alternatives, evidence and argument were presented as to each charged means of committing the offense, and Instruction No. 6 made reference to both alternatives. The omission of essential elements relieved the prosecution of its burden to prove the offense under RCW 9A.36.031. *Stein*, 144 Wn.2d at 240-41. The error requires reversal because the evidence was not “uncontroverted” as to the missing elements. *Brown*, 147 Wn.2d at 349.

Furthermore, the omission of essential elements of RCW 9A.36.031(a) likely confused the jury. *See e.g. State v. Martin*, 69 Wn. App. 686, 689, 849 P.2d 1292 (1993).³ The state’s theory of the case was based almost exclusively on one alternative means of committing third degree assault and the defense theory (as argued in closing) was based

² The instruction did properly set forth the elements required for conviction under RCW 9A.36.031(1)(g). Instruction No. 7, Supp CP.

³ In *Martin*, as here, the court’s definition instruction outlined two alternative means of committing the charged crimes; however, the elements instruction addressed only one alternative. *Id.*, at 688 n. 1 (majority opinion), 690 n. 1 (dissent). The court reversed, finding a possibility that jurors had been confused. *Id.*, at 689. The definition instruction also advised jurors they need not be unanimous as to the mode of commission of the offense. *Id.*, at 688 n. 1.

entirely on another means. RP 75-85.⁴ The jury was aware of both alternatives because (1) the judge read the Information prior to jury selection, (2) both alternatives were mentioned in Instruction No. 6, and (3) the parties argued both alternatives in closing. Clerks Minutes (10/31/12), Supp. CP; Instruction No. 6, Supp CP; RP 75-85. Under these circumstances, it is unlikely the jury understood exactly what was required for a guilty verdict.

Instructional error is presumed to be prejudicial. *Smith*, 144 Wn.2d at 246. Here, the entire defense theory was based on the contention that Ms. Cross did not intend to prevent her husband's arrest. RP 80-86. The evidence in support of that alternative means was controverted. RP 41, 46, 80-86. The omission of essential elements of RCW 9A.36.031(1)(a) likely confused the jury and relieved the prosecution of its obligation to prove the essential elements beyond a reasonable doubt. *Smith*, 144 Wn.2d at 246.

Accordingly, Ms. Cross's conviction must be reversed. Her case must be remanded for a new trial. *Id.*

⁴ The prosecution focused its argument on the definition of intentional assault. RP 78-80. Defense counsel, on the other hand, argued only that Ms. Cross had no intent to prevent her husband's arrest. RP 80-85.

C. Ms. Cross was prejudiced by the court's failure to instruct jurors that they must be unanimous as to the means of committing third-degree assault.

Accused persons in Washington have a right to an expressly unanimous jury verdict. Wash. Const. art. I, § 21; *State v. Lobe*, 140 Wn. App. 897, 903, 167 P.3d 627 (2007). In some cases, this includes the right to jury unanimity as to the means by which the defendant is found to have committed a crime. *Lobe*, 140 Wn. App. at 903.

Where the prosecution charges alternative means, an accused person has the right to a unanimity instruction unless there is substantial evidence supporting each alternative. *Id.* In the absence of a unanimity instruction, the reviewing court must determine whether a rational jury could have found the accused guilty of each of the alternative means beyond a reasonable doubt. *Lobe*, 140 Wn. App. at 905; *State v. Kitchen*, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988).⁵

Here, the prosecution failed to present substantial evidence to prove RCW 9A.36.031(1)(a) (the first charged alternative). Under that provision, a person is guilty of assault if she or he assaults another

with intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself, herself, or another person...

⁵ Although *Kitchen* involved multiple acts rather than alternative means, the court spelled out the proper analysis regarding alternative means cases. *Kitchen*, 110 Wn.2d at 410-411.

RCW 9A.36.031(1)(a). The statute thus requires proof that the person assaulted was engaged in the execution of a “lawful process or mandate of any court officer,” or that s/he was attempting to effectuate “the lawful apprehension or detention” of another person. RCW 9A.36.031(1)(a).

In Ms. Cross’s case, there was no evidence establishing either of these elements. The prosecution failed to establish that the officer had lawful authority to arrest her husband. Although Deputy Adams testified that he had a warrant, but no warrant was submitted into evidence. RP (10/21/12) 20-21. Deputy Adams did not provide any details about the warrant, and thus the record does not contain any information suggesting that it was lawfully issued by a competent authority based on probable cause (or other applicable standard).

Likewise, there was insufficient evidence that the officers actually had “any lawful process or mandate of any court officer” to execute upon Ms. Cross’s husband. Deputy Adams testified that he had civil papers to serve, but did not explain what the papers were or provide details establishing that they qualified as “lawful process or mandate of any court officer.” RP 20. Furthermore, the prosecution admitted that the officer engaged in a “ruse” to gain custody of Mr. Cross. RP (10/31/12) 76.

In addition, the evidence showed that Ms. Cross cooperated with the officers (until the time of the assault): she told them when they could return to find her husband, called her husband to the door, and stepped onto the porch to allow the officer to have access to her husband so they could serve the papers. RP (10/31/12) 26-27.

Because there was not substantial evidence supporting both alternative means, the court was required to provide a unanimity instruction. *Lobe*, 140 Wn. App. at 905. Failure to do so was reversible error. *Id.* Ms. Cross's conviction must be reversed and the case remanded for a new trial. *Id.*

Upon remand, Ms. Cross may not be tried on the "intent to prevent or resist" prong of third-degree assault. *See Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986).

II. MS. CROSS WAS DENIED HER SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review.

A claim of ineffective assistance presents a mixed question of law and fact, and is reviewed *de novo*. *In re Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). Ineffective assistance is a constitutional claim that may

be raised for the first time on appeal. RAP 2.5(a)(3); *Kyllo*, 166 Wn.2d at 862.⁶

B. Ms. Cross was denied a fair trial when defense counsel failed to subject the state's case to meaningful adversarial testing.

The right to the effective assistance of counsel is “fundamental to, and implicit in, any meaningful concept of ordered liberty.” *State v. A.N.J.*, 168 Wn.2d 91, 96, 225 P.3d 956 (2010). Generally, counsel provides ineffective assistance if his or her performance falls below “an objective standard of reasonableness” and the client is prejudiced. *A.N.J.*, 168 Wn.2d at 109 (citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). When, however, the accused is constructively denied the assistance of counsel altogether, no showing of prejudice is required. *United States v. Cronin*, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *see also State v. Chavez*, 162 Wn. App. 431, 439, 257 P.3d 1114 (2011).

The language of the Sixth Amendment requires not only that an accused person be provided with counsel, but that counsel “assist” with

⁶ Prior to *Kyllo*, the court stated that an ineffective assistance of counsel claim must qualify as a manifest error affecting a constitutional right in order to be raised for the first time on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995). *Kyllo* appears to abrogate that holding *sub silentio* by not addressing whether the claim at issue was “manifest.” *Kyllo*, 166 Wn.3d at 862. Regardless, Ms. Cross's counsel's failure in this case presents a manifest error affecting her constitutional right to counsel.

her “defence.” U.S. Const. Amend. XIV, VI. The right to counsel is violated “if no actual ‘assistance’ ‘for’ the accused’s ‘defence’ is provided.” *Cronic*, 466 U.S. at 654. Such a breakdown occurs, for example, when counsel representing a client in a motion to withdraw a guilty plea distances himself from his client and essentially argues no basis for the motion. *Chavez*, 162 Wn. App. 439.

The right to the effective assistance of counsel includes the “the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *Cronic*, 466 U.S. at 657. Failure of counsel to subject the state’s case to such adversarial testing “makes the adversary process itself presumptively unreliable.” *Cronic*, 466 U.S. at 659. Thus, where counsel wholly fails to present a defense, no separate showing of prejudice is required for reversal. *Id.*

Here, Ms. Cross was charged with three alternative means of committing third-degree assault. CP 1-2. The jury was instructed on two alternative means; however, the elements instruction outlined only one alternative means. Instruction No. 7, Supp. CP. Despite this, defense counsel’s entire theory of the case and argument at closing addressed only one of the three alternatives: that Ms. Cross lacked intent to prevent her husband’s arrest. RP 80-85. By contrast, the prosecution’s theory and closing argument focused almost exclusively on the allegation that she

assaulted a law enforcement officer who was performing his official duties. RP 78-79.

Counsel failed to present any evidence or argument addressing this alternative, even though the Information alerted him to all three alternatives, and the court's elements instruction outlined *only* this alternative. Instruction No. 7, Supp CP. Counsel either failed understand that this was an alternative means case, or simply chose not to defend Ms. Cross against one of the means presented at trial.

Either failure requires reversal. Counsel did not subject the state's case to "meaningful adversarial testing." *Cronic*, 466 U.S. at 659.

Because of this, prejudice need not be shown. *Id.*

Ms. Cross was denied her Sixth Amendment right to the effective assistance of counsel. *Id.* Her conviction must be reversed and the case remanded for a new trial. *Id.*

III. THE PROSECUTOR COMMITTED MISCONDUCT BY IMPROPERLY APPEALING TO THE JURY'S SENSE OF DUTY TO THE COMMUNITY AND BY INVITING JURORS TO PUT THEMSELVES IN THE POSITION OF THE TWO PARTICIPANTS.

A. Standard of Review.

Prosecutorial misconduct requires reversal if there is a "substantial likelihood the misconduct affected the jury verdict." *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). The lack of a defense objection at

trial does not preclude review if the misconduct was “flagrant and ill-intentioned.” *Id.* Furthermore, a manifest error affecting a constitutional right may be raised for the first time on appeal. *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009); RAP 2.5(a)(3).

A prosecutor’s comments during closing argument are reviewed in the context of the case as a whole. *Glasmann*, 175 Wn.2d at 704.

B. The prosecutor committed misconduct by appealing to the passion and prejudice of the jury.

Prosecutorial misconduct can deprive an accused person of her right to a fair trial. *Glasmann*, 175 Wn.2d at 703-04; U.S. Const. Amend. XIV, VI; Wash. const. art. I, § 22. A prosecutor must make arguments to the jury based on “probative evidence and sound reason.” *Id.* It is misconduct to use arguments “calculated to inflame the passions or prejudices of the jury.” *Id.*, (quoting American Bar Association Standards for Criminal Justice std. 3-5.8(c)(2d ed. 1980)).

1. The prosecutor committed misconduct by arguing that the jury should hold Ms. Cross accountable as a member of the community.

A prosecutor commits misconduct when he argues that the jury should “hold [the accused] accountable” for his alleged misdeeds. *State v. Neal*, 361 N.J. Super. 522, 537, 836 A.2d 723 (App. Div. 2003). Such arguments are akin to asking the jury to send a message, and thus

“improperly divert jurors’ attention from the facts of the case.” *Id.*

Arguments of this type may also “promote a sense of partisanship with the jury that is incompatible with the jury’s function.” *Id.* See also *State v. Hawk*, 327 N.J. Super. 276, 283, 743 A.2d 325 (App. Div. 2000) (“Such statements, uncorrected could mislead a jury as to its role and duty.”).

It is also prosecutorial misconduct for a prosecutor to argue that the jury should return a guilty verdict in order to protect the community. *State v. Ramos*, 164 Wn. App. 327, 337, 263 P.3d 1268 (2011). Such improper arguments risk conviction “for reasons wholly irrelevant to the [accused’s] own guilt or innocence. *Ramos*, 164 Wn. App. at 338 (quoting *United States v. Sullivan*, 937 F.2d 1146, 1153 (6th Cir. 1991)) (“the amelioration of society’s woes is far too heavy a burden for the individual criminal defendant to bear.”). See also *State v. Coleman*, 74 Wn. App. 835, 876 P.2d 458 (1994) (it is misconduct for a prosecutor to appeal to the jurors’ sense of duty by implying that an acquittal would violate their oath); *State v. Bautista-Caldera*, 56 Wn. App. 186, 195, 783 P.2d 116 (1989) (it is misconduct for the prosecutor to “exhort[] the jury to send a message to society”).

Nor should a prosecutor “exhort the jury to ‘do its job’; that kind of pressure... has no place in the administration of criminal justice.”

United States v. Young, 470 U.S. 1, 18, 105 S.Ct. 1038, 84 L.Ed.2d 1

(1985). By the same token, a prosecutor must not warn a jury “about not doing its job.” *State v. Acker*, 265 N.J. Super. 351, 627 A.2d 170, 173 *cert. denied*, 134 N.J. 485, 634 A.2d 530 (1993) (quoted with approval by *Coleman*, 74 Wn. App. at 840). Giving such warnings “is considered to be among the most egregious forms of prosecutorial misconduct.” *Id.*

Here, the prosecutor closed his argument by saying:

The community has said that we have a law about that. It’s called assault in the third degree.
RP 79-80.

He urged the jury to “hold [Ms. Cross] accountable as we would any other citizen who breaks these rules.” RP 80. These arguments were improper.

As in *Neal*, the prosecutor’s directive to hold her “accountable” is akin to asking jurors to send a message. This diverted jurors’ attention from the facts and promoted a sense of partisanship incompatible with the jury’s function. *Neal*, 361 N.J. Super. at 537; *see also Bautista-Caldera*, 56 Wn. App. at 195. Furthermore, the prosecutor’s improper reference to the community’s laws implied that conviction was necessary to protect the community and to uphold its values. *See Ramos*, 164 Wn. App. at 337.

These arguments encouraged the jury to convict Ms. Cross in order to “ameliorat[e] society’s woes.” *Ramos*, 164 Wn. App. at 338. It is misconduct for a prosecutor to appeal to the passion and prejudice of a

jury in such a manner. *Id.* Accordingly, her conviction must be reversed and her case remanded for a new trial. *Id.*

2. The prosecutor committed misconduct by encouraging jurors to put themselves in the shoes of each participant.

The *Glasmann* court noted the risk that “the jury will give special weight to the prosecutor’s arguments, not only because of the prestige associated with the prosecutor’s office but also because of the fact-finding facilities presumably available to the office.” *Glasmann*, 175 Wn.2d at 706 (citing American Bar Association Standards for Criminal Justice, std. 3-5.8, commentary).

It is misconduct for a prosecutor to compel the jury to “substitute its subjective belief about how any juror would have responded” rather than considering the evidence objectively. *State v. Walker*, 164 Wn. App. 724, 736, 265 P.3d 191 (2011). Thus, statements that invite the jurors to put themselves in the alleged victims’ shoes are improper. *Id.*; *see also State v. Blaine*, 427 N.W.2d 113, 115 (S.D. 1988). Such personalized arguments “encourage[] the jury to make its decision personal.” *Walker*, 164 Wn. App. at 736.

Here, the prosecutor argued that the jury should put themselves in the officer’s shoes, arguing, “If you think you can do a better job, then join up [with law enforcement].” RP 77. He went on to suggest that jurors

consider the situation by placing themselves in Ms. Cross's shoes, with the idea of showing that the jurors, personally, would not have responded to the situation as she did:

when police officers are performing their duty, you can stand there and complain, you can call them names, you can write letters to their bosses or letters to the editor, you can go down to your legislature and try and get laws changed, but you do not get to physically assault and attack a police officer, because down that path leads disaster [sic].
RP 77.

These arguments encouraged the jury to assess the evidence on a personal level rather than impartially. By asking jurors to place themselves in the shoes of the officer—and then to consider how they, personally would have reacted—the prosecutor committed misconduct. *Walker*, 164 Wn. App. at 736.

In *Walker*, the misconduct was based on an improper argument that the jury imagine their own reaction if in the position of the accused. *Walker*, 164 Wn. App. at 736. Here, the prosecutor increased the prejudicial effect of the misconduct by making the argument found improper in *Walker*, and then encouraging jurors to put themselves in the officer's shoes.

As in *Ramos* and *Walker*, no curative instruction could have undone the prejudice caused by the prosecutor's improper arguments in Ms. Cross's case. *Ramos*, 164 Wn. App. at 340-41; *Walker*, 164 Wn.

App. at 737. The misconduct prejudiced Ms. Cross' right to a fair trial. Her conviction must be reversed. *Id.*

CONCLUSION

Ms. Cross's conviction must be reversed and the case remanded for a new trial. The trial court's "to convict" instruction omitted essential elements of third-degree assault and relieved the prosecution of its burden to prove the offense, in violation of Ms. Cross's Fourteenth Amendment right to due process.

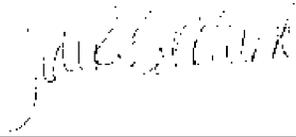
In addition, court's failure to provide a unanimity instruction violated Ms. Cross's right to a unanimous verdict, because one alternative means submitted to the jury was not supported by substantial evidence. Upon remand, Ms. Cross may not be tried on the "intent to prevent or resist" prong of third-degree assault.

Furthermore, Ms. Cross was deprived of her Sixth Amendment right to the effective assistance of counsel by her attorney's complete failure to subject the state's case to meaningful adversarial testing.

Finally, the prosecutor committed misconduct that was flagrant and ill-intentioned and that violated Ms. Cross's Fourteenth Amendment right to due process.

Respectfully submitted on May 15, 2013,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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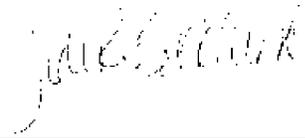
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Kitsap County Prosecuting Attorney
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 15, 2013.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

May 15, 2013 - 2:05 PM

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