

No. 44331-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Alan Olson,

Appellant.

Cowlitz County Superior Court Cause No. 12-1-00936-5

The Honorable Judge Marilyn K. Haan

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Skylar T. Brett
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 3

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 6

ARGUMENT..... 10

I. Prosecutorial misconduct deprived Mr. Olson of a fair trial. 10

A. Standard of Review..... 10

B. The prosecutor committed misconduct during cross-examination of Mr. Olson and during closing argument. . 11

II. Officer Shelton’s testimony invaded the province of the jury and deprived Mr. Olson of his Sixth and Fourteenth Amendment right to a jury trial..... 17

A. Standard of Review..... 17

B. Officer Shelton invaded the province of the jury by opining on Everett’s credibility and on Mr. Olson’s guilt. 18

III. The court erred by failing to inquire into juror misconduct..... 21

A. Standard of Review..... 21

	B.	The court erred in failing to inquire into the possible juror misconduct of premature deliberation.....	21
IV.		The court improperly commented on the evidence and violated Mr. Olson’s Sixth and Fourteenth Amendment right to a fair trial by an impartial jury.	25
	A.	Standard of Review.....	25
	B.	The court commented on the evidence by playing the 911 tape a second time before the close of the evidence. .	25
V.		Mr. Olson received ineffective assistance of counsel. ..	28
	A.	Standard of Review.....	28
	B.	Mr. Olson’s attorney unreasonably failed to object to prosecutorial misconduct, improper opinion testimony, juror misconduct, and a judicial comment on the evidence.	29
VI.		The court erred by ordering Mr. Olson to pay fees and costs for a charge on which the jury acquitted.....	35
	A.	Standard of Review.....	35
	B.	The court should not have ordered Mr. Olson to pay the costs of prosecution without determining the amount attributable to the charge on which the jury acquitted.	35
CONCLUSION			37

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Fuller v. Oregon</i> , 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974) (Fuller II).....	35
<i>Hodge v. Hurley</i> , 426 F.3d 368 (6th Cir. 2005).....	30
<i>Sheppard v. Maxwell</i> , 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966)	21, 25
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	29
<i>United States v. Resko</i> , 3 F.3d 684 (3d Cir. 1993).....	22, 23, 28, 32

WASHINGTON STATE CASES

<i>Bellevue School Dist. v. E.S.</i> , 171 Wn.2d 695, 257 P.3d 570 (2011) .	17, 25
<i>In re Glasmann</i> , 175 Wn.2d 696, 286 P.3d 673 (2012).....	11, 14, 17, 29
<i>Lakey v. Puget Sound Energy, Inc.</i> , 176 Wn.2d 909, 296 P.3d 860 (2013)	35
<i>State v. Becker</i> , 132 Wn.2d 54, 935 P.2d 1321 (1997).....	25
<i>State v. Boehning</i> , 127 Wn. App. 511, 111 P.3d 899 (2005).....	11
<i>State v. Braham</i> , 67 Wn. App. 930, 841 P.2d 785 (1992)	18, 20, 32
<i>State v. Cross</i> , 156 Wn.2d 580, 132 P.3d 80 (2006).....	14
<i>State v. Depaz</i> , 165 Wn.2d 842, 204 P.3d 217 (2009).....	24
<i>State v. Dixon</i> , 150 Wn. App. 46, 207 P.3d 459 (2009)	14

<i>State v. Elmore</i> , 155 Wn.2d 758, 123 P.3d 72 (2005)	24
<i>State v. Fuller</i> , 169 Wn. App. 797, 282 P.3d 126 (2012) <i>review denied</i> , 176 Wn.2d 1006, 297 P.3d 68 (2013) (Fuller I)	11
<i>State v. George</i> , 161 Wn. App. 86, 249 P.3d 202 (2011)	12
<i>State v. Guevara</i> , 172 Wn. App. 184, 288 P.3d 1167 (2012)	21
<i>State v. Hendrickson</i> , 138 Wn. App. 827, 158 P.3d 1257 (2007) 29, 31, 32, 33, 34	
<i>State v. Hopkins</i> , 156 Wn. App. 468, 232 P.3d 597 (2010)	21, 24
<i>State v. Hudson</i> , 150 Wn. App. 646, 208 P.3d 1236 (2009)	19, 20
<i>State v. Jackman</i> , 156 Wn.2d 736, 132 P.3d 136 (2006)	25
<i>State v. Jones</i> , 144 Wn. App. 284, 183 P.3d 307 (2008)	11
<i>State v. Jordan</i> , 103 Wn. App. 221, 11 P.3d 866 (2000)	22
<i>State v. King</i> , 167 Wn.2d 324, 219 P.3d 642 (2009)	17, 18, 31
<i>State v. Koontz</i> , 145 Wn.2d 650, 41 P.3d 475 (2002)	26, 27, 28, 33
<i>State v. Kyllo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)	29, 31, 34
<i>State v. Lane</i> , 125 Wn.2d 825, 889 P.2d 929 (1995)	25
<i>State v. Levy</i> , 156 Wn.2d 709, 132 P.3d 1076 (2006)	25, 26, 27, 28
<i>State v. McCreven</i> 170 Wn. App. 444, 284 P.3d 793 (2012), <i>review</i> <i>denied</i> 176 Wn.2d 1015, 297 P.3d 708 (2013)	12, 13, 14
<i>State v. Moon</i> , 124 Wn. App. 190, 100 P.3d 357 (2004)	35, 36, 37
<i>State v. Perrow</i> , 156 Wn. App. 322, 231 P.3d 853 (2010)	15
<i>State v. Sutherby</i> , 138 Wn. App. 609, 158 P.3d 91 (2007) <i>aff'd on other</i> <i>grounds</i> , 165 Wn. 2d 870, 205 P.3d 916 (2009)	18, 20, 31
<i>State v. Walker</i> , 164 Wn. App. 724, 265 P.3d 191 (2011)	12

<i>Utter v. State, Dep't of Soc. & Health Servs.</i> , 140 Wn. App. 293, 165 P.3d 399 (2007).....	35
---	----

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI... 1, 2, 3, 4, 5, 11, 17, 18, 21, 22, 25, 26, 29, 33, 34	
U.S. Const. Amend. XIV 1, 2, 3, 4, 5, 11, 17, 18, 21, 22, 25, 26, 29, 33	
Wash. const. art. I, § 21	18, 22
Wash. Const. art. I, § 22.....	11, 18, 22, 26, 33
Wash. Const. art. I, § 3.....	21
Wash. Const. art. IV, § 16.....	2, 4, 25, 33

WASHINGTON STATUTES

RCW 10.01.160	35, 37
RCW 2.36.110	22
RCW 36.18.016	36
RCW 43.43.754	36
RCW 5.60.060	15

OTHER AUTHORITIES

ER 401	15
ER 402	15
RAP 2.5.....	11, 17, 21, 25, 29
<i>State v. Loftin</i> , 191 N.J. 172, 922 A.2d 1210 (2007)	23
<i>State v. R.D.</i> , 169 N.J. 551, 781 A.2d 37 (2001)	23

State v. Valcourt, 792 A.2d 732 (R.I. 2002) 23

Tolbert v. United States, 905 A.2d 186 (D.C. 2006) 23

ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct that was flagrant and ill-intentioned.
2. The prosecutor committed misconduct that violated Mr. Olson's Fourteenth Amendment right to due process.
3. The prosecutor improperly cross-examined Mr. Olson in a manner that shifted the burden of proof.
4. The prosecutor improperly shifted the burden of proof in closing argument.
5. The prosecutor improperly argued that the state need not disprove self-defense.
6. The prosecutor improperly argued that jurors were required to believe Mr. Olson in order to acquit.
7. The prosecutor improperly cross-examined Mr. Olson about his attorney's trial strategy.
8. The prosecutor improperly cross-examined Mr. Olson about privileged attorney-client communications.
9. Mr. Olson's conviction was entered in violation of his Sixth and Fourteenth Amendment right to a jury trial.
10. Officer Shelton's testimony invaded the province of the jury and infringed Mr. Olson's right to an independent determination of the facts.
11. Officer Shelton provided improper opinion testimony on the credibility of witnesses and the guilt of the accused.
12. Officer Shelton improperly opined that Everett's initial statements were more credible than her trial testimony.
13. Officer Shelton provided improper profile testimony.

14. Officer Shelton improperly provided an opinion on Mr. Olson's guilt by identifying Everett as the "victim" in this self-defense case.
15. The jury committed misconduct by engaging in premature deliberations before jurors had been instructed on the law.
16. The trial court erred by failing to inquire into juror misconduct.
17. The trial court commented on the evidence in violation of Wash. Const. art. IV, § 16.
18. The trial judge inappropriately communicated to jurors that she agreed the 911 tape was a critical piece of evidence.
19. The trial judge erred by replaying the 911 tape for jurors before instructing the jury on the law.
20. Mr. Olson was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
21. Defense counsel unreasonably failed to object to numerous instances of prosecutorial misconduct.
22. Defense counsel unreasonably argued prosecutorial misconduct to the jury without raising an objection to the court.
23. Defense counsel unreasonably failed to object to improper cross-examination.
24. Defense counsel unreasonably failed to object to improper opinion testimony.
25. Defense counsel unreasonably failed to object to juror misconduct.
26. Defense counsel unreasonably failed to object to a judicial comment on the evidence.
27. Defense counsel unreasonably failed to object when the trial judge replayed the 911 tape for jurors before instructing them on the law.
28. The trial court improperly required Mr. Olson to pay costs and fees.

29. The trial court imposed costs and fees without considering whether any portion of the total was attributable to the prosecution's decision to charge Mr. Olson with a felony on which the jury did not convict.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A prosecutor may not commit misconduct that infringes an accused person's Fourteenth Amendment right to a fair trial. Here, the prosecutor shifted the burden of proof through improper cross-examination and argument. Did the prosecutor's flagrant and ill-intentioned misconduct violate Mr. Olson's Fourteenth Amendment right to due process?
2. A prosecutor may not cross-examine on privileged matters. Here, the prosecutor improperly cross-examined Mr. Olson about his attorney's trial strategy and about privileged attorney-client communications. Did the prosecutor violate Mr. Olson's Sixth and Fourteenth Amendment rights to due process and to the assistance of counsel?
3. A witness may not testify to an opinion as to the credibility of a witness. Here, Officer Shelton opined that Everett's initial statements were more credible than her trial testimony. Did Shelton's testimony invade the province of the jury in violation of Mr. Olson's Sixth and Fourteenth Amendment right to a jury trial?
4. Opinion testimony on the guilt of an accused person infringes the right to an independent jury determination of the facts. Here, Mr. Olson claimed self-defense, and Officer Shelton opined that Everett was the "victim" of the incident. Did Officer Shelton's opinion testimony violate Mr. Olson's Sixth and Fourteenth Amendment right to a jury trial?
5. Jurors commit misconduct by disobeying a trial judge's order not to deliberate until they are given the case. Here, jurors committed misconduct by engaging in premature deliberation.

Was Mr. Olson denied his Sixth and Fourteenth Amendment right to a fair trial by an unbiased jury?

6. A trial judge has a duty to investigate juror misconduct. Here, the trial judge failed to inquire when the jury asked to hear the 911 tape a second time, after they'd been instructed not to discuss the case and before they'd been permitted to start deliberating. Did the trial judge's failure to investigate juror misconduct violate Mr. Olson's Sixth and Fourteenth Amendment right to a fair trial by an impartial jury?
7. A trial judge is prohibited from commenting on the facts. Here, the trial judge confirmed the jury's belief that the 911 recording was a critical piece of evidence. Did the trial judge improperly comment on the evidence in violation of Wash. Const. art. IV, § 16?
8. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, defense counsel unreasonably failed to object to numerous instances of prosecutorial misconduct. Did counsel's deficient performance prejudice Mr. Olson in violation of his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
9. To be effective, defense counsel should object to inadmissible evidence that prejudices the accused person. Here, defense counsel unreasonably failed to object to improper opinion testimony on the credibility of a witness and the guilt of the accused. Was Mr. Olson deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
10. Jurors commit misconduct by engaging in premature deliberations. Here, defense counsel failed to raise an objection when the jury made a request that indicated jurors had started deliberating before the case had been submitted. Did counsel's failure to object deprive Mr. Olson of his Sixth

and Fourteenth Amendment right to the effective assistance of counsel?

11. Judges may not comment on the evidence. Here, defense counsel failed to object when the judge commented on the evidence and unfairly emphasized the prosecution's case by replaying the 911 tape prior to instructing jurors on the law. Did counsel's failure to object deny Mr. Olson his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

12. A sentencing court may not impose costs and fees that can be attributed to a charge on which the jury did not convict. Here, the court imposed costs and fees without determining how much of the total amount was attributable to the state's decision to charge a felony on which the jury did not convict. Did the trial court impose costs and fees that were not authorized?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Alan Olson and Cathy Everett had a mistrustful relationship. In late summer of 2012, they accused each other of infidelity and argued at length. RP 271, 275, 292. Police came, and both Mr. Olson and Everett claimed the other had committed an assault. RP 142.

The state charged Mr. Olson with Assault in the Second Degree. CP 1.

The state did not serve Everett with a subpoena requiring her to appear at trial. She came to the courthouse at defense counsel's request, made to her the morning of trial. RP 2-3, 71-77, 79. The trial judge affirmed that the defense had no obligation to inform the state that the alleged victim would appear for trial. RP 74, 76.

Officer Shelton testified that he came to the house that night. RP 96, 102. Before Everett testified, and without any objection from defense counsel, Shelton told the jury about how domestic violence victims behave. He said that he completed training to notice that "the victim can change their story or change their mind at different times along the way." RP 99. He further testified that

Usually originally what they say, they're still caught up in the excitement of the incident being the victim, you know, reaching out for help and that usually ends up being closest to the truth of what happened. Because sometimes later when they have time to

think about it, then they'll, you know, sometimes change their story when they're like thinking that well --...
RP 101.

Officer Shelton referred to Everett as the “victim” throughout his testimony. RP 102-146.

When asked about the injuries he saw on Everett, Officer Shelton said that they were consistent with being strangled, adding that none of her injuries were inconsistent with strangulation. RP 116. Defense counsel did not object to this evidence. RP 116.

Everett testified that she assaulted Mr. Olson and he responded in defense. RP 246-250. She rejected the idea that Mr. Olson strangled or assaulted her. RP 250.

Mr. Olson testified, denying any assault. RP 294-382. The state cross-examined him aggressively about his communication with his lawyer, and the defense decision to call witnesses:

Q. Okay. And you were present at pre-trial, were you not?

A. I was.

Q. And you, at that time, were well aware that your attorney told in open court that you had no witnesses, correct?

A. I'm not sure what my lawyer said in open court. I'm --

Q. You weren't paying attention?

A. Again, that was months ago. I'm not exactly sure what my lawyer said verbatim.

Q. November 2nd was pre-trial, isn't that right?

A. I suppose, yeah, sure.

Q. Sound right?

A. Sounds about right.

Q. Okay. So a little over a month ago --

A. (inaudible.)

Q. -- month and eight days. So a month and eight days ago, you were standing in court, and your attorney says you have no witnesses. You heard that, right?

A. I -- if I was here, then I probably would have heard it. I don't exactly recall that.

Q. And you met with your attorney prior to that day, right?

A. Yes.

Q. And you would know that it would be very important to let him know about any witnesses for your defense, right?

A. Yeah, sure. Yeah.

Q. You didn't do that, did you?

A. We didn't have to yet.

Q. You didn't have to yet?

A. I -- I'm not sure what you're getting at here.

Q. You didn't have to notify your attorney of potential witnesses on the -- before the date he has to tell the court?

MR. BLONDIN: Objection. Speculation.

JUDGE HAAN: Sustained.

BY MS. HUNTER: (Continued.)

Q. Did you talk to him about witnesses?

A. I'm sure I had.

Q. You told him about what happened, right?

A. Yep.

....

Q. You didn't correct your attorney in court on the 2nd about witnesses, did you?

A. No.

RP 363-365.

The prosecutor also asked Mr. Olson about the defense's failure to present specific evidence. She asked him if he'd sought police photos of his injuries from the night of the incident, if he kept his boxer shorts (which had been torn during the incident), if he'd sought a copy of his mug shot or taken pictures of his own injuries, or if he'd accessed his

medical records, documenting an earlier occasion when Everett had broken his wrist. RP 330, 340, 353, 355, 357.

Throughout the trial, the judge instructed jurors not to begin discussing the evidence until the case was submitted to them. RP 91, 212-13, 388-89. After both parties had introduced all their evidence, but before the court instructed jurors on the law, the jury asked to hear the 911 recording again. RP 392. Defense counsel did not raise any concerns, and did not object when the court replayed the 911 recording. RP 403-405. After replaying the recording, the judge instructed jurors on the law, and the parties gave closing arguments. RP 405-471.

During closing, the prosecutor argued that Everett's status as a defense witness undermined her credibility. RP 431. She also urged the jury to come to a quick verdict without analysis of the claim of self-defense: "If the state has proven that he did strangle her, stop. Write in guilty and be done." RP 437. She also argued:

... if you don't believe the defendant's version, State doesn't have to disprove it, okay? ... If you don't believe what he says about self-defense, does the State have to pro – disprove something you don't believe? No.
RP 442.

The state focused the jury's attention on evidence the defense did not bring, including defense counsel's failure to ask Everett about prior

injuries she had inflicted upon Mr. Olson. RP 441. In rebuttal, the prosecutor returned to the theme of missing defense evidence:

And then the Defense put on their evidence, and only if you believe their evidence, do you have a question that the State has to disprove lawful force. Because the State's evidence is there was no lawful force used... So the question you have to ask yourself is do you believe the Defendant?
RP 465.

The jury convicted Mr. Olson of the lesser charge of Assault in the Fourth Degree. CP 3.

Even though the state charged a felony for which the jury did not convict, the court imposed several fines and fees: \$200 filing fee, \$250 jury demand fee, \$816.69 for attorney's fees, \$165 in service fees and \$100 for DNA testing. CP 4. The court did not determine whether or not any of these costs and fees resulted from the state's decision to charge a felony.

Mr. Olson timely appealed. CP 10.

ARGUMENT

I. PROSECUTORIAL MISCONDUCT DEPRIVED MR. OLSON OF A FAIR TRIAL.

A. Standard of Review.

A prosecutor commits misconduct when s/he makes improper statements that prejudice the accused. *In re Glasmann*, 175 Wn.2d 696,

704, 286 P.3d 673 (2012). If not objected to, prosecutorial misconduct requires reversal if it is flagrant and ill-intentioned. *Id.*

Furthermore, an appellant can argue prosecutorial misconduct for the first time on review if it creates manifest error affecting a constitutional right. RAP 2.5(a)(3). Prosecutorial misconduct that violates the constitutional rights of the accused necessitates reversal unless the court finds it harmless beyond a reasonable doubt. *State v. Fuller*, 169 Wn. App. 797, 813, 282 P.3d 126 (2012) *review denied*, 176 Wn.2d 1006, 297 P.3d 68 (2013) (Fuller I). A reviewing court analyzes the prosecutor's statements during closing in the context of the case as a whole. *State v. Jones*, 144 Wn. App. 284, 291, 183 P.3d 307 (2008).

B. The prosecutor committed misconduct during cross-examination of Mr. Olson and during closing argument.

Prosecutorial misconduct can deprive the accused of a fair trial. *Glasmann*, 175 Wn.2d at 703-04; U.S. Const. Amend VI, XIV, Wash. Const. art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704.

1. The prosecutor committed misconduct by minimizing the state's burden of proof.

A prosecutor commits misconduct when s/he makes arguments shifting the burden of proof onto the accused. *State v. Walker*, 164 Wn. App. 724, 732, 265 P.3d 191 (2011). A prosecutor cannot comment on the lack of defense evidence because the defense has no duty to present evidence. *State v. McCreven* 170 Wn. App. 444, 284 P.3d 793 (2012), *review denied* 176 Wn.2d 1015, 297 P.3d 708 (2013).

When the accused raises self-defense, the state must prove beyond a reasonable doubt that force used was not lawful. *State v. George*, 161 Wn. App. 86, 95-96, 249 P.3d 202 (2011). A prosecutor commits misconduct by arguing that the state need not disprove self-defense. *McCreven*, 170 Wn. App. at 470-71.

On cross-examination, the prosecutor questioned Mr. Olson at length about the defense's failure to present certain pieces of evidence. She asked him whether he had tried to obtain photos taken by the police on the night of the incident. RP 330. She inquired whether he'd kept his torn boxer shorts. RP 340. She implied that he should have obtained his mug shot or taken pictures of his own injuries. RP 353-54 Finally, the prosecutor asked Mr. Olson whether he'd sought his medical records (regarding his previously broken wrist). RP 355, 357.

The prosecutor's questions had no other purpose than to call the jury's attention to items that the defense did not offer into evidence. The prosecutor's cross-examination of Mr. Olson contained numerous comments that undermined the presumption of his innocence by shifting the burden onto him to prove the defense theory. *McCreven* 170 Wn.App. 444.

The prosecutor also made burden-shifting arguments during closing. She stated on multiple occasions that if the jury didn't believe Mr. Olson's version of the facts, they did not need to consider whether his use of force was lawful:

If the State has proven that he did strangle her, stop. Write in guilty and be done.
RP 437.

... if you don't believe the defendant's version, State doesn't have to disprove it, okay? ... If you don't believe what he says about self-defense, does the State have to pro – disprove something you don't believe? No.
RP 442.

And then the Defense put on their evidence, and only if you believe their evidence, do you have a question that the State has to disprove lawful force. Because the State's evidence is there was no lawful force used... So the question you have to ask yourself is do you believe the Defendant?
RP 465.

These arguments shifted the burden of proof onto Mr. Olson and misstated the law of self-defense. *McCreven*, 170 Wn. App. at 471. Mr.

Olson's entire defense theory revolved around self-defense. The prosecutor's argument that the state did not need to disprove self-defense prejudiced Mr. Olson. *Id.*

The prosecutor's repeated attempt to shift the burden of proof onto Mr. Olson constituted flagrant and ill-intentioned misconduct. *Glasmann*, 175 Wn.2d at 704. The prosecutor's misconduct deprived Mr. Olson of his right to proof beyond a reasonable doubt and to be presumed innocent. *Id.* It denied him a fair trial, and affected the verdict. *Id.* The state cannot show harmlessness beyond a reasonable doubt. *McCreven*, 170 Wn. App. at 471. Accordingly, the prosecutor's improper burden shifting—on cross-examination and in closing argument—requires reversal of Mr. Olson's conviction. *Glasmann*, 175 Wn.2d at 704.

2. The prosecutor committed misconduct by cross-examining Mr. Olson about trial strategy and privileged communications with counsel.

A prosecutor commits misconduct by commenting on the accused's choice of whether to testify at trial. *State v. Dixon*, 150 Wn. App. 46, 59, 207 P.3d 459 (2009).

Trial strategy, including what evidence to present to the jury, falls within the province of defense counsel, not the accused. *State v. Cross*, 156 Wn.2d 580, 611, 132 P.3d 80 (2006). Attorney-client privilege protects communication and advice between an attorney and his/her client.

State v. Perrow, 156 Wn. App. 322, 328, 231 P.3d 853 (2010); RCW

5.60.060. This privilege exists in order to “allow the client to communicate freely with an attorney without fear of compulsory discovery.” *Id.*

Evidence that is not relevant is not admissible at trial. ER 401, ER 402.

The prosecutor cross-examined Mr. Olson at length about communications with his attorney and matters of trial strategy, including his decision to testify:

PROSECUTOR: Did you know you would be testifying to that?

MR. OLSON: I didn't think I would have to be testifying.

PROSECUTOR: Okay. So at what point did you know that you would be asked those questions?

MR. OLSON: Honestly, I don't know. Maybe a week ago. I figured you would have dropped this by now.

...

PROSECUTOR: So a week, at least ago, you knew that you were going to be asked these questions.

RP 356.

PROSECUTOR: November 2nd was pre-trial, isn't that right?

MR. OLSON: I suppose, yeah, sure.

PROSECUTOR: ...So a month and eight days ago, you were standing in court, and your attorney says you have no witnesses. You heard that, right?

MR. OLSON: I -- if I was here, then I probably would have heard it. I don't exactly recall that.

PROSECUTOR: And you met with your attorney prior to that day, right?

MR. OLSON: Yes.

PROSECUTOR: And you would know that it would be very important to let him know about any witnesses for your defense, right?

MR. OLSON: Yeah, sure. Yeah.

PROSECUTOR: You didn't do that, did you?

MR. OLSON: We didn't have to yet.

PROSECUTOR: You didn't have to yet?

MR. OLSON: I -- I'm not sure what you're getting at here.

PROSECUTOR: You didn't have to notify your attorney of potential witnesses on the -- before the date he has to tell the court?

DEFENSE COUNSEL: Objection. Speculation.

COURT: Sustained.

PROSECUTOR: Did you talk to him about witnesses?

MR. OLSON: I'm sure I had.

PROSECUTOR: You told him about what happened, right?

MR. OLSON: Yep.

PROSECUTOR: Do you mention to him Mr. Denlocker?

MR. OLSON: I think I had. He was the one that was at the river.

PROSECUTOR: You didn't correct your attorney in court on the 2nd about witnesses, did you?

MR. OLSON: No.

PROSECUTOR: Nothing further.

RP 364-365.

The prosecutor also asked Mr. Olson about items that the defense had not obtained or introduced into evidence. *See* RP 330 (police photos from the night of the incident); RP 340 (torn boxer shorts); RP 353 (mug shot); RP 355, 357 (medical records).

The prosecutor attempted to undermine Mr. Olson's credibility by highlighting matters of trial strategy properly allocated to defense counsel and by making repeated references to privileged communications. This tactic constituted prejudicial misconduct. The prosecutor's improper questioning continued at length and comprised a significant part of the

prosecutor's cross-examination strategy. The cross-examination of Mr. Olson was flagrant and ill-intentioned, prejudicial misconduct. *Glasmann*, 175 Wn.2d at 714.

The prosecutor committed misconduct when she made extensive burden-shifting arguments and cross-examined Mr. Olson about trial strategy and privileged communications. Prosecutorial misconduct requires reversal of Mr. Olson's conviction. *Id.*

II. OFFICER SHELTON'S TESTIMONY INVADED THE PROVINCE OF THE JURY AND DEPRIVED MR. OLSON OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A JURY TRIAL.

A. Standard of Review.

Reviewing courts consider constitutional issues *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wn.2d 695, 702, 257 P.3d 570 (2011).

Testimony providing an "explicit or nearly explicit" opinion of the guilt of the accused or the credibility of the alleged victim creates manifest error affecting a constitutional right. *State v. King*, 167 Wn.2d 324, 332, 219 P.3d 642 (2009). An appellate court may consider such error for the first time on appeal. RAP 2.5(a)(3).

- B. Officer Shelton invaded the province of the jury by opining on Everett's credibility and on Mr. Olson's guilt.

Testimony providing an improper opinion of guilt or witness credibility violates the right to a trial by jury. *State v. Sutherby*, 138 Wn. App. 609, 617, 158 P.3d 91 (2007) *aff'd on other grounds*, 165 Wn. 2d 870, 205 P.3d 916 (2009); U.S. Const. Amend. VI, XIV; Wash. const. art. I, §§ 21, 22. Opinion testimony regarding a witness's credibility "is unfairly prejudicial because it invades the exclusive province of the jury." *Id.* Testimony provides an opinion if it is "based on one's belief or idea rather than on direct knowledge of the facts at issue." *Id.* Neither a lay nor an expert witness may offer improper opinion testimony by direct statement or inference. *King*, 167 Wn.2d at 331.. A law enforcement officer's improper opinion testimony may be particularly prejudicial because it carries "a special aura of reliability." *Id.*

An expert may not provide "profile" testimony because it creates the risk of "unfair prejudice and the ensuing false impression the jury might derive about the value of the expert's ostensible inference." *State v. Braham*, 67 Wn. App. 930, 935, 841 P.2d 785 (1992). Profile testimony has limited probative value. *Id.*

Whether testimony includes an improper opinion turns on the circumstances of the case, including "(1) the type of witness involved, (2)

the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.” *State v. Hudson*, 150 Wn. App. 646, 653, 208 P.3d 1236 (2009).

Officer Shelton testified at Mr. Olson’s trial regarding situations in which an alleged victim of domestic violence later recants his/her story:

Usually originally what they say, they're still caught up in the excitement of the incident being the victim, you know, reaching out for help and that usually ends up being closest to the truth of what happened. Because sometimes later when they have time to think about it, then they'll, you know, sometimes change their story
...
RP 101.

Shelton’s testimony infringed Mr. Olson’s rights for three reasons.

First, under the *Hudson* factors, this statement constituted an improper opinion of Everett’s credibility. *Hudson*, 150 Wn. App. at 653. Turning to the type of witness involved: Shelton is a law enforcement officer who testified that he’d received special training in domestic violence issues. The jury likely lent Officer Shelton’s statement “a special aura of reliability.” *Id.*; *King*, 167 Wn.2d at 331; RP 99. Looking to the nature of the testimony: Officer Shelton asserted that the first version of events provided by an alleged domestic violence victim is usually “closest to the truth.” RP 101. This related directly to Mr. Olson’s case, because the only real issue of fact was which of Everett’s stories the jury believed. *Hudson*, 150 Wn. App. at 653. Considering the nature of the charge and

the type of defense: Mr. Olson’s self-defense claim put Everett’s credibility at the forefront of his case. *Id.* Reflecting, finally, on the other evidence before the trier of fact, no other law enforcement officer – or truly disinterested third party – testified at Mr. Olson’s trial. *Id.*

Each of the factors outlined in *Hudson* establish the impropriety of the testimony. Officer Shelton’s statement that an alleged victim’s first version of events is usually “closest to the truth” directly commented on Everett’s credibility. The testimony invaded the province of the jury. *Id.*

Second, Officer Shelton referred to Everett as “the victim” throughout his testimony.¹ *See generally* RP 97-139. In a self-defense case, the identification of one party as the victim equates to an opinion on the ultimate issue of guilt. This is improper. *Sutherby*, 138 Wn. App. at 617.

Third, the officer’s general statements regarding domestic violence victims amounted to “profile” testimony. Such evidence is inadmissible because of its potential for unfair prejudice and limited probative value. *Braham*, 67 Wn. App. at 935.

Officer Shelton’s testimony included improper opinions on Everett’s credibility and Mr. Olson’s guilt. *Hudson*, 150 Wn. App. at 653.

¹ This tied Everett to Shelton’s improper opinion on credibility, which was couched in terms of the general behavior of alleged victims.

It created a manifest error affecting Mr. Olson's Sixth and Fourteenth Amendment right to a jury trial.² This error requires reversal of Mr. Olson's conviction. *Hudson*, 150 Wn. App. at 656.

III. THE COURT ERRED BY FAILING TO INQUIRE INTO JUROR MISCONDUCT.

A. Standard of Review.

Reviewing courts analyze mixed questions of law and fact *de novo*. *State v. Guevara*, 172 Wn. App. 184, 187, 288 P.3d 1167 (2012).³

B. The court erred in failing to inquire into the possible juror misconduct of premature deliberation.

Due process requires that an accused person receive a trial by an impartial jury free from outside influences. U.S. Const. Amend XIV;⁴ *Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). Furthermore, a trial judge has the duty

to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias,

² Accordingly, it may be reviewed under RAP 2.5(a)(3).

³ A trial court's decision whether to dismiss a juror for misconduct is reviewed for abuse of discretion. *State v. Hopkins*, 156 Wn. App. 468, 232 P.3d 597 (2010). That inquiry, however, takes place only after the court has properly held a hearing regarding the alleged misconduct. *Id.* The issue of whether the court should have inquired into potential misconduct, on the other hand, presents a mixed question of law and fact.

⁴ Wash. Const. art. I, § 3.

prejudice, indifference, inattention, or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 2.36.110. This provision places “a continuous obligation on the trial court to excuse any juror who is unfit to perform the duties of a juror.”

State v. Jorden, 103 Wn. App. 221, 227, 11 P.3d 866 (2000).⁵

The right to a fair trial before an impartial jury includes the right to a trial in which the jury does not discuss the case prior to hearing all of the evidence and the court’s instructions. *United States v. Resko*, 3 F.3d 684, 688 (3d Cir. 1993); U.S. Const Amend. VI, XIV; Wash. Const. art. I, §§ 21, 22. Premature deliberation can constitute juror misconduct when the judge has instructed the jury against discussing the evidence prior to the close of trial. *Resko*, 3 F.3d 684. In *Resko*, the court reversed because the trial court failed to conduct a meaningful inquiry into possible juror misconduct in the form of early deliberation. *Resko*, 3 F.3d at 691.

Premature deliberation invades the right to an impartial jury because (1) once a juror has expressed views to the other jurors s/he is likely to adhere to that opinion; (2) the jury system is designed to promote collective decision-making and premature deliberation can thwart that

⁵ Although the *Jorden* court upheld the trial court’s refusal to *voir dire* a juror who had been sleeping during trial, the trial judge’s decision was made only after an evidentiary hearing. *Jorden*, 103 Wn. App. at 228.

process; (3) deliberation prior to the court's instructions is conducted without the benefit of information on the reasonable doubt standard; (4) the requirement that jurors refrain from discussing the case until the close of trial protects the accused's right to a fair trial and to place the burden of proof on the state. *Resko*, 3 F.3d at 689-90.

A hearing in the trial court provides the only appropriate forum for determining whether juror misconduct has taken place. Courts from other jurisdictions have explicitly held that information giving rise to a suspicion of juror misconduct requires a factual inquiry. *See e.g. State v. Loftin*, 191 N.J. 172, 193-94, 922 A.2d 1210 (2007) (“...our courts have not hesitated to make inquiry of the jurors to ensure that they have not been fatally tainted”); *Tolbert v. United States*, 905 A.2d 186, 191 (D.C. 2006) (“In order to determine whether extraneous information has a prejudicial impact on the jury, the trial court should conduct a hearing”); *State v. Valcourt*, 792 A.2d 732, 735 (R.I. 2002) (“To determine a juror's impartiality, an appropriate *in camera* inquiry of the juror is necessary”); *State v. R.D.*, 169 N.J. 551, 558, 781 A.2d 37 (2001) (“The court is obliged to interrogate the juror, in the presence of counsel, to determine if there is a taint; if so, the inquiry must expand to determine whether any other jurors have been tainted thereby.”).

Washington cases addressing juror misconduct assume that the lower court will hold a hearing. *See e.g. Hopkins*, 156 Wn. App. 468 (court did not abuse its discretion by dismissing a juror who allegedly refused to deliberate and stated upon *voir dire* that she could not be impartial); *State v. Depaz*, 165 Wn.2d 842, 204 P.3d 217 (2009) (court did not err by dismissing a juror for misconduct during deliberation after questioning three jurors on the issue); *State v. Elmore*, 155 Wn.2d 758, 123 P.3d 72 (2005) (court applied the wrong standard in dismissing juror for misconduct after conducting *voir dire* of several jurors on the issue).

Each day of trial, the court instructed jurors in Mr. Olson's case that they should not discuss the evidence until deliberations began. RP 91, 212-13, 388-89. Nonetheless, at the end of the third day of trial, before jury instructions and closing arguments, the jury informed the bailiff that they wanted to listen to the recording of Everett's 911 call again. RP 392. This statement by the jury gave rise to an inference that jurors had discussed the evidence while the trial remained in progress. The court did not inquire, however, into the possible misconduct of early jury deliberation.

The court's failure to hold a hearing regarding possible juror misconduct deprived Mr. Olson of his due process right to an impartial

jury. The court's error requires reversal of Mr. Olson's conviction.

Sheppard, 384 U.S. at 335.

IV. THE COURT IMPROPERLY COMMENTED ON THE EVIDENCE AND VIOLATED MR. OLSON'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY.

A. Standard of Review.

Constitutional issues are reviewed *de novo*. *E.S.*, 171 Wn.2d at 702. Manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3).

B. The court commented on the evidence by playing the 911 tape a second time before the close of the evidence.

Judges may not "charge juries with respect to matters of fact." Wash. Const. art. IV, § 16. A judge can neither convey a personal attitude nor instruct jurors that factual matters have been established as a matter of law. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). The comment need not be expressly made; it is sufficient if it is implied. *Id.* A statement is a judicial comment if the court's attitude can be inferred. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); accord *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006).

A comment on the evidence "invades a fundamental right." *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). Judicial comments are

presumed prejudicial and are only harmless if the record affirmatively shows no prejudice could have resulted. *Levy*, 156 Wn.2d at 725. This is a higher standard than that normally applied to constitutional errors. *Id.*

The federal and state constitutions both guarantee the accused the right to a fair and impartial jury. U.S. Const. Amend. VI, XIV; Wash. Const. art. I, § 22. A trial judge violates these rights by placing undue emphasis on one party's evidence. For example, a judge may not replay a recording during jury deliberations without first considering whether doing so will be unduly prejudicial and what procedures to employ in order to protect the parties' rights. *State v. Koontz*, 145 Wn.2d 650, 657-58, 41 P.3d 475 (2002).

The *Koontz* court found abuse of discretion when the lower court replayed videotaped testimony during deliberations, in response to a jury request. *Koontz*, 145 Wn.2d at 660. The trial judge failed to weigh the jury's request to re-hear the evidence against the possibility of prejudice to the accused. *Koontz*, 145 Wn.2d at 654. In addition, the trial court should have crafted a procedure for replaying the testimony that would have minimized the risk of undue emphasis on the state's evidence "at such a late stage of trial." *Id.*

The *Koontz* court found that the accused in that case was prejudiced because (a) there was no physical evidence linking him to the

alleged assault, (b) the state's case and the accused's defense depended upon the content of the replayed testimony, and (c) the credibility of the accused was central to his defense. *Koontz*, 145 Wn.2d at 660.

At Mr. Olson's trial, the jury asked to hear the 911 tape again at the end of the state's case-in-rebuttal.⁶ RP 392. The court complied by playing the tape a second time, right before instructing jurors on the law. RP 403-05. In doing so, the court placed undue emphasis on the state's evidence and prejudiced Mr. Olson. *Koontz*, 145 Wn.2d at 660.

The court did not consider the potential for prejudice, and did not take any steps to mitigate any unfair prejudice. In addition, under the court's decision the 911 tape became the last piece of evidence heard by the jury. RP 403-05. Furthermore, because the judge played the tape, jurors received the impression that the judge believed—as they apparently did—that the tape was an important piece of evidence. This violated the prohibition against judicial comments. *Levy*, 156 Wn.2d at 725.

The error here likely caused greater prejudice than the error in *Koontz*. As in *Koontz*, no physical evidence linked Mr. Olson to Everett's injuries. *Koontz*, 145 Wn.2d at 660. Everett testified for the defense; her recorded statements formed the centerpiece of the state's case. *Id.* The

⁶ As noted elsewhere in this brief, this request indicated juror misconduct.

central question for jurors was whether to believe the version of events on the tape or that presented by Mr. Olson at trial. Furthermore, credibility—both Everett’s and that of Mr. Olson—played a central role in the defense. *Cf. Koontz*, 145 Wn.2d at 660.

The court should not have responded to juror misconduct (in the form of early deliberation) by acceding to the jury’s request.⁷ *See Resko*, 3 F.3d 684. The court’s decision to replay the tape before instructing the jury and before deliberations began placed undue emphasis on the state’s evidence and prejudiced Mr. Olson. *Koontz*, 145 Wn.2d at 654-661. It also violated the constitutional prohibition against judicial comments on the evidence. *Levy*, 156 Wn.2d at 725

The error deprived Mr. Olsen of his right to a fair trial by an impartial jury. *Id.*; *Koontz*, 145 Wn.2d at 661. His conviction must be reversed. *Id.*

V. MR. OLSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review.

Ineffective assistance of counsel requires reversal if counsel provides deficient performance that prejudices the accused. *State v. Kylo*,

⁷ Especially in light of the court’s repeated instructions not to begin discussions. RP 91, 212-13, 388-89.

166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Ineffective assistance raises an issue of constitutional magnitude that the court can consider for the first time on appeal. *Id.*; RAP 2.5(a)(3).

B. Mr. Olson’s attorney unreasonably failed to object to prosecutorial misconduct, improper opinion testimony, juror misconduct, and a judicial comment on the evidence.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amend. VI, XIV; *Strickland*, 466 US at 685.

Counsel’s performance is deficient if it falls below an objective standard of reasonableness. U.S. Const. Amend VI, XIV; *Kyllo*, 166 Wn.2d at 862. Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

A failure to object constitutes ineffective assistance when counsel has no valid tactical reason to waive objection. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007).

1. Mr. Olson’s counsel provided ineffective assistance by failing to object to numerous instances of prosecutorial misconduct.

In most cases, failure to object to prosecutorial misconduct waives the issue for appeal.⁸ *Glasmann*, 175 Wn.2d at 704. Failure to object to

⁸ Exceptions exist for misconduct that is flagrant and ill-intentioned or that creates a manifest error affecting a constitutional right.

prosecutorial misconduct is generally unreasonable. Misconduct that undermines the defendant's credibility or bolsters the prosecution's case can be particularly prejudicial. *Hodge v. Hurley*, 426 F.3d 368, 387 (6th Cir. 2005).

Here, the prosecutor committed numerous instances of misconduct. The prosecutor improperly shifted the burden of proof onto the defense, and inappropriately commented on trial strategy and privileged communications with counsel. RP 340, 348-49, 354, 355, 356, 364, 430-31, 437, 439, 442, 465. Mr. Olson's counsel did not object to any of this misconduct. *Id.* Defense counsel clearly recognized the impropriety of the prosecutor's statements because he argued in closing that the prosecutor had impermissibly attempted to shift the burden of proof. RP 447-448, 456-457. Counsel had no valid tactical reason for failing to object. In addition to pointing out the impropriety to the jury, a timely objection could have halted the prosecutor's improper questions and arguments. At the very least, counsel could have obtained a curative instruction.

Counsel's failure to object to prosecutorial misconduct prejudiced Mr. Olson. Mr. Olson's defense relied on his credibility. The prosecutor improperly undermined his credibility by referring to matters of trial strategy and to privileged communications. RP 330, 340, 353, 355, 357,

364-65. The prosecutor also improperly shifted the burden of proof. RP 330, 340, 353-54, 355, 357, 437, 442, 465. Defense counsel should have objected. *Hendrickson*, 138 Wn. App. at 833.

Counsel's failure to object constituted deficient performance and prejudiced Mr. Olson. *Kyllo*, 166 Wn.2d at 862. Accordingly, Mr. Olson's conviction must be reversed. *Id.*

2. Mr. Olson's counsel provided ineffective assistance by failing to object to improper opinion testimony.

Failure to object to improper opinion testimony can waive the issue for appeal unless the testimony included an explicit or nearly explicit opinion of guilt or witness credibility. *King*, 167 Wn.2d at 332. In the absence of a valid tactical reason, failure to object constitutes deficient performance. *Hendrickson*, 138 Wn. App. at 833.

Defense counsel did not object when Officer Shelton provided improper opinion testimony regarding Everett's credibility. RP 99-101. Officer Shelton opined that a victim's statement reflects the truth if provided shortly after an incident of domestic violence. *Id.* This statement improperly bolstered Everett's out-of-court statements. Her credibility was central to the outcome of the trial; thus, the improper opinion was particularly prejudicial. *Sutherby*, 138 Wn. App. at 617.

In addition, Shelton's identification of Everett as the "victim" amounted to an opinion on guilt, given that Mr. Olson raised self-defense. *See generally* RP 97-139. By identifying Everett as the "victim," Shelton announced his opinion that Mr. Olson attacked her. This necessarily undermined his self-defense claim.

Shelton also provided improper "profile" testimony. RP 101; *Braham*, 67 Wn. App. 935. He outlined the typical behavior of domestic violence victims, and made clear that he believed Everett's initial version of events because she fit his notion of a typical DV victim.

Mr. Olson's attorney should have protected his client from Shelton's inadmissible and prejudicial opinion testimony. Counsel's failure to object amounted to deficient performance, and prejudiced Mr. Olson. *Hendrickson*, 138 Wn. App. at 833. Mr. Olson's conviction must be reversed. *Id.*

3. Mr. Olson's counsel provided ineffective assistance when he failed to object to juror misconduct and the court's decision to replay the 911 tape.

A juror commits misconduct by engaging in premature deliberation prior to the close of evidence and the court's instructions. *Resko*, 3 F.3d at 688. A court abuses its discretion when it places undue emphasis on one party's evidence by replaying it for the jury without first assessing the prejudicial effect and whether that effect could be mitigated through the

proper procedures. *Koontz*, 145 Wn.2d at 654. Each of these errors violates the accused's right to an impartial jury. U.S. Const. Amend. VI, XIX; Wash. Const. art. I, § 22; *Resko*, 3 F.3d at 688; *Koontz*, 145 Wn.2d at 654.

At Mr. Olson's trial, the jury asked to hear the 911 tape a second time. This request occurred prior to the court's instructions, at a time when jurors should not have started discussing the evidence. RP 392. Mr. Olson's counsel did not object and the court played the tape again before the jury was instructed on the law. RP 403-05.

Defense counsel's failure to object amounted to deficient performance. *Hendrickson*, 138 Wn. App. at 833. Counsel should have asked the court to investigate the jury's premature deliberations. There was no valid tactical reason for defense counsel's failure to object to juror discussion of the evidence in violation of Mr. Olson's right to an impartial jury.

Similarly, the 911 tape presented the state's theory—in Everett's own voice—and provided the prosecution's strongest evidence. Defense counsel had no valid tactical reason not to object when the court decided to replay the 911 tape. The decision to replay the tape confirmed that the judge viewed the tape as important. This amounted to a comment on the evidence, in violation of Wash. Const. art. IV, § 16.

Counsel's failure to object prejudiced Mr. Olson. Everett's credibility was important to both parties. The verdict rested on the narrow question of whether jurors believed the version of events presented by the 911 tape or that presented by the defense at trial. The jury heard the 911 tape twice before deliberations; this undoubtedly had an effect on the verdict. Furthermore, the court's apparent endorsement of the jury's belief—that the 911 tape was important—likely exacerbated this effect. Defense counsel provided ineffective assistance by failing to object to juror misconduct and to the court's decision to replay the 911 recording. *Hendrickson*, 138 Wn. App. at 833.

Mr. Olson's counsel provided ineffective assistance when he failed to object to prosecutorial misconduct, improper opinion testimony, juror misconduct, and the court's over-emphasis of the state's evidence. These denials of Mr. Olson's Sixth Amendment right to counsel require reversal of his conviction. *Kyllo*, 166 Wn.2d at 862. The case must be remanded for a new trial. *Id.*

VI. THE COURT ERRED BY ORDERING MR. OLSON TO PAY FEES AND COSTS FOR A CHARGE ON WHICH THE JURY ACQUITTED.

A. Standard of Review.

Statutory interpretation presents a question of law reviewed *de novo*. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 926, 296 P.3d 860 (2013).

B. The court should not have ordered Mr. Olson to pay the costs of prosecution without determining the amount attributable to the charge on which the jury acquitted.

The court may order a convicted defendant to pay expenses incurred by the state in his prosecution. RCW 10.01.160. Statutes authorizing such costs are “in derogation of common law” and courts should construe them narrowly. *State v. Moon*, 124 Wn. App. 190, 195, 100 P.3d 357 (2004).

Courts may not order an offender to pay costs for charges that do not result in conviction. *Utter v. State, Dep't of Soc. & Health Servs.*, 140 Wn. App. 293, 312, 165 P.3d 399 (2007) (citing *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974) (Fuller II)). Costs and fees may only be assessed if they relate to charges for which the jury convicted; a person acquitted of some charges but convicted of others may

not be required to pay costs for the charges resulting in acquittal. *Moon*, 124 Wn. App. at 194-95.

The jury acquitted Mr. Olson of Assault in the Second Degree and convicted only of Assault in the Fourth Degree. CP 3-9. The court ordered him to pay \$2,281.69 including \$816.69 in attorney fees. CP 4-5. The court made no inquiry into what portion of the fee could be attributed to defending against the felony assault charge. *See generally* RP 488-502. This was error. *Moon*, 124 Wn. App. at 194-195.

The court also ordered Mr. Olson to pay a \$250 jury demand fee. CP 4; RCW 36.18.016. Had the state charged Mr. Olson with fourth degree assault (the offense of which he was convicted), he would have had a 6-person jury and been ordered to pay only \$125. RCW 36.18.016. Under the circumstances, the \$250 fee was unreasonable. *Moon*, 124 Wn. App. at 194-195.

The court also ordered Mr. Olson to pay a \$100 DNA Identification fee. CP 4. DNA collection is not applicable, however, based on a conviction for Assault in the Fourth Degree. RCW 43.43.754.

The court made no determination as to the costs of prosecuting Mr. Olson for the felony assault. *See generally*, RP 488-502. In failing to make such an inquiry, the court inevitably ordered Mr. Olson to pay the cost of the prosecution of a charge of which he was acquitted. This

violated RCW 10.01.160. *Moon*, 124 Wn. App. at 194-95. The order imposing legal financial obligations must be vacated. *Moon*, 124 Wn. App. at 195.

CONCLUSION

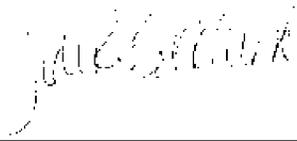
The prosecutor committed flagrant and ill-intentioned misconduct: she made extensive burden-shifting arguments and questioned Mr. Olson about trial strategy and privileged communications with counsel. Officer Shelton provided an impermissible opinion of Everett's credibility, which invaded the province of the jury. The court denied Mr. Olson due process when it failed to inquire into possible juror misconduct. The court made an impermissible comment on the evidence and over-emphasized the state's theory when it replayed the 911 tape before trial had ended. Mr. Olson received ineffective assistance of counsel when his attorney failed to object to the prosecutorial misconduct, opinion testimony, juror misconduct, and playing the 911 tape a second time. The court erred in ordering Mr. Olson to pay the costs of his prosecution for a charge of which he was acquitted.

The Court of Appeals must reverse Mr. Olson's conviction. In the alternative, the court must vacate the order to pay legal financial

obligations, and remand the case with instructions to exclude any costs or fees associated with the felony assault charge.

Respectfully submitted on July 11, 2013,

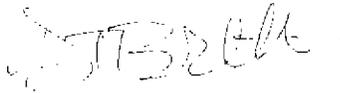
BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

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

Alan Olson
1322 Bowmont Ave
Kelso, WA 98626

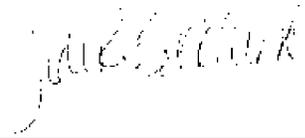
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney
baur@co.cowlitz.wa.us

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 July 11, 2013.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

July 11, 2013 - 11:41 AM

Transmittal Letter

Document Uploaded: 443317-Appellant's Brief.pdf

Case Name: State v. Alan Olson

Court of Appeals Case Number: 44331-7

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Manek R Mistry - Email: backlundmistry@gmail.com

A copy of this document has been emailed to the following addresses:

bours@co.cowlitz.wa.us