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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____ DEPUTY

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

In Re Personal Restraint Petition of Christopher Olsen Petitioner.	No. 44984-6-II PETITIONER'S REPLY BRIEF

A. REPLY ARGUMENT

1. Mr. Olsen's Conviction Must Be Reversed In Light Of In re Personal Restraint of Glasmann and This Court's Recent Decision in State v. Herbin

At issue here is whether the deputy prosecutor's use of unadmitted booking photographs, altered evidence, and expressing a personal opinion of guilt through use of a PowerPoint slideshow presentation during closing arguments at trial was unfairly prejudicial and infringed on Mr. Olsen's right to a fair trial. It unequivocally did, and Mr. Olsen's conviction must be reversed in light of this Court's recent reversal and remand on the same factual grounds in State v. Herbin, 174 Wn.App. 1078 (unpublished opinion, 41944-1-II, filed May 21, 2013). A copy of the opinion is attached as Appendix B. This result mandates Mr. Olsen's conviction also be reversed and his case remanded for a new trial.

In State v. Herbin, this Court reversed Deshone Herbin's convictions based on the prosecutorial misconduct of (now ex-) Thurston County Deputy Prosecutor David Bruneau[1] for his use

[1] David Bruneau was fired from the prosecutor's office.

of improper slides in a PowerPoint presentation to the jury during closing arguments. See Appendix A. (Bruneau was the same deputy prosecutor who also represented the State in Mr. Olsen's case, here). This Court had determined that "3 of the 119 slides contained in the record [were] problematic." Herbin, 174 Wn.App. 1078, *7; see Appendix B at 5. Those slides had included: (1) Herbin's booking photograph with the words "STATE OF WASHINGTON vs." above the photograph and Herbin's name below the photograph, and the words "GUILTY AS CHARGED" written within quotation marks; (2) a larger version of the same booking photograph with the addition of text written across the photograph; and (3) Herbin's booking photograph with the word "GUILTY" written across the face in a large font—both of which are circled—and several arrows pointing at the encircled photo with various text written at the start of each arrow describing various pieces of evidence. Herbin, 174 Wn.App. 1078, *7; Appendix B at 5-6. This Court then, following In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012), concluded that "the slides resulted in prejudice" and warranted a new trial. Herbin, 174 Wn.App. 1078, *8; Appendix B at 6-7. This Court further held that "the prosecutor's use of slides containing Herbin's altered booking photograph 'was so pervasive that it could not have been cured by an instruction.'" Herbin, 174 Wn.App. 1078, *9 (quoting Glasmann, 175 Wn.2d at 707); Appendix B at 7. This Court then reversed Herbin's convictions and remanded for a new trial. Id.

Here, just like he did in Deshone Herbin's trial, deputy prosecutor David Bruneau used Mr. Olsen's unadmitted booking photograph (along with the booking photograph of his co-defendant, Michael Sublett) in multiple PowerPoint slides, altering the unadmitted evidence with the addition of words calculated to impact the jury during his closing arguments. See Response to Personal Restraint Petition, Appendix B at 1, 9, 38-47 (12 of the improper slides at issue here out of the 47 shown to the jury).

The improper slides, just like in Herbin, included: (a) two separate slides (both identical) that contained both Olsen and Sublett's booking photographs with the words "STATE OF WASHINGTON vs. MICHAEL SUBLETT AND CHRISTOPHER OLSEN" above their photographs, and below their photographs the words "MURDER IN THE FIRST DEGREE --- PREMEDITATED MURDER OR FELONY MURDER," see Response, Appendix B at 1, 9; and (b) a sequence of ten slides starting with the booking photographs of both defendants contained in a circle, and continuing with a sequential progression of one arrow added to each slide pointing to the encircled photographs with various text written at the start of each arrow, up to the final slide which shows the encircled booking photographs surrounded by text and 8 arrows and the word "GUILTY" in bold red letters written in a large font across the faces of both Olsen and Sublett, see id., Appendix B at 38-47. These altered and unadmitted booking photos were prejudicial to Olsen, affecting the fairness of his trial.

Further compounding the prejudice to Mr. Olsen was the personal opinion of Mr. Olsen's guilt expressed by deputy prosecutor Bruneau directly to the jury during his closing argument, which he verbalized at exactly the same time he was presenting the final slide in his PowerPoint presentation. At the same time Bruneau was showing the final slide, which encompassed the encircled booking photographs of Olsen and Sublett surrounded by eight arrows and the word "GUILTY" in bold red letters in a large font superimposed over their photographs, see Response, Appendix B at 47, Bruneau told the jury: "They are guilty as indicated. These defendants, ladies and gentlemen, are guilty as charged and guilty as proven." RP 1003 (06/17/08). Moreover, during his rebuttal closing argument, Bruneau again told the jury: "--- Mr. Sublett and Mr. Olsen are both killers and are guilty as charged." RP 1076 (06/17/08).

The State has responded to Mr. Olsen's personal restraint petition with an argument premised on the contention that the prosecutor's slide with the word "GUILTY" superimposed over a photo of Olsen was not improper, did not constitute altered evidence, was not prejudicial, and that the prosecutor did not make any improper comments. Response, at 7-24. The State's arguments are meritless and have already been similarly rejected by this Court in Herbin. (This Court has already considered and rejected these same arguments as advanced by deputy prosecuting attorney Carol La Verne who represented the State on appeal in

Herbin, and who is again representing the State here. Ms. La Verne takes substantially the same position here as she did in Herbin, and makes no new arguments).

a. The State Used Mr. Olsen's Unadmitted Jail Booking Photo throughout Its PowerPoint Slide Presentation.

The State first seems to dispute Olsen's factual assertion that the photograph of Olsen used during the prosecutor's slide presentation was his jail booking photo, arguing that it "is not apparent from the photograph itself, nothing in the record reflects that, and Olsen does not include that assertion in his sworn declaration." Response, at 15. Although the State could have simply confirmed it themselves through their very own case files instead of attempting to mislead this court, Mr. Olsen has obtained a copy of that very same booking photograph used in the prosecutor's slide presentation through a public records request to the Thurston County Corrections Administration (Jail). That booking photograph, the response letter from the jail, and Mr. Olsen's sworn declaration authenticating the facts presented here, are all attached as Appendix C. Cf. Response, Appendix B, 1, 9, 38-47.

Moreover, the booking photo itself was not admitted as an exhibit at trial. The State concedes this fact in their response: "[t]he State does not dispute that the photo itself may not have been admitted as an exhibit[.]" Response, at 15.

The prosecutor's use of the unadmitted and extrinsic evidence then, was improper, constituted misconduct, and was prejudicial to Olsen. State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994) ("[T]he consideration of novel or extrinsic evidence by a jury is misconduct and can be grounds for a new trial."). Novel or extrinsic evidence is defined as "information that is outside all the evidence admitted at trial, either orally or by document." Id. (citation and emphasis omitted). Such evidence is improper, and "consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced." State v. Rinkes, 70 Wn.2d 854, 862, 425 P.2d 658 (1967) (citing State v. Burke, 124 Wash. 632, 215 P. 31 (1923)); see also Marshall v. United States, 360 U.S. 310 (1959).

b. The Prosecutor Altered Mr. Olsen's Unadmitted Booking Photograph.

The State contends that the prosecutor did not alter evidence, attempts to distinguish this case from Glasmann, and argues that Mr. Olsen "misunderstands what constitutes 'altered' evidence." Response, at 21. The State's argument is misguided.

Here, there is no dissimilarity between this case and Herbin in that deputy prosecutor David Bruneau (again, the same prosecutor in both cases) used the addition of words and arrows surrounding the unadmitted and encircled booking photograph of the defendant, altering the photograph with

the word "GUILTY" superimposed in a large font over the photograph. Herbin, 174 Wn.App. 1078, *7; Appendix B at 6. Cf. Response, Appendix B at 47. And this Court in Herbin, following Glasmann, held that the prosecutor's use of those slides were an alteration of the original booking photo which constituted misconduct warranting a new trial. Herbin, 174 Wn.App. 1078, *8; Appendix B at 7.

It is clear that the prosecutor in this case, just like as what occurred in both Glasmann and Herbin, intentionally altered Olsen's booking photograph with "the addition of phrases calculated to influence the jury's assessment" of Olsen's guilt. Id. Olsen's original booking photograph did not contain the word "GUILTY" in bright red letters superimposed across his face. Cf. Appendix C. And the state cannot rationally argue otherwise.

d. The Prosecutor Expressed An Improper Opinion of Guilt.

In Herbin, this Court recognized that although the slide linking the "GUILTY" statement superimposed over Herbin's booking photograph with various pieces of evidence presented during the trial did not, through use of that slide, express the prosecutor's personal opinion of Herbin's guilt, the prosecutor did express a personal opinion of Herbin's guilt when presenting a slide with the phrase "GUILTY AS CHARGED" written beneath Herbin's booking photograph. Herbin, 174 Wn.App. 1078, *8; Appendix B at 7.

Here, there was no slide with the words "GUILTY AS CHARGED" used in the prosecutor's PowerPoint presentation. However, the prosecutor instead stated it outright when he told the jury: "They are guilty as indicated. These defendants, ladies and gentlemen, are guilty as charged and guilty as proven." RP 1003 (06/17/08). Further, in his rebuttal closing, the prosecutor again told the jury: "--- Mr. Sublett and Mr. Olsen are both killers and are guilty as charged." RP 1076 (06/17/08).

These statements by deputy prosecutor Bruneau to the jury were a personal opinion of Mr. Olsen's guilt. They were improper, inflammatory, and prejudicial. State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006) (finding it improper for a prosecuting attorney to express his individual opinion that the accused is guilty, independent of the testimony in the case (citing State v. Armstrong, 37 Wash. 51, 79 P. 490 (1905))); State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003) (permitting latitude to attorneys to argue the facts in evidence and reasonable inferences therefrom, but prohibiting statements of personal belief of a defendant's guilt or innocence). By expressing his personal opinion of Olsen's guilt through his closing arguments, the prosecutor engaged in misconduct.

e. No Instruction Could Have Cured the Resulting Prejudice to Mr. Olsen.

Like this Court aptly noted in Herbin, deputy prosecutor Bruneau's "use of slides containing Herbin's altered booking

photograph 'was so pervasive that it could not have been cured by an instruction.'" Herbin, 174 Wn.App. 1078, *9 (quoting Glasmann, 175 Wn.2d at 707); Appendix B at 7. We have the exact same situation in the instant case.

Here, deputy prosecutor Bruneau essentially produced a media event with the deliberate goal of influencing the jury to return a guilty verdict, just like he did in Deshone Herbin's trial. This action and misconduct by Bruneau meant that one of the last things seen by the jury before deliberations was the representative of the state impermissibly flashing the word "GUILTY" across an image of Mr. Olsen's face on a large screen while at the same time telling the jury that Olsen was "GUILTY AS CHARGED" and "GUILTY AS PROVEN" -- thus, predisposing the jury to return a harsh verdict. RP 1003 (06/17/08); Response, Appendix B at 47. The misconduct of Bruneau went even further when he called Mr. Olsen and his co-defendant "KILLERS" to the jury, and again, expressed his personal opinion that they were "GUILTY AS CHARGED" just moments before the jury began their deliberations. RP 1076 (06/17/08).

Further, the cumulative prejudicial effect of the prosecutor's unauthorized use of Olsen's unadmitted booking photographs, his wrongful alteration of those photographs, and his improper and highly inflammatory personal opinions of Mr. Olsen's guilt to the jury during closing arguments were so

pervasive and affected the jury verdict, and could not have been cured by an instruction. Herbin, 174 Wn.App. 1078, *9 (citing Glasmann, 175 Wn.2d at 707); Appendix B at 7.

f. All 47 Slides Contained In The Prosecutor's PowerPoint Presentation Were Shown To The Jury During Closing Arguments.

The State seems to dispute whether all of the 47 slides in the PowerPoint presentation were actually shown to the jury during closing arguments. Response, at 18 n.4. They argue that it seems likely that the sequence was aborted early due to the objection by Olsen's counsel. Id.; RP 1003 (06/17/08). The State's argument is specious.

As evidenced by an attached sworn declaration by Christopher Olsen and his trial attorney Richard Woodrow, (see Appendix D, E), all 47 slides were shown to the jury in spite of Mr. Woodrow's objection to the trial court. Deputy prosecutor Bruneau made sure to quickly advance through the last few slides after the defense objection was made so that while the final slide was being shown with the word "GUILTY" splashed across an image of Olsen's face, he could make the statement: "They are guilty as indicated --- they are guilty as charged and guilty as proven." This was purposeful and intentional misconduct.

Further, the record itself reflects the showing of the final slide when Olsen's co-defendant, Mr. Sublett, was speaking to the sentencing court. See RP 1151-52 (07/23/08).

2. Mr. Olsen's Trial Counsel Was Ineffective For Failing To Challenge the Juror During Voir Dire, And an Evidentiary Hearing is Needed To Develop the Factual Record

At trial, and during jury selection, Mr. Olsen recognized a man in the jury pool who he had previous contact with at a church service held in the Thurston County Jail. This juror, who ended up seated on the jury throughout the remainder of the trial, had prior knowledge — through a conversation and prayer session with Olsen — of certain material factual details of Olsen's case. See Appendix F. Mr. Olsen immediately told his attorney and voiced his concerns to him, but trial counsel failed to question or otherwise challenge the juror. Id. This was ineffective assistance of counsel which prejudiced Olsen.

Had trial counsel challenged the juror at the outset, there would have been a valid basis for a challenge for cause due to actual or implied bias of the juror who had "inside" knowledge of material facts, which he had obtained from the defendant himself extraneous to trial.

Even so, trial counsel had a second opportunity to challenge the juror when the juror approached and told the bailiff two weeks into trial that he had been to church services at the jail. RP 850 (06/16/08). And although, according to the bailiff, the juror allegedly stated that he did not see Mr. Olsen at the church service; conversely, the juror also tried to advance that he came forward because he heard Olsen mention the fact that he (Olsen)

had been to one of those church services at the jail during some of the recordings played for the jury the previous week, id., which was not true as Olsen never once stated, inferred, or otherwise mentioned attending a jail church service on any of the three recordings played for the jury. The juror had "come forward" under false pretenses. See Appendix F at 3. But, trial counsel again failed to question or otherwise challenge the juror when the opportunity and need arose. RP 851 (06/16/08). Again, ineffectiveness.

Had trial counsel bothered to explore the issue through some questioning of the juror, as any reasonable and competent defense attorney would have, especially after learning of Mr. Olsen's initial concerns during voir dire, trial counsel would have effectively learned what information and material facts the juror knew and had been essentially "hiding" since the start of trial, i.e., that he in fact knew Olsen and had gained knowledge of material facts of the case prior to trial. That would have been enough cause to have the juror dismissed, and further, would have been grounds for a mistrial.

To the extent that the juror failed to speak up during voir dire regarding this material fact was juror misconduct. Kuhn v. Schnall, 155 Wn.App. 560, 573, 228 P.3d 828 (2010); In re Detention of Broten, 130 Wn.App. 326, 337, 122 P.3d 942 (2005).

Unfortunately, Mr. Olsen does not possess the voir dire transcripts as they were apparently not ordered for his direct appeal; but even so, it can be reasonably presumed that the juror was asked the standard and boilerplate type questions that are always asked by the trial court and attorneys during voir dire regarding knowing the defendant, witnesses, etc., prior to trial. So it can be further presumed that the juror answered dishonestly then when asked—either individually or as part of the group—that material question, or any other question regarding prior knowledge of this case, the facts, or of the defendant, Mr. Olsen.

That being the case, then it is grounds for a new trial as there was a valid basis during voir dire for a challenge for cause and to excuse the juror for actual or implied bias. McDonough Power Equip. Inc., v. Greenwood, 464 U.S. 548, 556 (1984); see also RCW 4.44.170; Carle v. McChord Credit Union, 65 Wn.App. 93, 108, 827 P.2d 1070 (1992).

Because these, and all related questions regarding the ineffectiveness of Olsen's trial counsel during jury selection cannot be resolved with the existing record, and because the State disputes all of Olsen's assertions regarding this issue, see Response, at 24-26, an evidentiary hearing is needed. RAP 16.11; Frazer v. United States, 18 F.3d 778, 784 (9th Cir. 1994).

3. Mr. Olsen's Trial Counsel Was Ineffective For Failing To Request A Voluntary Intoxication Instruction, And an Evidentiary Hearing is Needed on Olsen's Claim

The State disputes Olsen's claim that his attorney was ineffective for failing to request a voluntary intoxication instruction, and attempts to advance that Olsen's argument amounts to nothing more than a claim of his attorney "cho[osing] the wrong strategy." Response, at 26, 36. The State further disputes the need for an evidentiary hearing regarding counsel's failure to pursue an "involuntary [sic] intoxication defense." Id. at 39. The State is wrong and has seemingly conflated the issue.

The issue was not whether Olsen's trial counsel was ineffective for failing to pursue an "involuntary [sic] intoxication defense," i.e., an entire defense centered solely on voluntary intoxication, but rather a jury "instruction" relating to Olsen's ability to form the requisite intent or mental state of the crime(s) charged due to his intoxication at the time of the alleged events. The jury instruction would have enhanced trial counsel's defense, it was warranted and supported by the facts presented at trial, Olsen was entitled to it, and Olsen's attorney was ineffective for failing to request it.

A defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a mental state, (2) there is substantial evidence of intoxication, and (3) there is evidence that the intoxication affected the defendant's ability

to form the requisite intent or mental state. State v. Kruger, 116 Wn.App. 685, 691, 67 P.3d 1147 (2003) (citing State v. Gallegos, 65 Wn.App. 230, 238, 828 P.2d 37 (1992).

Here, the facts and circumstances presented at trial support Olsen's entitlement to a voluntary intoxication instruction. First, the crimes charged against Olsen included a mental state. See Jury Instruction 15 (murder in the first degree — "intent to cause the death of ..."); Jury Instruction 16 (burglary in the first degree — "intent to commit a crime ..."); and Jury Instruction 19 (robbery in the second degree — "intent to commit theft ..."). Second, there was substantial evidence of Olsen's intoxication at trial, which included using methamphetamine and drinking. See RP 506, 507, 521-23, 524, 583, 590 (06/09/08); RP 856-57, 860, 861, 864, 865, 880, 882, 911, 912, 956 (06/16/08). And finally, there was evidence that Olsen's intoxication affected his ability to form the requisite intent or mental state. See RP 590 (06/09/08) (Olsen "crying," and "sitting on the floor underneath the dining room table"); RP 881-82 (06/16/08) (Olsen remaining in hotel room instead of leaving with Ms. Frazier and Mr. Sublett because he was "high"); RP 912 (06/16/08) (Olsen had headache due to using "too much dope, and drinking"). Given these facts, trial counsel was ineffective for failing to request the instruction.

To show ineffective assistance of counsel, Mr. Olsen is required under Strickland v. Washington, 466 U.S. 668,

687 (1984), to show deficient performance and resulting prejudice.

As to the first prong, deficient performance, the relative question is whether a reasonable attorney should have proposed an instruction under these facts. See, e.g., State v. Glenn, 86 Wn. App. 40, 44, 935 P.2d 679 (1997) (counsel's performance is deficient if it falls below "a minimum objective standard of reasonable attorney conduct").

Here, although defense counsel knew of Olsen's intoxication through the State's discovery, which included the pre-trial statements of both Olsen and April Frazier (see Trial Exhibits 179A, 179B, 180), and further through his own conversations with Olsen, defense counsel failed to conduct any investigation regarding the extent of Olsen's intoxication relevant to Olsen's state of mind on any of the charged offenses. A reasonable attorney would have conducted even a minimal inquiry and exploration for applicability and potential impact as part of any defense: For example, if trial counsel's strategy was to attack the mens rea of the charged offenses, evidence of Olsen's drug and alcohol intoxication would have enhanced that defense. If, on the other hand, trial counsel's strategy was to stay away from Olsen's state-of-mind at the time of the crime, then there was absolutely no reason to introduce Olsen's extensive use of drugs and alcohol and counsel should have sought to exclude it.

And although the State disputes Olsen's claim that his attorney failed to investigate and argues that there was "scant evidence that he should have done so," Response, at 38, (which is properly the subject of the requested evidentiary hearing—RAP 16.11), what <u>is</u> clear is that trial counsel unequivocally knew through the testimony at trial that Olsen had ingested copious amounts of mind-altering substances prior to the events which led to the State's filing of charges.

"A defendant is entitled to have his or her theory of the case submitted to the jury under appropriate instructions when the theory is supported by substantial evidence." <u>Kruger</u>, 116 Wn.App. at 693 (citation omitted). There is sufficient evidence here to permit a jury to make the required findings.

Instead, trial counsel allowed the jury to hear evidence of Olsen's illegal drug use (as he made no attempt to exclude it), but stopped short—at a point where the jury heard about Olsen's use of illegal drugs, but also without sufficient evidence <u>or</u> an instruction that would have permitted jurors to give that evidence any positive (to Olsen) effect. Counsel should have asked for the instruction here, and it was deficient performance for him not to do so.

The second <u>Strickland</u> prong requires proof that "'defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unproffessional errors, the result of the proceeding would

have been different.'" In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002)(quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)).

Here, the jury was instructed on the elements of first degree murder (Instruction 15), first degree burglary (Instruction 16), and second degree robbery (Instruction 19), including intent. And Mr. Olsen's intoxication was brought to the jury's attention, repeatedly. But the jury "was not instructed that intoxication could be considered in determining whether the defendant[] acted with the mental state essential to commit the crime" of first degree murder, first degree burglary, or second degree robbery. State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984).

In Rice, the court held that even where there was testimony from which the jury could infer the absence of intent due to the defendant's intoxication, the court erred by not giving an intoxication instruction. This is because "the jury, without the requested instruction, was not correctly apprised of the law, and defendants' attorneys were unable to effectively argue their theory of an intoxication defense." Id. The same is true here. Even if the issue of Olsen's intoxication was before the jury, without the instruction, the defense was impotent. See id. (under harmless error standard, where an erroneous instruction is given on behalf of a party in whose favor a verdict is returned, prejudice is presumed).

The jury here was confused about intent, and an additional instruction on that crucial issue would have made a critical difference in this case. Defense counsel's failure to proffer the necessary voluntary intoxication instruction, which stemmed from his initial failure to conduct an investigation into Olsen's intoxication and drug usage prior to the crime, was ineffective assistance of counsel and prejudiced Mr. Olsen.

Counsel could not make reasonable, tactical decisions without first conducting an investigation. Counsel must, at a minimum, conduct a reasonable investigation enabling him to make an informed decision about how best to represent his client. In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001); Seidel v. Merkel, 146 F.3d 750, 755 (9th Cir. 1998). No investigation is not a reasonable investigation.

However, Olsen ultimately recognizes that these arguments can only be resolved after the facts are found. As a result, he repeats his request for an evidentiary hearing. In addition, although this matter must be resoled by the trial court, Olsen also seeks expert assistance at that hearing pursuant to RAP 16.12; CrR 3.1.

4. Mr. Olsen's Trial Counsel Was Ineffective For Inquiring About Olsen's Possession of a Gun, Thereby Opening the Door To Admission of His Prior Conviction

On this claim, the State argues that it was not defense counsel's question about the gun that opened the door to

admission of Olsen's prior conviction in 2006 for second degree unlawful possession of a firearm, but rather "Olsen's statements during the recorded telephone conversation, coupled with his answers to cross examination questions, that opened the door." Response, at 41. The State is incorrect.

The State fails to recognize that only questions and answers extracted on direct examination can be then further explored on cross-examination. Therefore, without defense counsel's initial question to Olsen on direct examination about a gun, thus opening the door, the State would have had no opportunity to inquire further — to the point of getting evidence of Olsen's inadmissible (up to that point) prior criminal history admitted at trial. A simple analogy: A roof will never exist without first building the walls to hold it up.

Earlier in trial, the State had played two recordings of jail phone calls between Olsen and April Frazier. RP 788 (transcripts of those two calls were admitted as Exhibits 178A and 178B). When Olsen was on the stand testifying in his own behalf, his defense attorney on direct asked the question: "There's been some conversation about a gun on the recorded phone calls. What kind of gun was that?" RP 856 (06/16/08). Without that question, the State would not have had opportunity on cross-examination to inquire further about Olsen's "possession of a gun." RP 875-76. Then, on redirect, defense counsel elicited even more information

from Olsen regarding "the gun that's on the recorded telephone call" by asking him what he meant by "mak[ing] things toasty?" RP 916. This directly led to further questions by the State on recross which resulted in an objection by defense counsel, a side bar, a discussion between the court and parties, and then the admission of evidence of Olsen's prior conviction for unlawful possession of a firearm. RP 919-22. This was prejudicial to Mr. Olsen. State v. Saunders, 91 Wn.App. 575, 580, 958 P.2d 364 (1998)("Evidence of a prior conviction is inherently prejudicial when the defendant is the witness because it shifts the jury focus from the merits of the charge to the defendant's general propensity for criminality") (citing State v. Hardy, 133 Wn.2d 701, 710, 946 P.2d 1175 (1997)).

This direct chain of events was beget solely by defense counsel's questioning of his own client about gun possession which unmistakably opened the door for the state and ultimately led straight to the admission of Olsen's prior conviction. That was an error that was not the result of any strategic decision.

This Court should remand this claim for an evidentiary hearing so that it can be explored along with the previous claims. In addition, because this Court must cumulatively measure the prejudice that resulted from trial counsel's deficient performance, if any is found, that can only be done by remanding all colorable claims of ineffectiveness.

5. There Was Cumulative Error In This Case

The State argues that there was no cumulative error, stating that the only thing that "could even be considered error" was the final PowerPoint slide in the prosecutor's closing argument, and "only by stretching the holding of Glasmann beyond what that court actually said." Response, at 43-44.

That hollow argument is meritless, and appellate counsel should know better, especially since she unequivocally knows that this Court in Herbin — to which she herself was the respondent for the State in that case also — expressly held otherwise. See Part A.1, supra.

The cumulative error here started with the misconduct of the juror, and continued with trial counsel's errors by not challenging the juror; inquiring about Olsen's possession of a gun which allowed his prior conviction to come in; failing to conduct an investigation into Olsen's intoxication, and failing to request a jury instruction regarding same; and culminating with the prosecutorial misconduct by David Bruneau during closing arguments at trial when showing the altered and unadmitted booking photograph of Olsen, and expressing his personal opinion of Olsen's guilt by stating that Olsen was "guilty as charged and guilty as proven," and further calling Olsen a "killer." RP 1003, 1076 (06/17/08). All these errors have substantially prejudiced Mr. Olsen.

B. CONCLUSION

Based on the above, this Court should either remand this case to Thurston County Superior Court for an evidentiary hearing or for a decision of this petition on the merits.

Dated this 11 day of October, 2013.

Respectfully Submitted:

Christopher Lee Olsen

Christopher Olsen DOC 831898
Pro Se

Appendix A

NEW TRIAL ORDERED IN OLYMPIA KIDNAPPING, ROBBERY

By JEREMY PAWLOSKI
The Olympian

OLYMPIA — The Washington Court of Appeals has overturned a Thurston County kidnapping and robbery conviction and ordered a new trial because of what it ruled as insufficient evidence and a prosecutor's misconduct.

The Appeals Court found that former Thurston County Deputy Prosecuting Attorney David Bruneau committed misconduct in presenting a PowerPoint slide to the jury during closing arguments depicting the defendant's mug shot with the word "guilty" superimposed on the photograph.

In 2011, a jury convicted Deshone Herbin of first-degree burglary, three counts of first-degree kidnapping and four counts of first-degree robbery. The Court of Appeals reversed the convictions last week, ruling that the state's evidence was insufficient to support three of his four first-degree robbery convictions. Herbin's convictions on the remaining charges were reversed based on the PowerPoint slide.

A judge had sentenced Herbin to 52 years and five months in prison.

On Friday, Thurston County Chief Criminal Deputy Prosecuting Attorney Andrew Toynbee said his office will retry Herbin. Toynbee added that his office will ask that Herbin remain in custody as the case is retried.

Herbin and two other suspects were charged in the Dec. 27, 2009, home-invasion robbery in Olympia. One of the suspects was armed with a shotgun and threatened the occupants.

Appendix B

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174 Wash.App. 1078

NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington, Division 2.

STATE of Washington, Respondent,

v.

Deshone Verell HERBIN, Appellant.

No. 41944-1-II. | May 21, 2013.

Appeal from Thurston Superior Court; Honorable Paula K. Casey, J.

Attorneys and Law Firms

Lisa Elizabeth Tabbut, Attorney at Law, Longview, WA, for Appellant.

Carol L. La Verne, Thurston County Prosecutor's Office, Olympia, WA, for Respondent.

Opinion

UNPUBLISHED OPINION

VAN DEREN, J.

*1 A jury returned verdicts finding Deshone Verell Herbin guilty of one count of first degree burglary, three counts of first degree kidnapping, and four counts of first degree robbery. The jury also returned special verdicts finding that Herbin committed his offenses "while armed with a deadly weapon—firearm." Herbin appeals his convictions and sentence, asserting that (1) the trial court erred by failing to instruct the jury that it did not need to be. unanimous to answer "no" on the special verdict sentencing enhancement forms, (2) the trial court improperly imposed firearm sentencing enhancements due to erroneous jury instructions, and (3) his defense counsel was ineffective for failing to object to certain hearsay testimony. In his statement of additional grounds for review (SAG), Herbin asserts (1) the State's evidence was insufficient to support three of his first degree robbery convictions, [1] (2) the State's evidence was insufficient to support his three kidnapping convictions, (3) the trial court acted outside its statutory authority by ordering mental health evaluation and treatment as a condition of community custody, (4) he received an unconstitutionally disproportionate sentence, (5) he was denied his Sixth Amendment right to an impartial jury, (6) the prosecutor's use of a PowerPoint demonstration during closing argument constituted misconduct, and (7) cumulative error denied his right to a fair trial. We affirm in part and reverse in part. We reverse three of Herbin's first degree robbery convictions and their attendant firearm sentencing enhancements for insufficient evidence; and we reverse his convictions on the remaining charges and remand for a new trial because the prosecutor committed prejudicial misconduct during closing argument.

FACTS

Nicholas Oatfield, Zachary Dodge, Aaron Ormrod, and Nicholas Ormrod were members of a paintball team who shared a house in Olympia, Washington. All four were at home on December 27, 2009, with Dodge's fiancee, Brittany Burgess, and fellow teammate, Casey Jones. The team gathered at the Olympia house because they had scheduled an early practice the next morning. Another teammate, Malcolm Moore, came to the house around 3:30 am. When Moore arrived, Jones was asleep on a couch in the living room and everyone else was asleep in their bedrooms. Moore locked the door, made himself a sandwich, and called his girlfriend. Shortly after calling his girlfriend, Moore heard a loud knock at the door.

Moore woke up Jones and told him that something "sketchy[ ]" was going on outside the house. Report of Proceedings (RP) (Feb. 23, 2011) at 134. When Jones opened the door slightly, someone on the porch tried to force the door open. Moore and Jones attempted to shut the door and Jones began shouting for the other occupants to wake up and call 911. Moore and Jones could not shut the door, however, because someone on the porch stuck the barrel of a shotgun in the door jam and yelled, "Shoot that motherfucker." RP at 150. Three men entered the home, and one of the intruders forced Moore and Jones to crawl into the kitchen/

dining room area at gunpoint while the two remaining intruders made their way toward the bedrooms .[2]

*2 Nicholas[3] woke up when he heard a commotion in the house and someone shouting to call 911. He called 911 and locked his door. Soon thereafter, a man carrying a shotgun kicked open Nicholas's bedroom door and forced Nicholas to crawl into the kitchen.

When Oatfield heard someone knocking at the door, he woke up and left his bedroom to see who was there. After hearing a loud crash and Jones shouting to call 911, Oatfield ran into Aaron's bedroom and told him that they were being robbed. Aaron woke up and called 911, while Oatfield sat against the bedroom door. Oatfield could hear footsteps in the hallway and people forcing their way into the other bedrooms. One of the intruders kicked open the bedroom door that Oatfield had been leaning against and pointed a shotgun at Oatfield's head. Oatfield quickly glanced at the intruder and, although the intruder was wearing something to obscure his face, Oatfield was able to later identify him as **Herbin**. **Herbin** then forced Oatfield and Aaron to crawl into the kitchen/dining room.

Dodge also woke up when he heard a commotion coming from the living room. Dodge peered out his bedroom door and heard intruders yelling and Jones shouting for someone to call 911. Dodge ran back into his bedroom and held Burgess until two intruders forced their way into the bedroom. The first intruder, whom Dodge later identified as **Herbin**, pointed a shotgun at Dodge and told the couple not to call the police or he would shoot them. **Herbin** then left the room and, a short time later, a second intruder armed with a shotgun entered. The second intruder took a laptop computer and some money and then forced Dodge and Burgess to walk into the kitchen/dining room and lie face down next to the others.

After the occupants and guests were forced into the kitchen/dining room, the intruders took items from Oatfield's bedroom as well as from both of the Ormrod brothers' bedrooms, which items included cash, a television, and paintball equipment. The three intruders were in the house for approximately five minutes before police arrived.

Thurston County Deputy Sheriff Rod Ditrich was the first officer to arrive at the house. As he approached, Ditrich saw a red Ford Explorer in the road with one person in the Explorer's driver's seat and another person standing just outside the passenger side of the vehicle. As Ditrich turned on his lights and drove toward the Explorer, the men fled in different directions. A short time later, Jessup Tillman, the man who had been standing outside the passenger side of the Explorer, called the police and told them that he was one of the intruders. A canine patrol officer and his dog located John Burns nearby and arrested him.

Officers found items that had been taken from the house in the Explorer. Officers also found a loaded shotgun that belonged to Tillman in the bushes near the house's front door. Police located **Herbin** and arrested him the following day. The **State** charged **Herbin** with first degree burglary while armed with a deadly weapon—firearm, three counts of first degree kidnapping while armed with a deadly weapon—firearm, and four counts of first degree robbery while armed with a deadly weapon—firearm.

*3 Burns, Tillmon, and **Herbin** were tried together in April 2010. The jury returned verdicts finding Burns and Tillmon guilty of all charges and sentencing aggravators. But the jury could not reach a unanimous decision about **Herbin's** guilt on any charges and the trial court declared a mistrial.

Herbin was tried a second time in November 2010. At **Herbin's** second trial, the trial court excused a juror after finding that the juror presented extrinsic evidence during deliberations. The trial court later declared a mistrial after a reconstituted jury could not reach a verdict. **Herbin's** third trial began on February 22, 2011.

At **Herbin's** third trial, Tiffani Strickland testified that she owned the Ford Explorer police had located at the crime scene and that she was acquainted with **Herbin**. She **stated** that **Herbin** and **Herbin's** father were at her home on the evening of December 26, 2009, from approximately 7:00 to 8:00 pm until around midnight. **Herbin** returned to Strickland's home at around 3:00 AM, woke her up, and asked for her car keys. About one hour later, police called Strickland to inquire whether her car had been stolen. Strickland told police

that she had loaned the car to Herbin. When she went outside, Strickland saw a white Chevrolet Impala that she had not seen before parked in the same spot where she had parked her Explorer the previous evening. The Chevrolet Impala was registered to Tillmon, whom Strickland had never met.

Laurie Owen testified that she owned a house in Tumwater, Washington, where she lived with Herbin; Herbin's girlfriend, Ashley Perreira; and Perreira's daughter. Owen stated that Herbin and his father came to her house at around 10:00 pm on December 26, 2009. Owen woke up at around 3:00 pm when she heard Herbin talking loudly on his telephone saying, " 'Come get me then. Come get me right now.' " RP (Feb. 23, 2011) at 277. Owen told Herbin to be quiet, returned to bed, and then heard someone leave the house. About one hour later, Owen received a call from Herbin's cell phone but when she answered it, there was no response.

The jury returned guilty verdicts on all charges and answered "yes" on each special verdict form. Clerks Papers (CP) at 50–65. The trial court imposed an exceptional sentence downward of 629 months. Herbin timely appeals his convictions and sentence. We address only those issues necessary to this appeal based on our reversal of his convictions for three first degree robbery convictions for insufficient evidence and our reversal and remand of his convictions for first degree burglary, three counts of first degree kidnapping, and one count of first degree robbery based in prosecutorial misconduct during closing.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

In his SAG, Herbin first argues that the State's evidence was insufficient to support three of his four first degree robbery convictions. Specifically, Herbin argues that under the trial court's jury instructions, the State's evidence was insufficient to support a finding that he or an accomplice unlawfully took personal property *from the person* of Oatfield, Aaron, or Nicholas. We agree, vacate those convictions and their attendant firearm sentence enhancements, and remand for resentencing consistent with this opinion.

A. Standard of Review

*4 Sufficient evidence exists to support a conviction if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Hosier,* 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A defendant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn from the evidence. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton,* 64 Wn.App. 410, 415–16, 824 P.2d 533 (1992).

We review jury instructions de novo, "within the context of the jury instructions as a whole." *State v. Jackman,* 156 Wn.2d 736, 743, 132 P.3d 136 (2006). Jury instructions, "taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." *State v. Pirtle,* 127 Wn.2d 628, 656, 904 P.2d 245 (1995). When a defendant challenges the sufficiency of the evidence in light of an incomplete or incorrect jury instruction, we determine whether sufficient evidence exists to sustain the conviction based on the given instruction. *See, e.g., Tonkovich v. Dep't of Labor & Indus.,* 31 Wn.2d 220, 225, 195 P.2d 638 (1948) ("It is the approved rule in this state that the parties are bound by the law laid down by the court in its instructions [.] ... In such case, the sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions and rules of law laid down in the charge.").

B. Sufficiency of the Evidence—First Degree Robbery of Oatfield, Aaron, or Nicholas

Here, the trial court's jury instructions were victim-specific "to-convict" first degree robbery jury instructions, to which neither party objected at trial:

> To convict the defendant ... of the crime of robbery in the first degree, ... each of the following six elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 27, 2009, the defendant or an accomplice unlawfully took personal property *from the person of another,* [victim's name];

(2) That the defendant or an accomplice intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's or accomplice's use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property or to the person or property of another;

(4) That force or fear was used by the defendant or an accomplice to obtain or retain possession of the property;

(5)(a) That in the commission of these acts or in immediate flight therefrom the defendant or an accomplice was armed with a deadly weapon; or

*5 (b) That in the commission of these acts or in the immediate flight therefrom the defendant or an accomplice displayed what appeared to be a firearm or other deadly weapon; and

(6) That any of these acts occurred in the State of Washington.

CP at 41–43 (emphasis added).

Although this instruction was based on 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 37.02, at 667 (3d ed.2008) (WPIC), the trial court's "to-convict" instructions omitted the WPIC's optional language, "[or in the presence] of another." And because the trial court's "to-convict" instructions were provided without objection, they became the law of the case. *See State v. Homes,* 74 Wn.2d 721, 725, 446 P.2d 344 (1968) (Under the' "law of the case' " doctrine, jury instructions not objected to become the law of the case. (quoting *State v. Leohner,* 69 Wn.2d 131, 134, 417 P.2d 368 (1966))).

Accordingly, to sustain a first degree robbery conviction, the State's evidence must have been sufficient to support the jury finding that Herbin or an accomplice "unlawfully took personal property *from the person of another.*" CP 41–43 (emphasis added). But here the State did not present any evidence that Herbin or an accomplice took personal property *from the person* of Oatfield or from either of the Ormrod brothers. Instead, the evidence showed that Oatfield, Aaron, and Nicholas did not discover that any of their personal property had been taken until after Herbin, Tillmon, and Bruns left the home.

The State' conceded this that Herbin or an accomplice did not take property from the person of Oatfield or the Ormrod brothers, when it presented its theory of the case during closing arguments:

> The four victims of robbery, ladies and gentlemen, the people who in the case of Zachary Dodge, who was present when his property was stolen, or Nicholas Oatfield, Nicholas Ormrod and Aaron Ormrod, who were removed from their rooms so that their property could be stolen, are the victims of the robbery.

RP (Feb. 24, 2011) at 427. Because the law of the case doctrine required the State to prove that Herbin or an accomplice unlawfully took personal property *from the person* of Oatfield, Aaron, and Nicholas to sustain the first degree robbery convictions related to those victims, and because the State's evidence was insufficient to prove that requisite element of the offenses, we vacate Herbin's first degree robbery convictions in relation to those victims, as well as the attendant firearm sentence enhancements, and remand for resentencing consistent with this opinion.

C. Sufficiency of the Evidence—Kidnapping

Herbin also contends that sufficient evidence does not support his kidnapping convictions, arguing that the kidnappings were merely incidental to the first degree robbery convictions and therefore must be dismissed under our decision in *State v. Korum,* 120 Wn.App. 686, 86 P.3d 166 (2004), *aff'd in part and rev'd in part on other grounds,* 157 Wn.2d 614, 620, 141 P.3d 13 (2006), We disagree.

*6 Although we held in *Korum* that under certain circumstances, kidnapping is merely incidental to robbery, a kidnapping is not incidental to a robbery when the victim of the kidnapping was different from the victim of the robbery. Our analysis in *Korum* relied on *State v. Green,* 94 Wn.2d 216, 226–27, 616 P.2d 628 (1980), in which our Supreme Court held that the restraint and movement of a victim that are merely incidental and integral to the commission of another crime do not constitute the independent, separate crime of kidnapping.

In *State v. Vladovic,* 99 Wn.2d 413, 424, 662 P.2d 853 (1983), the defendant, citing *Green,* argued that there was insufficient evidence that he committed kidnapping because "the acts did not bear the indicia of a true kidnapping." Our Supreme Court disagreed, concluding that "*Green* is inapposite in the instant case since ... the restraint of the four employees was a separate act from the robbery of Mr. Jensen. Therefore the robbery of Mr. Jensen could not supply the restraint element of the kidnappings." *Vladovic,* 99 Wn.2d at 424.

Here, the State charged Herbin with three counts of first degree kidnapping for his conduct related to Moore, Jones, and Burgess; whereas, it charged Herbin with four counts of first degree robbery for his conduct related to Dodge, Oatfield, Aaron, and Nicholas. The trial court's "to-convict" jury instructions also named each victim related to each first degree kidnapping and each first degree robbery charge. Accordingly, because each of the kidnapping victims was distinct from each of the robbery victims, we hold that Herbin's first degree kidnapping convictions are not merely incidental to his remaining first degree robbery conviction and, thus, sufficient evidence supports his kidnapping convictions.

II. PROSECUTORIAL MISCONDUCT

Herbin also argues that the prosecutor committed misconduct during closing argument by presenting a PowerPoint slide that contained the word "GUILTY" superimposed across his photograph. We agree that the prosecutor's use of certain slides during closing argument was improper and hold that the prosecutor's improper conduct resulted in such prejudice that Herbin is entitled to a new trial.

A defendant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. *State v. Fisher,* 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prejudice exists when there is a substantial likelihood that the misconduct affected the Verdict. *State v. McKenzie,* 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Because Herbin did not object to the prosecutor's allegedly improper conduct at trial, we must ascertain whether the prosecutor's misconduct was "so flagrant and ill-intentioned" that it caused an "enduring and resulting prejudice" incurable by a jury instruction. *State v. Stenson,* 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). Under this heightened standard of review, Herbin has the burden to show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.' " *State v. Emery,* 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (quoting *State v. Thorgerson,* 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). In analyzing a prosecutorial misconduct claim, we "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Emery,* 174 Wn.2d at 762. " 'The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?' " *Emery,* 172 Wn.2d at 762 (alteration in original) (quoting *Slattery v. City of Seattle,* 169 Wash. 144, 148, 13 P.2d 464 (1932)).

*7 Here, 3 of the 119 slides contained in the record are problematic .[4] The first slide contains the words "STATE OF WASHINGTON vs." in a large font written above what appears to be Herbin's booking photograph with his name written below the photograph. Suppl. CP at 162. On that same slide, below Herbin's name, the words "GUILTY AS CHARGED" are written within quotation marks. Suppl. CP at 162. A second slide has a larger version of the same booking photograph with the following text written across the photograph:

(FACE) "... burned in my memory ...

... scariest day of my life ..."

Nick Oatfield

Suppl. CP at 249. Finally, the third slide also contains **Herbin's** booking photograph with the word "GUILTY" written across his face in a large font. Suppl. CP at 259. In this same slide, **Herbin's** photograph and the word "GUILTY" are circled and several arrows are pointing at the encircled photograph with various text written at the start of each arrow describing various pieces of evidence such as, "Identified by Nick Oatfield," and "Ford Explorer at crime scene." Suppl. CP at 259.

The prosecutor's use of these slides during closing argument was improper. Our Supreme Court has recently analyzed a prosecutorial misconduct claim related to the prosecutor's use of PowerPoint slides during closing argument in *State v. Glasmann,* 175 Wn.2d 696, 286 P.3d 673 (2012). In *Glasmann,* the prosecutor presented at least five slides that contained the defendant's booking photograph, in which he had a bloody and unkempt appearance due to his altercation with police during his arrest, and each of the slides contained a caption. 175 Wn.2d at 701–702, 706. Our Supreme Court described these slides as follows:

> In one slide, the booking photo appeared above the caption, "DO YOU BELIEVE HIM?" In another booking photo slide the caption read, "WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?" Near the end of the presentation, the booking photo appeared three more times: first with the word "GUILTY" superimposed diagonally in red letters across Glasmann's battered face. In the second slide the word "GUILTY" was superimposed in red letters again in the opposite direction, forming an "X" shape across Glasmann's face. In the third slide, the word "GUILTY," again in red letters, was superimposed horizontally over the previously superimposed words.

Glasmann, 175 Wn.2d at 701–702 (internal record citations omitted). In addition to the slides described above, the prosecutor presented the following slides during closing arguments:

> One slide showed Glasmann crouched behind the minimart counter with a choke hold on [the victim] and a caption reading, "YOU JUST BROKE OUR LOVE." Another slide featuring a photograph of [the victim's] back injuries appeared with the captions, "What was happening right before defendant drove over [the victim] ..." and "... you were beating the crap out of me!" This slide also featured accompanying audio.

***8** *Glasmann,* 175 Wn.2d at 701 (alterations in original) (internal record citations omitted).

The court held that the prosecutor's use of these slides was improper, reasoning that the slides expressed the prosecutor's personal opinion of the defendant's guilt and presented evidence that was not part of the trial. *Glasmann,* 175 Wn.2d at 706–707. It noted that "there w[as] no sequence of photographs in evidence with 'GUILTY' on the face or 'GUILTY, GUILTY, GUILTY.' Yet this 'evidence' was made a part of the trial by the prosecutor during closing argument." *Glasmann,* 175 Wn.2d at 706 (internal record citations omitted).

Similarly here, there was no evidence at trial depicting **Herbin's** face with the word "GUILTY" superimposed on it and it was improper for the prosecutor to present this slide at closing. Additionally, the use of the slide containing the text, "GUILTY AS CHARGED" in quotation marks suggests the prosecutor's personal belief as to **Herbin's** guilt, particularly because this quoted phrase was not attributable to any trial testimony. Suppl. CP at 162. Finally, the use of Oatfield's testimony, "(FACE) 'burned in my memory ..... scariest day of my life ...' " superimposed over an enlarged photograph of **Herbin** could potentially inflame the passions of the jury by suggesting that **Herbin** is a scary and dangerous person. Suppl. CP at 249. Accordingly, the prosecutor's use of these slides was improper.

Moreover, we agree with **Herbin** that the prosecutor's improper use of these slides requires reversal of his convictions. We recognize that this case is distinguishable from *Glasmann* because, unlike Glasmann, **Herbin's** booking photograph does notdepict him in a bloody an unkempt manner, "a condition likely to have resulted in even greater impact because of captions that challenged the jury to question the truthfulness of [Glasmann's] testimony." *Glasmann,* 175 Wn.2d at 705. Also unlike Glasmann, **Herbin's** credibility was not directly at issue since he did not testify at trial, and none of the prosecutor's slides commented on **Herbin's** credibility. Despite these distinctions, however, we hold that the use of

the slides resulted in prejudice that "had a substantial likelihood of affecting the jury verdict" warranting a new trial. *Thorgerson,* 172 Wn.2d at 455.

Like *Glasmann,* here the prosecutor "intentionally presented the jury with copies of [Herbin's] booking photograph altered by the addition of phrases calculated to influence the jury's assessment of [Herbin's] guilt." 175 Wn.2d at 705. As our Supreme Court reasoned when holding that the prosecutor's use of a similarly altered booking photograph was misconduct warranting a new trial, "the prosecutor's modification of photographs by adding captions was the equivalent of unadmitted evidence ... made a part of the trial by the prosecutor during closing argument." *Glasmann,* 175 Wn.2d at 706. Additionally, although we recognize that the prosecutor here linked the "GUILTY" statement superimposed over Herbin's booking photograph with various pieces of evidence presented during the trial and, thus, did not express a personal opinion of Herbin's guilt through use of that slide, the prosecutor did express a personal opinion of Herbin's guilt when presenting a slide with the phrase "GUILTY AS CHARGED" written beneath Herbin's booking photograph. [5] Suppl. CP at 259, 162.

*9 Following' *Glasmann,* we hold that the prosecutor's use of slides containing Herbin's altered booking photograph "was so pervasive that it could not have been cured by an instruction." 175 Wn.2d at 707. As our Supreme Court recognized when reversing Glasmann's convictions for prosecutorial misconduct, "Highly prejudicial images may sway a jury in ways that words cannot" and, thus, "may be very difficult to overcome with an instruction." *Glasmann,* 175 Wn.2d at 707 (citing *State v. Gregory,* 158 Wn.2d 759, 866–67, 147 P.3d 1201 (2006)). Because the prosecutor's misconduct in presenting highly inflammatory slides containing Herbin's altered booking photograph had a substantial likelihood of affecting the jury verdict that was incurable by a jury instruction, we reverse Herbin's remaining convictions and remand for a new trial.

We reverse three of Herbin's first degree robbery convictions and their attendant firearm sentence enhancements for lack of sufficient evidence, reverse and remand Herbin's convictions for one count of first degree burglary, three counts of first degree kidnapping, and one count of first degree robbery for a new trial based on prosecutorial misconduct in closing. [6]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.Worswick, C.J.

We concur: PENOYAR, J., and WORSWICK, C.J.

Parallel Citations

2013 WL 2247398 (Wash.App. Div. 2)

Footnotes

1 Herbin's appellate counsel filed a supplemental brief in support of this SAG argument.

2 The record is unclear if the kitchen and dining room are together but the record suggests that all the victims were eventually on the dining room floor.

3 Because Nicholas and Aaron Ormrod are twin brothers that share the same last name, we use their first names for clarity.

4 The State did not provide the slides used in its PowerPoint demonstration during closing arguments before Herbin's appellate counsel filed its opening brief and before Herbin filed his SAG. On August 9, 2012, this court ordered the State to provide the PowerPoint slides to appellate counsel. Although the State provided a supplemental record containing 119 PowerPoint slides, it is unclear which of the slides were actually used during closing argument. The State filed a declaration that to the best of its knowledge the 119 PowerPoint slides contained in the supplemental record represented all of the PowerPoint slides that were shown to the jury during the trial. We will assume for the sake of Herbin's argument that all of the slides contained in the record were shown to the jury during closing argument.

5 The record on appeal does not indicate the nature of the prosecutor's argument when presenting this slide to the jury.

6 We decline to address several of Herbin's asserted issues on appeal in light of our reversal of his three first degree robbery convictions for insufficient evidence and our reversal of his remaining convictions based in prosecutorial

misconduct during closing. But we note that, to the extent that **Herbin** argues that his counsel's failure to object to hearsay testimony prejudiced him because sufficient evidence did not support the imposition of firearm enhancements absent the hearsay testimony, his argument fails. Here, even assuming that Detective Hamilton's testimony regarding the operability of the firearm found at the Olympia home was objectionable hearsay, eyewitness testimony describing the shotguns possessed by **Herbin**, Tillmon, and Burns during the course of the home invasion was sufficient to support the jury's finding that **Herbin** was armed with a firearm during the commission of his offenses. *See e.g., State v. Mathe,* 35 Wn.App. 572, 581–82, 668 P.2d 599 (1983) (State presented sufficient evidence that defendant "used a real and operable gun" with the testimony of two eyewitnesses who described in detail the guns used by the defendant), *aff'd,* 102 Wn.2d 537, 688 P.2d 859 (1984); *State v.. Bowman,* 36 Wn.App. 798, 803, 678 P.2d 1273 (1984) (" 'The evidence is sufficient if a witness to the crime has testified to the presence of such a weapon, as happened here.... The evidence may be circumstantial; no weapon need be produced or introduced.' " (quoting *Tongate,* 93 Wn.2d 751, 754, 613 P.2d 121 (1980))).

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Appendix C

DECLARATION OF CHRISTOPHER OLSEN

I, Christopher Olsen, declare:

1. I am the Petitioner in this action, am over the age of 18 and competent to testify, and base this declaration on personal knowledge.

2. I am submitting this declaration to authenticate the material facts regarding my public records request to the Thurston County Jail for my booking photograph to evidence that it was the same photograph improperly used by deputy prosecutor David Bruneau in his PowerPoint slide presentation to the jury during closing arguments at trial.

3. Pursuant to a public records request I submitted in August 2013 to the Thurston County Corrections Administration (Jail) requesting a color copy of my booking photo and verification of the fact that it was a booking photograph, I received a verification/response letter and a copy of the booking photograph requested. Both the response letter and the booking photograph are incorporated herein, with a true and correct copy of each attached hereto.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Walla Walla, Washington this 11 day of October, 2013.

Christopher Olsen

Christopher Olsen

THURSTON COUNTY SHERIFF'S OFFICE

WASHINGTON
SINCE 1852

JOHN D. SNAZA
Sheriff

Timothy P. Braniff, Undersheriff
David A. Pearsall, Chief Deputy
Bradley J. Watkins, Chief Deputy
Todd L. Thoma, Chief Deputy
Joan A. Plaja, Fiscal Manager

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September 5, 2013

Christopher Olsen – DOC#831898
Washington State Penitentiary
R B-2-12
1313 N 13th Avenue
Walla Walla, WA 99362-8817

RE: Records Request received September 3, 2013

Dear Mr.Olsen:

This is sent in response to your records request received September 3, 2013 by Thurston County Corrections Administration.

Your request is for: *"A color copy of the booking photo with verification such as a letter or other proof that it is in fact a booking photo"*

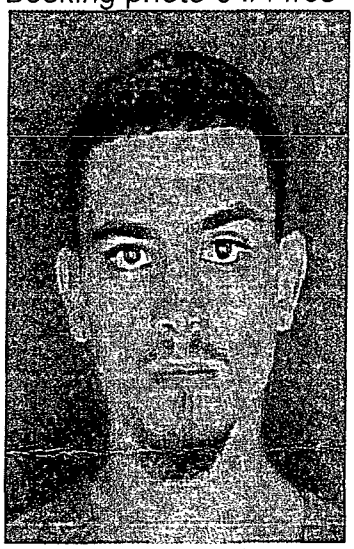
We have enclosed a copy of your booking photo from 04/11/08 which notates the name of this facility. It includes your full name and date of birth and the date of the photo which should verify the photo. This concludes your request for information.

Sincerely,

James Downing, Captain
Thurston County Corrections

JD/vw
cc: Olsen PDR #849

Thurston County Corrections
Booking photo 04/11/08



Christopher Lee Olsen
DOB: 12/25/80

Appendix D

FIRST DECLARATION OF CHRISTOPHER OLSEN

I, Christopher Olsen, declare:

1. I am the Petitioner in this action, am over the age of 18 and competent to testify, and base this declaration on personal knowledge.

2. I am submitting this declaration to authenticate the material facts regarding the prosecutorial misconduct of deputy prosecuting attorney David Bruneau during closing arguments in my trial.

3. During deputy prosecutor Bruneau's closing arguments at trial, he presented a slide-show presentation to the jury that included multiple slides that contained my unadmitted jail booking photograph.

4. The last of those slides he showed to the jury was a slide which showed the booking photographs of myself and my co-defendant contained in a circle and surrounded by eight arrows with corresponding words at the start of each arrow, and the word "GUILTY" in bold red letters in a large font across the photographs of myself and my co-defendant.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Walla Walla, Washington this 11 day of October, 2013.

Christopher Olsen

Christopher Olsen

Appendix E

"Placeholder" Declaration of Christopher Olsen

I, Christopher Olsen, declare:

1. I have previously mailed a Declaration to my trial counsel, Richard Woodrow, WSBA #18680, for his review and signature.

2. That declaration has in fact been reviewed, signed, and was placed in the mail addressed to me by Mr. Woodrow. However, the declaration did not arrive in time before such time as I had to file this Reply Brief, which was due October 24, 2013.

3. That declaration will be filed with the Court as soon as I receive it back from Mr. Woodrow in the mail. This Declaration of myself, Christopher Olsen, is intended only as a "placeholder" until Mr. Woodrow's own declaration can be filed.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and based on personal knowledge.

DATED at Walla Walla, Washington on October 24, 2013.

Christopher Olsen

Christopher Olsen

RICHARD WOODROW

ATTORNEY AT LAW

December 19, 2012

Christopher Olsen
DOC #831898 RB212WSP
1313 North 13th Avenue
Walla Walla, WA 99362

Re: PRP

I know your probably know your appeal was denied. When you file your PRP make sure to include the following:

1. Violation of right to fair trial when Bruneau used an exhibit that had your mug shot displayed on a projector screen. Your picture was highlighted with a red banner that said guilty. I objected and the judge ordered the prosecutor to remove the exhibit from the jury's view. The prosecutor took his time about it. I believe under recent case law[1] this issue will get you a new trial.

I will submit an affidavit on your behalf. I will also get Sublett's attorney to submit one.

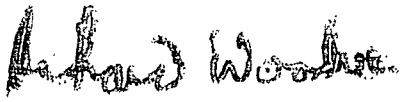
Make sure you ask for the exhibit. I don't think it was filed. Make a motion in your PRP for it. Make a public records request for it.

2. Make sure you get a copy of the voir dire transcript. According to the court record a transcript was produced. I don't think we had any closures of the court but you never know.

Good luck.

Sincerely,

Richard Woodrow
RAW:



[1]In re Glasman No 84475-5. This case is very similar to your case. We had asked for a lesser included charges just like in Glasman. I think this use of an un-admitted exhibit made the jury come back on murder one.

3732 Pacific Avenue SE (360) 352 9911 Fax (360) 352 9955
Olympia, WA 98501

Appendix F

SECOND DECLARATION OF CHRISTOPHER OLSEN

I, Christopher Olsen, declare:

1. I am the Petitioner in this action, am over the age of 18 and competent to testify, and base this declaration on personal knowledge.

2. I am submitting this declaration to authenticate the material facts regarding the misconduct of a juror in my trial.

3. During a church service at the Thurston County Jail occurring prior to my trial, I met with "Vince" (or "Vincent") who was part of a volunteer group from Grace Community Covenant Church (located at 5501 Wiggins Rd SE; ph: 360-491-8954).

4. This church volunteer "Vince" became a juror in my trial. He is a caucasian (white) man of average hight and build, has brown hair, and had a mustache and was wearing jeans when I met with him.

5. The church service at the jail was held after dinner in the classroom/multi-purpose room (located between "D" and "B" tanks). There were approximately 10-15 other inmates and a few volunteers that attended that particular service. The service itself was a Christian service.

6. At one point during the church service I had gone up to him ("Vince") and asked him to pray for me because I needed as much help as possible and I believed prayer on my behalf was the most powerful help available.

7. I don't recall exactly everything I had told "Vince" during our conversation, but I do recall telling him that I was in jail for a murder that I did not commit; that I had only become involved with the crime 'after-the-fact'; and that my co-defendant and his

girlfriend were trying to use me as their 'scapegoat'. I had also told him that I had been involved with the dumping of the body.

8. He and I talked and prayed for about 5-6 minutes. We were off to the side and one-on-one, and he held my hand and was facing me while we prayed about my case. A couple of other inmates were also praying with other members of the volunteer group. I cannot be sure if anyone heard what we were saying although there were quite a few people in the service with us.

9. During the prayer, he asked that the Lord's will be done in regards to my situation; prayed that the Lord soften the hearts of the judge and prosecutor in my case; and prayed that justice be done according to the Lord's will. The next time I saw him was at my trial.

10. During jury selection at my trial as I was sitting at a table with my attorney (Richard Woodrow) and facing the jury pool, I recognized "Vince" from the church service at the jail. He was one of the members of the jury pool.

11. After recognizing "Vince", I immediately told my attorney that I had prayed with that man about my case during church services at the jail. My attorney didn't say much about it other than to say "don't worry about it, it could be good for us." Although I had voiced my strong concerns to him, my attorney did not seem particularly worried about it.

12. Later, and well into trial, a bailiff informed the trial court judge that she had been approached by a juror. The bailiff then explained to counsel for the parties that the juror told her that during some of the recordings played for the jury he had heard myself, Christopher Olsen, mention

that I had attended a church service in the jail, and that he had also attended a service at the jail but had not seen me there.

13. Upon recollection, and additionally, after careful review of the verbatim transcripts of the only three recordings played for the jury and admitted at trial, at no time did I state, reference, or otherwise mention attending a church service at the jail.

14. The transcripts of those recordings admitted at trial were admitted as Exhibits 178A and 178B (two jail phone calls), and 179A, 179B, 180 (interview of Olsen) on June 11, 2008, the same day the recordings themselves were admitted and played. See Appendix G at 9 (Exhibit List) submitted herewith. No other recordings were played or otherwise admitted. Id. at 9-10 (exhibits #181-184 not admitted).

15. The juror, "Vince", was dishonest and misled the bailiff — and by extension, the court and parties — by stating that he had heard me on one of the recordings played for the jury that I mentioned going to one of the church services in the jail.

16. The juror, "Vince", also waited five days before coming forward as the recordings were played on June 11, 2008, and he didn't say anything to the bailiff till June 16, 2008. See Appendix G at 9; RP 850-51 (06/16/08).

17. Had my attorney questioned the juror as he appropriately should have, the juror, upon any admission, would have been excused for cause (actual or implied bias) due to the juror's knowledge of material facts of my case prior to trial through my admissions made to him during our conversation and prayer together while at the jail church service. See paragraph 7, above.

18. I do not have the verbatim report of proceedings (transcripts)

of the jury selection (voir dire), so I do not know what "Vince's" juror number was; and cannot yet – due to lack of voir dire transcripts – direct this court to his dishonest answers to general voir dire questioning.

19. It is upon an abiding belief that "Vince" did indeed remember me from our conversation and prayer at the jail church service, and had come forward as a result of his recollection. He was obviously dishonest to the bailiff about his reason for coming forward (i.e., hearing me mention a jail church service on a recording played in court), and had he been challenged and questioned by my attorney either when I first voiced my concerns or when the juror finally came forward, the juror could have been excused for cause.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Walla Walla, Washington this 11 day of October, 2013.

Christopher Olsen

Christopher Olsen

Appendix G

10

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'08 JUN 17 P3:05

BY _____ DEPU

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY	
STATE OF WASHINGTON Plaintiff, vs. MICHAEL LYNN SUBLETT and CHRISTOPHER LEE OLSEN Defendants.	NO. 07-1-00312-0 and 07-1-01363-0 **EXHIBIT LIST (EXLST)** JUDGE CHRISTINE A. POMEROY Clerks: Alisa Williams / Denise Merz Court Reporter: Cheri Davidson Date: June 2, 2008 – June 18, 2008 Bailiffs: Donna Altman / Betty Benefiel Type of Hearing: Jury Trial

Offered By	Number of Exhibit	Admitted? Date	Title or Name of Exhibit
		PHOTOGRAPHS	
Mr. Bruneau	State's No. 1	Yes 06-04-08	aerial photo 320 "I" St vicinity
Mr. Bruneau	State's No. 2	Yes 06-04-08	320 "I" St floor plan
Mr. Bruneau	State's No. 2A	Yes 06-04-08	Diagram of alleged victim's home
Mr. Bruneau	State's No. 3	Yes 06-04-08	Front door
Mr. Bruneau	State's No. 4	Yes 06-04-08	Opposite view, front
Mr. Bruneau	State's No. 5	Yes 06-04-08	Rear
Mr. Bruneau	State's No. 6	Yes 06-04-08	Another view, same
Mr. Bruneau	State's No. 7	Yes 06-04-08	Other rear view
Mr. Bruneau	State's No. 8	Yes 06-04-08	View "5th Wheel"
Mr. Bruneau	State's No. 9	Yes 06-04-08	Another view—"5th Wheel"

S C A N N E D

Offered By	Number of Exhibit	Admitted? Date	Title or Name of Exhibit
Mr. Bruneau	State's No. 10	Yes 06-04-08	View of car port
Mr. Bruneau	State's No. 11	Yes 06-04-08	Same, closer view
Mr. Bruneau	State's No. 12	Yes 06-04-08	Door to Utility Room
Mr. Bruneau	State's No. 13	Yes 06-04-08	Same, different view
Mr. Bruneau	State's No. 14	Yes 06-04-08	Entry: Utility Room to K
Mr. Bruneau	State's No. 15	Yes 06-04-08	Kitchen/Dining Area
Mr. Bruneau	State's No. 16	Yes 06-04-08	Opposite View
Mr. Bruneau	State's No. 17	Yes 06-04-08	View of blinds
Mr. Bruneau	State's No. 18	Yes 06-04-08	View of Kitchen window
Mr. Bruneau	State's No. 19	Yes 06-04-08	Closer view
Mr. Bruneau	State's No. 20	Yes 06-04-08	Same, uncovered
Mr. Bruneau	State's No. 21	Yes 06-04-08	Front door (interior)
Mr. Bruneau	State's No. 22	Yes 06-04-08	Desk near front door
Mr. Bruneau	State's No. 23	Yes 06-04-08	Couch
Mr. Bruneau	State's No. 24	Yes 06-04-08	"Tossed" BR
Mr. Bruneau	State's No. 25	Yes 06-04-08	Other BR
Mr. Bruneau	State's No. 26	Yes 06-04-08	LR, Recliner
Mr. Bruneau	State's No. 27	Yes 06-04-08	Same, other view
Mr. Bruneau	State's No. 28	Yes 06-04-08	Floor near Recliner
Mr. Bruneau	State's No. 29	Yes 06-04-08	Another view floor area (bat)
Mr. Bruneau	State's No. 30	Yes 06-04-08	Fireplace (bat)
Mr. Bruneau	State's NO. 31	Yes 06-04-08	Closer view, same
Mr. Bruneau	State's No. 32	Yes 06-04-08	Utility Room (water heater)

S C A N N E D

Offered By	Number of Exhibit	Admitted? Date	Title or Name of Exhibit
Mr. Bruneau	State's No. 33	Yes 06-04-08	Same, another perspective
Mr. Bruneau	State's No. 34	Yes 06-04-08	Tape
Mr. Bruneau	State's NO. 35	Yes 06-04-08	Closer view, same
Mr. Bruneau	State's NO. 36	Yes 06-04-08	Glove
Mr. Bruneau	State's No. 37	Yes 06-04-08	Closer view of glove
Mr. Bruneau	State's No. 38	Yes 06-04-08	Bat
Mr. Bruneau	State's No. 39	Yes 06-04-08	Safe
Mr. Bruneau	State's No. 40	Yes 06-04-08	Same, door open
Mr. Bruneau	State's No. 41	Yes 06-04-08	Vicinity 6300 Old Oly Hwy
Mr. Bruneau	State's No. 42	Yes 06-04-08	Same, different view
Mr. Bruneau	State's No. 43	Yes 06-04-08	Embankment
Mr. Bruneau	State's No. 44	Yes 06-04-08	Other view
Mr. Bruneau	State's No. 45	Yes 06/04/08	Totten Truck, impound
Mr. Bruneau	State's No. 46	Yes 06/04/08	Same, rear view
Mr. Bruneau	State's No. 47	Yes 06/04/08	Same, side view
Mr. Bruneau	State's No. 48	Yes 06/04/08	Same, closer view of canopy
Mr. Bruneau	State's No. 49	Yes 06/04/08	Similar view
Mr. Bruneau	State's No. 50	Yes 06/04/08	Interior look
Mr. Bruneau	State's No. 51	Yes 06/04/08	Closer look
Mr. Bruneau	State's No. 52	Yes 06/04/08	Victim revealed
Mr. Jackson	State's No. 53	Yes 06-04-08	P/U Processing: side view
Mr. Jackson	State's No. 54	Yes 06-04-08	Same, rear view
Mr. Jackson	State's No. 55	Yes 06-04-08	Victim revealed

S C A N N E D

Offered By	Number of Exhibit	Admitted? Date	Title or Name of Exhibit
Mr. Jackson	State's No. 56	Yes 06-04-08	Closer view
Mr. Jackson	State's No. 57	Yes 06-04-08	Close-up, head
Mr. Jackson	State's No. 58	Yes 06-04-08	Interior view, boxes removed
Mr. Jackson	State's No. 59	Yes 06-04-08	Table
Mr. Jackson	State's No. 60	Yes 06-04-08	Victim out of truck
Mr. Jackson	State's No. 61	Yes 06-04-08	Closer view (R arm)
Mr. Jackson	State's No. 62	Yes 06-04-08	Victim's feet
Mr. Jackson	State's No. 63	Yes 06-04-08	Bound wrists
Mr. Jackson	State's No. 64	Yes 06-04-08	Victim chest
Mr. Jackson	State's No. 65	Yes 06-04-08	Frontal, face
Mr. Jackson	State's No. 66	Yes 06-04-08	Right face
Mr. Jackson	State's No. 67	Yes 06-04-08	Closer view
Mr. Jackson	State's No. 68	Yes 06-05-08	Elsie Pray T-Bird
Mr. Jackson	State's No. 69	Yes 06-05-08	Same, side view
Mr. Jackson	State's No. 70	Yes 06-05-08	Sublett, 350 Z
Mr. Jackson	State's No. 71	Yes 06-05-08	Same, different view
Mr. Jackson	State's No. 72	Yes 06-11-08	"Permission slip" for Pray
Mr. Jackson	State's No. 73	Yes 06-05-08	"Permission slip" for Landstad
Mr. Jackson	State's No. 74	Yes 06-09-08	Coins from Z
Mr. Jackson	State's No. 75	Yes 06-09-08	Same
Mr. Jackson	State's No. 76	Yes 06-05-08	Chevy Suburban
Mr. Jackson	State's No. 77	Yes 06-05-08	Same, driver side
Mr. Jackson	State's No. 78	Yes 06-05-08	Same, passenger side

S C A N N E D

Offered By	Number of Exhibit	Admitted? Date	Title or Name of Exhibit
Mr. Jackson	State's No. 79	Yes 06-09-08	Driver interior view
Mr. Jackson	State's No. 80	Yes 06-09-08	Passenger interior view
Mr. Jackson	State's No. 81	Yes 06-09-08	Suburban cargo area
Mr. Jackson	State's No. 82	Yes 06-09-08	Handicap card/Suburban
Mr. Jackson	State's No. 83	Yes 06-09-08	Floorboard
Mr. Jackson	State's No. 84	Yes 06-09-08	Grip/9mm
Mr. Jackson	State's No. 85	Yes 06-09-08	9 mm
Mr. Jackson	State's No. 86	Yes 06-09-08	9mm w/mag
Mr. Jackson	State's No. 87	Yes 06-09-08	Victim Checkbook
Mr. Jackson	State's No. 88	Yes 06-09-08	Victim Check
Mr. Jackson	State's No. 89	Yes 06-09-08	Victim Coin Books
Mr. Jackson	State's No. 90	Yes 06-09-08	Victim SS Card
Mr. Jackson	State's No. 91	Yes 06-09-08	Coin box w/coin
Mr. Jackson	State's No. 92	Yes 06-05-08	Sublett/Frazier personals, Las Vegas
Mr. Jackson	State's No. 93	Yes 06-05-08	Sublett Personals, Las Vegas
Mr. Jackson	State's No. 94	Yes 06-05-08	Victim/pre post-mortem examination
Mr. Jackson	State's No. 95	Yes 06-05-08	Victim
Mr. Jackson	State's No. 96	Yes 06-05-08	Ligature/wrists
Mr. Jackson	State's No. 97	Yes 06-05-08	Ligature/arm
Mr. Jackson	State's No. 98	Yes 06-05-08	Clothes removed/front
Mr. Jackson	State's No. 99	Yes 06-05-08	Same, back
Mr. Jackson	State's No. 100	Yes 06-05-08	Wound, back of neck
Mr. Jackson	State's No. 101	Yes 06-05-08	Facial wounds

S C A N N E D

Offered By	Number of Exhibit	Admitted? Date	Title or Name of Exhibit
Mr. Jackson	State's No. 102	Yes 06-05-08	Mouth, closer view
Mr. Jackson	State's No. 103	Yes 06-05-08	Wounds, R jawline
Mr. Jackson	State's No. 104	Yes 06-05-08	Wound, chin
Mr. Jackson	State's No. 105	Yes 06-05-08	Wound, jawline
Mr. Jackson	State's No. 106	Yes 06-05-08	Right eye
Mr. Jackson	State's No. 107	Yes 06-05-08	Left eye
Mr. Jackson	State's No. 108	Yes 06-05-08	Evidence, cause/death
Mr. Jackson	State's No. 109	Yes 06-05-08	Same
Mr. Jackson	State's No. 110	Yes 06-05-08	Same
Mr. Jackson	State's No. 111	Yes 06-05-08	Interior head/blood trapped in head
Mr. Bruneau	State's No. 112	Yes 06-04-08	April Frazier 2/4/07
Mr. Bruneau	State's No. 113	Yes 06-04-08	Same
Mr. Bruneau	State's No. 114	Yes 06-04-08	Same, arm
			SCENE
Mr. Jackson	State's No. 115	Yes 06/03/08	Aerial photo
Mr. Jackson	State's No. 116	Yes 06-04-08	Table
Mr. Jackson	State's No. 117	Yes 06-04-08	Baseball bat
Mr. Jackson	State's No. 118	Yes 06-04-08	Latex glove
Mr. Jackson	State's No. 119	Yes 06-04-08	Notes from counter
Mr. Jackson	State's No. 120	Yes 06-04-08	Lifts from top of safe, dryer, washer (item 123)
Mr. Jackson	State's No. 121	Yes 06-04-08	(item 123A)
Mr. Jackson	State's No. 122	Not Admitted	(item 134) lift from table
Mr. Jackson	State's No. 123	Yes 06-04-08	(items 92, 22, 24, 60)

S C A N N E D

Offered By	Number of Exhibit	Admitted? Date	Title or Name of Exhibit
Mr. Jackson	State's No. 124	Yes 06-04-08	(victim's prints)
Mr. Jackson	State's No. 125	Yes 06-04-08	Lift from victim's pick up
Mr. Jackson	State's No. 126	Not Admitted	Lift from seat (victim's pick up)
Mr. Jackson	State's No. 127	Not Admitted	Tape from "top shelf"
Mr. Jackson	State's No. 128	Yes 06-04-08	Tape from "top shelf"
Mr. Jackson	State's No.129	Yes 06-04-08	Tape from "top shelf"
		SUBURBAN	
Mr. Jackson	State's No. 130	Yes 06-11-08	Leather bag w/coin books, victim's personal effects
Mr. Jackson	State's No. 131	Yes 06-11-08	9mm pistol (item 99)
Mr. Jackson	State's No. 132	Yes 06-11-08	(item 109) - purse w/ hotel receipts
Mr Bruneau	State's No. 133	Yes 06-09-08	(item 106) - casino items
Mr Bruneau	State's No. 134	Yes 06-09-08	Victim financial documents (item 111)
Mr Bruneau	State's No. 134A	Not Admitted	Manila Envelope containing legal documents
Mr. Jackson	State's No. 135	Yes 06-09-08	Bail receipt
Mr. Jackson	State's No. 136	Yes 06-09-08	(item 101) - contents of checkbook
Mr. Jackson	State's No. 137	Yes 06-09-08	Hotel receipts and W.V. receipts
Mr. Jackson	State's No. 138	Yes 06-09-08	Checkbook
Mr. Jackson	State's No. 139	Yes 06-09-08	Hotel receipt (item 100)
Mr. Jackson	State's No. 140	Yes 06-09-08	Hotel receipt
Mr. Jackson	State's No. 141	Yes 06-09-08	(item 117) - (clothing receipt)
Mr. Jackson	State's No. 142	Yes 06-09-08	(item 103) receipt J.I.'s
Mr. Jackson	State's No. 143	Yes 06-05-08	"permission slips" (Nissan)
Mr Bruneau	State's No. 144	Yes 06-09-08	Sublett's personal property (Las Vegas)

S C A N N E D

Offered By	Number of Exhibit	Admitted? Date	Title or Name of Exhibit
		AUTOPSY	
Mr. Jackson	State's No. 145	Yes 06-11-08	Tape/wrists (item 92)
Mr. Jackson	State's 1 No. 145-A	Yes 06-11-08	Tape from ankle
Mr. Jackson	State's No. 146	Yes 06-11-08	Sock from foot (item 95)
Mr. Jackson	State's No. 147	Yes 06-11-08	(item 96) sock from hand
Mr. Jackson	State's No. 148	Yes 06-11-08	Yellow glove (L) hand (item 94)
Mr. Jackson	State's No. 149	Yes 06-11-08	(item 91) strap from head
Mr. Jackson	State's No. 150	Yes 06-11-08	Victim DNA (item 75)
Mr. Jackson	State's No. 151	Yes 06-11-08	Olsen DNA (item 121)
Mr Bruneau	State's No. 152	Yes 06-09-08	(item 131) Sublett DNA
Mr Bruneau	State's No. 153	Yes 06-09-08	(item 132) Frazier DNA
		MISCELLANEOUS	
Mr. Jackson	State's No. 154	Yes 06-10-08	Item 124 (Target video)
Mr. Jackson	State's No. 155	Not Admitted	Transcript of statement of April Frazier
Mr. Jackson	State's No. 156	Yes 06-11-08	Department of Justice Firearms receipt
Mr. Jackson	State's No.157	Yes 06-10-08	Copies of Target credit card transactions
Mr. Jackson	State's No. 158	Yes 06-10-08	CD - Target surveillance
Mr. Jackson	State's No. 159	Yes 06/03/08	Purchase receipts (serial numbers) 2 pages
Mr. Jackson	State's No. 160	Yes 06/03/08	Tumwater Pawn (1/16/07)
Mr. Jackson	State's No. 161	Yes 06/03/08	Pawn X (1/27/07)
Mr. Jackson	State's No. 162	Yes 06/03/08	Coin receipts (1/10/07)
Mr. Jackson	State's No. 163	Yes 06-04-08	(item 34) Swab of stain on carpet
Mr. Bruneau	State's No. 164	Yes 06-09-08	Photograph of alleged victim

S C A N N E D

Offered By	Number of Exhibit	Admitted? Date	Title or Name of Exhibit
Mr. Jackson	State's No. 165	Yes 06/03/08	Photograph of generator
Mr. Bruneau	State's No. 166	Not Admitted	Transcript of statement of Elsie Pray
Mr. Bruneau	State's No. 167	Not Admitted	Transcript of statement of Peter Landstad
Mr. Jackson	State's No. 168	Yes 06-09-08	Little Creek Casino hotel receipts
Mr. Jackson	State's NO. 169	Yes 06-09-08	Little Creek Casino vehicle receipts
Mr. Jackson	State's No. 170	Yes 06-09-08	City Bank transactions summary
Mr. Jackson	State's No. 171	Yes 06-09-08	Western Union transactions summary
Mr. Woodrow	Defendant's No. 172	Yes 06-17-08	April Frazier's personal items
Mr. Woodrow	Defendant's No. 173	Not Admitted	Packet of letters Frazier to Sublett
Mr. Woodrow	Defendant's No. 173A	Not Admitted	Copy of Envelope Frazier to Sublett
Mr. Lane	Defendant's No. 174	Not Admitted	Letter from Frazier to Sublett
Mr. Jackson	State's No. 175	Yes 06-10-08	Key Bank Totten video
Mr. Jackson	State's No. 176	Yes 06-10-08	Key Bank summary chart
Mr. Jackson	State's No. 177	Not Admitted	Investigation summary of Key Bank
Mr. Bruneau	State's No. 178	Yes 06-11-08	CD – Jail phone calls
Mr. Bruneau	State's No. 178A	Yes 06-11-08	Transcript of jail phone calls illustrative
Mr. Bruneau	State's No. 178B	Yes 06-11-08	Transcript of jail phone calls illustrative
Mr. Bruneau	State's No. 179	Yes 06-11-08	CD – Olsen
Mr. Bruneau	State's No. 179A	**Yes 06-11-08**	Transcript of Olsen illustrative **For purposes of using as a listening device only**
Mr. Bruneau	State's No. 179B	Yes 06-12-08	Transcript of Olsen/Frazier/Pray-Hicks illustrative
Mr. Bruneau	State's No. 180	Yes 06-12-08	2nd part of Transcript Olsen
Mr. Lane	Defendant's No. 181	Not Admitted	CD of jail phone calls
Mr. Lane	Defendant's No. 182	Not Admitted	Transcript of CD illustrative

S C A N N E D

Offered By	Number of Exhibit	Admitted? Date	Title or Name of Exhibit
Mr. Lane	Defendant's No. 183	Not Admitted	CD of jail phone calls
Mr. Lane	Defendant's No. 184	Not Admitted	Transcript of CD illustrative
Mr. Woodrow	Defendant's No. 185	Yes 06-12-08	A-Ace Bail Bond form
Mr Woodrow	Defendant's No. 186	Yes 06-12-08	Tumwater Pawn receipt
Mr. Jackson	State's No. 187	Not Admitted	Statement of Christopher Olsen
Mr. Jackson	State's No. 188	Not Admitted	Judgment and Sentence/Christopher Olsen

STIPULATION TO EXHIBIT LIST

I have examined the exhibits in the above-entitled case and stipulate the exhibits noted as admitted are acceptable for review by the jury/judge.

Dated: 17 Jun, 2008.

23022

Attorney(s) for Plaintiff

Attorney(s) for Defendant

SCANNED

FILED
COURT OF APPEALS
DIVISION II
2013 OCT 31 PM 1:24
STATE OF WASHINGTON
BY
DEPUTY

DECLARATION OF SERVICE
(Pursuant to GR 3.1)

I, Christopher Olsen, declare that, on October 24, 2013, I deposited the foregoing PETITIONER'S REPLY BRIEF with attached Appendixes A thru G, or a copy thereof, in the internal Legal Mail system of Washington State Penitentiary, 1313 N. 13th Avenue, Walla Walla, WA 99362 and made arrangements for postage, addressed to:

David C. Ponzoha, Clerk
Court of Appeals Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Walla Walla, Washington on October 24, 2013.

Christopher Olsen

Christopher Olsen DOC 831898

To: Clerk, Court of Appeals

Division II

October 24, 2013

RECEIVED
OCT 31 2013
CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

Re: Reply Brief Enclosed

Case No. 44484-6-II

Dear Clerk,

Please find enclosed a Petitioner's Reply Brief to be filed with the Court.

Please note however, that Appendix E to the Reply Brief contains a temporary "placeholder" declaration. Please inform the Court that the original declaration (of Richard Woodrow) will be filed with the Court as soon as I receive it back from my trial attorney Mr. Woodrow.* Thank you.

Sincerely yours,

Christopher Olsen

Christopher Olsen DOC 831898
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362-8817

* Mr. Woodrow can be contacted by phone at 360) 352-9911 or by fax at 360) 352-9955 to verify that he is in fact submitting the aforementioned declaration. And you'll find a true and correct copy of a letter from Mr Woodrow to myself about said declaration in Appendix E

To: Clerk, Court of Appeals 11/13/2013

Division II

Re: Declaration Enclosed for Filing with Reply Brief

Case No. 44984-6-II

RECEIVED
NOV 18 2013
CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

Dear Clerk,

Please find enclosed a Declaration of Richard Woodrow that needs to be filed as Appendix E to my previously filed Petitioner's Reply Brief. Currently, the Reply Brief contains a "placeholder" declaration until the current declaration could be obtained.

Please then, file the enclosed Declaration as Appendix E to my previously filed Petitioner's Reply Brief. Thank you.

Sincerely yours,

Christopher Olsen DOC 831848
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362-8817

DECLARATION OF MAILING
(Pursuant to GR 3.1)

I, Christopher Olsen, declare that, on November 13, 2013, I deposited the foregoing DECLARATION OF RICHARD WOODROW [to be filed as Appendix E to my previously filed Petitioner's Reply Brief], or a copy thereof, in the internal Legal Mail system of Washington State Penitentiary, 1313 N. 13th Avenue, Walla Walla, WA 99362 and made arrangements for postage, addressed to:

Clerk, Court of Appeals
Division II
950 Broadway, Suite 300
Tacoma, WA 98402-3636

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED on November 13th, 2013, at Walla Walla, Washington.

Christopher Olsen DOC 831898

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COURT OF APPEALS
DIVISION II
2013 NOV 18 PM 1:42
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BY
DEPUTY

DECLARATION OF RICHARD WOODROW

1. I am a licenced attorney in the State of Washington (WSBA # 18680), am competent to testify, and base this declaration on personal knowledge.

2. I was the defense attorney who represented Christopher Olsen throughout all pre-trial and trial proceedings in the case entitled State of Washington vs. Christopher Olsen, Thurston County Superior Court Cause Number 07-1-01363-0.

3. During Deputy Prosecutor David Bruneau's closing arguments to the jury on June 17, 2008, he presented a 47-slide PowerPoint presentation that included multiple slides containing the unadmitted booking photographs of both Mr. Olsen and his co-defendant Michael Sublett, all of which had the addition of text above and below the photographs or encircling the photographs along with arrows pointing to the photographs, and an altered photograph with the word "GUILTY" in bold red letters superimposed over the photograph.

4. Although I made two objections on the record during deputy prosecutor Bruneau's presentation, Mr. Bruneau continued through his slide presentation showing the jury all 47 slides, including the final slide which included the word "GUILTY" in bold red letters superimposed over the unadmitted booking photographs of Mr. Olsen and Mr. Sublett.

5. At the same time the final slide was being presented, deputy prosecutor Bruneau told the jury: "They are guilty as indicated. These defendants, ladies and gentlemen, are guilty as charged and guilty as proven."

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct

DATED at Olympia, Washington this 14th day of October, 2013.

Richard Woodrow, WSBA # 18680

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