

No. 45429-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

MARCIANO CARLOS ELLIS,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 12-1-03918-8
The Honorable Linda CJ Lee, Judge

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR	1
II.	ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR	1
III.	STATEMENT OF THE CASE	2
	A. PROCEDURAL HISTORY.....	2
	B. SUBSTANTIVE FACTS	3
IV.	ARGUMENT & AUTHORITIES	6
	A. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED EVIDENCE THAT WAS BOTH IRRELEVANT AND PREJUDICIAL.	6
	B. THE PROSECUTOR’S MISCONDUCT DURING CLOSING ARGUMENT DEPRIVED ELLIS OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.	13
	C. THE CUMULATIVE EFFECT OF THE CLAIMED ERRORS MATERIALLY AFFECTED THE OUTCOME OF ELLIS’ TRIAL	20
V.	CONCLUSION	21

TABLE OF AUTHORITIES

CASES

<u>Estelle v. Williams</u> , 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976)	13
<u>State v. Anderson</u> , 153 Wn. App. 417, 220 P.3d 1273 (2009)	17
<u>State v. Belgarde</u> , 110 Wn.2d 504, 755 P.2d 174 (1988).....	17, 19
<u>State v. Brett</u> , 126 Wn.2d 136, 892 P.2d 29 (1995)	19
<u>State v. Case</u> , 49 Wn.2d 66, 298 P.2d 500 (1956)	14, 20
<u>State v. Charlton</u> , 90 Wn.2d 657, 585 P.2d 142 (1978)	13
<u>State v. Davenport</u> , 100 Wn.2d 757, 675 P.2d 1213 (1984)	13, 16
<u>State v. Descoteaux</u> , 94 Wn.2d 31, 614 P.2d 179 (1980).....	10
<u>State v. Dhaliwal</u> , 150 Wn.2d 559, 79 P.3d 432 (2003)	14
<u>State v. Estill</u> , 80 Wn.2d 196, 492 P.2d 1037 (1972)	15
<u>State v. Fairfax</u> , 42 Wn.2d 777, 258 P.2d 1212 (1953).....	10
<u>State v. Finch</u> , 137 Wn.2d 792, 975 P.2d 967 (1999)	13
<u>State v. Gotcher</u> , 52 Wn. App. 350, 759 P.2d 1216 (1988).....	15
<u>State v. Hoffman</u> , 116 Wn.2d 51, 804 P.2d 577 (1991)	14
<u>State v. Hubbard</u> , 103 Wn.2d 570, 693 P.2d 718 (1985)	11
<u>State v. Ish</u> , 170 Wn.2d 189, 241 P.3d 389 (2010)	13
<u>State v. Janes</u> , 121 Wn.2d 220, 850 P.2d 495 (1993)	16
<u>State v. Johnson</u> , 90 Wn. App. 54, 950 P.2d 981 (1998).....	20

<u>State v. McKenzie</u> , 157 Wn.2d 44, 134 P.3d 221, 226 (2006)	14
<u>State v. Monday</u> , 171 Wn.2d 667, 257 P.3d 551 (2011)	14
<u>State v. Oswalt</u> , 62 Wn.2d 118, 381 P.2d 617 (1963).....	10
<u>State v. Perrett</u> , 86 Wn. App. 312, 936 P.2d 426 (1997).....	7, 20, 21
<u>State v. Pirtle</u> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	7
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984)	14
<u>State v. Reeder</u> , 46 Wn.2d 888, 285 P.2d 884 (1955)	17
<u>State v. Thorgerson</u> , 172 Wn.2d 438, 258 P.3d 43 (2011).....	13
<u>State v. Walker</u> , 164 Wn. App. 724, 265 P.3d 191 (2011)	16-17
<u>State v. Weaville</u> , 162 Wn. App. 801, 256 P.3d 426 (2011).....	9

STATUTES & OTHER AUTHORITIES

AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980).....	19
ER 401	9
ER 402	9
ER 801	8
ER 802	8
ER 803	8
RCW 9A.36.011	9
RCW 9.41.040	10

United States Constitution, Amendment Fourteen	13
United States Constitution, Amendment Six	13
Washington Constitution article I, section 22	13

I. ASSIGNMENTS OF ERROR

1. The trial court erred when it admitted irrelevant but prejudicial evidence that improperly impeached Marciano Ellis' testimony and negatively impacted Ellis' credibility?
2. The prosecutor's misconduct during closing argument deprived Marciano Ellis of his constitutional right to a fair trial.
3. The cumulative effect of the claimed errors materially affected the outcome of Marciano Ellis' trial and denied Ellis his constitutional right to a fair and impartial trial.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion by admitting irrelevant evidence that improperly bolstered the victim's credibility and impeached Marciano Ellis' testimony, where the jury's opinion concerning the credibility of the victim and of Ellis was critical to the outcome of this case? (Assignment of Error 1)
2. Did the prosecutor commit flagrant and ill-intentioned misconduct during closing argument, and thereby deprive Marciano Ellis of his right to a fair trial, when he: repeatedly expressed his personal opinion about Ellis' guilt and witness' credibility; repeatedly mischaracterized facts or interjected facts that were not in evidence; misstated the law; told the jury

it should determine the “truth;” and appealed to the sympathies of the jury? (Assignment of Error 2)

3. Did the cumulative effect of the claimed errors materially affect the outcome of Marciano Ellis’ trial and was Ellis therefore denied his constitutional right to a fair and impartial trial? (Assignment of Error 3)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Marciano Carlos Ellis with one count of first degree assault (RCW 9A.36.011(1)(a)), and alleged he was armed with a firearm during the commission of the offense. (CP 1) The State also charged Ellis with one count of unlawful possession of a firearm (RCW 9.41.01., .040). (CP 1-2)

A jury convicted Ellis of the lesser charge of second degree assault and of unlawful possession of a firearm. (CP 132, 144; 6RP 373)¹ The jury found that he was armed with a firearm during the commission of the assault. (CP 137; 6RP 374) Ellis stipulated to his criminal history and offender score. (CP 152-53; 8RP 400-02) The

¹ The trial transcripts labeled volumes I through VIII will be referred to by their volume number (#RP). The remaining transcripts will be referred to by the date of the proceeding contained therein.

trial court imposed a standard range sentence totaling 70 months of confinement. (8RP 405; CP 143) This appeal timely follows. (CP 154)

B. SUBSTANTIVE FACTS

Charles Anthony Roshau had in the past suffered a severe head injury and had issues with memory and judgment. (2RP 78, 81-82) But in 2012, he had the idea to start a business baking and selling medical marijuana products to Tacoma area dispensaries. (2RP 48, 50, 51) Roshau was a medical marijuana user himself, and also had a history of illegal drug use. (2RP 57)

In late August of 2012, Roshau met Ellis, who agreed to assist him with his business idea. (2RP 55-56, 61) However, according to Roshau, Ellis obtained Roshau's personal information and used it to apply for a car loan. (2RP 59-60) When Ellis came to Roshau's house on September 11, 2012 to help package and label marijuana products, Roshau confronted Ellis about the loan application. (2RP 61, 62, 65)

Roshau testified that he and Ellis argued briefly, then Roshau turned around and walked towards the kitchen to get his telephone so that he could call his guardian. (2RP 65, 105-06) According to Roshau, Ellis then shot him in his buttock as he walked away. (2RP

66) Roshau immediately fell to the ground. (2RP 67) Roshau testified that he asked Ellis why he shot, and Ellis told him he wanted money. (2RP 67)

After Ellis left, Roshau called his guardian, while Roshau's girlfriend, Coleena May, called 911. (2RP 54-55, 168; 3RP 125, 168) Roshau was treated at St. Joseph's Hospital. (CP 87) The bullet had traveled through Roshau's hip and penetrated his scrotum and penis. (CP 87) A surgeon removed the bullet from his penis. (CP 87)

May testified that Ellis and Roshau were arguing the night before the incident about a woman and a car loan. (3RP 162-63) She was in bed when Ellis arrived at the house on the morning of September 11. (3RP 160, 162) But May heard them arguing, and saw Ellis pull something from the back of his pants, then shoot Roshau. (3RP 165-66) She did not think that Ellis was really trying to shoot Ellis, but that he was trying to scare him by shooting towards his legs. (3RP 181-82)

May acknowledged that she has mental health issues, including schizophrenia, and that she sometimes hallucinates and cannot always tell if what she sees is real or imagined. (3RP 167-68) She thinks but is not sure that what she saw on September 11

was real. (3RP 168, 172-73)

Roshau testified that Ellis shot him with a 9 millimeter Kel-Tek handgun. (2RP 73) He testified that Ellis showed him the gun several days before the incident and tried to convince Roshau to purchase it from him. (2RP 72) Roshau acknowledged that he kept weapons in his home, including an inoperable but realistic looking gun. (2RP 98; 3RP 134, 137, 146, 153, 154)

About two weeks after the incident, police searched a hotel room where Ellis had been staying, and recovered a 9 millimeter Kel-Tek handgun. (3RP 200-01, 207-08, 211) A 9 millimeter bullet casing found on the floor of Roshau's home was tested and determined to have been fired from that same Kel-Tek handgun. (CP 80, 83) Ellis stipulated that he had a prior conviction that made him ineligible to possess a firearm. (CP 85)

Ellis testified on his own behalf at trial. He explained that Roshau came to Ellis' birthday party on the night of September 10. (3RP 225-26) Roshau was drinking and acting belligerent. (3RP 226) He began making a scene, so Ellis asked him to leave. (3RP 227) As he left, Roshau told Ellis that he had a gun. (3RP 227)

The next day, Ellis went to Roshau's house, as they had previously discussed, to retrieve some belongings he had left there.

(3RP 227-28) When Ellis arrived, Roshau appeared disheveled and smelled strongly of alcohol. (3RP 229) Roshau began yelling at Ellis, trying to provoke a fight. (3RP 230)

Ellis began gathering his belongings, but Roshau followed closely behind him and continued to provoke an argument. (3RP 230, 231) Ellis knew that Roshau had weapons of all kinds stored around his home, including in his kitchen. So he became concerned when he heard Roshau say “I’ll show you,” as he walked toward the kitchen. (3RP 232, 234) Ellis saw the Kel-Tek handgun in a storage space of the La-Z-Boy armrest, so he picked it up in case he needed to protect himself from Roshau. (3RP 234, 235)

Ellis could see Roshau in the kitchen. His back was towards Ellis, but Ellis could see that Roshau had a gun in his hand. (3RP 235) Ellis was scared for his safety, so he fired the gun towards Roshau in an attempt to prevent Roshau from shooting him. (3RP 235, 238-39) He was not trying to hit Roshau, he only wanted to fire a warning shot. (3RP 235)

IV. ARGUMENT & AUTHORITIES

- A. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED EVIDENCE TO IMPEACH ELLIS THAT WAS BOTH IRRELEVANT AND PREJUDICIAL.

A trial court’s admission of evidence is reviewed for abuse of

discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). “A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds.” State v. Perrett, 86 Wn. App. 312, 319, 936 P.2d 426 (1997) (quoting Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 168, 876 P.2d 435 (1994)). In this case, the trial court abused its discretion when it admitted the recording of Roshau’s conversation with the 911 operator and when it allowed the State to impeach Ellis on matters that were not relevant to the trial or charges.

During its direct examination of Roshau, the State sought to admit and play for the jury a recording of the conversation between Roshau and a 911 operator. On the recording Roshau describes the shooting, expresses how much pain he is in, and claims he and Ellis were arguing about a car loan. (2RP 52-53; Exh. 11) The State argued that the recording was admissible to show how much pain Roshau was in at the time, and also to contradict in advance Ellis’ expected claim that he did not apply for a car loan using Roshau’s personal information. (2RP 53) Ellis objected, arguing that Roshau’s pain or physical condition during the call was not relevant, and that the State had not provided any grounds for admissibility under the

hearsay rules.² (2RP 51-52, 53-54) The trial court, with no explanation or analysis, ruled that the tape was admissible under ER 803(a)(1) (present sense impression), ER 803(a)(2) (then existing mental or physical condition), and/or ER 803(a)(3) (excited utterance). (2RP 54)

Later, when Ellis testified, he denied using Roshau's information to apply for a loan. He also testified that he was gainfully employed and earning a significant salary and therefore did not need to falsify a car loan application. (3RP 239-42; 4RP 290-95) Ellis denied that he and Roshau argued over a car loan. (3RP 239-40) He also testified that he did not immediately turn himself in after the shooting because he wanted to attend a labor training class that was scheduled to occur soon after the incident. (3RP 245-47) He testified that he did not end up attending the class because it was canceled. (4RP 295-96)

Over defense objection, the trial court allowed the State to impeach Ellis by cross-examining him about his work and salary history. The State was also allowed to call Michael Koontz, an apprenticeship coordinator from Ellis' labor union, to testify that the

² "Hearsay" is an out-of-court statement offered in evidence to prove the truth of the matter asserted, and is generally not admissible unless it falls within the exceptions to the rule of exclusion. ER 801, ER 802.

training class was not canceled and in fact took place as scheduled.
(4RP 267-87, 290-97, 320-22)

None of this impeachment evidence or testimony was relevant, and therefore should not have been admitted. ER 401 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 402 provides that “[e]vidence which is not relevant is not admissible.” Thus, to be relevant, “evidence must (1) tend to prove or disprove the existence of a fact, and (2) that fact must be of consequence to the outcome of the case.” State v. Weaville, 162 Wn. App. 801, 818, 256 P.3d 426 (2011) (quoting Davidson v. Municipality of Metro. Seattle, 43 Wn. App. 569, 573, 719 P.2d 569 (1986)).

The State charged Ellis with first degree assault and unlawful possession of a firearm. A person is guilty of first degree assault if he or she, “with intent to inflict great bodily harm ... [a]ssaults another with a firearm or any deadly weapon . . . or [a]ssaults another and inflicts great bodily harm.” RCW 9A.36.011(1)(a)(c). A person is guilty of first degree unlawful possession of a firearm “if the person owns, has in his or her possession, or has in his or her control any

firearm after having previously been convicted . . . of any serious offense as defined in this chapter.” RCW 9.41.040(1)(a). Accordingly, only evidence that tended to prove or disprove these elements was relevant in this case.

The subject matter of the argument on the day of the shooting, the amount of pain Roshau felt immediately after the shooting, whether Ellis was employed and earning a decent living, or whether Ellis did or did not intend to take part in a training class, does not tend to establish any of the necessary elements.

Furthermore, a witness cannot be impeached on an issue collateral to the issues being tried. State v. Descoteaux, 94 Wn.2d 31, 37, 614 P.2d 179 (1980).³ A witness may be impeached on only those facts directly admissible as relevant to the trial issues. See ER 401 (defining “relevant evidence”); State v. Oswald, 62 Wn.2d 118, 121-22, 381 P.2d 617 (1963); State v. Fairfax, 42 Wn.2d 777, 780, 258 P.2d 1212 (1953). “[I]mpeachment by contradiction actually constitutes rebuttal evidence To be admissible, such extrinsic evidence must be independently competent and must be admissible for a purpose other than that of attacking the credibility of the

³ Overruled on other grounds by State v. Danforth, 97 Wn.2d 255, 257 & n. 1, 643 P.2d 882 (1982).

witness.” State v. Hubbard, 103 Wn.2d 570, 693 P.2d 718 (1985).

Evidence relating to Ellis’ work and salary history, his attendance or absence from labor training classes, and the availability of said labor classes, constituted impeachment on a collateral matter and its sole purpose was to attack Ellis’ credibility. As argued above, it was not admissible for any other proper reason, and should not have been admitted as impeachment in this case.

There was no relevance to any of this evidence, and the trial court abused its discretion when it allowed the State to present it to the jury. The error was not harmless. The outcome of the trial rested almost entirely on the jury’s determination of credibility. So the negative impact of improperly admitted impeachment testimony, and of evidence that diminished Ellis’ credibility in the eyes of the jury, cannot be understated.

The prosecutor also relied on this evidence heavily in his closing arguments to the jury, stating:

While we’re on the topic of the car loan, remember the defendant’s testimony. “I didn’t need money for a car loan. That’s ridiculous. Look at all the money I made, look at the job I had,” et cetera, et cetera. Which turned out to be one fabrication after another after another after another. The defendant gambled. He gambled that on Tuesday afternoon, late in the day, he could say that stuff from this stand, and he gambled that by Thursday morning at 9 o’clock we could not find

somebody to come in and say “bull.” He gambled we would not be able to get Mr. Koontz, be able to subpoena Mr. Koontz, get the defendant’s personnel file with all of his hours in it. . . . But you now know as a result of that, it was all a bunch of nonsense.

(5RP 343-44) The prosecutor further stated:

[T]hink about what happened in the 911 call with [Roshau]. . . . [He is] obviously in pretty much agony. And they’re asking him questions. “I can’t answer. Ah, ah, help.” “Okay. Well, why’d he shoot you?” “It was a car loan.” Okay. Do you think [Roshau] made that up at that point in time to somehow help this case? At least in [his] mind it was all about the car loan. So in reality, in a real world, your logic’s probably going to conclude in the jury room, “Yeah, it was about the car loan.”

(5RP 344-45) The prosecutor continued this line of argument:

But you heard [Roshau’s] voice on that 911 call saying what it was all about. He was not making that up.

(5RP 365)

The trial court abused its discretion when it admitted the evidence and testimony over defense objection because it was not relevant and not admissible. The impact of the evidence and testimony, coupled with the prosecutor’s exploitation of it during closing bolstered Roshau’s credibility and undermined Ellis’ credibility, and was clearly not harmless. Accordingly, Ellis’ convictions should be reversed.

B. THE PROSECUTOR'S MISCONDUCT DURING CLOSING ARGUMENT DEPRIVED ELLIS OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Prosecutors have a duty to see that those accused of a crime receive a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). In the interest of justice, a prosecutor must act impartially, seeking a verdict free of prejudice and based upon reason. Charlton, 90 Wn.2d at 664.

Prosecutorial misconduct may deprive a defendant of his right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). In order to prevail on a claim of prosecutorial misconduct, a defendant is required to show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). To show prejudice, there must be a substantial likelihood that the misconduct affected the jury verdict. State v. Ish, 170 Wn.2d 189, 195, 241 P.3d 389 (2010);

State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Absent a proper objection, a defendant must show that the misconduct was so flagrant and ill-intentioned that no curative instruction would have obviated the prejudice. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). But the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect. State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956).

In this case, the prosecutor failed in his duties, and committed misconduct, when he repeatedly made improper statements during closing and rebuttal closing arguments.

First, a fair trial “‘implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.’” State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original) (quoting State v. Case, 49 Wn.2d at 71); see also State v. Reed, 102 Wn.2d 140, 145-47, 684 P.2d 699 (1984). Accordingly, a prosecutor may not express an independent, personal opinion as to the defendant’s guilt or witness credibility. State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221, 226 (2006).

The prosecutor in this case repeatedly expressed his personal opinions on witness credibility and the strength of the evidence, stating:

I suggest you start with the defendant's own story. It's ludicrous. It's ridiculous. You know it didn't happen the way he told you it happened. Now, just because you know that doesn't necessarily get you to understanding how it did happen, but you know it didn't happen that way. (5RP 342)

And that's the defendant's version. It makes no sense in any universe you can think of. So it's not true. (5RP 342)

[R]emember the defendant's testimony. "I didn't need money for a car loan." That's ridiculous. (5RP 343)

[Roshau] did not go after that [gun] in order to harm the defendant. That just isn't true. It couldn't be possible because it doesn't make any sense at all. (5RP 363)

But you heard [Roshau's] voice on that 911 call saying what it was all about. He was not making that up. (5RP 365)

Furthermore, a prosecutor's argument to the jury must be confined to the law stated in the trial court's instructions. State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). When the prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatement affected the jury verdict, the defendant is denied a fair trial. State v. Gotcher, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988). A prosecutor's misstatement of the law

is a serious irregularity having the grave potential to mislead the jury. Davenport, 100 Wn.2d at 764.

Here, the prosecutor misstated the law of self-defense when he told the jury that it could judge Ellis' actions by whether they themselves would have done the same thing. The prosecutor states: "And in some ways, hopefully what we have here is a pretty typical average jury, and, you know, you're the reasonably prudent people, and maybe it's a question of what would you do?" (5RP 341)

But the reasonableness standard is not whether the jury would have done the same thing. Rather, as the trial court instructed the jury, the standard is that a person may "employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident." (CP 117) *See also State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). As noted by this Court in State v. Walker,

Nothing in the instruction requires the jury to substitute its subjective belief about how any juror would have responded in the situation. The prosecutor's comments encouraged the jury to judge the events not objectively, but based on their own individual beliefs about how they would have responded. The prosecutor's comments encouraged the jury to make

its decision personal. This misstated the defense of others standard and was improper.

164 Wn. App. 724, 736-37, 265 P.3d 191 (2011).

It is also improper to request that a jury declare “the truth,” because “[a] jury’s job is not to ‘solve’ a case. . . . Rather, the jury’s duty is to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt.” State v. Anderson, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009). But here, the prosecutor told the jury that it should “figure out the facts” (5RP 347, 348) and that they should “[u]se common sense in deciding what the truth is of this case, what really happened, what the real facts are.” (5RP 366)

Next, while counsel is given latitude in closing argument to draw and express reasonable inferences from the evidence, counsel may not mislead the jury by misstating the evidence; this is particularly true of a prosecutor—a representative of the court, who has a duty to see that the defendant receives a fair trial. State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955). It is also misconduct for a prosecutor to make arguments that introduce extraneous evidence not before the jury. State v. Belgarde, 110 Wn.2d 504, 516-17, 755 P.2d 174 (1988).

In this case, the prosecutor both misstated the evidence and introduced extraneous evidence during his closing argument.

The defendant gambled. He gambled that on Tuesday afternoon, late in the day, he could say that stuff from this stand, and he gambled that by Thursday morning at 9 o'clock we could not find somebody to come in and say "bull." He gambled we would not be able to get Mr. Koontz, be able to subpoena Mr. Koontz, get the defendant's personnel file with all of his hours in it. And that's probably a pretty decent gamble on the defendant's part, when you get right down to it. What were the odds that we'd be able to pull that off? How much effort do you think that took to make that happen? But you now know as a result of that, it was all a bunch of nonsense.

(5RP 344)

Now [defense counsel] came up with a great argument that never occurred to me. We've got some nine-millimeter bullets hanging around in this house. That's a great question. Would have been a great question to ask [Roshau] as he sat on the stand because he might have been able to explain it to you. But it wasn't asked because [defense counsel] wanted to save it for now. That's a great tactic.

(5RP 363)

[B]ut he didn't want to kill [Roshau]. He just wanted to teach him a lesson. "You talk to me that way, punk. I'll show you who's boss around here. And I'm going to pull out my nine and I'm going to prove it to you" And that's what it was really all [about] when you get down to it.

(5RP 365)

Why would [Roshau] call [his guardian]? He's been

shot. Let's face it. At that point in time he doesn't know whether he's going to live or die, and maybe he thinks he's going to live. He doesn't know if that's going to live or die. And to a man, that can be everything. You talk to a guy who's gone through prostate surgery and became impotent. How many of those guys suffer horribly from it. I'm no longer a man. I don't know if I want to live. Okay? [Roshau is] 40 years old. At least the guys that go through prostate surgery are usually closer to 55, 60, 75, something like that. [Roshau is] a 40-year-old guy. And he's in absolute agony, and he calls [his guardian]. Why [his guardian]? What does a soldier do on a battlefield when he's been gut shot and he's laying there and thinks he's dying? He cries for his mama. That's what he does. Tony called the only adult woman in his life that is the equivalent of his mother. Of course he did.

(5RP 364-65) None of the facts recited by the prosecutor in the above sections was testified to or presented as evidence during trial.

Moreover, the final quote above from the prosecutor is also a blatant attempt to sway the jury by appealing to their emotions and sympathies. But "[t]he prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE std. 3-5.8(c) (2d ed. 1980); State v. Brett, 126 Wn.2d 136, 179, 892 P.2d 29 (1995); Belgarde, *supra*. The prosecutor did this a second time when he told the jury: "Everyone deserves the protection of the law, including [Roshau]. And that's what this case is about, is [Roshau's] rights as a victim in this case." (5RP 369)

The prosecutor's repeated expressions of personal opinion, mischaracterizations of the law and facts, misstatements of the jury's role, and appeals to the jury's emotion, was blatant and flagrant misconduct. And "the cumulative effect of repetitive prejudicial prosecutorial misconduct" in this case was "so flagrant that no instruction or series of instructions" could have erased their combined prejudicial effect. Case, 49 Wn.2d at 73. Ellis' convictions should be reversed on this ground as well.

C. THE CUMULATIVE EFFECT OF THE CLAIMED ERRORS MATERIALLY AFFECTED THE OUTCOME OF ELLIS' TRIAL.

An accumulation of non-reversible errors may deny a defendant a fair trial. Perrett, 86 Wn. App. at 322. Where it appears reasonably probable that the cumulative effect of the trial errors materially affected the outcome of the trial, reversal is required. State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). As argued in detail above, each of the claimed errors prejudiced Ellis' right to a fair trial. It is reasonably probable that the improperly admitted testimony and repeated misconduct of the prosecutor during closing arguments influenced the jury's evaluation of Ellis' and Roshau's credibility and led the jury to apply incorrect legal standards. The jury reasonably could have reached a different

outcome absent these errors.

Thus, even if one of the above issues standing alone does not warrant reversal of Ellis' conviction, the cumulative effect of these errors materially affected the outcome of the trial and Ellis' convictions should be reversed. See Perrett, 86 Wn. App. at 322-23 (and cases cited therein).

V. CONCLUSION

The trial court erred when it allowed the State to present evidence and testimony that was irrelevant and improper impeachment on a collateral issue. The prosecutor also committed flagrant and ill-intentioned misconduct during closing arguments by repeatedly making statements that have been found by numerous courts to be improper. These errors, alone or cumulatively, prejudiced Ellis' right to a fair trial, and require that Ellis' convictions be reversed.

DATED: April 25, 2014



STEPHANIE C. CUNNINGHAM

WSBA #26436

Attorney for Marciano Carlos Ellis

CERTIFICATE OF MAILING

I certify that on 04/25/2014, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Marciano C. Ellis, Inmate #28902-086, Federal Detention Center, P. O. Box 13900, Seattle WA 98198.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

April 25, 2014 - 12:52 PM

Transmittal Letter

Document Uploaded: 454297-Appellant's Brief.pdf

Case Name: State v. Marciano Carlos Ellis

Court of Appeals Case Number: 45429-7

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

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

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: S C Cunningham - Email: sccattorney@yahoo.com

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

pcpatcecf@co.pierce.wa.us