

24944-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JACKIE BURTON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S AMENDED BRIEF

Julia A. Dooris
Attorney for Appellant

GEMBERLING & DOORIS, P.S.
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A. ASSIGNMENTS OF ERROR

1. Ms. Burton was denied due process by the State's failure to timely produce a trial transcript.
2. The record produced four years after Ms. Burton's trial was unintelligible, made no sense, and was so replete with errors as to be rendered wholly unreliable.
3. The trial court erred by denying Ms. Burton's motion to vacate the judgment based upon the tardy, unreliable transcript.
4. The prosecutor committed misconduct by intentionally eliciting impermissible ER 404(b) evidence that was highly prejudicial to Ms. Burton.
5. Ms. Burton received ineffective assistance of counsel when trial counsel failed to object to the State's introduction of multiple highly prejudicial descriptions of Ms. Burton's prior bad acts.
6. Ms. Burton was denied her right to a fair trial because Instruction 10 failed to include the defendant's burden of proof:

Entrapment is a defense to a criminal charge if the criminal design originated in the mind of law enforcement officials, or any person acting under

their direction, and the defendant was lured or induced to commit a crime that the defendant had not otherwise intended to commit.

The defense is not established if the law enforcement officials did no more than afford the defendant an opportunity to commit a crime.

(CP 68)

7. In closing argument, the State committed prosecutorial misconduct by arguing that the State's burden of establishing guilt was lower than beyond a reasonable doubt.
8. Ms. Burton received ineffective assistance of counsel when trial counsel failed to object to the State's misconduct in closing argument.
10. The presence of cumulative errors entitles Ms. Burton to a new trial.

B. ISSUES

1. Is a criminal defendant's Federal and State Constitutional right to due process denied when the defendant must wait more than three years to receive a trial transcript due to the delay of the court reporter and when the transcript arrives it is not in useable form, necessitating additional delay?

2. Does the trial court err by denying a motion to vacate because the record is inadequate for appellate review when the record produced by the court reporter is replete with nonsensical phrases and unintelligible words, and when defense trial counsel has no independent recollection of the particular passages because four years have elapsed since the trial?
3. After trial counsel moves *in limine* to preclude the State from introducing prior bad acts of the accused, does trial counsel provide ineffective assistance by failing to object to the State's eliciting multiple incidents of prior bad acts by the accused?
4. Does a prosecutor commit misconduct by intentionally introducing highly prejudicial prior bad acts after the prosecutor assured the trial court it would not do so?
5. Does a prosecutor's misconduct in eliciting highly prejudicial testimony about a defendant's alleged prior bad acts violate the accused's Federal and State Constitutional right to a fair trial?
6. Is an accused's Federal and State Constitutional right to a fair trial denied where the court gives a Jury Instruction on

the accused's affirmative defense of entrapment but fails to instruct the jury that the accused's burden is a preponderance of the evidence?

7. Does a prosecutor commit misconduct in closing argument when he lessens the State's burden by equating a casual, cocktail party description with an abiding belief beyond a reasonable doubt?
8. Does trial counsel provide ineffective assistance by failing to object to the State's argument that lessens the burden of proof?
9. Where a transcript is provided after an inordinate delay and is replete with unintelligible passages, and recreation of the record is attempted four years after the trial, where the jury hears lengthy detailed testimony of the accused's prior bad acts without objection, where the prosecutor argues that if a juror thinks he/she will describe this case in general terms at a cocktail party a year from now, that equates with beyond a reasonable doubt, and where the affirmative defense instruction fails to instruct the jury that the accused's burden is merely preponderance of the evidence

and not beyond a reasonable doubt, is the trial so plagued with cumulative errors that a new trial is required?

C. STATEMENT OF THE CASE

1. Substantive Facts. Jackie Burton was a legal secretary, and she began working for attorney Peter Dahlin in February 1991. (3RP¹ 39) At the time she met Mr. Dahlin, Ms. Burton was married, but about three years later, she experienced problems in her marriage. (3RP 39) Ms. Burton also had problems with alcohol. (3RP 39)

Ms. Burton and her husband permanently separated in September 2001. (3RP 40) At that time, Mr. Dahlin and Ms. Burton began having a sexual relationship. Ms. Burton continued working for Mr. Dahlin, and he represented Ms. Burton in her divorce proceedings. (3RP 40)

After the sexual relationship began, Mr. Dahlin would regularly get upset with Ms. Burton and fire her. (3RP 41-42) Ms. Burton described herself as a “chronic alcoholic.” (3RP 42) Mr. Dahlin kept alcohol at the office and drank often. (3RP 42)

Mr. Dahlin was physically abusive to Ms. Burton, and he would frequently slap her, spit in her face, and once he shoved her into a wall

¹ 1RP refers to the transcript from 12/1/05; 2RP refers to the transcript from 12/5/05; 3RP refers to the transcript from 12/6/05.

hard enough to require stitches. (3RP 43) Ms. Burton has issues with depression and has attempted suicide more than once. (3RP 43)

Mr. Dahlin threatened Ms. Burton that if she ever tried to quit her job, he would make sure she would never again work as a paralegal in Spokane County. (3RP 44) Eventually, Ms. Burton left and found another job with personal injury attorney Michael Riccelli. (3RP 44-45)

Friday, January 7, 2005. On Friday, during Ms. Burton's first week at the new job, Jon Ballentine arrived in the office to visit Mr. Riccelli. (3RP 45) As he was about to leave, Mr. Ballentine showed off his new business cards that stated "Large White Man, Inc." (3RP 45-46). Mr. Riccelli looked at the card, and commented that Ms. Burton was "having trouble" with someone and Mr. Ballentine should help. (3RP 45)

An hour and a half later, Mr. Ballentine telephoned Ms. Burton. (3RP 45) Mr. Ballentine told Ms. Burton that he could help her, and asked her to meet him for lunch. (3RP 46) A while later, Mr. Ballentine called again and told Ms. Burton that he and his "crew" were going to be at a bar in the Valley. Ms. Burton at first declined, but Mr. Ballentine continued persisting, so she relented and agreed to meet him for one drink. (3RP 47)

Ms. Burton began drinking at 5:00 p.m. that night. (3RP 47) She arrived at 10:00 p.m., and Mr. Ballentine paid her cover charge, bought her a drink and introduced her to his "crew": "Daddy Rat," "Cruton,"

“Animal,” and Animal’s girlfriend. (3RP 48) Mr. Ballentine persuaded Ms. Burton to leave the bar and go talk in his car. (3RP 48)

Upon entering the car, Mr. Ballentine asserted that he had to check Ms. Burton for a wire, so he stuck his hand under her shirt and down her pants. (3RP 49) He invited her to frisk him, but she declined. (3RP 49) He asked what her problem was with Mr. Dahlin, and she told him about the physical and verbal abuse and said she was afraid of him. (3RP 49)

Mr. Ballentine said he charged \$50 per hour, and Ms. Burton said she could not afford him. (3RP 49) Mr. Ballentine suggested that he work something out with his “crew” – such as “roughing him up” to get Mr. Dahlin to leave Ms. Burton alone. (3RP 49) The two returned to the bar, drank more wine, and then left together. (3RP 50)

Ms. Burton stated that she was “very intoxicated.” (3RP 50-51) When they arrived at the house, they drank more and eventually Mr. Ballentine told Ms. Burton to take off her clothes and she did. She spent the night with him. (3RP 51)

Saturday, January 8, 2005. In the morning, Mr. Ballentine bragged about how violent his friends were and told of past exploits and how they could kill anyone and make it look like suicide. (3RP 52) At some point, Ms. Burton stated that she would want Mr. Ballentine to

communicate that he represented Ms. Burton to Mr. Dahlin and intimidate him into staying away from her. (3RP 52)

Mr. Ballentine convinced Ms. Burton to let him come to her house. While he was there, he bragged about the gun he carried at all times. (3RP 53) He continued to brag about his participation in the Hell's Angels, and of his connections within that group. (3RP 53) Ms. Burton began drinking before she left Mr. Ballentine's house and she drank all day. (3RP 54) Eventually Ms. Burton went home, but before she did she told Mr. Ballentine to forget about her and her case. (3RP 56-57)

Sunday, January 9, 2005. Mr. Ballentine called her the next morning and asked her to come to his house. (3RP 57) When she arrived, Mr. Ballentine resumed talking about her "case" and what he could do to Mr. Dahlin. He asked Ms. Burton if she had a photo of him, and when she said no, he asked if the photo was in the phonebook. (3RP 57-58) Ms. Burton confirmed that it was, so Mr. Ballentine gave her a phonebook and told her to rip out the picture. (3RP 58)

At that point, Mr. Ballentine told Ms. Burton that he was going to "snuff" Mr. Dahlin. When Ms. Burton learned that meant "kill," she protested and said that was not what she wanted. Mr. Ballentine told her it was too late to back out, he had already spoken to his crew. Mr. Ballentine threatened her that if she backed out, he would make her pay.

(3RP 58) He called her names and swore at her and demanded she leave.

(3RP 58) Ms. Burton left.

Monday, January 10, 2005. The following morning, Ms. Burton called Mr. Ballentine and apologized for things not working out and asked him not to tell her boss about what had happened. Mr. Ballentine called her obscene names and hung up on her. (3RP 59) Within the hour, Mr. Ballentine arrived at the office and met alone with Mr. Riccelli. (3RP 59)

That afternoon, Mr. Ballentine called back and apologized for all he had said. (3RP 60) He told her that he had paid \$1,500 of his own money and it was too late to back out of the plan. (3RP 60) Mr. Ballentine told Ms. Burton, "You don't cross these people" and "they were dangerous". (3RP 60)

Mr. Ballentine invited Ms. Burton over for dinner. (3RP 61) They ate, looked through his family photo albums and drank alcohol. (3RP 61) He told her again it was too late to back out. (3RP 62) He told Ms. Burton she had to come up with \$500 cash. (3RP 62) Ms. Burton spent the night again with Mr. Ballentine. (3RP 63)

Tuesday, January 11, 2005. The following day at work, Mr. Ballentine called Ms. Burton several times. He told her he had met with his Aryan Nations friend, and he wanted to know if she had the money in small bills. (3RP 63-64)

That evening, while Ms. Burton was at Mr. Ballentine's house, he pulled out his handgun and played with it while he told her again that she could not back out. (3RP 65)

Wednesday, January 12, 2005. On Wednesday, Ms. Burton arrived home from work to find Mr. Ballentine in front of her house. He wanted to have a drink before he took her to a motel for the pre-arranged meeting with the supposed hit man. Ms. Burton began drinking at the office. (3RP 65) While they drank at home, Mr. Ballentine told Ms. Burton that the Aryan Nations had sent the "biggest, baddest" thug to "take care of this." (3RP 66) He told her that this man wanted to talk to her. (3RP 66)

Mr. Ballentine told Ms. Burton that she couldn't appear scared or weak and she had to be convincing and use certain words like she wanted him dead, and wanted him to suffer. (3RP 66) He gave her specific lines he insisted that she use. (3RP 67)

Feeling like she had no choice but to go through with the "plan," Ms. Burton went with Mr. Ballentine to the motel. They went up in the elevator together. (3RP 68) Ms. Burton met with Mr. Ballentine and his "connection" and she said what Mr. Ballentine told her to say. (3RP 69)

The man in the hotel was actually Spokane Police Department Detective Leroy Fairbanks. (2RP 166) Ms. Burton went along with what

Mr. Ballentine had rehearsed with her: she wanted Mr. Dahlin killed, and she paid \$500. (2RP 166) This meeting was videotaped by the police. (Exhibit 7)

Friday, January 15, 2005. Ms. Burton next received a call from the detective, still posing as a contract killer. (3RP 12) The detective instructed Ms. Burton to meet him at the Yoke's parking lot. Ms. Burton was still afraid of what they would do to her if she did not follow through, so she went to the parking lot. (3RP 70) She was scared and intoxicated. (3RP 70)

At the Yoke's parking lot, the officers showed Ms. Burton two photos of Mr. Dahlin, who had been made-up to make him appear beaten and dead. (3RP 13; CP 5) Ms. Burton gave an additional \$500 cash to the undercover officer and was immediately arrested. (2RP 140-41; CP 6)

Ms. Burton was charged on January 19, 2005 with Solicitation to Commit Murder in the First Degree. (CP 1)

The trial proceedings. Prior to trial, Ms. Burton moved *in limine* to prohibit the State from mentioning any of her prior convictions or bad acts. (1RP 8-9) The State responded that it did not intend to introduce

any evidence of prior bad acts, including an incident in which Ms. Burton was alleged to have rammed her car into Mr. Dahlin's car.² (1RP 9)

Yet during trial, the State's witness Pete Dahlin testified at length about Ms. Burton's alleged prior bad acts during the State's case-in-chief. (See 1RP 101-106) Over six pages of transcript, the prosecutor carefully and repeatedly elicited detailed accounts from Mr. Dahlin of Ms. Burton's prior bad acts. For example, the jury was told that Ms. Burton was violent and aggressive, and that Mr. Dahlin had to telephone the police on more than one occasion to try to control her. (1RP at 101-02) Mr. Dahlin told the jury that Ms. Burton tried to run his car off the road with her car, implied that she kidnapped one of his cats, she trespassed, she poked holes in his waterbed and she vandalized his car. (1RP 103-06)

Finally, defense counsel objected. (1RP 107-08) The court expressed surprise that the testimony was admitted without an earlier objection and said it doubted that the jury would be able to disregard all that they had just heard. (1RP 108-09)

² The State added the caveat that if certain psychological evidence was introduced, it then might seek to admit such evidence. The court reserved on that portion of the issue, pending whether evidence was admitted of Ms. Burton's particular susceptibility to inducement was admitted. (1RP at 10)

The following day, the court clarified its ruling on the objection, possibly³ noting that the prejudicial impact of that evidence outweighed its probative value:

THE COURT: ... Some of the series of instances fall into a category where purpose the prejudicial impact substantially ways the probative effect derived from the testimony on those acts. And Mr. Maxey was invited to suggest a limiting instruction, and I believe he chose in his discretion to not take that approach. And so, I believe ultimately, Counsel, there was really no sustaining of the objection.

(3RP 3)

Detective John Miller testified that on January 10, 2005, he met with Jon Ballentine, who had called his office and relayed that Jackie Burton asked him to kill her boyfriend and former employer Peter Dahlin.

(2RP 123) At that point Detective Miller began directing Mr. Ballentine to set up a formal meeting with Ms. Burton and a “contract killer.”

(2RP 128) The detective told Mr. Ballentine to make sure he did not initiate any conversations with Ms. Burton regarding killing Mr. Dahlin.

(2RP 129) The price was set by the police. (2RP 159)

Also during trial, the State played a videotape of the meeting in the motel with Ms. Burton. (2RP 167) The detective testified that during the motel meeting, Ms. Burton gave her name, cash, and drew a diagram of

³ The transcription of this passage was garbled.

Mr. Dahlin's house. (3RP 9-10) He said he did not detect any indication that Ms. Burton had consumed alcohol or drugs. (3RP 13)

During closing argument, the deputy prosecutor explained the State's burden of proof and abiding belief as⁴):

Something that abides is something that carries on in time it's true today, it's true tomorrow, it's true into the future it's true past true today and future to abide through time that's what a word means time. So how does that affect your mind set as juror what abiding belief something that you come to believe about the case that you can have confidence in. So think about a situation where you're a year from now at cocktail party a guest this time ooh Chris matter something like that and TV story comes up something comes up, and the topic of juror service comes as sometimes does the oirj sperj speakings with said waling var been on a jury and respond smashing I was, what was of the case about.

the case was about a woman who hated her boss and wanted to die kill him and thiewt they was hag a hit man and paid 5 fine to undercover and the whole thing was on videotape.

In a nut sheal ladies and gentlemen if that is how you believe you will describe this case a year from now, then Ms. Burton is guilty of the crime of sew list tation of mered in first-degree that's abelief abiding in the future.

(3RP 127-28)

⁴ This is a direct quote from the original transcript. The State's "correction" to this passage reads: "Mr. Garvin illustrated an abiding conviction as being a conviction that lasts over a period of time and noted that if the jury could see themselves at a later point in time describing this as a case where a lady hated her boss and hired a hit man to kill him and paid \$500 and the whole thing was videotaped then Ms. Burton was guilty." (CP 274-75)

Instruction 10 was the sole instruction related to the defense of entrapment:

Entrapment is a defense to a criminal charge if the criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and the defendant was lured or induced to commit a crime that the defendant had not otherwise intended to commit.

The defense is not established if the law enforcement officials did no more than afford the defendant an opportunity to commit a crime.

(CP 68)

The jury convicted Ms. Burton.

2. Procedural Facts.

Ms. Burton was sentenced on February 2, 2006. A Notice of Appeal was filed on February 7, 2006. (CP 134) On March 9, 2006, Ms. Burton filed a Statement of Arrangements requesting that Ms. Loni Smith provide a copy of the transcript from the pretrial hearing, as well as the trial. The transcript was due May 30, 2006.

Nearly three years later, in February, 2009, Ms. Burton filed a Motion to Vacate Judgment and Sentence based upon the missing transcript. (CP 214-217) The court denied the motion. (CP 233)

After multiple continuances and unexplained delays, Ms. Smith finally filed the transcript three years late, on May 1, 2009. The following month, appellate counsel reviewed the transcripts. On July 6, 2010,

appellate counsel filed an objection to the report of proceedings. (CP 238)
The State failed to respond. On October 9, 2010, appellate counsel again
filed an objection to the record and noted a hearing date. (CP 244-250)

On November 13, 2009, the court ordered trial counsel to attempt
to recreate a report of proceedings from their respective notes and
memories. (CP 252-53)

Appellate counsel was directed to indicate particular passages
where the record was deficient, or contained typographical and
grammatical errors and keystrokes that do not reflect actual words. On
November 13, 2009, Counsel provided 128 specific passages, which did
not include every erroneous keystroke in the record, but reflected the
passages that appeared important for adequate appellate review.
(CP 255-63)

On December 16, 2009, the State filed its proposed amendments to
the record. The State provided a narrative for most, but not all, of the 128
identified passages. (CP 264-77)

On February 23, 2010, Ms. Burton's trial counsel, Bevan Maxey,
filed a response to the State's proposed amendments to the record.
(CP 288) Mr. Maxey stated in part, "I believe that Mr. Garvin's
submission is accurate to the extent it describes the general nature of the
testimony. However, to the extent Mr. Garvin's materials are summaries

of the testimonies, without the specific verbatim testimony, I believe they are inadequate and no further clarification can be made.” (CP 288)

On April 19, 2009, the court held a status hearing, and directed counsel to file a motion related to objections to the proposed amendments and objection to the form of the record. (CP 291) In response, Ms. Burton filed an Objection to the State’s Amendments to the Report of Proceedings and to the Form of the Recreated Report of Proceedings. (CP 292-311) The State resisted. (CP 313-317) Ms. Burton filed a Reply. (CP 320-325) The court ultimately denied Ms. Burton’s motion to vacate the judgment. (CP 334-336)

Ms. Burton appealed from that order. (CP 337-38) The cases were consolidated on appeal.

D. ARGUMENT

1. MS. BURTON WAS DENIED HER FEDERAL AND STATE CONSTITUTIONAL DUE PROCESS RIGHTS BY THE STATE’S FAILURE TO PRODUCE A TRIAL TRANSCRIPT FOR THREE YEARS.

The United States Constitution does not require the states to provide convicted defendants a right to appellate review. *Rheuark v. Shaw*, 628 F.2d 297, 302 (5th Cir.1980), *cert. denied*, 450 U.S. 931, 101 S. Ct. 1392, 67 L. Ed. 2d 365 (1981). While the right to a speedy

appeal is not contemplated in the Sixth Amendment, federal courts have held that undue delay in processing an appeal may rise to the level of a violation of due process. *United States v. Smith*, 94 F.3d 204, 206-07 (6th Cir.1996), *cert. denied*, 519 U.S. 1133, 117 S. Ct. 997, 136 L. Ed. 2d 877 (1997).

“Washington guarantees the right to appeal criminal prosecutions, and substantial delay in the appellate process may constitute a due process violation.” *State v. Lennon*, 94 Wn. App. 573, 577, 976 P.2d 121 (1999) (*citing* Const. art. I, § 22). To determine whether an inordinate delay denies due process, most courts have adopted a modified version of the test formulated in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), analogizing appellate delay to the violation of speedy trial rights. *Lennon*, 94 Wn. App. at 577-78.

In determining whether a delayed appeal denies due process, the appellate court considers four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant’s diligence in pursuing the right to appeal; and (4) the prejudice to the defendant. *Lennon*, 94 Wn. App. at 578 (*citing Barker v. Wingo*, 407 U.S. at 530).

“In extreme circumstances, an inordinate delay may give rise to a presumption of prejudice.” *Lennon*, 94 Wn. App. at 578 (*citing Doggett v. United States*, 505 U.S. 647, 655-57, 112 S. Ct. 2686,

120 L. Ed. 2d 520 (1992). Case law establishes a baseline of about two years to find a delay facially unreasonable. See *United States v. Smith*, 94 F.3d at 209.

(a) The Length Of Delay. Under the first factor, the court examines the length of delay. Here, the State failed to produce a trial transcript for three years. The transcript was not useable in its original form, and nearly another two years have elapsed before the attempts to cure the transcript's deficiencies and before this appeal could be filed. In all, nearly five years have elapsed since Ms. Burton's Judgment and Sentence was entered on February 2, 2006.

The delay incurred in this case in obtaining a trial transcript was of such an unreasonable length to trigger judicial review. See, e.g., *Harris v. Champion*, 15 F.3d 1538, 1559-60 (10th Cir.1994) (two-year appellate delay will create a rebuttable presumption that the constitutional threshold has been crossed). Depending upon how the facts are analyzed, the delay was three years to the production of a record that was replete with nonsensical phrases, words and symbols, and nearly two more years until the process for attempting to cure the record was complete. By any analysis, the delay in obtaining a record so that an appeal could move forward was of an extraordinary duration.

(b) The Reason for Delay. The second factor, the reason for the delay, is that the court reporter inexplicably did not produce the transcript. The court reporter was eventually sanctioned, arrested and still delayed production of the transcript. (See CP 224-26) However, none of the court reporter's delay is attributable to Ms. Burton.

(c) Diligence In Pursuing The Appeal. The third factor – defendant's diligence in pursuing the right to appeal – is met in this case. Ms. Burton moved to dismiss when the transcript was not forthcoming and kept in regular contact with the court regarding the progress being made in procuring the transcript. When the transcript arrived, Ms. Burton engaged in the lengthy process of identifying the unreadable portions of the transcript, and attempted to cure the deficiencies in the Superior Court.

(d) Prejudice As A Result Of The Delay. The fourth factor requires the court to examine the prejudice resulting from the delay to Ms. Burton. First, under some circumstances, “an inordinate delay may give rise to a presumption of prejudice.” *Lennon*, 94 Wn. App. at 578. In this case, five years should be considered an “inordinate” delay that gives rise to the presumption of prejudice.

Additionally, consideration of proof of prejudice is not limited to the specifically demonstrable, nor is affirmative proof of particularized prejudice essential to the claim:

Excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, it is part of the mix of relevant facts, and its importance increases with the length of delay.

Doggett v. U.S., 505 U.S. 647. (citations omitted).

The *Doggett* court noted that in cases where the State is negligent in timely pursuing a case the delay is not “automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him.” *Doggett*, 505 U.S. 647, 112 S. Ct. at 2693. This reasoning should be extended to the present case. The delay in this case in producing the transcript had a tangible prejudicial impact – the memories of both trial counsel had to be impaired as a result of the passage of time and thus the recreation of the record was hindered.

It is impossible to demonstrate exactly how this prejudiced Ms. Burton because she cannot establish her trial counsel’s version of the disputed portions of the transcript. And while the State produced rather detailed passages for the indecipherable portions of the record, it must be

presumed that the State's recall abilities were hampered by the passage of approximately four years likely filled with intervening trials.

The question of prejudice concerns three interests of a convicted defendant seeking a prompt appeal: (1) to prevent oppressive incarceration pending review; (2) to minimize the defendant's anxiety and concern; and (3) to limit the possibility that the grounds for the appeal or the defenses in the case of a retrial might be impaired. *Lennon*, 94 Wn. App. at 578-79.

In this case, Ms. Burton has been incarcerated for the duration of the pending appeal. She has experienced significant anxiety and concern that have manifested themselves in documented medical issues, and the grounds for an appeal have been impaired by the inordinate delay because trial counsel for Ms. Burton is simply unable to remember with any honest accuracy what words were spoken at the multiple instances of garbled transcript.

On balance, Ms. Burton's case establishes a due process violation. The now five-year delay in bringing her case to appeal was unreasonable. Ms. Burton has diligently pursued the appeal throughout the lengthy, arduous process. The deficient transcript that was produced exacerbated the prejudice of the delay. Had the transcript been accurate, the prejudice would have been diminished. But because appellate counsel had to

attempt to recreate the transcript into a readable, useable record, the passage of time became a significant factor. Ms. Burton's trial counsel could not recall what words were used with any accuracy, and thus Ms. Burton was left to rely only upon the State's version of which words were spoken. The deputy prosecutor's memory had to have faded after the passage of time and intervening trials, and thus his recitation of what transpired during the garbled passages cannot be deemed inherently reliable. The delay in this appeal was highly prejudicial to Ms. Burton.

An analysis of all four factors indicates that Ms. Burton's due process rights were denied by the inordinate delay between her trial and this appeal. As a result, Ms. Burton is entitled to a new trial.

2. THE TARDY TRIAL TRANSCRIPT IS REplete WITH ERRORS, UNINTELLIGIBLE, UNRELIABLE AND INADEQUATE FOR APPEAL, AND THE TRIAL COURT'S FINDING THAT THE TRANSCRIPT WAS SUFFICIENT VIOLATED MS. BURTON'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS OF DUE PROCESS AND EQUAL PROTECTION.

A criminal defendant must have a "record of sufficient completeness" for appellate review of potential errors. *State v. Larson*, 62 Wn.2d 64, 66, 381 P.2d 120 (1963) (citing *Draper v. Washington*, 372 U.S. 487, 495-96, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963)).

The State's duty to provide an adequate transcript for indigent defendants is based upon both Constitutional guaranties of due process and equal protection. *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956). The State's duty includes providing a record that is sufficiently complete in order to permit appellate review: "In terms of a trial record, this means that the State must afford the indigent a 'record of sufficient completeness' to permit proper consideration of (his) claims." *Mayer v. Chicago*, 404 U.S. 189, 196, 92 S. Ct. 410, 415, 30 L. Ed. 2d 372 (1971), quoting *Draper*, 372 U.S. at 499.

(a) Under Certain Circumstances, The State May Substitute Alternatives To A Verbatim Report Of Proceedings.

Alternative methods of reporting trial proceedings are permissible, but only if these methods place before the court "an equivalent report of the events at trial ..." *Draper*, 372 U.S. at 495-96. An alternative method of constructing the record must allow counsel to determine which issues to raise on appeal and to "place before the appellate court an equivalent report of the events a trial from which the appellant's contentions arise." *State v. Jackson*, 87 Wn.2d 562, 565, 554 P.2d 1347 (1976) (quoting *Draper*, 372 U.S. at 495). If the reconstructed record fails to satisfactorily recount events material to appellate issues, the appellate

court must order a new trial. *State v. Tilton*, 149 Wn.2d 775, 783, 72 P.3d 735 (2003).

(b) It Is The State's Burden To Show A Substitute
For The Transcript Will Suffice For Appeal.

Where a defendant establishes a colorable need for a complete transcript, it is the State's burden to show that less than a complete transcript will suffice for an effective appeal. *Mayer v. Chicago*, 404 U.S. at 197.

Generally, a reconstructed record will be deemed sufficient when only a short period of time has elapsed since the trial. *See State v. Claussen*, 143 Wn. App. 45, 56, 176 P.3d 582 (2008) (recollections one week after the conclusion of testimony "exhibited a high degree of reliability")

Additionally, a reconstructed record will suffice when a discrete hearing is not recorded, but the court enters findings of facts and conclusions of law and the oral ruling was transcribed. *See State v. Putman*, 65 Wn. App. 606, 829 P.2d 787 (1992).

A reconstructed record is adequate when a court's response to a jury question is not transcribed, but the defendant does not establish any prejudice. *State v. Miller*, 40 Wn. App. 483, 486, 698 P.2d 1123 (1985).

By contrast, when appellate counsel is not trial counsel and the entire trial is lost, a trial court's narrative will be deemed insufficient. *See Larson*, 62 Wn.2d at 67.

Similarly, where a trial lawyer has no independent memory or notes of the critical testimony that was essential to an appeal based on ineffective assistance of trial counsel, a reconstructed record is insufficient. *See Tilton*, 149 Wn.2d at 783.

Putman, *Miller* and *Claussen* are each distinguishable from the present case. *Putnam* involved a discrete, simple suppression hearing. Significantly, the court had prepared written findings and conclusions, and the oral ruling was available. Similarly, *Miller* involved a single missing court response to a jury inquiry. By contrast, the unusable portion of this record spans several witnesses, court rulings and argument.

Claussen is also distinguishable. In this case, the parties are attempting to reconstruct testimony, argument and rulings four years after the trial. Four years is a significant amount of time and the trial lawyers undoubtedly participated in multiple intervening trials in those years. In short, the memories of trial counsel, four years after the fact, cannot be concluded to be "highly reliable" as the recollections one week after trial were deemed to be in *Claussen*.

This case is similar to those cases where the court found that the reconstructed record was insufficient on appeal. Like *Larson*, Ms. Burton's appellate counsel was not her trial counsel, and thus has no way of appraising the sufficiency of the State's amendments to the record.

This case is like *Tilton* in that Mr. Maxey has declared that four years after the fact, he has no independent recollection of the particular testimony given by the witnesses. Also like *Tilton*, Ms. Burton is pursuing an ineffective assistance of counsel claim.

In summary, the factors present in this case align more closely with the cases in which a reconstructed record was deemed insufficient for appellate review.

(c) Under The Four *Claussen* Factors, The Reconstructed Transcript Is Insufficient For Adequate Appellate Review.

In determining if a reconstructed record is satisfactory, factors the court considers include: (1) whether all or only part of the trial record is missing or reconstructed; (2) the importance of the missing portion to review the possible appellate issues; (3) the adequacy of the reconstructed record to permit appellate review; and (4) the degree of prejudice from the missing or reconstructed record to the defendant. *State v. Claussen*, 143 Wn. App. at 55.

- (i) Errors Appear Throughout The Transcript With Such Frequency That The Entire Transcript Is Of Dubious Credibility.

All of the transcript is affected by pervasive errors. Some errors occur with greater frequency in some phases of the trial, but the court reporter's failure to properly transcribe the trial seems to permeate the record.

In 380 pages of transcribed testimony, appellate counsel pointed out 128 passages that were not discernable. Those 128 passages did not include every misplaced or misspelled word, nor did it include every nonsensical phrase. The record is replete with errors, and because the errors are so numerous, the remainder of the record simply cannot be deemed reliable.

- (ii) The Affected Portions Of The Transcript Are Of Critical Importance To The Analysis Of Potential Appealable Issues.

Second, the importance of the unusable record to the review of appellate issues is critical. For example, as discussed above, in order to analyze possible ineffective assistance, the transcript must accurately reflect the arguments and ruling by the court related to the admission of prior bad acts by Ms. Burton against Mr. Dahlin.

A second example of an area of transcript where the particular words used that are critical to a potential issue on appeal is prosecutorial misconduct in closing argument. The transcript of the State's closing argument is littered with court-reporter generated inaccuracies. In fact, the State's closing argument was transcribed into 12 pages, which contained 300 lines. Of those 300 lines, 117 of the lines contained some sort of error – structural, grammatical, spelling or character combinations that did not create a word from the English language. This means that 39% of the transcript of the State's closing argument is not readable, and thus of little value on appeal.

While it is by no means clear, the transcript seems to indicate that the prosecutor instructed the jury that the definition of an “abiding belief” hinged on how the juror would summarize the case at a cocktail party a year in the future. (*See* 1RP 127-28)

In this case, the jury instruction defining reasonable doubt did not define “abiding belief.” The State's closing argument may raise an issue of whether the argument impermissibly lessened the burden on the State to prove each element beyond a reasonable doubt by providing a definition of an abiding belief that is a significant departure from the accepted definitions of the State's burden of proof beyond a reasonable doubt.

(iii) The Amendments Proposed By The State Are Inadequate To Permit Appellate Review.

The State has provided some narrative passages for some, but not all, of the places where the record contains errors. A narrative form is insufficient for several types of appellate issues. For example, the State's closing argument may raise an issue of prosecutorial misconduct. In a prosecutorial misconduct issue, review of the exact wording used is absolutely necessary. Reviewing a prosecutor's comments during closing argument entails examining the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004).

The high frequency of errors that occur within the State's closing argument – 39% of the argument is plagued with errors – make it impossible to examine the entire context of the argument and the evidence addressed in the arguments. The transcript is simply not readable or reliable. Additionally, the exact words are necessary to examine evidentiary objections and rulings, effective assistance of counsel, and a myriad of other appellate issues. The record, in its reconstituted form, is simply not serviceable for a direct appeal.

(iv) The Degree Of Prejudice To Ms. Burton From The Reconstructed Record Is High.

As argued above, several viable appellate issues require the ability to review the context of an argument and the exact words used. An attempt to reconstruct the words that were used nearly four years after the fact is inherently unreliable and thus prejudicial to Ms. Burton. The reconstructed record as it exists is insufficient to allow Ms. Burton a full, fair appeal. As such, if she is required to use the recently reconstructed record, the prejudice to her will be impermissibly high. Analysis of all the *Claussen* factors indicates that the reconstructed record is insufficient to permit appellate review. The court should find the trial court erred by finding that the record was sufficient for appellate review.

3. THE STATE'S INTRODUCTION OF IMPROPER ER 404(b) EVIDENCE WAS MISCONDUCT AND VIOLATED MS. BURTON'S STATE AND FEDERAL RIGHTS TO A FAIR TRIAL.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b).

When the State seeks to admit evidence of uncharged crimes, the trial court must (1) find by a preponderance of the evidence that the uncharged acts probably occurred, (2) identify the purpose for which the evidence is admitted, (3) find that the evidence is relevant to that purpose, and (4) balance the probative value of the evidence against its prejudicial effect. *State v. Kilgore*, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

“By generally allowing admission of highly prejudicial evidence of prior bad acts to be admitted at trial, the jury has a much higher likelihood of convicting an innocent defendant because of other crimes or bad acts committed in the defendant’s past. ER 404(b) protects against this type of prejudicial and biased trial.” *State v. Magers*, 164 Wn.2d 174, 198, 189 P.3d 126 (2008) (Johnson, dissenting).

The State committed misconduct in its improper presentation of the ER 404(b) evidence. The prosecuting attorney represents the people and is presumed to act with impartiality “ ‘in the interest only of justice.’ ” *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984) (quoting *State v. Case*, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956) (quoting *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497 (1899))). Prosecuting attorneys are quasi-judicial officers who have a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant. *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

The Sixth Amendment to the United States Constitution guarantees a defendant a fair trial but not a trial free from error. *Reed*, 102 Wn.2d at 145. The burden rests on the defendant to show the prosecuting attorney's conduct was both improper and prejudicial. *State v. Gregory*, 158 Wn.2d 759, 858, 147 P.3d 1201 (2006).

Once proved, prosecutorial misconduct is grounds for reversal where there is a substantial likelihood the improper conduct affected the jury. *Id.* at 841; *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Defense counsel's failure to object to the misconduct at trial constitutes a waiver on appeal unless the misconduct is " 'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice' " incurable by a jury instruction. *Gregory*, 158 Wn.2d at 841 (*quoting State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998)).

In this case, the State explicitly informed the court that it would not introduce any evidence of Ms. Burton's alleged prior bad acts in its case-in-chief. And yet the seventh question the State asked Mr. Dahlin about Ms. Burton was clearly designed to elicit alleged prior bad acts: "Q. Now, during the course of that relationship, were there ever arguments between you and Ms. Burton?" (2RP 102) The State followed that question immediately with "Did you ever have occasion to call the

police?” (2RP 102) The prosecutor continued asking questions that were obviously designed to produce detailed accounts of Ms. Burton’s prior bad acts.

When this was raised *in limine*, the trial court failed to conduct any analysis or weighing of the evidence under ER 404(b). The court’s failure was error that obviously prejudiced Ms. Burton. The jury heard multiple, unsubstantiated highly prejudicial descriptions of her past abusive, aggressive, drunken behavior that regularly required police intervention.

No limiting instruction could have cured this prejudice or caused the jury to forget this damning evidence. The State was well aware of the prejudicial nature of this testimony, because the deputy prosecutor assured the court and counsel that he would not seek to admit it. Yet he unabashedly did so. This conduct was so flagrant and ill-intentioned that it evinced an enduring and resulting prejudice that no jury instruction could cure. Ms. Burton is entitled to a new trial.

4. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO THE STATE’S ELICITING OF MS. BURTON’S ALLEGED PRIOR BAD ACTS.

As stated above, in order to establish ineffective assistance of counsel, the defendant must show that (1) counsel’s performance was deficient, and (2) the deficient performance prejudiced the defense.

State v. Turner, 143 Wn.2d 715, 730, 23 P.3d 499 (2001). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d at 705-06. Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different.

Prior to trial, defense counsel moved to exclude prior bad acts by Ms. Burton toward Mr. Dahlin. The State asserted it did not plan to introduce this evidence in its case in chief, so the court reserved ruling.

And yet the State elicited multiple instances of Ms. Burton's prior bad acts from witness Pete Dahlin. Mr. Dahlin testified at length that Ms. Burton had a drinking problem, she was violent, aggressive, and he had to call the police to control her both at home and at the office. The jury also heard Mr. Dahlin state that she stabbed holes in his water bed, kidnapped one of his cats, and tried to run him off the road in her car. Mr. Dahlin wrapped up his description by telling the jury that one summer night, she was drunk at work and screaming, so he called the police and left.

The jury heard a virtual parade of prior bad acts and prejudicial commentary from Mr. Dahlin about Ms. Burton without a single objection. Even the court indicated its uncertainty that the jury would be able to disregard all that testimony if the court were to give a limiting instruction.

The following day, the court attempted to clarify its ruling on the objection. The transcript is garbled, but it appears the court speculated that some of the damaging testimony would “fall into a category where purpose the prejudicial impact substantially ways the probative effect derived from the testimony on those acts.” (3RP 3)

Trial counsel’s failure to object to the damning testimony fell below an objective standard of reasonableness. The failure to object was particularly inexplicable, given that defense counsel moved *in limine* to prohibit this exact kind of testimony.

No reasonable trial strategy would support allowing the State to elicit highly prejudicial characterizations of the accused, along with colorful accounts of alleged previous bad acts. Counsel’s failure to object to this evidence constituted ineffective assistance.

5. THE COURT'S FAULTY ENTRAPMENT INSTRUCTION THAT OMITTED THE STANDARD FOR THE BURDEN OF PROOF DENIED MS. BURTON HER FEDERAL AND STATE CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Under RCW 9A.16.070,

- (1) In any prosecution for a crime, it is a defense that:
 - (a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and
 - (b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.
- (2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.

RCW 9A.16.070.

The appellate court reviews *de novo* alleged errors of law in jury instructions. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). Due process requires that the jury be fully instructed on the defense theory of the case. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Jury instructions are sufficient if they allow the parties to argue their theories of the case and properly inform the jury of the applicable law. *Barnes*, 153 Wn.2d at 382.

Generally, an instruction can be given to the jury if evidence exists to support the theory upon which the instruction is based. *State v. Davis*, 119 Wn.2d 657, 665, 835 P.2d 1039 (1992). Defendants must prove their affirmative defenses. *State v. Ziegler*, 19 Wn. App. 119, 575 P.2d 723

(1978). But in proving an affirmative defense, a defendant is not required to persuade the jury beyond a reasonable doubt. Instead, in proving entrapment, the quantum of proof necessary to entitle a defendant to an entrapment instruction, a defendant must present evidence which would be sufficient to permit a reasonable juror to conclude that the defendant has established the defense of entrapment by a preponderance of the evidence. *State v. Trujillo*, 75 Wn. App. 913, 883 P.2d 329 (1994). The standard for deciding whether there was sufficient evidence presented to create an issue of fact for the jury is a question of law. *Rhoades v. DeRosier*, 14 Wn. App. 946, 948, 546 P.2d 930 (1976).

In other words, a defendant must present evidence sufficient to permit a reasonable juror to conclude that Ms. Burton established the defense of entrapment by a preponderance of the evidence. *Trujillo*, 75 Wn. App. at 917.

The jury instructions, read as a whole, “must make the relevant legal standard manifestly apparent to the average juror.” *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). In *Walden*, as here, the jury was properly instructed in part. *Walden*, 131 Wn.2d at 475. But in addition, the *Walden* jury was given an incorrect instruction defining the kind of injury that must be apprehended to establish self defense, and the court reversed. When an instruction fails to correctly assign burdens

of proof, the instruction is legally deficient. *State v. Garbaccio*, 151 Wn. App. 716, 214 P.3d 168 (2009).

In this case, the trial court instructed the jury on entrapment. The Washington Pattern Instructions for Criminal law provide a pattern instruction that is identical to Instruction 10 in this case, with a significant omission: Instruction 10 failed to provide the last four sentences, informing the jury of the quantum of proof the defendant must establish:

The use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty [as to this charge].

See WPIC 18.05

The instruction failed to inform the jury of Ms. Burton's quantum of proof – that she had to establish entrapment by a preponderance of the evidence, not beyond a reasonable doubt. Preponderance of the evidence means that considering all the evidence, the proposition asserted must be more probably true than not true. *State v. Otis*, 151 Wn. App. 572, 577, 213 P.3d 613 (2009) By contrast, “[a] reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully,

fairly, and carefully considering all of the evidence or lack of evidence.”
WPIC 4.01.

Establishing an affirmative defense by a preponderance of the evidence is significantly easier than establishing the defense beyond a reasonable doubt. The jury was not informed of the critical fact – that Ms. Burton did not have to establish entrapment by a reasonable doubt, but only a preponderance of the evidence. The jury instructions failed to inform the jury of the relevant legal standard – Ms. Burton’s burden of proof to establish her affirmative defense – and this constituted reversible error.

Ms. Burton raises this deficiency for the first time on appeal. Under RAP 2.5(a)(3), a party may raise for the first time on appeal a “manifest error affecting a constitutional right.” The faulty instruction at issue impacted Ms. Burton’s right to a fair trial because in the absence of a proper instruction, the jury likely believed Ms. Burton had to establish her affirmative defense beyond a reasonable doubt. Thus, error may be assigned to such an instruction for the first time on appeal. *See State v. Byrd*, 72 Wn. App. 774, 782, 868 P.2d 158 (1994), *aff’d*, 125 Wn.2d 707 (1995).

Ms. Burton is entitled to a new trial that includes an entrapment jury instruction including a proper statement that her burden is a preponderance of evidence.

6. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT BY LOWERING THE STATE'S BURDEN FROM BEYOND A REASONABLE DOUBT.

Prosecutorial misconduct may violate a defendant's constitutional right to a fair trial. *State v. Charlton*, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). "[A]llegations of prosecutorial misconduct are reviewed under an abuse of discretion standard." *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). A trial court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

To prevail on a claim of prosecutorial misconduct, the defendant must establish both the impropriety of the prosecuting attorney's comments and their prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). The defendant bears the burden of proof on both issues. *State v. Munguia*, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001) (*quoting State v. Furman*, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993)).

In determining whether comments of a prosecuting attorney denied the criminal defendant a fair trial, reviewing courts engage in a two-part inquiry. *See State v. Reed*, 102 Wn.2d at 145. The court must first determine whether the prosecutor's comments are in fact improper. *Id.* If they are improper, the court must then consider whether there was a substantial likelihood that the comments affected the jury. *Id.*

In closing argument, prosecutors are granted wide latitude to draw and argue reasonable inferences from the evidence in the record. *State v. Harvey*, 34 Wn. App. 737, 739, 664 P.2d 1281 (1983). "A prosecuting attorney's allegedly improper remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *Brown*, 132 Wn.2d at 561.

Unless a proper objection was made at trial, a defendant cannot raise the issue of prosecutorial misconduct on appeal, unless the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered. *State v. Brown*, 132 Wn.2d at 561.

In *Scurry*, the trial court, in an attempt to explain the concept of reasonable doubt, told the jury that "[i]n order to establish proof beyond a reasonable doubt, the evidence must be such that you would be willing to

act upon it in the more important affairs of your own life,” and that “if ... you have an abiding conviction of the defendant’s guilt, such as you would be willing to act upon in the more weighty and important matters in your own affairs, then you have no reasonable doubt.”

On review, the District of Columbia Circuit found that this statement was an inaccurate statement of the law, explaining in part:

Being convinced beyond a reasonable doubt cannot be equated with being “willing to act ... in the more weighty and important matters in your own affairs” ... The jury ... is prohibited from convicting unless it can say that beyond a reasonable doubt the defendant is guilty as charged. Thus there is a substantial difference between a juror’s verdict of guilt beyond a reasonable doubt and a person making a judgment in a matter of personal importance to him. To equate the two in the juror’s mind is to deny the defendant the benefit of a reasonable doubt.

Scurry v. United States, 347 F.2d 468, 469-70 (D.C.Cir.1965), *cert. denied*, 389 U.S. 883 (1967).

This case presents a similar issue. In the State’s certificate supplementing the record, the State recalled this portion of closing argument as:

Mr. Garvin illustrated an abiding conviction as being a conviction that lasts over a period of time and noted that if the jury could see themselves at a later point in time describing this as a case where a lady hated her boss and hired a hit man to kill him and paid \$500 and the whole thing was videotaped then Ms. Burton was guilty.

(CP 274-75)

In essence, the State's closing argument impermissibly equated "beyond a reasonable doubt" with a casual, summary description. This is an even lesser standard than the one rejected in *Scurry*. In that case, the State addressed reasonable doubt in terms of "weighty" and "important" matters. But in this case, the State equated a brief, spontaneous description at a "cocktail party" a year in the future with reasonable doubt. (*see* 3RP 127-28)

As in *Scurry*, to equate these two completely different concepts – casual, cocktail party summaries and reasonable doubt – denied Ms. Burton the benefit of a reasonable doubt. The court should find that this misconduct, a blatant diminishment of the State's burden to convict, was so flagrant and ill-intentioned that no curative instruction could have obviated the prejudice to Ms. Burton.

- (a) Alternatively, Ms. Burton Received Ineffective Assistance Of Counsel When Trial Counsel Failed To Object To The State's Mischaracterization Of Reasonable Doubt.

In order to establish ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *State v. Turner*, 143 Wn.2d at 730. Deficient performance is shown if counsel's conduct

fell below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d at 705-06. Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different.

Ms. Burton's counsel failed to object to the State's lessening its burden of proof by informing jurors they should convict if they could envision themselves at a cocktail party, summarizing the case as "a case where a lady hated her boss and hired a hit man to kill him and paid \$500 and the whole thing was videotaped" (CP 274-75; 3RP 127-28)

The failure to object fell below an objective standard of reasonableness. There is a reasonable probability that the jury believed the State was providing an accurate representation of how to determine reasonable doubt and the lack thereof. Defense counsel lodged no objection, complaint, or rebuttal to this mischaracterization. Nor could any strategy reasonably support the failure to object. Given the State's mischaracterization that significantly lessened the State's burden to prove guilt beyond a reasonable doubt, the failure to object constituted ineffective assistance. Ms. Burton should be granted a new trial.

7. THE CUMULATIVE ERROR DOCTRINE
REQUIRES THAT MS. BURTON RECEIVE A
NEW TRIAL.

The cumulative error doctrine applies when several errors occurred at the trial but none alone warrants reversal. *State v. Hodges*, 118 Wn. App. 668, 673, 77 P.3d 375 (2003). A defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair. *State v. Saunders*, 120 Wn. App. 800, 826, 86 P.3d 232 (2004). But absent prejudicial error, there can be no cumulative error that deprived the defendant of a fair trial. *Saunders*, 120 Wn. App. at 826.

In this case, a multitude of errors occurred, several of which alone entitle Ms. Burton to a new trial. But in the event the court disagrees, the cumulative error doctrine dictates that given (a) the extraordinarily tardy, highly defective original trial transcript; (b) the introduction of alleged prior horrific acts by Ms. Burton without any weighing of the prejudice against the probative value; (c) the faulty jury instruction that failed to inform the jury that in order to prove entrapment Ms. Burton's burden was a preponderance of the evidence; (d) the State's misconduct in intentionally eliciting the extensive prior bad act testimony after the deputy prosecutor assured the court he would not do so, along with (e) the prosecutor's misconduct in lessening the burden of proof and equating beyond a reasonable doubt with a casual cocktail party summary of a case;

and (f) the ineffective assistance of counsel during the testimony of the prior bad acts and the improper closing argument, all require that Ms. Burton receive a new trial.

E. CONCLUSION

For the foregoing reasons, this court should reverse the trial court and grant Ms. Burton a new trial.

Respectfully submitted this 17th day of December, 2010.

A handwritten signature in black ink, appearing to read "Julia A. Dooris", with a long horizontal flourish extending to the right.

Julia A. Dooris #22907
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	COA No. 24944-1-III
)	
vs.)	
)	CERTIFICATE
JACKIE BURTON,)	OF MAILING
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on December 17, 2010, I served a copy of the Appellant's Amended Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Mark E. Lindsey
mlindsey@spokanecounty.org

I certify under penalty of perjury under the laws of the State of Washington that on December 17, 2010, I mailed a copy of the Appellant's Amended Brief in this matter to:

Jackie Burton
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Gig Harbor, WA 98332

Signed at Spokane, Washington on December 17, 2010.

GEMBERLING & DOORIS, P.S.


Janet Gemberling, #13489