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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 28185-0-III
COURT OF APPEALS

DIVISION III

OF

THE STATE OF WASHINGTON

State of Washington,
Respondent

v.

Anthony D. Koss,
Appellant

Appeal from the Superior Court of Spokane County

BRIEF OF APPELLANT

Attorney for Appellant Anthony D. Koss:
Douglas D. Phelps, WSBA #22620
Phelps & Associates
N. 2903 Stout Rd.
Spokane, WA 99206
(509) 892-0467

TABLE OF CONTENTS

	Page No.
Table of Authorities	iii
I. Assignments of Error	1
II. Statement of the Case	1
III. Introduction	2-12
IV. Argument	12-24
Issue 1: Whether the prosecutors' arguments in closing constitute a due process violation which misstated the law, misrepresented the role of the jury, and the burden of proof requiring a new trial.	12-15
Issue 2: Whether the language of RCW 9A.52.020(1) creates an issue of statutory interpretation which must be strictly construed in favor of the criminal defendant requiring dismissal of the First Degree Burglary charge.	15-18
Issue 3: Whether there was insufficient evidence as a matter of law for a jury to find that a First Degree Burglary occurred requiring dismissal of the First Degree Burglary charge.	18-19
Issue 4: Whether the trial court violated the Defendant's constitutional rights by not conducting proceedings in open court including jury instructions and questions received from the jurors during deliberation requiring a new trial.	20-22
Issue 5: Whether the court committed reversible error in failing to properly instruct the jury on the question of the defendant being on DOC as irrelevant 404(b) material requiring a new trial.	23-24
V. Conclusion	25

TABLE OF AUTHORITIES

<u>Washington Cases</u>	<u>Page Nos.</u>
<i>Bone-Club</i> , 128 Wash 2d at 259, 906 P. 2d 325	21,22
<i>Orange</i> , 152 Wash. 2d at 805-08 100 P. 3d 291	21
<i>Rettinger v. Bresnahan</i> , 42 Wn. 2d 631, 633-34, 257 P. 2d 633 (1953)	19
<i>State v. Arndt</i> , 87 Wn. 2d 374, 376, 553 P. 2d 1328 (1976)	17
<i>State v. Belgrade</i> , 110 Wn.2d 504, 507, 755 P.2d 174 (1998)	12,13,14,15
<i>State v. Brightman</i> , 155 Wash. 2d 506, 122 P. 3d 150 (2005)	22
<i>State v. Davenport</i> , 100 Wash 2d 757, 761-62, 675 P. 2d 1213 (1984)	13
<i>State v. Delmarter</i> , 94 Wn. 2d 634, 638, 618 P. 2d 99 (1980)	19
<i>State v. Easter</i> , 130 Wash 2d 228, 242-43, 922 P. 2d 1285 (1996)	13,14
<i>State v. Echevarria</i> , 71 Wn. App. 595, 598, 860 P. 2d 420 (1993)	12,13
<i>State v. Fleming</i> , 83 Wash App. 209, 216, 921 P. 2d 1076 (1996)	14,15
<i>State v. Foxhoven</i> , 161 Wash. 2d 168, 175, 163 P. 3d 786 (2007)	23
<i>State v. Gilbert</i> , 68 Wn. App. 379, 842 P. 2d 1029 (1993)	15,16,17,18
<i>State v. Green</i> , 94 Wn. 2d 216, 221, 616 P. 2d 628 (1980)	18
<i>State v. Kirkpatrick</i> , 160 Wash. 2d 873, 880, 161 P. 3d 990 (2007)	24
<i>State v. Kitchen</i> , 110 Wn. 2d 403, 409, 756 P. 2d 105 (1988)	17
<i>State v. Momah</i> , 217 P. 3d 321, at 325 (2009)	21
<i>State v. Neidigh</i> , 78 Wn. App. 71, 79, 895 P. 2d 423 (1995)	13

<i>State v. Ortega-Martinez</i> , 124 Wn. 2d 702, 707, 881 P. 2d 231 (1994)	16
<i>State v. Partin</i> , 88 Wn. 2d 899, 906-07, 567 P. 2d 1136 (1977)	18
<i>State v. Pirthe</i> , 127 Wash 2d 628, 672, 904, P. 2d 245 (1995)	13
<i>State v. Rivas</i> , 97 Wn. App. 349, 351-52, 984 P. 2d 432 (1999)	17
<i>State v. Stein</i> , 144 Wash. 2d 236, 240, 27 P. 3d 184 (2001)	24
<i>State v. Thorp</i> , 96 Wash. 2d 591, 599, 637 P. 2d 961 (1981)	24
<i>State v. Whitney</i> , 108 Wn. 2d 506, 508, 739 P. 2d 1150 (1987)	17
<i>State v. Williams</i> , 96 Wn. 2d 215, 222, 634 P. 2d 868 (1981)	19

<u>Federal Cases</u>	<u>Page Nos.</u>
<i>Jackson v. Virginia</i> , 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)	18
<i>Waller v. Georgia</i> , 467 U.S. 39, 46, 104 S. Ct. 2210 (1984)	20,21
<i>Gannett Co. v. DePasquale</i> , 443 U.S. 368, at 380 (1979)	20

<u>Other Authorities</u>	<u>Page Nos.</u>
RCW 9A.52.020(1)	1,12,15
ER 404(b)	1,23,24
ER 404	23
UNITED STATES CONST. SIXTH AMENDMENT	20,21,25
WASH. CONST. Art I. §10	20,21,24,25
WASH. CONST. Art. I, §21	13,16
WASH. CONST. Art I, §22	13,20,21,24,25
WASH. CONST. Art I, §25	13

I. ASSIGNMENTS OF ERROR

1. The prosecutions arguments in closing constitute a due process violation which misstated the law, misrepresented the role of the jury, and the burden of proof requiring a new trial.
2. The language of RCW 9A.52.020(1) creates an issue of statutory interpretation which must be strictly construed in favor of the criminal defendant.
3. There was insufficient evidence as a matter of law for the jury to find that a First Degree Burglary occurred.
4. The trial court violated the Defendants' Constitutional rights by not conducting proceedings in open court including jury instructions, arguments, and questions received from the jurors during deliberations.
5. The court committed reversible error in failing to properly instruct the jury on the question of the Defendant being on DOC as irrelevant 404(b) material.

II. STATEMENT OF THE CASE

A jury convicted Anthony D. Koss of First Degree Burglary based upon an allegation that he went onto a porch and knocked on the victims front door. (CP 63) After the victim came to the door Mr. Anthony Koss was alleged to have hit the female in the lip. The victim claimed his arm breached the doorway during the striking. (RP 180) The victim stated that Mr. Koss never attempted to gain entry to her home. (RP 186 lines 14-18) After the striking Mr. Koss ran from the porch of the home. (RP 175-176)

III. INTRODUCTION

On October 1, 2007, at 12:30a.m., Spokane Police responded to a call at 1101 East Indiana in Spokane, Washington. (RP 87-88) Police were directed to 1104 East Indiana in an effort to locate a possible suspect. (RP 89) Police were allowed to enter the home and proceeded to search the house at 1104 East Indiana. (RP 90-91) Officer Ottmar exited the home and was going to look in a shed in the back of the house. During his walk to the shed he looked into the basement windows and observed Anthony Koss changing his shirt in the basement. (RP 94) Officer Ottmar believed that Anthony Koss was hiding and avoiding being illuminated by his flashlight shining through the window. (RP 95) A fact that the officer failed to document in his police report but testified to at trial. (RP 107) His memory of Mr. Koss hiding in the basement was triggered after he read Spokane Sgt. Walkers' report. (RP 108-109)

At 1104 East Indiana Sgt. Walker found two white males believed to be possible suspects in the reported assault at 1101 East Indiana. One suspect, a Mr. Drake was asked to go outside for the identification by the alleged victim. (RP 114) The same request was made of Anthony Koss. (RP 118)

Officer Meyer spoke with Ms. Katy Jones the alleged victim at 1101 East Indiana. Ms. Jones was described at 5'5" and 120lbs and she

opened her door while armed with a baseball bat. (RP 146-147) Ms. Katy Jones also had blood on her lower lip. (RP 148) The officer also observed a small cut on the inside of her bottom lip. (RP 150)

Ms. Katy Jones told Officer Meyer she was near the entryway of the front door. (RP 152) Ms. Jones told him that the suspects went across the street to 1104 East Indiana. (RP 153) Mr. Drake was described as a large white male 6'6" and 260lbs. (RP 154) Ms. Jones identified Mr. Drake as one of the people involved. (RP 155) Mr. Anthony Koss was identified as 5'8" and approximately 150lbs. (RP 155) Officer Meyer further described that Mr. Koss was reported to be wearing a "wife-beater" type tank top. (RP 159) Ms. Katy Jones identified Anthony Koss at the police show-up. (RP 158) Officer Meyer then decided to arrest Mr. Anthony Koss for First Degree Burglary. (RP 160)

Katy Jones testified at the trial that she lived at 1101 Indiana with two other female roommates. (RP 168) That she had moved into the house the month before the incident occurred. (RP168) She did not know Mr. Drake or Anthony Koss before that night. (RP 169) Ms. Jones was awakened by a knocking on the front door of the house. (RP 170) During the month that she had lived there she had altercations with various people from across the street. (RP 171) She opened the door of the house and met two men. (RP 172) A man 5'9" with very short hair wearing a wife beater,

gray sweatpants, and tattoos on each of his shoulders. (RP 172) Behind the shorter guy was a 6'2" to 6'4" with red hair and a tattoo on his neck. (RP 172) She had seen the red haired person at the house across the street once before. (RP 172)

She stated that she never opened the door all the way and never stepped outside the doorway. (RP 174) She stated Mr. Anthony Koss asked if a lady with a particular name lived there and she only remembered the name began with an M. (RP 174) After asking her what her name was Mr. Koss hit her in the lip with a closed fist. (RP 174)

Upon being struck she stumbled back one, maybe two steps. She promptly closed the door and dead bolted it and ran upstairs. (RP 175) As she closed the door she reported seeing both men running across the street toward the house across the street. (RP 175-176)

Ms. Katy Jones stated she was a couple of feet in her home when she was punched in the face. (RP 179) She stated that Mr. Koss' arm had to have breached the threshold of the door when she was punched. (RP 179) Ms. Jones stated she never went onto the porch of the house. (RP 180) Ms. Katy Jones stated she had a "fat lip but had to (sic) eat through straws—for about a week or so." (RP 180 lines 7-10) Mr. Anthony Koss had changed his clothes after the incident at the door. (RP 181) Ms. Katy

Jones stated that the neighbors across the street would cat call at her and weren't the greatest neighbors. (RP 185)

Ms. Katy Jones stated that she believed the men were trying to be invited in but didn't force their way into the house. (RP 186 line 14-18) At first the two men were pleasant and were being a little bit friendly. (RP 186 line 19-24) The door to the house opens into the house and opens on the left. (RP 187)

The defense presented its first witness Delanzo Pleasant who lived at 1104 East Indiana at the time of the incident and for a period of ten years. (RP 191) Mr. Pleasant believed that there was a group of girls from Gonzaga living there because of parties and stuff. (RP 193) Mr. Pleasant heard a car pull up and then heard a female and male voice yelling from across the street. (RP 195 lines 1-10) Mr. Pleasant saw the men knock on the door and an Asian female answer the door. Then an argument followed between the female and the men. (RP 196 lines 14-24) Mr. Pleasant stated he observed Andrew Drake strike the female. Then the female went back into the house slamming the door of the house. (RP 197 lines 6-13)

Jonathan Boltz testified that he was across the street with Mr. Pleasant when he heard a female yelling at the house across the street. (RP 213) After the female was yelling he observed Andrew Drake and Anthony Koss pull up in a car. (RP 213-214) Mr. Boltz stated that the

female stepped out onto the porch yelling and throwing her arms around. Mr. Drake stepped back and then swung at the female. (RP 215 lines 13-25) Mr. Boltz stated the female was out on the porch when she was struck. (RP 216 lines 1-13) After the struggle occurred both of the men ran away from the scene. (RP 227 lines 17-23)

The defense called Andrew Drake who testified he had gone to Red Lobster in Coeur d' Alene with Anthony Koss on the night of the incident. (RP 233 lines 6-16) The female across the street was yelling something about a stolen keg. (RP 234 lines 11-22) Mr. Drake and Mr. Anthony Koss went across the street and knocked on the door. The female came out of the house and was not happy. (RP 236 lines 7-14) Then the female pushed Mr. Drake knocking the cigarette from his hands. (RP 237 lines 10-22) As she pushed him he reacted in self defense because the female was "freaking out". (RP 237 lines 17-22) Mr. Drake stated that he hit her with his left hand as he pushed her. (RP 238 lines 9-23) After pushing Ms. Jones he ran away and into Delanzo Pleasants' house. (RP 239-240) Mr. Drake stated that Mr. Koss was on DOC at the time of the incident. (RP 240 lines 11-14)

On cross examination the prosecutor asked Mr. Drake:

Q: And Mr. Koss ran, correct?

A: Yes. Yes.

Q: And was it your testimony because something about
DOC?

A: Yeah. (RP 253 lines 5-8)

At that point in the examination the defense attorney objected. (RP 253 line 9) The defense later argued that there was no relevance to the statement. (RP 254 line 3-5) In a hearing conducted on the record outside of the presence of the jury, the court ruled that the evidence was inadmissible as speculative evidence on Mr. Koss' reason for flight. (RP 255-262)

The court on April 29, 2009 returns to the record discussing jury instructions by stating that "counsel and I met in chambers." The record does not reflect what the discussions were regarding the instructions and the defendant's presence was not discussed on the record. (RP 271 lines 13-23) There was no discussion as to why this occurred outside of the open courtroom. (RP 271)

Anthony Koss was called to testify for the defense. (RP 275) Mr. Koss testified that on the evening of the incident, he, Mr. Drake, and his fiancé were at Red Lobster in Coeur d'Alene, Idaho. (RP 279) As they pulled up at the Pleasants' residence they saw a female yelling across the street. (RP 281 lines 11-14) When they went to the house to knock on the door the female came outside closing the door of the house. (RP 282 lines

10-16) Mr. Koss stated he asked what her name was and she started yelling and swinging her arms around her. (RP 283 lines 17-25) It was during this exchange that Mr. Drake pushed Katy Jones causing the injury. After that exchange Ms. Katy Jones pushed the door of the house open and stepped back into the house closing the door. (RP 284 lines 10-16) The two men then ran away down the street. (RP 284 lines 12-25) Anthony Koss testified that he did not assault Katy Jones. (RP 290 line 19) Katy Jones bumped into him as she slapped at the side and brushed against him. (RP 297 lines 9-13)

The court on April 29, 2009 comes back into session stating that counsel and the trial judge met in chambers. There is no indication who was present or why this occurred. (RP 271) The trial judge then states that the definition of burglary has been modified to remove the words “or an accomplice.” (RP 271 lines 17-22) The prosecution charged the offense as a First Degree Burglary alleging accomplice liability. (CP 1) There was no amendment of the information and the only explanation was that it was removed based upon the facts of the case. (RP 271 lines 16-21) There is a statement by the court that one instruction was changed at Mr. Collins’ request. (RP 271 lines 3-8) Neither the prosecutor or the defense counsel objected to the instructions proposed by the court. (RP 271 lines 8-12)

The court then read the jury the courts instructions. A reasonable doubt is described based upon an abiding belief in the truth of the charge. (RP 310 lines 1-15)(CP47) In the instructions the court defines First Degree Burglary (RP 310 line 16-21)(CP48) and the elements of the First Degree Burglary are set out in the courts instructions. (RP 310 line 25 to RP 311 line 10)(CP49)

The court instructed the jury that: “A person commits the crime of burglary in the first degree when he or she enters or remains unlawfully in a building with the intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom that person in the crime assaults any person.” (CP 48) (RP 310 line 16-21)

In instructing the jury as to the elements for first degree burglary the instruction read: “One: That on or about the 1st day of October, 2007, the defendant entered or remained unlawfully in a building.....Three: That in so entering or while in the building, the defendant assaulted a person; and Four: That any of these acts occurred in the State of Washington.” (CP 49) (RP 310-311)

These instructions were the same as those proposed by the prosecutor in the Plaintiffs’ Proposed Instructions. (CP 26&27)

The prosecution gave a closing argument in which he begins by stating: “At the start of this process, the state asked if a person has a fundamental right to be secure in their home and to be free from bodily injury, and it was unanimous that when a person is in their home, they should be secure in their own safety. They should be secure in their own safety. They should be secure that their way of life, our way of life, is not disturbed by some other person who is not invited to be in there or consents to any type of harmful conduct, and you folks have, basically, been brought here to determine whether or not the defendant violated Katy Jones’ right to be secure in her home and free from bodily injury.” (RP 317 lines 15-25)

Additionally, the prosecution argued that it was not necessary to prove complete entry. “Also, under Washington law, the State does not have to prove that an individual completely entered into another person’s home. It is enough under Washington law to show that a part of that person’s body was inserted into another individual’s home. It could be a hand through a window. It could be a hand breaching the threshold of a door, as Katy Jones had testified to you in this particular case, for an entry to be made.” (RP 318 line 17-24) In this particular case, you have to be convinced that some part of the defendant’s body breached the threshold of Katy Jones’ front door and struck her in the mouth.” (RP 318 line 25 to

319 lines 1-2) The prosecutor then misstates the burden of proof. “Now, when you think of that concept beyond a reasonable doubt. It’s okay if there are some questions that are unanswered so long as the information you have before you leads you to believe that the defendant committed this crime.” (RP 319 lines 8-12)

Ultimately, the prosecutor requested that they jury hold Mr. Koss accountable for breaching Ms. Katy Jones’ security of her home on October 11, 2007 and assaulting her on that particular early morning. (RP 314 and 325) The prosecution argued that the defense witnesses were not credible because they “can’t even figure out the ethnicity of the female” (victim). (RP 323 lines 23-25 to 324)

The jury began deliberations and later submitted questions to the court. Question number one was a request for a player to play the 911 call. (CP61) That inquiry was received at 12:00pm on 4/29/09. The next question was “Mr. Drake stated that Tony Cross was DOC can we factor that in? And if so what is the meaning?” The court’s response: “Please Re-read your jury instructions.” The response was dated April 29, 2009 at 12:20. (CP62) There is no other record of any discussion between counsel or any record of the parties being brought into court. The jury ultimately delivered a guilty verdict to First Degree Burglary. (RP 347 lines 12-15)(CP63)

The defendant timely filed his appeal with the court.

IV. ARGUMENT

Mr. Anthony Koss was convicted of First Degree Burglary. Mr. Koss was convicted of the charge based on the allegation that his arm breached a doorway as the defendant struck the victims lip or in immediate flight from the building. (CP 48) (RP 310 lines 16-21) The evidence was that the defendant never attempted to enter the residence (RP 186 lines 14-18) except that the victim was struck as she stood in the doorway or in immediate flight from the building. (RP 239-240)

A question of statutory interpretation arises under RCW 9A.52.020(1) which must be strictly construed in favor of the criminal defendant. A related question arises whether there was sufficient evidence as a matter of law for the jury to find beyond a reasonable doubt that a first degree burglary occurred.

Then the prosecutor capitalized on these errors by arguing in closing by misstating the law, misrepresenting the role of the jury, and the burden of proof all of which requires a new trial.

ISSUE 1: The prosecutor's arguments in closing constitute a due process violation which misstated the law, misrepresented the role of the jury and the burden of proof requiring a new trial.

Prosecutor's have a duty to seek verdicts free from appeals to passion or prejudice. *State v. Belgrade*, 110 Wn. 2d. 504, 507, 755 P. 2d. 174(1988); *State v.*

Echevarria, 71 Wn. App 595, 598, 860 P. 2d. 420(1993) Accordingly, a prosecutor engages in misconduct when making an argument that appeals to jurors' fear and repudiation of criminal groups or invokes racial, ethnic, or religious prejudice as a reason to convict. *Belgrade*, 110 Wn. 2d 504. Likewise, inflammatory remarks, incitements to vengeance, exhortations to join a war against crime or drugs, or appeals to prejudice or patriotism are forbidden. *State v. Neidigh*, 78 Wn. App. 71, 79, 895 P. 2d 423(1995)

The Washington State Constitution grants criminal defendants substantial rights. Article 1 § 21 an inviolate right to jury trial, § 22 guarantees many rights to a criminal defendant including a copy of accusation against him, to have a speedy public trial by an impartial jury, and a right to appeal in all cases. In Article 1 § 25 the Washington Constitution provides a right to prosecution by information or indictment.

Prosecutorial misconduct is grounds for reversal where there is a substantial likelihood the misconduct affected the verdict. *State v. Pirthe*, 127 Wash 2d 628, 672, 904 P. 2d 245(1995) When the prosecutor's misconduct affects a constitutional rights, such as a right against self-incrimination, the court undertakes a separate analysis: the constitutional harmless error analysis. *State v. Easter*, 130 Wash 2d. 228, 242-43, 922 P. 2d 1285(1996); *State v. Davenport*, 100 Wash 2d. 757, 761-62, 675 P. 2d 1213(1984). Under this review the error is harmless if the court is convinced beyond a reasonable doubt that they jury would

have reached the same result. *Easter*, 130 Wash 2d at 242, 922 P. 2d 1285; see also *State v. Fleming*, 83 Wash App. 209, 216, 921 P. 2d 1076(1996) (Utilizing the constitutional harmless error analysis where prosecutor improperly shifted the burden of proof, misstated the nature of reasonable doubt and the role of the jury, and infringed on the defendant's right to remain silent.)

In the Anthony Koss case the prosecutor argues that beyond a reasonable doubt is where "there are some questions that are unanswered so long as the information you have before you leads you to believe the defendant committed the crime." (RP 319 lines 8-12) Based upon this analysis where a person is led to believe the defendant committed the crime the jury could determine there was evidence beyond a reasonable doubt. The standard stated by the prosecutor was a burden below that of beyond a reasonable doubt and is actually much closer to a probable cause standard.

Next, the prosecutor urged the jury to make their decision based upon the fundamental right of a person to be secure in their own safety in their own home. (RP 317 lines 15-25) He told the jury they were brought here "to determine whether or not the defendant violated Katy Jones' right to be secure in her home and free from bodily injury." (RP 317 lines 15-25) Once more the prosecution took the focus from determining if the government proved the case beyond a reasonable doubt. The prosecutor focused the jury on their duty to protect Katy Jones' "fundamental right to be secure in their home." (RP 317) The prosecution

was making a plea to the jury appealing to the jurors' passions and extolling them to protect the fundamental rights of the alleged victim.

The prosecution in this case also argued that the defense witnesses were not credible because they could not identify the victims' ethnic background. (RP 323 lines 23-25 to 324) Once more the prosecution abandoned his duty to seek a verdict free from appeals to passion or prejudices required under *State v. Belgrade*, 110 Wn. 2d. 504, 507, 755 P. 2d. 174(1988) The violations here were constitutional in scope misstating the law and misrepresented the role of the jury and the burden of proof. In a case which is strikingly similar to what has occurred in the Koss case the Court of Appeals found manifest constitutional error. *State v. Fleming*, 83 Wn. App. 209, 216, 921 P. 2d 1076(1996)

The prosecutorial misconduct which occurred in this case is of such magnitude that the court should remand the case for a new trial. The prosecutorial misconduct involved errors of a constitutional magnitude which requires a new trial.

ISSUE 2: The language of RCW 9A.52.020(1) creates an issue of statutory interpretation which must be strictly construed in favor of the criminal defendant requiring dismissal of the First Degree Burglary charge.

The facts of the case before the court are very similar to those presented in *State v. Gilbert*, 68 Wn. App. 379, 842 P. 2d 1029(1993) The *Gilbert* case involved an allegation where the defendants were involved in assaulting a person

outside of the building. The court concluded that the Legislature's intent in passing the first degree burglary statute was to prohibit assault of someone while in the building.

The state in the *Gilbert* case argued that the court should give a broader interpretation to the statute and allow for assaults occurring while leaving the property to be included. The *Gilbert* court explicitly rejected that position ruling: "an assault outside a burglarized dwelling does not elevate a residential burglary to first degree burglary." *State v. Gilbert*, 68 Wn. App. 379, 384, 842 P. 2d 1029(1993)

The facts of the current case are particularly susceptible to a jury finding that the assault occurred while leaving the property. There was conflicting testimony about where the assault occurred but it was uncontested that the men immediately fled from the building. (RP 175-76) (RP 216) (RP 227) (RP 239-240) The jury given the testimony is likely to have concluded that the assault occurred in flight from the building as occurred in *Gilbert, supra*. The court instructed the jurors that a burglary could be found: "That in so entering or while in the building or in immediate flight from the building, the defendant assaulted a person." (RP 311) (CP 48 and 49)

Jury verdicts in criminal cases must be unanimous as to the defendant's guilt of the crime charged. *State v. Ortega-Martinez*, 124 Wn. 2d 702, 707, 881 P. 2d 231 (1994)(citing Const. Art. I § 21) In some situations, the right to jury

unanimity includes the right to express unanimity as to the means by which the defendant committed the crim. Id.

The threshold test governing whether express unanimity is required as to the alternate means of committing the crime is whether sufficient evidence exists to support each of the alternate means presented to the jury. Id. If the evidence is sufficient to support each such means, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary. But if the evidence is insufficient to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, a general verdict of guilt cannot stand unless the prosecutor elected or the court instructed the jury which means to rely on in its deliberations. Id. At 707-708; *State v. Kitchen*, 110 Wn. 2d 403, 409, 756 P. 2d 105 (1988); *State v. Rivas*, 97 Wn. App. 349, 351-52, 984 P. 2d 432 (1999) Jury unanimity requirements may also be met if each of the means is supported by substantial evidence in the record and the means are not repugnant to one another. *State v. Whitney*, 108 Wn. 2d 506, 508, 739 P. 2d 1150 (1987); *State v. Arndt*, 87 Wn. 2d 374, 376, 553 P. 2d 1328 (1976)

Here the assaulting of the victim in flight from the building would not be a first degree burglary should the court follow the ruling of *State v. Gilbert*, 68 Wn. App. 379, 842 P. 2d 1029 (1993) Given the instructions provided to the jury it is impossible to ascertain which of the alternative means the jury utilized therefore

this court should remand for entry of a conviction to fourth degree assault consistent with the courts decision in *Gilbert, supra*.

ISSUE 3: There was insufficient evidence as a matter of law for the jury to find that a First Degree Burglary occurred requiring dismissal of the First Degree Burglary charge.

There was insufficient evidence to establish

(1) That on or about the 1st day of October, 2007, the defendant entered or remained unlawfully in a building;

(2) That the entering or remaining was with intent to commit a crime against a person or property therein:

(3) That in so entering or while in the building or in immediate flight from the building the defendant assaulted a person; and

When sufficiency of the evidence is at issue, the test is “Whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Green*, 94 Wn. 2d 216, 221, 616 P. 2d 628 (1980) (quoting *Jackson v. Virginia* 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)) All reasonable inferences must be drawn in the State’s favor and interpreted most strongly against the defendant. *Id.* See also *State v. Partin*, 88 Wn. 2d 899, 906-07, 567 P. 2d 1136 (1977). In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than

direct evidence.” *State v. Delmarter*, 94 Wn. 2d 634, 638, 618 P. 2d 99 (1980) (internal citation omitted) It is the fact-finder’s province to believe or disbelieve any witness whose credibility it is called upon to consider. *State v. Williams*, 96 Wn. 2d 215, 222, 634 P. 2d 868 (1981) (quoting *Rettinger v. Bresnahan*, 42 Wn. 2d 631, 633-34, 257 P. 2d 633 (1953))

A person is guilty of burglary in the first degree where “the entering was with intent to commit a crime against a person or property therein; (3) That in so entering or while in the building or in immediate flight from the building the defendant assaulted a person; and (4) That any of these acts occurred in the State of Washington. (CP 49) (RP 311)

Here Mr. Koss never entered the building intending to commit a crime of assault. The victim testified that she believed the men were trying to be invited in but didn’t force their way into the house. (RP 186 lines 14-18) The testimony of Mr. Pleasant was that Mr. Drake struck the female before she returned to her house and slammed the door of the house. (RP 197 lines 6-13) Here the jury was confronted with evidence that an assault occurred outside of the house without any intent to enter the home or alternatively as the subjects left the front porch an assault occurred without any intent to enter the home. Under either scenario there was not a burglary but a fourth degree assault and the court should rule that Mr. Koss was convicted of the lesser offense of fourth degree assault.

ISSUE 4: The trial court violated the defendant's constitutional rights by not conducting proceedings in open court including jury instruction, arguments, and questions received from jurors during deliberations.

The United State Supreme Court has ruled that a criminal defendant has under the United State's Constitution a Sixth Amendment right to a public trial. That the right to a public trial extends to suppression hearings. *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210 (1984) The *Waller* court recognized the public trial guarantee as one created for the benefit of the defendant. *Waller*, *supra* 46 citing *Gannett Co. v. DePasquale*, 443 U.S. 368, at 380 (1979) "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions...In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury." *Waller v. Georgia*, 467, U.S. at 39, 46-47, 104 S. Ct. 2210 (1984)

The Washington Supreme Court has considered the question of the criminal defendants' right to a public trial under Article 1 § 22 of the Washington State Constitution. Article 1, Sections 10 and 22 serve complimentary and interdependent functions in assuring fairness of our judicial system, particularly in the context of a criminal proceeding. Indeed, the central aim of any criminal

proceeding must be to try the accused fairly. Thus, the requirement of a public trial is primarily for the benefit of the accused: that the public may see he is fairly dealt with and not unjustly condemned and that the presence of interested spectators may keep his triers keenly alive to a sense of responsibility and to the importance of their functions. For these reasons, under Article 1, Sections 10 and 22, a strong presumption exists that the courts are to be open at all trial stages. *State v. Momah*, 217 P. 3d 321, at 325 (2009)

“To protect the defendant’s public trial right under Article 1 § 22, this court adopted the same standard for closing the court that applies to cases under Article 1 § 10.” *Momah*, *supra* citing *Bone-Club*, 128 Wash 2d at 259, 906 P. 2d 325 “The decision employing this closure standard for both sections 10 and 22 cases are similar to the analysis applied under the Sixth Amendment of the United States Constitution and the United States Supreme Court decision in *Waller v. Georgia*, 467 U.S. 39, 47, 104 S. Ct. 2210 81 L. Ed. 2d 31 (1984)”

To determine if closure is appropriate, the court applies guidelines drawn from *Waller’s* approach. *Bone-Club*, 128 Wash. 2d at 259-61, 906 P. 2d 325; *Orange*, 152 Wash. 2d at 805-08 100 P. 3d 291 There are five guidelines establishing the procedures the court must consider prior to closing or conducting proceedings outside of open court. After applying these guidelines the court should enter specific findings on the record to justify the closure. *State v. Momah*, 217 P. 3d 321, at 325-326 (2009)

In this case there is nothing on the record to explain the reasons that the court conducted a conference on jury instructions in chambers. (RP 271) There was no seeking of objection or receiving assent from defendant but merely the mention on the record of the chamber conference on jury instructions. It seems clear that the defendant and observation by the public was denied during a critical phase of the criminal trial. The makeup of the jury instructions and the outcome of these instructions involves critical issues of elements of offenses and potential defenses. Where the record is lacking any record on the trial courts reasoning in closing a court during the Defendants trial there is structured error requiring a new trial. *State v. Brightman, 155 Wash. 2d 506, 122 P. 3d 150 (2005)*

Similarly, in the case before the court the jury returned with two written questions. (CP 61-62) There was no record that these questions were discussed in open court with counsel or whether the defendant was present to discuss the jury's questions. All that is in the record is the question with the courts response. Once more the record has no information of whether the defendant or counsel were consulted. All that is available was the question and the courts response. It appears that once more the defendant was not consulted and no analysis was made on the record as required by *Bone-Club*. Once more the response to a jury question is a critical phase in a jury trial. The failure of the court to conduct two critical portions of the jury trial in the open court without conducting an analysis on the record is structural error requiring a new trial.

ISSUE 5: The court committed reversible error by failing to properly instruct the jury after a question was submitted about the defendant “being on DOC” as irrelevant 404(b) material.

During the trial Mr. Drake testified that Mr. Koss was “on DOC.” (RP 240 lines 11-14) (RP 253 lines 5-8) The prosecutor followed that up on cross examination by questioning Mr. Drake about what he said about Mr. Koss being on DOC. (RP 253 lines 7-8) The defense objected based upon relevance. (RP 254 lines 3-4) The issue of the DOC comes up next in the context of jury deliberation. (CP 62) The jurors submit a question to the court: “Mr. Drake stated that Tony Cross was DOC. Can we factor that in (sic)? And if so what is the meaning?” The court wrote back: “Please Re-read your jury instructions.” (CP 62) The record demonstrates that the jury was considering the testimony about the defendant’s involvement with DOC. The court failed to instruct the jury to disregard the irrelevant testimony about DOC.

Generally, evidence of a defendant’s prior misconduct is inadmissible to demonstrate the accused’s propensity to commit a crime charged. ER 404(b) However, the trial court may admit evidence of prior misconduct for other purposes like demonstrating intent so long as the probative value outweighs its prejudicial effect. ER 404; *State v. Foxhoven*, 161 Wash. 2d 168, 175, 163 P. 3d 786 (2007)

Here the jury questioned the court on how 404(b) evidence was to be considered and if it should be considered during the actual deliberations. The error in this case is a manifest error because an error is manifest where it had “practical and identifiable consequences in the trial of the case.” *State v. Kirkpatrick*, 160 Wash. 2d 873, 880, 161 P. 3d 990 (2007) (quoting *State v. Stein*, 144 Wash. 2d 236, 240, 27 P. 3d 184 (2001)) The jury question demonstrates the practical and identifiable consequences in the trial through the influence it had in the jurors deliberations.

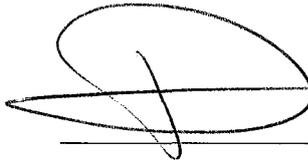
The issue here is of constitutional magnitude because the court failed to bring this issue to the defendant or defense counsel in open court. In the preceding argument the appellant argues that the failure to conduct critical proceedings in open court violated the defendant’s rights under the Sixth Amendment to the United States Constitution and Article 1 Sections 10 and 22. Here the courts failure to bring the issue before the defendant and counsel in open court denies any record of how the court instructed the jury on this critical question.

The defense requests that the case be remanded for a new trial because the error was of constitutional magnitude and it is within reasonable probabilities that the outcome would have been materially affected had the error not occurred. *State v. Thorp*, 96 Wash. 2d 591, 599, 637 P. 2d 961 (1981)

V. CONCLUSION

The appellant requests that the court find that due to insufficiency of the evidence that the case must be remanded to the trial court for retrial on the question of whether the defendant assaulted the victim. A new trial on the assault is required due to the due process argument based upon prosecutorial misconduct and the courts failure to conduct critical proceedings in open court pursuant to the United States Constitution Sixth Amendment and Washington State Constitution Article 1 Sections 10 and 22.

Respectfully submitted this 20 day of January, 2010



Douglas D. Phelps, WSBA #22620
Phelps & Associates
N. 2903 Stout Rd.
Spokane, WA 99206
(509) 892-0467