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**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY EMERY, JR. and AARON OLSON, PETITIONERS

Review of Court of Appeals # 39119-8-II

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 06-1-05953-2 and 06-1-05952-4

SUPPLEMENTAL BRIEF OF RESPONDENT

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ORIGINAL

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A. ISSUES PRESENTED FOR REVIEW.

1. Whether the defendants waived the issue regarding prosecutorial misconduct in closing argument where the defendants failed to object to the argument at trial?
2. Whether the prosecuting attorney's argument was flagrant and ill-intentioned?
3. Whether any error or misconduct in the prosecutor's argument could have been cured by an instruction from the trial court?
4. Whether the prosecutor's closing argument resulted in prejudice affecting the verdict?
5. Whether the trial court abused its discretion in denying the defendant's motion to sever and for separate trials?

B. STATEMENT OF THE CASE.

1. Procedure

On December 18, 2006, the Pierce County Prosecuting Attorney (State) charged Anthony Emery and Aaron Olson with kidnapping in the first degree, robbery in the first degree, rape in the first degree, and attempted robbery in the first degree. CP 1-3, 4-5. On July 19, 2007, the State amended the Information to charge an alternative means to rape in the first degree, and added two more counts of rape in the first degree. CP

46-49. The court later ordered that some of the counts be severed for trial. CP 50-51. On June 5, 2008, the State filed a Second Amended Information, charging kidnapping in the first degree, robbery in the first degree, four counts of rape in the first degree, and one count of attempted robbery in the first degree. CP 72-75.

December 29, 2008, Olson moved to sever the defendants for trial. CP 110.

Trial began January 6, 2009, before Hon. Bryan Chushcoff. RP 4 ff. Before jury selection began, Olson argued his motion to sever defendants. RP 36. After hearing the argument, the court denied the motion. RP 58. Olson repeated the motion before the victim testified. RP 84. Again, the court denied the motion. *Id.* After the State rested, Olson again renewed the motion to sever. RP 622. The court denied the motion. RP 623. Olson rested his case without presenting evidence. RP 629. Neither defendant moved to dismiss after the close of the State's case.

Emery testified in his own defense. RP 631-724. After Emery testified, he rested his case. RP 724. Olson then testified in rebuttal. RP 725-742. Before closing arguments, Olson again renewed his motion to sever. RP 777. After closing arguments, he renewed his severance motion. RP 907. The court denied the motion each time. RP 781, 908.

The jury returned verdicts of guilty on all counts for each defendant. CP 295, 298, 299; 174-177 RP 914-914. Judge Chushcoff

sentenced Olson March 27, 2009. CP 337-350. Emery was sentenced April 2, 2009. CP 180-195.

The defendants appealed their convictions. CP 364-378, 203-204. The Court of Appeals affirmed the convictions in *State v. Emery*, 161 Wn. App. 172, 253 P. 3d 413 (2011).

2. Facts

The substantive facts in this case can be found in the Court of Appeals decision below. *See State v. Emery*, 161 Wn. App. at 180-182. In the interest of brevity and to avoid repetition, the substantive facts will be examined in detail here only where necessary to the argument.

In brief summary, the defendants, Anthony Emery and Aaron Olson, abducted G.C. at gunpoint as she walked to her car after work at a Walgreen's in Tacoma. RP 102, 104, 112. The defendants took personal property from the victim. RP 102. The defendants then took turns raping G.C. RP 115, 118. G.C. intentionally preserved the semen from each defendant by wiping it on different parts of her clothing. RP 115, 131.

C. ARGUMENT.

1. WHERE THE PROSECUTOR'S ARGUMENT WAS NOT FLAGRANT OR ILL-INTENTIONED AS TO BE INCURABLE BY INSTRUCTION, THE DEFENDANT WAIVES THE ISSUE ON APPEAL WHEN HE FAILED TO OBJECT AT TRIAL.

a. By failing to object to the prosecutor's remarks in closing argument, the defendant waived the issue on appeal.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 718-19.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995), citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If a curative instruction could have cured the error and the defense

failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), overruled on other grounds by *State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002).

Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132 Wn.2d at 719, citing *Gentry*, 125 Wn.2d at 593-594. This analysis of remarks where there has been no objection has been used and applied by the Supreme Court for many years. See *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Gentry*, 125 Wn.2d at 596; *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994); *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P. 2d 577 (1991); *State v. Stamm*, 16 Wn. App. 603, 614, 559 P. 2d 1 (1976).

In addition to the general principal of issue preservation, it is important for trial counsel to object to improper argument. Timely objections serve to discourage a prosecutor from escalating improper comments on a topic or theme that has been rejected by the court. See, e.g. *State v. Warren*, 165 Wn.2d 17, 195 P. 3d 940 (2008). Proper objections may stop repetitive or continuing improper questions or argument in trial. See, e.g., *State v. Mckenzie*, 157 Wn.2d 44, 53 n. 2, 134 P.3d 221 (2006). A timely objection gives the trial court the opportunity to instruct the jury or otherwise cure the error, insuring a fair trial and avoiding a costly

retrial. *See, e.g. Warren, supra*, at 25. The trial court is in the best position to determine whether misconduct or improper argument prejudiced the defendant. *See Stenson*, at 718. In other words, the best time and place to address an improper argument is in the trial court, where the court can take remedial action.

Failure to object or move for mistrial at the time of the argument “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P. 2d 610 (1990); *see also State v. Monday*, 171 Wn.2d 667, 679, 257 P.3d 551 (2011). In *Swan*, the Court further observed that “[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.” *Id.*, quoting *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960).

Recently, in *State v. Sakellis*, -- Wn. App. --, -- P. 3d -- (2011)(2011 WL 4790918), Division II of the Court of Appeals questioned the concept of “waiver” where the defendant fails to object to the alleged misconduct at trial. The Court of Appeals acknowledged this Court’s recent cases characterizing the defendant's failure to object to the alleged misconduct at trial as a “waiver” of any error. The Court of Appeals cited *State v. Thorgerson*, — Wn.2d —, 258 P.3d 43, 46 (2011); *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009); and *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). The Court

of Appeals criticized the waiver rule and warned that it “invites an overly simplistic analysis that is based on purely procedural grounds.” *Sakellis*, slip op., at 6. The Court went on to urge the abandonment of the use of the term “waiver.” *Id.*, at 7.

Recently, this Court again examined the issue of prosecutorial misconduct in closing. In *State v. Warren*, 165 Wn.2d at 24, the prosecuting attorney improperly argued that “Reasonable doubt does not mean give the defendant the benefit of the doubt, and that is clear when you read the definition.” *Id.* Despite defense objections, the prosecutor repeated this line of argument later in closing. *Id.*, at 25. The trial court sustained the objection, and intervened, properly instructing the jury. *Id.*

In *State v. Monday*, 171 Wn.2d 667, 257 P. 3d 551 (2011), this Court examined explicit and implicit racial remarks made by a prosecuting attorney in questioning witnesses and in closing. Although defense counsel had objected to some of the questioning, counsel had failed to object to the closing. The Court referred to its opinion in *Warren*, at 43: “we have held that without a timely objection, reversal is not required ‘unless the conduct is ‘so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.’” *Monday*, 171 Wn.2d., at 679. However, the Court found the prosecutor’s conduct in *Monday* so egregious that it resulted in prejudice. *Id.*, at 681.

In the present case, neither defendant objected to the prosecutor's closing argument. That issue is therefore waived unless the defendant can show the remark is flagrant and ill-intentioned, prejudiced the defendants, and was incurable by instruction. The defendants do not meet their burden. They waived their objection.

- b. The prosecutor's argument was not flagrant or ill-intentioned and did not result in prejudice that could not have been cured by a jury instruction.

Where there is a failure to object to improper statements, it constitutes a waiver unless the statement is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P. 3d 432 (2003).

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the jury instructions. *State v. Russell*, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994), citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990).

Here, the trial court instructed the jury regarding burden of proof and reasonable doubt per WPIC 4.01:

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The

defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

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. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Instruction 3. CP 258.

The trial court also properly instructed the jury that:

The lawyer's remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

Instruction 0, CP 254. See WPIC 1.02.

In the present case, the prosecutor did make a "fill in the blank" reasonable doubt argument. RP 830. The prosecutor also argued that the jury's verdict should "speak the truth." RP 831. In several recent cases, the Court of Appeals found similar "fill in the blank" and "speak the truth" arguments to be improper. See *State v. Walker*, - Wn. App. -, -P.3d - (2011)(2011 WL 5345265); *Sakellis, supra*; *State v. Evans*, - Wn. App. -, 260 P. 3d 934 (2011); *State v. Johnson*, 158 Wn. App. 677, 243 P. 3d 936

(2010); *State v. Venegas*, 155 Wn. App. 507, 228 P.3d 813 (2010); *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009).

The word “flagrant” means “extremely, flauntingly, or purposefully conspicuous: ...glaringly evident.” Webster’s Third New International Dictionary (unabridged), 862-863 (2002). In deciding whether the improper argument was “flagrant,” it is worth noting that the “fill in the blank” argument has never been objected to at trial and then reviewed on appeal. Apparently, its impropriety is not so glaringly evident as to attract the attention or objection of numerous defense counsel.

In determining whether these arguments were “flagrant and ill-intentioned”, the Court should consider the fact that all of the trials involving the “fill in the blank” argument occurred before the *Anderson* decision was filed.¹ See *Venegas*, at 512; *Johnson*, at 685; *Walker*, slip op., at 7, n.6. In *State v. Fleming*, 83 Wn. App. 209, 214, 921 P. 2d 1076 (1996), Division I found, in part, that the prosecutor’s “find the witness lying or mistaken” argument was flagrant and ill-intentioned, because this argument had earlier been held improper in *State v. Casteneda-Perez*, 61 Wn. App. 354, 362-363, 810 P. 2d 74 (1991). In *Johnson*, the State, citing *Fleming*, argued that the Court should have taken this into consideration.

¹ The published decisions in *State v. Evans* and *State v. Sakellis* do not refer to the trial or sentencing dates. However, the list of proceedings, including the trial dates, regarding these two cases are public record and may be found on the Pierce County website: pierce.co.us, under the Superior Court LINX section. Case numbers: *State v. Evans*, 08-1-05298-4; and *State v. Sakellis*, 06-1-05885-4.

Division II specifically declined to follow that aspect of the *Fleming* decision. *Johnson*, 158 Wn. App., at 685. Again, in *Warren*, this Court similarly noted that the same prosecutor in that case had made the same “benefit of the doubt” argument in a prior, unpublished case. The Court of Appeals had found the argument “entirely inappropriate.” *Warren*, 165 Wn.2d at 27, n.4. Here, the prosecutor did not have the guidance or notice from a prior opinion that the argument was improper, unlike the prosecutors in *Warren* and *Fleming*.

Here, as in *Anderson*, *Venegas*, and the other cases cited *supra* which examined the “fill in the blank” argument, the prosecutor attempted to make a reasonable argument based on the law as given to the jury in the court’s instructions. The prosecutor did not try to mislead the jury. The argument was not ill-intentioned.

The prosecutor was clear in his argument that the burden of proof in a criminal case is on the State and that burden is proof beyond a reasonable doubt. RP 791-792, 827-829. In rebuttal closing, the prosecutor reminded the jury again that the State bears the burden of proof. RP 877-878. The prosecutor quoted the law directly from the jury instructions. RP 829-830. Nothing in the record indicates that he was acting in bad faith or trying to mislead the jurors. The prosecutor’s statements were an attempt to expound on the concept of reasonable doubt. The language “a reasonable doubt is one for which a reason exists” is taken directly out of the instruction. CP 258, Instruction 3.

The State's argument mirrored the jury instruction and also explained the State's burden. "A 'reasonable doubt', at a minimum, is one based upon 'reason.'" "A fanciful doubt is not a reasonable doubt." *Victor v. Nebraska*, 511 U.S. 1, 17, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)(citing *Jackson v. Virginia*, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). Some states permit the jury to be instructed that reasonable doubt is one which they can, in their own mind, conscientiously give a reason. *See, e.g., State v. Coward*, 292 Conn. 296, 317, 972 A. 2d 691 (2009). In California, the instruction might imply that jurors had to articulate a reason for doubt. *See People v. Taylor*, 48 Cal. 4th 574, 631, 229 P. 3d 12 (2010). In *Anderson*, the Court found that the examples of reasons to doubt that the prosecutor gave; such as whether there was enough evidence, or whether a witness identified the defendant, were proper. *Anderson* 153 Wn. App. at 430. However, those examples were in the context of the "fill in the blank" argument, which was found to be improper. *Id.*, at 431.

The explanation of the concept of "reasonable doubt" has challenged courts and attorneys for many years. In 1997, in considering a non-standard reasonable doubt instruction, Division I observed that: "Scholars will continue endlessly to debate the best definition of reasonable doubt." *State v. Castle*, 86 Wn. App. 48, 62, 935 P.2d 656, *review denied*, 133 Wn.2d 1014 (1997). That same year, Division I considered yet another nonstandard reasonable doubt instruction in *State*

v. Cervantes, 87 Wn. App. 440, 942 P.2d 382 (1997). For a period of time, the *Castle* instruction was approved for general use. See 11 Washington Practice, Pattern Jury Instructions (2d edition, 1994), 4.01A (1998 pocket part). Eventually, in *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007), the Supreme Court requested that trial courts cease using the *Castle* instruction, in favor of the standard WPIC 4.01.

The appellate courts have found a number of different acts to be incurable prosecutorial misconduct. *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984) is a notorious case where, despite defense objections, the prosecutor committed numerous acts of misconduct including insulting defense counsel and defense experts, pandering to the prejudices of the jury, and calling the defendant a liar, without arguing the evidence.

In *State v. Belgarde*, 110 Wn.2d 504, 755 P. 2d 174 (1988), the prosecutor used inflammatory racist remarks regarding Native Americans in his closing. Although the argument was unobjected to, this Court reversed because the argument was so outrageous, and that no instruction could have cured the remarks. *Id.*, at 508.

Most recently, in *State v. Monday*, *supra*, this Court again reversed a conviction where racist remarks, this time regarding African Americans, were made. 171 Wn. 2d at 679. Although there was no objection, the Court reversed because the remarks were so fundamentally wrong and no instruction could possibly cure them. *Id.*, at 680.

In *State v. Barrow*, 60 Wn. App. 869, 874-875, 809 P.2d 209 (1991) and *State v. Fleming*, 83 Wn. App. at 213- 214, the prosecutor argued that in order to acquit, the jury had to find that the State's witnesses were lying. In *Fleming*, the prosecutor also commented in closing on the defendant's failure to present evidence. *Id.*, at 214. Although defense counsel failed to object, the Court of Appeals found that the prosecutor's errors "pervaded" the closing and were not harmless beyond a reasonable doubt. *Id.*, at 21. In *State v. Stenson*, 132 Wn.2d at 719-724, and *State v. Henderson*, 100 Wn. App. 794, 998 P.2d 907 (2000), defense counsel did object where the prosecutor elicited improper comments from witnesses regarding improper opinion (*Stenson*) and comment on the defendant's right to remain silent (*Henderson*).

In the present case, the prosecutor did not engage in any of these flagrant acts. He attempted to argue reasonable doubt to the jury in the words of the instruction. This Court has subsequently found that argument improper. The jury was correctly instructed on the law. They were told what standards to apply and also to disregard any remarks that were not supported by the law or the court's instructions. The State's remark was not flagrant or ill-intentioned. Even if this Court finds it was in error, the jury was still properly instructed and presumed to follow the court's instructions on the law.

- c. If improper, the prosecutor's remarks did not result in prejudice.

When considering improper argument, a reviewing court will not reverse a conviction absent a showing of prejudice. See *Warren*, 165 Wn. 2d at 29. Even in an extreme case, such as *Monday*, the Court considered whether the improper argument resulted in prejudice. 171 Wn. 2d at 680. In *Monday*, the Court applied a constitutional harmless error analysis. *Id.*, at 680.

The improper argument in the present case was harmless or failed to result in prejudice. The central purpose of a criminal trial is to determine guilt or innocence. *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Neder v. United States*, 527 U.S. 1, 17, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). “[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” *Brown v. United States*, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973) (internal quotation omitted).

Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not

contribute to the verdict that was obtained. *Id.* at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

Here, even if part of the prosecutor’s argument was improper, the defendants cannot show that the improper argument affected the verdict. The evidence against the defendants was considerable. The victim picked Emery out of a photo montage. RP 150, 346. She identified him in court. RP 154. Forensic tests found his fingerprints inside the victim’s car. RP 403. Lab tests showed that his semen and DNA was on the victim’s clothes. RP 548, 564.

Emery testified at trial, admitting most of what the victim had testified to, including that both he and Olson were present and had oral sex with the victim on the night in question. RP 639-640. Emery’s testimony about Olson was confirmed by lab testing. Olson’s semen and DNA was on a different part of the victim’s clothing than Emery’s. RP 547, 562.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING OLSON’S MOTION TO SEVER TRIALS.

Separate trials have never been favored in Washington. *State v. Grisby*, 97 Wn.2d 493, 647 P.2d 6 (1982). The granting or denial of a motion for severance of jointly charged defendants is entrusted to the sound discretion of the trial court and will not be disturbed on appeal

absent a manifest abuse of discretion. *State v. Alsup*, 75 Wn. App. 128 876 P.2d 935 (1994); *State v. Barry*, 25 Wn. App. 751, 611 P.2d 1262 (1980). To support a finding that the trial court abused its discretion, the burden is on the defendant to come forward with facts sufficient to warrant the exercise of discretion in his favor. *Alsup*, 75 Wn. App. at 131. Severance is only proper when the defendant carries the difficult burden of demonstrating undue prejudice from a joint trial. *Grisby*, 97 Wn.2d at 507. Defendants seeking a separate trial must demonstrate manifest prejudice in a joint trial which outweighs the concern for judicial economy. *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991).

The administration of justice would be greatly burdened if required to accommodate separate trials in all cases where multiple parties have participated in a criminal offense and where one or more have confessed to its commission.

State v. Ferguson, 3 Wn. App. 898, 906, 479 P.2d 114 (1970), *review denied*, 78 Wn.2d 996 (1971), cited in *State v. Samsel*, 39 Wn. App. 564, 694 P.2d 670 (1985).

A defendant can demonstrate specific prejudice by showing:

(1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculcating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants.

State v. Canedo-Astorga, 79 Wn. App. 518, 528, 903 P.2d 500 (1995).

Existence of mutually antagonistic defenses is not alone sufficient to compel separate trials. *State v. Hoffman, supra; State v. Davis*, 73 Wn.2d 271, 438 P.2d 185 (1968). The defense must demonstrate that the conflict is so prejudicial that defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.

All of the participants in a crime will invariably be in conflict when all are tried for that crime. If such conflicts are regarded as requiring separate trials, then joint trials will be the exception and not the rule. *Grisby, supra*. Defenses that are inconsistent are not necessarily irreconcilable. To be irreconcilable, and thus mutually antagonistic, they must be “mutually exclusive to the extent that one must be believed if the other is disbelieved.” *State v. McKinzy*, 72 Wn. App. 85, 90, 863 P.2d 594 (1993).

Recently, the Court of Appeals considered similar issues in *State v. Johnson*, 147 Wn. App. 276, 194 P. 3d 1009 (2008). There, three defendants were each charged with first degree murder, two counts of first degree assault, and one count of first degree burglary. Two defendants had a strategy to blame the others. The third claimed alibi. *Id.*, at 287. Despite the fact that one of the defendants took the stand and implicated the other two, this did not make the defenses irreconcilable. *Id.*, at 287-288.

Here, the trial court considered Olson’s arguments and specifically found that the separate trials would make no difference to the defendants. The court pointed out that Olson might maintain his alibi and assert that

the “white male” was someone else. RP 56. Indeed, the evidence in this case supported such a strategy. When shown the montages, the victim came closest to identifying a Mr. McMullen as the white male. RP 330. The Court observed that Olson’s attorney would cross-examine Emery and argue credibility to the jury. It was the jury’s job to determine whose version to believe, RP 48. Olson did not show that the defenses were irreconcilable. The court did not abuse its discretion in denying the motion to sever.

a. Emery waived his objection to severance.

A motion to sever defendants must be made before trial:

A defendant’s motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.

CrR 4.4(a)(1).

Here, Emery did not move to sever his trial from Olson’s before or during trial. Therefore, he waived this issue and cannot raise it for the first time on appeal.

3. THE STATE RELIES ON ITS RESPONSE BRIEF
IN THE COURT OF APPEALS BELOW
REGARDING ADDITIONAL ISSUES RAISED.

The defendants raised several additional issues in their appeals below, including sufficiency of the evidence, ineffective assistance of

counsel, and motions for mistrial. Due to space limitations in this supplemental brief, the State will refer the Court to the Brief of Respondent in the court below regarding these issues.

D. CONCLUSION.

Part of the prosecutor's closing argument has subsequently been found to be improper by the Court of Appeals. Neither defendant objected at trial to the remarks. The defendants had a fair trial where the State presented overwhelming evidence to convict them of all charges. For the reasons argued above, the State respectfully requests that the defendants' convictions be affirmed.

DATED: November 21, 2011

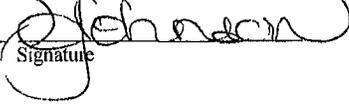
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Pierce County
Prosecuting Attorney



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Deputy Prosecuting Attorney
WSB # 17442

Certificate of Service:

The undersigned certifies that on this day she delivered by ^{e-filed} ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/21/11 
Date Signature