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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

ODIES WALKER, APPELLANT

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

No. 09-1-02784-8

Supplemental Brief of Respondent/Cross-Appellant to the Supreme Court

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A. CROSS-APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred where it instructed the jury that it must find that Walker was a major participant in order to find him guilty.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether Washington's Flagrant and Ill-Intentioned Standard for prosecutorial misconduct that has not been objected to at trial has improperly should be overturned where it improperly misleads the appellate courts into making factual determinations?

2. Whether prior to the issuance of the court's opinion on *Glasmann*, prosecutors' were not on notice that the conduct disapproved of in *Glasmann* was improper?

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6. Whether the court of appeals properly held that the jury instructions did not deprive Walker of a unanimous verdict?
7. Whether the court of appeals properly denied Walker's claims on his remaining issues regarding prosecutorial misconduct?

C. STATEMENT OF THE CASE.

Odeis Walker and Tonie Williams-Irby were not married but considered and represented themselves husband and wife. 7RP 626-28. Walker had worked at the Lakewood WalMart and Williams-Irby still did in June of 2009. 5 RP 309; 7RP 663.

Months before June 2009, Walker began planning the robbery of Walmart with Calvin Finley. 7RP 665-66. In those discussions they talked about killing the guard. 7RP 665-66. Marshawn Turpin was included as one of the participants in the plan. 7 RP 659.

Walker also included Jessie Lewis in the plan and Lewis's role was to shoot the armored car guard. 9RP 902-04. Immediately after telling Lewis about the plan, Walker took him over to the WalMart store to rob the guard. 9RP 904-05. Walker tried to give Lewis a gun for the crime, but Lewis got nervous and didn't take it. 9RP 911. Lewis knew they

weren't going to get away with it and that someone was going to get killed, so he walked out of the store. 9RP 912. Lewis told Walker he didn't want to be involved in a murder. 9RP 913. Walker later tried to recruit Lewis again but was unsuccessful. 9RP 914, 966. Walker then tried to recruit Darrell Parrott to commit the robbery. 9RP 966.

Walker arranged the getaway car, which he drove when they committed the robbery. 5RP 243; 7RP 663.

Walker and his accomplices committed the robbery on June 2, 2009. RP 4RP 94. They approached armored car guard Kurt Husted after he had picked up the receipts from the store. 4RP 118; 5RP 318. Walker was outside the store on the phone with Finley who went inside. 8RP 723. When Mr. Husted didn't immediately hand over the money Walker told Finley to kill "the motherfucker." They shot Mr. Husted in the head and took the money. 4RP 117-18.

C. ARGUMENT.

1. WASHINGTON'S FLAGRANT AND ILL-INTENTIONED STANDARD FOR CLAIMS OF PROSECUTORIAL MISCONDUCT THAT WERE NOT OBJECTED TO AT TRIAL HAS MISLED THE APPELLATE COURTS INTO IMPROPERLY MAKING FACTUAL DETERMINATIONS.

a. Washington Is The Only Jurisdiction In The United States That Uses The "Flagrant and Ill-Intentioned Standard.

An electronic search of all federal cases containing "flagrant" and "ill-intentioned" in the same sentence reveals 23 cases, all of which include the phrase in reference to cases arising in Washington. Similarly, in a search of all state cases, excluding those from Washington, the phrase occurs in only one case, in a parenthetical describing a holding in a Washington case. See *Murphy International Robotic Systems, Inc.* 766 So.2d 1010, 1025 (2000) (citing *Bellevue v. Kravik*, 69 Wn. App. 735, 743, 850 P.2d 559 (1993)).

The only jurisdiction in the United States to use the "flagrant and ill-intentioned" standard is the State of Washington.

b. The Flagrant And Ill-Intentioned Standard Does Not Conform To Standards For Constitutional Review Of A Prosecutorial Misconduct At Trial.

In *Glasmann*, with regard to the standard of review, the Washington Supreme Court stated:

In order to prevail on a claim of prosecutorial misconduct, a defendant is required to show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *Thorgerson*, 172 Wash.2d at 442, 258 P.3d 43. To show prejudice requires that the defendant show a substantial likelihood that the misconduct affected the jury verdict. *Id.*; *State v. Ish*, 170 Wash.2d 189, 195, 241 P.3d 389 (2010); *State v. Dhaliwal*, 150 Wash.2d 559, 578, 79 P.3d 432 (2003). Because Mr. Glasmann failed to object at trial, the errors he complains of are waived unless he establishes that the misconduct was so *flagrant and ill intentioned* that an instruction would not have cured the prejudice. *Thorgerson*, 172 Wash.2d at 443, 258 P.3d 43; *State v. Russell*, 125 Wash.2d 24, 86, 882 P.2d 747 (1994).

In re Personal Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). [Emphasis added.]

However, it has long been established by the United States Supreme court that "...a prosecutor's improper comments will be held to violate the Constitution only if they" 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Parker v. Matthews*, --- U.S. ---, 132 S. Ct. 2148 (2012) (quoting *Darden v. Wainright*, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974))).

Under federal law, if a claimed error was not objected to below, the court will only reverse the conviction where there is plain error. The plain error standard is expressed in Federal Rule of Criminal Procedure 52(b). That would seem to make the federal plain error standard

potentially inapplicable to state court proceedings. However, this is incorrect, because the plain error standard was an express attempt to restate existing law. See Fed. R. Cr. Proc. 52, Advisory Committee Notes, 1944 Adoption Note to Subdivision (b) (citing *Wiborg v. United States*, 163 U.S. 632, 658, 16 S. Ct. 1127, 1197, 41 L. Ed. 289 (1896); *Hemphill v. United States*, 112 F.2d 505 (9th Cir. 1940), *reversed*, 312 U.S. 657, 61 S. Ct. 729, 85 L. Ed. 1106, *conformed to*, 120 F.2d 115, *cert. denied*, 314 U.S. 627, 62 S. Ct. 111, 86 L. Ed. 503 (1941)).

The standards that should guide the exercise of remedial discretion under the plain error rule were articulated by the United States Supreme Court in a civil case that pre-dated the adoption of the Federal Rules of Criminal Procedure. See *United States v. Olano*, 507 U.S. 725, 736, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) (citing *United States v. Atkinson*, 297 U.S. 157, 159 (1936)). In *Atkinson*, the court noted that,

The verdict of a jury will not ordinarily be set aside for error not brought to the attention of the trial court. This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact.

Atkinson, 297 U.S. at 159. The court went on to state,

In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.

Atkinson, 297 U.S. at 160. As a civil case *Atkinson*, served to express the principle of appellate process that generally errors which were not objected to below will generally not be entitled to relief, but that the rule is not absolute and that in exceptional circumstances errors that were not objected to, particularly in a criminal context, may still be entitled to relief when raised for the first time on appeal.

By invoking “fairness,” the plain error standard directly relates to the right to a fair trial under the Due Process clause.

The requirement of a contemporaneous objection serves two important purposes. It gives the trial court, which is ordinarily in the best position to determine the relevant facts and adjudicate the dispute, the opportunity to avoid or correct a mistake so that it cannot possibly affect the outcome. *Puckett*, 556 U.S. at 134. It also prevents a litigant from “sandbagging” the court, i.e. remaining silent about the objection and belatedly raising the error only if the case does not conclude in the litigant’s favor, thereby giving parties an unfair second chance to avail themselves of alternative case strategies, and to improperly prolong the litigation. *Puckett*, 556 U.S. at 134.

Any standard necessarily must limit the review of errors not objected to below to only exceptional violations. Otherwise, the standard would encourage and reward parties to intentionally seed the trial record with error. In the criminal context this is particularly problematic in terms

of fundamental fairness of the proceedings to both the parties because double jeopardy means that the State will never benefit from generous grant of review of errors that were not objected to. Such a policy benefits the defense only, in a way that severely undermines fairness in the criminal justice process and the public perception of justice.

The federal plain error standard serves the purpose of properly balancing two significant concerns: a process of criminal justice that serves judicial efficiency in light of the fact that attorneys on both sides are imperfect human beings and does not hold them to unattainably high standards, while still ensuring that the defendant is accorded a fair. *See Puckett*, 556 U.S. at 135. Defendants are entitled to a fair trial but not a perfect one for there are no perfect trials. *Brown v. United States*, 411 U.S. 223, 231-32, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973).

Unwarranted extension of the authority granted by Fed. R. Crim. Proc. 52(b) would disturb the careful balance between judicial efficiency and the redress of injustice in a way that would be even less appropriate. *Puckett*, 556 U.S. at 135-363.

It is, and should be difficult to demonstrate all four prongs of the plain error test. *Puckett*, 556 U.S. at 135 (quoting *United States v. Domonguez Benitez*, 542 U.S. 74, 83, ln. 9, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004)). Relief for errors that were not objected to below are and should be rare exceptions.

Some might attempt to argue that the two standards, i.e. Washington's "flagrant and ill-intentioned" and the federal "plain error" are in fact similar. However, this is gravely mistaken even if it is tempting to try to view them so at first blush. The "flagrant and ill-intentioned" standard employed by the Washington Supreme Court differs from the standard adopted by the United States Supreme Court in ways that are significant and deeply problematic.

The original standard in Washington for claims of prosecutorial misconduct asserted on appeal was that ordinarily if a defendant objected to a statement by the prosecutor, in order to preserve the error, the defendant was required to request the trial court to correct the error by instructing the jury to disregard it, and then also taking exception to the trial court's refusal to do so. *See State v. Case*, 49 Wn.2d 66, 72, 298 P.2d 500 (1956). However, an exception to that rule existed in cases where the misconduct was so flagrant that no instruction could cure it. *Case*, 49 Wn.2d at 72. In *Case* and its predecessors, "flagrant" was a reference to the degree of prejudice to the defendant, not the intent of the prosecutor in committing the error. *See Case*, 49 Wn.2d at 72 (citing *State v. Meyerkamp*, 82 Wash. 607, 611, 144 P.2d 942 (1914) (citing *State v. Regan*, 8 Wash. 506, 511, 36 P. 472 (1894) (denying a claim of misconduct in closing based upon an argument of facts not in evidence because the defense did not appear to move to strike the statement or for

an instruction that the jury disregard it and there was no prejudice to the defendant)).

The phrase “flagrant and ill intentioned continues to be applied in civil cases. See *Bellevue v. Kravik*, 69 Wn. App. 735, 743, 850 P.2d 559 (1993).

The term “ill-intentioned” on the other hand, did not derive from the right to a fair trial. Instead, it appears to have first been used spontaneously in a civil personal injury case without reliance upon any other authority. See *Slattery v. City of Seattle*, 169 Wash. 144, 149-50, 13 P.2d 464 (1932). From there, some eighteen years later, it was picked up by another civil case, and then a third. See *Johnson v. Howard*, 45 Wn.2d 433, 275 P.2d 736 (1954); *Nelson v. Martinson*, 52 Wn.2d 684, 628 P.2d 703 (1958). From there, the civil language of “flagrant, persistent and ill-intentioned” was eventually incorporated into a criminal case, some 35 years after it first appeared in *Slattery*. See *State v. Morris*, 70 Wn.2d 27, 33, 422 P.2d 27 (1967). Thus, “ill-intentioned” never properly derived from the right to a “fair trial” and was incorporated into the standard improperly, and quite late.

However, once the “ill-intentioned” language was incorporated into the standard of review, it understandably altered the character of “flagrant,” misdirecting the court from a focus on the prejudice suffered by the defendant, and refocusing flagrancy on the intent of the prosecutor. From the time the ill-intentioned language was first used in a criminal

case, flagrant and ill-intentioned was turned into something separate from prejudice, even though prejudice is precisely what “flagrant” meant originally.

Unless the misconduct of counsel in his opening statement is so flagrant, persistent and ill-intentioned, or the wrong inflicted thereby so obvious, and the prejudice resulting therefrom so marked and enduring, that corrective instruction or admonitions clearly could not neutralize their effect, any objection to such misconduct of counselor error in the opening statement is waived by failure to make adequate timely objection and request for a corrective instruction or admonition.

Morris, 70 Wn.2d at 33 (citing *Nelson*, 52 Wn.2d 684; *Jones v. Hogan*, 56 Wn.2d 23, 351 P.2d 153 (1960)).

However, by directing the focus of the analysis to the intent of the prosecutor, the “flagrant and ill-intentioned” standard introduced error into the analysis.

c. The Flagrant And Ill-Intentioned” Standard Has Misled Washington’s Appellate Courts To Improperly Make Factual Determinations.

The bedrock foundational principle of Washington’s system of appellate review is that appellate court’s do not make factual determinations. *State v. Walters*, 162 Wn. App. 74, 255 P.3d 835 (2011); *Doyle v. Lee*, 166 Wn. App. 397, 406, 272 P.3d 256 (2012). *See also Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 572-575, 343 P.2d 183 (1959). On appellate review, the court is limited to the facts

contained in the appellate record. *See Am. Oil Co. v. Columbia Oil Co.*, 88 Wn.2d 835, 842-43, 567 P.2d 637 (1977); *State v. Wade*, 138 Wn.2d 460, 979 P.2d 850 (1999).

However, with regard to the actions of the prosecutor during trial, and particularly with regard to statements and the use of PowerPoint in closing argument, there is no evidence as to the prosecutor's intent or motivation.

Accordingly, it is highly improper for the court to draw inferences or make factual determinations about the prosecutor's intent. This is particularly so where such determinations are made without the prosecutor ever having been afforded the opportunity to explain what they did, including their motivations and intent, as, e.g. might occur in a hearing before the trial court if the defense had brought a timely motion challenging the conduct.

By applying the "flagrant and ill-intentioned" standard, the court has been misled into improperly making implicit, if not explicit, factual determinations regarding the prosecutor's intent. Doing so is not necessary to the analysis of the defendant's right to a fair trial.

The problem with the "flagrant and ill-intentioned" standard is that it is logically flawed so that it produces legally erroneous results. Error by a prosecutor may be flagrant and ill-intentioned, but still not significantly prejudice the defendant, and therefore not violate the defendant's right to a fair trial. Conversely, error by a prosecutor may not be flagrant and ill-

intentioned but only inadvertent, but nonetheless so infect the trial with unfairness as to make the resulting conviction a denial of due process. The touchstone is whether the defendant was so prejudiced that he was deprived of a fair trial.

What is particularly confounding about the court's reliance on the "flagrant and ill-intentioned" standard in *Glasmann*, and particularly the *Glasmann* court's greater focus on the conduct of the prosecutor rather than the prejudice to the defendant is that the Washington Supreme Court recently recognized that the lower courts were improperly focusing on the "flagrant and ill-intentioned" aspect of the standard and misapplying it so that the Supreme court emphasized the need for the lower courts to re-focus their analysis on the effect of the conduct, rather than the "flagrant and ill-intentioned" aspect.

Before analyzing the prosecutor's misconduct here, we pause to clarify our precedent. Our standards of review are based on a defendant's duty to object to a prosecutor's allegedly improper argument. See 13 Royce A. Ferguson, Jr., *Washington Practice: Criminal Practice And Procedure* § 4505, at 295 (3d ed. 2004) ("If either counsel indulges in any improper remarks during closing argument, the other must interpose an objection at the time they are made. This is to give the court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks."). Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process. *State v. Weber*, 159 Wash.2d 252, 271–72, 149 P.3d 646 (2006) (were a party not required to object, a party " 'could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial

on appeal.” (quoting *State v. Sullivan*, 69 Wash.App. 167, 173, 847 P.2d 953 (1993)); *State v. Swan*, 114 Wash.2d 613, 661, 790 P.2d 610 (1990) (“[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.” (Alteration in original) (quoting *Jones v. Hogan*, 56 Wash.2d 23, 27, 351 P.2d 153 (1960))). An objection is unnecessary in cases of incurable prejudice only because “there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.” *State v. Case*, 49 Wash.2d 66, 74, 298 P.2d 500 (1956).

However, shortly thereafter, in *Glasmann*, the Washington Supreme promptly failed to heed its own directive.

More importantly, the flagrant and ill-intentioned standard improperly causes the court to focus on the prosecutor’s intent and indirectly inferring a violation of the defendant’s right to a fair trial because of the ill-intent ascribed to the prosecutor rather than focusing directly on the defendant’s right to a fair trial.

Because the flagrant and ill-intentioned standard does not comply with the requirements for assessing violations of the right to a fair trial, the court should abandon it as a standard.

2. PRIOR TO THE COURT'S ISSUANCE OF ITS OPINION IN *GLASMANN*, NOTHING IN EITHER WASHINGTON OR FEDERAL LAW GAVE PROSECUTORS NOTICE THAT THE USES MADE OF THE POWERPOINT PRESENTATION WERE OF THE TYPES THAT FELL WITHIN PROHIBITED CONDUCT.

The nature of misconduct in closing arguments is such that it is difficult to have clear guidance on what is or is not acceptable so that even with many case-specific rulings there are considerable limitations. *See* Wayne R. LaFave, Jerold H. Israel, Nancy J. King, Orin S. Kerr, *CRIMINAL PROCEDURE*, 3rd ed. § 24.7(e), p. 460 (2008).

- a. No Prior Authority Indicated That It Was Improper To Combine Images Admitted Into Evidence With Captions Or Other Images Was The Equivalent Of Unadmitted Evidence.

It is commonly stated that the prosecutor may not refer to or build an argument upon evidence that is not within the record. To do so not only violates accepted trial norms, but also deprives the defendant of the right to cross-examine a person (the prosecutor) who is, in effect, testifying against him. The question often is presented, however, as to what is argued as evidence beyond the record, what is argued as inference from record evidence, and what is argued as common knowledge. Prosecutors are not prohibited from drawing inferences from the record, and although it is often said these factual inferences must be "reasonably" based on the record evidence, the latitude given prosecutors is very broad.

LaFave 6 Crim. Proc. § 24.7(e).

Most often, however, references to evidence outside the record are clearly identified—as where the prosecutor refers to evidence that was suppressed misrepresents a witnesses' testimony, or cites a past criminal record that never came before the jury. Although many courts have upheld the use during closing arguments of items not admitted into evidence or items similar to those admitted into evidence, other courts have condemned such antics as theatrics.

LaFave 6 Crim. Proc. § 24.7(e).

Of course, the prosecutor is not prohibited from explaining to the jury why it should conclude the defendant was guilty or accept or reject a particular witness' testimony. Where the prosecutor avoids a direct reference to phrases like “I think,” “I believe,” and “I know,” it is often difficult to draw the line between a characterization based on the evidence and an expression of personal belief. Thus, one court will say that the prosecutor was vouching for the witness when he stated that the two complainants in a rape case “were good and fine girls and not the type the defendant and his witnesses alleged they were,” while another will characterize as no more than advocacy the prosecutor's reference to “the ‘reputable officers’ and ‘very sweet’ complaining witness who testified for the government.”

LaFave 6 Crim. Proc. § 24.7(e).

Closing arguments traditionally have included appeals to emotion. It is said to be the “time honored privilege” of counsel to “drown the stage in tears.” Such appeals, however, are not without bounds. The outer limit on emotional appeals is generally stated as a prohibition against “arguments calculated to inflame the passions or prejudices of the jury.” Illustrative of prohibited appeals to the prejudices of the jury are references to race or religion in characterizing the qualities of the defendant or the

reliability of a witness. An illustration of a prohibited appeal to passion is the “Golden Rule” argument that asks the jury to step into the shoes of the victim. Still another is the dramatic and abusive characterization of the defendant (e.g., as a “cheap, slimy, scaly crook”) or defense counsel (e.g., a “flat liar”). Yet, here too, distinctions will be drawn and courts will vary in their assessment of what goes “too far.” The prosecutor may characterize the defendant with disparagement that is reasonably deduced from the evidence in the case.

LaFave, 6 Crim. Proc. § 24.7(e).

Though a failure to object is not necessarily fatal to the defense’s appellate challenge, it does require a more egregious error by the prosecutor and a clearer showing of prejudice to obtain a reversal. Without objection, the improper argument must reach the level required for a reversal under the plain error doctrine, which was described in *Young* as demanding an error so grave as to “undermine the fundamental fairness of the trial and contribute to a miscarriage of justice.”

LaFave, 6 Crim. Proc. § 24.7(g)

No matter how glaring the prosecutor’s misconduct (the Court characterized the prosecutor’s closing argument as “fully deserving the condemnation it received from every court to review it”), due process did not mandate a new trial unless that misconduct had such an impact as to deprive the defendant of a fair trial. The Court explained that various aspects of the trial, taken together, supported the lower court’s conclusion that the trial ““was not perfect—few are—but neither was it fundamentally unfair.””

LaFave, 6 Crim. Proc. § 24.7(h) (discussing *Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986)). In its opinion in *Glasmann*, in regard to the closing presentation the court stated that,

...here the prosecutor's modification of photographs by adding captions was the equivalent of unadmitted evidence.

Glasmann, 175 Wn.2d at 706. However, it is noteworthy that this statement is unsupported by any citation to authority

The court went on in the next paragraph to state that,

...[the] *Pete* and *Rinkes* [...] cases nevertheless establish that it is improper to present evidence that has been deliberately altered in order to influence the jury's deliberation.

Glasmann, 175 Wn.2d at 706 (citing to *State v. Pete*, 152 Wn.2d 546, 98 P.3d 803 (2004); *State v. Rinkes*, 70 Wn.2d 854, 425 P.2d (1967)).

Unfortunately, these statements do not accurately characterize the authority upon which they rely, nor do they accurately characterize the fact of what actually happened in the closing in *Glasmann*. Moreover, these statements are inconsistent with the prior case law that does exist on these issues with regard to the manner in which these statements were applied to the closing in *Glasmann*.

As a preliminary matter, neither the opinion in *Pete* nor *Rinkes* involved altered evidence. In *Pete*, two documents that had not been admitted at trial, a written statement made by Pete at the precinct station, and a written report by an officer who transported Pete, were inadvertently submitted to the jury. *Pete*, 152 Wn.2d at 553. *Rinkes* involved a newspaper article and cartoon that was accidentally sent to the jury room. *Rinkes*, 70 Wn.2d at 855.

More significantly, neither the opinion in *Pete*, nor *Rinkes*, nor any other Washington authority the State was able to locate, stands for the proposition that adding a caption to a copy of items admitted as evidence constitutes the deliberate alteration of evidence. Indeed, the opinion in *Pete* itself contradicts the proposition for which it was cited.

“Novel or extrinsic evidence is defined as information that is outside all the evidence admitted at trial, either orally or by document.”

Pete, 152 Wn.2d at 552 (quoting *State v. Balisok*, 123 Wn.2d 114, 117, 886 P.2d 631 (1994) (quoting *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 270, 796 P.2d 737 (1990))). Thus, contrary to the statement in *Glasmann*, which attempts to rely upon the opinion in *Pete*, the opinions in *Pete* and *Balisok* both support the position that as long as the material presented in closing is consistent with all the evidence admitted at trial, it is not extrinsic.

The idea implicit in the statement in *Glasmann* that the material presented in closing must be exact unaltered replicas of the admitted trial exhibits is contrary to the holdings in *Pete* and *Balisok*.

There is a widespread belief among many trial practitioners and judges that once an exhibit has been admitted into evidence, it may not be altered or modified. See, e.g. *Capps v. State*, 441 So.2d 1059, 1060 (Ala. 1983). Interestingly, other than the dicta in the opinion just cited, no authority among case law or secondary treatises could be found to support

this belief. *See, e.g.*, Karl Tegland 5 WASHINGTON PRACTICE: EVIDENCE §402.38 to § 402.42 (2007); Robert H. Aronson and Maureen A. Howard, THE LAW OF EVIDENCE IN WASHINGTON, 5th ed. §106[2] (2013) 23A C.J.S. Criminal. Law § 1641; 5 Am.Jur. Trials 553 §5-15. It is unclear whether that is because the principle is so fundamental that it never gets formally addressed in opinions, or, more likely, because no such rule actually exists, and instead, as with many evidentiary matters, the ability to modify exhibits after admission lies within the broad and sound discretion of the trial court.

In any case the closing slide show here did not alter any of the trial exhibits or evidence in the case. Rather, the closing slide show made use of images that were essentially duplicates of some of the exhibits admitted into evidence. The admitted exhibits were completely unaltered. Indeed, no evidence whatsoever was altered by the slide show

The holdings in *Glasmann* is inconsistent with the law of other jurisdictions that have addressed some of these issues.

The parties' wide latitude in argument includes the latitude to use visual aids. *Browning v. State*, 134 P.3d 816, 839 (Okla. 2006).

A prosecutor is "entitled to marshal the evidence and suggest inferences that the jury may draw from it." Inferences need not be inescapable, just reasonable and possible. A prosecutor may not "misstate the evidence or refer to facts not in evidence."

Comm. V. Lao, 460 Mass. 12, 21-22, 948 N.E.2d 1209 (2011). [Citations

omitted.] Visual aids are proper where they accurately reflect the closing argument. *Lao*, 460 Mass. at 22.

It was not improper to show slides in closing that juxtaposed pictures of the victim at the hospital with the statement, “I went too far” enclosed in quotation marks. *Peacher v. Comm*, 391 S.W.3d 821, 852 (Ky. 2013). Although the statement was not an literally what the defendant stated, it was consistent with the evidence, a reasonable inference from it and not improper. *Peacher*, 391 S.W.3d at 852.

PowerPoint slides used in closing were not improper where all the information contained on them was supported by the evidence, and the prosecutor did not appeal solely to the emotions of the jury and there was no reasonable likelihood that the presentation would confuse the jury. *State v. Francione*, 136 Conn.App. 302, 328, 46 A.3d 219 (2012).

The prosecutor’s use of a timeline chart in closing was not improper where the argument was grounded in the evidence and did not misrepresent any witness’s testimony. *Lao*, 460 Mass. at 22.

Courts have held that display of several photographs on a single posterboard was proper where each individual photograph had been entered. *See Connover v. State*, 933 P.2d 904, 914 (Okl. 1997). *See also Com. v. Gease*, 548 Pa. 165, 172-76, 696 A.2d 130 (1997).

Similarly, the courts have repeatedly held that it is not improper and does not introduce facts outside the record where prosecutors act out portions of the crime as a demonstration for jurors. *See Com. v. Nol*, 39

Mass. App. Ct. 901, 902, 652 N.E.2d 898 (1995); *Perry v. State*, 274 Ga. 236, 238, 552 S.E.2d 798 (2001); *Laney v. State*, 515 S.E.2d 610 (Ga. 1999). *State v. Ash*, 526 N.W.2d 473, 483 (N.D. 1995).

The courts have also repeatedly held that it was not improper introduction of facts not in evidence for the prosecutor in closing to display unadmitted items of a type similar to the weapons used to commit murder, assault, etc.

In closing, “[i]t is entirely proper for a prosecutor to use objects similar to those connected with the commission of a crime for purposes of illustration.”

People v. Barnett, 17 Cal.4th 1044, 954 P.2d 384, 443 (1998) (fishing lure and knife). *See also, e.g., Meisberger v. State*, 640 N.E.2d 716 722 (Ind. 1994) (2x4 board); *Norton v. State*, 745 S.E.2d 630 (Ga. 2013) (piece of wood representing sawed off shotgun); *State v. Duncan*, 761 So.2d 586, 592-93 (La. 2000) (baseball bat as indicative of type of weapon).

b. Prosecutors Were Not On Notice That The Use Of Red Was Inherently Improper.

“...varying color is one way to control where the audience members look when they first see a slide. Stephen M. Kosslyn, Ph.D. Better PowerPoint: Quick Fixes Based on How Your Audience Thinks 67 (2011).¹ For selections containing the cited text, *see* Appendix A. When

¹ Prof. Kosslyn is Dean of Social Science and John Lindsley Professor of Psychology at Harvard University and Associate Psychologist in the Department of Neurology at the Massachusetts General Hospital.

employing this technique, he advises using warmer colors in the foreground and cooler colors in the background. Kosslyn at 67. He also advises against having combinations of blue and red or blue and green in adjacent regions and to avoid heavily saturated blue colors. Kosslyn at 66, 69.

Indeed, a quick review of the internet and common experience quickly reveal that all of the major colors have negative associations. Blue is the color of sadness, depression, fear, coldness and [obscurity]. Yellow is the color of warning or caution, is used to identify a significant foul in soccer, and most significantly, is the color of cowardice. Green is commonly associated with jealousy, envy, greed and evil. Purple is associated with arrogance or superiority (presumably via its association with royalty), bruising, cruelty, and malice. Orange is associated with burning, destruction and being consumed. Brown is associated with dirt, filth, feces and the Nazis.

Even black, white and gray pose problems. Black is associated with evil, darkness and death. White is associated with antiseptic sterility, distance or remove, coldness, emptiness. Gray is associated with being diminished or faded, ambivalence and impurity.

Of course all the major colors have positive associations as well. Because the court in *Glasmann* took issue with the use of the color red, it is worth mentioning its positive connotations as well. Red is the color of berries (raspberries, strawberries, currants, cranberries), cherries, apples,

tomatoes, radishes. It is the color of lobster and crab and cardinals (both aviary and Roman Catholic). It is the color of courage. The red carpet is rolled out for dignitaries. It is the color of Santa Claus and Christmas, sunsets, rubies. Red is the color of attraction and passion. *See, e.g.,* Andrew J. Elliot and Daiela Niesta, Romantic Red: Red Enhances Men's Attraction To Women, *J. Personality and Soc. Psych.*, Vol. 95(5), Nov. 2008, 1150-1164. For many cultures it is the color of happiness and marriage (Chinese wedding dresses are typically red), and love.

That all colors have positive and negative associations leads to prosecutors being condemned if they do and condemned if they don't. Where the courts choose to fixate on the negative connotations and associations of color, the inference drawn is that the prosecutor is attempting to use them to vilify the defendant. Where the courts choose to focus on the positive connotations and associations of color, the inference drawn is that the prosecutor is seeking to improperly bolster its argument via the positive associations.

The point here is first, that in *Glasmann* the court's exception to the use of red was misplaced because the court's interpretation of the use of red was improperly selective. Second, and more significantly, what was particularly unwarranted was the court's drawing an inference of improper intent based on the use of the color red.

Presumably red was selected for the simple reason that captures the viewers attention quickly, and serves as a good contrast with the

background, both of which are important when the attorney is reviewing slides at a relatively rapid rate and needs to focus the viewer's attention. Precisely this point is illustrated by the cover of Professor Kosslyn's book the book Better PowerPoint. It uses red to highlight the phrase "Quick Fixes" and an arrow near it in order to draw attention to the phrase.

c. The Use Of All Capitals Does Not
Constitute Shouting.

Similarly, in *Glasmann*, the court's exception to the use of all capitals is also misplaced. The idea that all capital letters constitutes shouting is an unofficial, non-universal quasi-convention from text messaging and internet message board posts.

The court's own slip opinions list the court, the parties, and section headings all in captials. *See, e.g., State v. Lui*, No. 84045-8. Presumably the court is not "shouting" those things at its readers. Similarly, the court's rules on its own web site contain headings that are all in capitals. *See, e.g.,* RAP 1.1.

http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=app&set=RAP&ruleid=apprap01.1. In the Westlaw classic view, the various research categories, e.g. "Find & Print" "Keycite," etc. are all in capitals. Text bubbles containing normal conversation in the newspaper cartoons Peanuts and Dilbert are also all in capitals, although neither the cartoonist nor the characters are shouting at the reader.

Putting words all in capitals is not a mechanism for shouting at the jury. However, it is a mechanism for separating headings from the body of text, for emphasizing text. When a single word is used by itself in a display, it is not uncommon to capitalize all the letters as doing so makes the word visually balanced.

Prof. Kosslyn advises people using PowerPoint to avoid using underlining for emphasis (because it makes words harder to read). Kosslyn at 33. This means that when creating a presentation, some other means must be used when words need to be emphasized and the alternative available means are limited. Using all capital letters serves this function well, as does using a readily visible color such as red.

“Don’t use UPPERCASE, *italics* or **bold** for more than three or four words in a line...” Kosslyn at 33. He goes on to advise emphasizing only a few words or they will not stand out from the material. Kosslyn at 34.

d. The Prosecutor Was Not On Notice That The Use Of The Word “Guilty” Constituted An Expression Of Personal Opinion.

The Ninth Circuit Court of Appeals held that it was not misconduct for a the prosecutor, during cross-examination of the defendant to write the following on a marker board, ask a question of the defendant, circle the first letter of each sentence, and then ask: “Isn’t it a fact, Mr. McBrearty, that despite your attempts to explain and justify your conduct, what it all adds up to is that you’re guilty as charged in this indictment.”:

Given \$100,000 cash.
U-haul [check with police to determine status of this vehicle seized by authorities].
In disguise [at Order meeting].
Land purchase.
Telephone system [set up for Order members].
Years in jail [questioned prospective Order members about their willingness to endure this].

United States v. Yarbrough, 855 F.2d 1522, 1538 (9th Cir. 1988). The defense objected, and no curative instruction was given. The appellate court nonetheless held that this did not state an improper personal belief of the prosecutor. *Yarbrough*, 855 F.2d at 1538. *See also Blue v. State*, 170 Ga.App. 304, 316 S.E.2d 862 (1984) (district attorney writing the word “guilty” on chalkboard during closing argument was not improper).

e. The Court of Appeals Properly Affirmed Walker’s Conviction Where The Prosecutor’s Use Of The Powerpoint Slide Show In Closing Did Not Deprive The Defendant Of His Right To A Fair Trial.

A prosecutor’s improper argument will only reach the level of a constitutional violation, where it so infected the trial with unfairness as to make the resulting conviction a denial of due process. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).

There is no doubt that, in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused. . . . If every remark made by counsel outside of the testimony were grounds for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in

the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation.

LaFave, 6 Crim. Proc. § 24.7(i) (quoting *Dunlop v. United States*, 165 U.S. 486, 498, 17 S. Ct. 375, 41 L. Ed. 799 (1897)).

“...anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal.

Puckett v. United States, 556 U.S. 129, 129 S.Ct. 1423, 173 L. Ed. 2d 266 (2009) (quoting *United States v. Padilla*, 415 F.3d 211, 224 (1st Cir. 2005) (en banc) (Boudin, C.J., concurring)).

Here, the PowerPoint closing did not deprive Walker of his right to a fair trial. Unlike the defendant in *Glasmann*, Walker did not testify, so that his credibility was not at issue. Additionally, there was overwhelming evidence of his guilt, so that any impropriety did not rise to the high level to require reversal of his conviction. For these reasons, as well as for the additional reasons argued in the Supplemental Brief of Respondent, this court should affirm the court of appeals and hold that Walker’s right to a fair trial was not violated.

- f. The State Reaffirms Its Claim On Cross-Appeal That The Trial Court Erred When It Instructed The Jury That In Order To Find Walker Guilty As An Accomplice It Had To Find That He Was A Major Participant.

Where the court of appeals did not reach this issue because it affirmed Walker's conviction, the State reasserts this issue here for the sake of preservation. The State hereby relies upon and incorporates by reference the argument on this issue contained in the Brief of Respondent/Cross-Appellant and the Reply Brief of Respondent/Cross-Appellant.

- g. The Court of Appeals Properly Held That The Trial Court's Instructions Correctly Informed The Jury As To Accomplice Liability.

The State hereby relies upon and incorporates by reference the arguments on this issue contained in the briefs of Respondent/Cross-Appellant to the court of Appeals, as well as the analysis of the Court of Appeals in its opinion affirming Walker's conviction.

- h. The Court of Appeals Properly Held That The Jury Instructions Did Not Improperly Deprive Walker of A Unanimous Verdict

The State hereby relies upon and incorporates by reference the arguments on this issue contained in the briefs of Respondent/Cross-Appellant to the Court of Appeals, as well as the analysis of the Court of Appeals in its opinion affirming Walker's conviction.

i. The Court of Appeals Properly Denied Walker's Claims On His Remaining Issues Regarding Prosecutorial Misconduct.

Walker raised a number of additional claims of prosecutorial misconduct beyond those that could be addressed within the limits of this supplemental brief. With regard to those issues, the State hereby relies upon and incorporates by reference the arguments contained in the briefs of Respondent/Cross-Appellant to the court of Appeals, as well as the analysis of the Court of Appeals in its opinion affirming Walker's conviction.

D. CONCLUSION.

The court should overturn the "flagrant and ill-intentioned standard of review for prosecutorial misconduct in closing that was not objected to below. Prior to the court's issuance of its opinion in *Glasmann*, the prosecutor was not on notice that the conduct disapproved therein was improper. The court should hold that Walker's right to a fair trial was not violated by PowerPoint closing in this case where he did not testify, his credibility was not at issue and there was overwhelming evidence of his guilt.

The court should hold that no other prosecutorial misconduct deprived Walker of his right to a fair trial.

The court should hold that the jury was properly instructed as to accomplice liability.

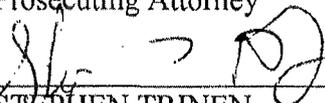
The court should hold that the court's jury instructions did not deprive Walker of a unanimous verdict.

The court should hold that the trial court erred when it instructed the jury that in order to find Walker guilty as an accomplice it had to find that he was a major participant.

The court should affirm the court of appeals and uphold Walker's conviction.

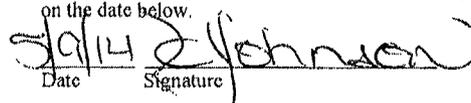
DATED: May 9, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney


STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:

The undersigned certifies that on this day she delivered by ^{file} ~~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.

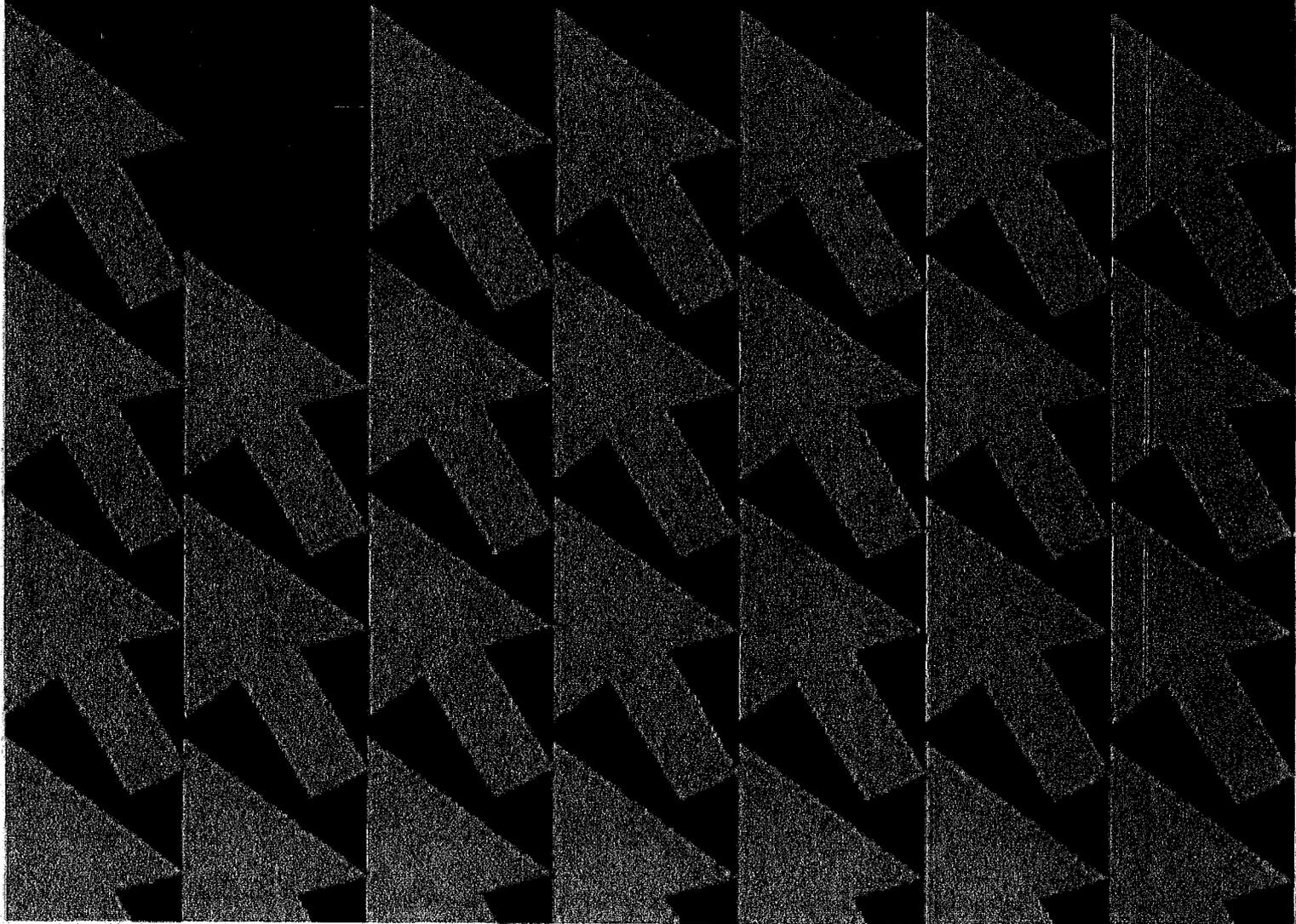
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Appendix A
Excerpts from
Better PowerPoint: Quick Fixes Based on How Your Audience Thinks
By Stephen M. Kosslyn, Ph.D.

STEPHEN M. KOSSLYN, Ph.D.

Better PowerPoint®

*Based On How
Your Audience Thinks*



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"When I first read this book, I wondered aloud, 'Does anyone really need this guidance? Can people really use PowerPoint this ineffectively?' But Stephen Kosslyn answered my question with extensive research, examples, and data, both proving his rules and showing that they are usually not followed. In fact, I looked back on my PowerPoint decks and found many places where I should have followed his rules more closely. I now recommend Kosslyn's book to every speaker I select for my conferences. Every PowerPoint user should be forced to read Stephen Kosslyn's books before installation."

—Mike Danesplid, award-winning speaker, instructor, author, and conference chair

"Wonderful! Kosslyn does it again! The most tips you will find in any PowerPoint book. Better PowerPoint is the definitive guide for business and scientific presentations. Kosslyn explains not only what you're doing wrong, but why you're doing it wrong, and how to do it right! Better PowerPoint is packed with practical tips that are easy to apply. Anyone who presents with slides will become ten times more effective if they read this book."

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"Better than Tufte or Duarte, Kosslyn provides a step-by-step guide and checklist for more understandable and informative PowerPoints."

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"Dr. Kosslyn shows you the reasons behind why some slides work and others fail. One of the most useful books on PowerPoint to ever be printed."

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Giving good presentations is not just common sense. Cognitive neuroscientist Stephen M. Kosslyn shows how to use knowledge about how our minds and brains work to improve presentations. Where many books focus on how to create a first draft, this book gives you quick steps to improve a presentation you already have. To help you revise, it provides simple principles that affect all aspects of presentations, easy-to-use checklists to guide you through the revision process, chapters structured to help you prioritize the most effective edits, and memorable examples and illustrations that make it clear what works and what doesn't. Be certain that you are getting the best results from your PowerPoint presentations by taking advantage of facts about how your audience is seeing and thinking about what you have to say.

Hard Design

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Preface

Presentations: We've all sat through them, wondering why we're there; or we've given them, wondering whether the audience cares. This is a book about how to make presentations effective and therefore more interesting to the audience members.

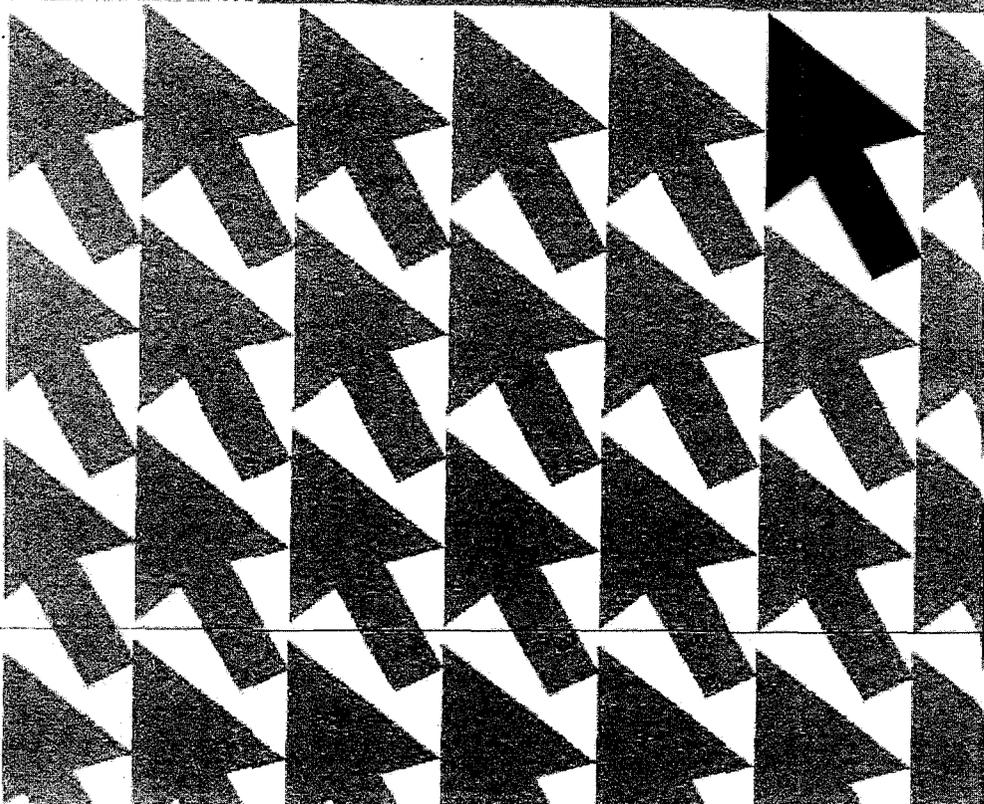
Years ago, I was at a conference where one of the most distinguished cognitive scientists in the world, an expert in how the mind processes information, was wandering through a PowerPoint® presentation and losing the audience in the process. I thought about the number of presentations I had heard where the presenters did not accommodate their audience members' short attention spans, difficulty reading small type, need for organization, and other strengths and weaknesses. As a scientist, I started thinking about how to use well-known laboratory findings to improve presentations. And then I wrote a book.

My book *Clear and to the Point* addressed all aspects of presentations and discussed eight "rules" about how our minds work: the same eight rules discussed in this guide. In that book, I assumed that the reader was starting from scratch and would read the book cover to cover. Although generally well received, it soon became clear to me that there is still a need for another, more focused book—for at least two reasons: First, most people interested in PowerPoint® presentations have already made at least one presentation; they are not PowerPoint® innocents. Second, people who want a book on presentations want one that they can use easily, not one they can take to an evening chair and read cover to cover.

With these considerations in mind, this book distills the core of my earlier book into a quick guide on how you can revise a presentation you already

Chapter 3

Make Text Clear and Legible



Illegible text has defeated many PowerPoint® presentations. To spot problems in how you present written words, go through the following checklist and consider each of your slides. If you answer "Yes" to a question, continue to the next question; if you answer "No," consult the correspondingly numbered section within this chapter to see how to revise your presentation.

Do you:

- 1 avoid all uppercase, all italics, or all bold in more than a few words?
- 2 avoid using underlining for emphasis?
- 3 only emphasize a few words?
- 4 use different typefaces only to convey information (and not just for variety)?
- 5 use a standard typeface (and not a complex or fancy one)?
- 6 use a typeface that is without question large enough to be easily seen from the back of the room?
- 7 use a sans serif typeface (one without little hooks on the letters)?
- 8 use a serif typeface (one with little hooks on the letters)?
- 9 select a typeface only after considering its connotations?
- 10 use only a single typeface?
- 11 use text that is clearly distinct from the background?
- 12 ensure that words that are not relevant at a particular point in the presentation have been made similar to the background?
- 13 have a background pattern that does not make the content material difficult to discern?
- 14 use a nonwhite background?

1. Avoiding All Uppercase, All Italics, or All Bold

Don't use **UPPERCASE**, *italics*, or **bold** for more than three or four words in a line; such letters are relatively similar to each other and require more effort to read than does a standard style (Mr. Magoo). If you have done so, replace your typeface with mixed uppercase and lowercase letters, which are easier to distinguish and read than all uppercase, italics, or bold (Mr. Magoo).

2. Avoiding Underlining for Emphasis

Avoid using underlying for emphasis. Underlining cuts off the descending parts of letters such as "p", "g", and "q", which makes them harder to read (Mr. Magoo). Using restraint, replace underlining with:

- italics,
- bold, or
- a color that contrasts with the background and the other words.

3. Emphasizing Only a Few Words

Only emphasize a few words; if you emphasize too much, it will not stand out from the other material—and hence will not in fact be emphasized (Rudolph the Red-Nosed Reindeer).

4. Using Typefaces to Inform

Use the same typeface on all your slides, with three exceptions. Change typeface to:

- emphasize a key fact, term, or concept (Rudolph the Red-Nosed Reindeer),
- specify different classes of information, such as titles versus content (Viva la Difference), or
- group material into distinct classes (Birds of a Feather).

If you change the typeface, the audience members will expect the change to mean something (Viva la Difference), and hence will be confused if it does not.

5. Avoiding Complex or Fancy Typeface

Use simple typefaces, without highly stylized letters or flourishes or “fancy” embellishment. The **letters of highly stylized typefaces** or *ornate typefaces* are more similar to each other than are letters in standard typefaces, and hence they are harder to read (Mr. Magoo).

6. Using a Large Enough Typeface

Don’t make those in the back rows squint and strain to see what you’ve written. Unfortunately, there is no hard-and-fast rule about how large typeface must be: The size of legible print depends on the size of the letters on the screen, the distance of the viewer, lighting, typeface, contrast, and color—as well as whether the viewer has 20/20 vision!

- As a rule of thumb, text should be at least 24 point, preferably at least 28 point (Mr. Magoo).
- You might—very rarely—get away with a typeface as small as 12 point for something like a label on a graphic if you call attention to it with your pointer and read the words or numbers aloud.

- The key to establishing the appropriate size of typeface is not size per se (e.g., as measured by points), but rather “visual angle.” Visual angle corresponds to the size of an object in a photo if you measured it with a ruler placed on the photo. Although the actual size of the object remains the same, the farther away the object is, the smaller its visual angle becomes.

If you are really concerned about the size of your type, when you have time it might be useful to use the following—albeit elaborate—procedure to estimate the appropriate size of text with your color scheme and typeface:

- 1 Take a photo (or ask a friend to take a photo and e-mail it to you) of the projection screen in the largest room where you’ll be speaking, as seen from the back row. Upload the photo into your phone, and measure the size of the projection screen as it appears on your phone (which is a way to estimate the visual angle).
- 2 Type the question “Can I easily read this?” eight times on your computer’s screen, forming a column (using double spacing). Set the type on the first line to be 34 point, the type on the second line to be 32 point, the type on the third line to be 30 point, and so on, decreasing the size by 2 points for each line as you go down the column (go down to 20 point)—like this:

Can I easily read this?

- 3 Now look at your computer screen as viewed through the camera in your phone. Back away from your computer screen, looking at its image as you move farther back. Stop moving when the image is the same size (i.e., has the same visual angle) on your phone as the image of the projection screen in the photo (from the room in which you will be speaking).
- 4 Put down your phone. From that distance, look at your computer and decide which typeface is too small to be easily read at a glance. Then choose the size 2 points larger, just to be on the safe side.

- 14 Are you sure that the hatching patterns in different regions are clearly distinct?
- 15 Are the orientations of the hatching patterns clearly different, to avoid creating "visual beats"?

1. Avoiding More Than Four Different Colors for Text

Don't be tempted to use more than four colors for your text. In fact, four is probably more than you need: In general, three or even two colors should be sufficient to signal different types of text (e.g., titles versus text; Rudolph the Red-Nosed Reindeer; Rule of Four).

2. Using Colors That Are Clearly Distinct

Adjust the hue, lightness, and saturation so that the colors are clearly distinct.

- To ensure that colors are distinct, separate the hues in your display by at least one other noticeably distinct hue in the spectrum, which can be found in the standard color wheel.
- To be safe, use the "11 colors that are never confused," which are *white, gray, black, red, green, yellow, blue, pink, brown, orange, and purple* (Mr. Magoo). But my strong advice is never to use all 11 in a single display: To do so would be overwhelming, making even the word "garish" seem an inappropriately delicate description (Rudolph the Red-Nosed Reindeer; Rule of Four).

3. Avoiding Red/Blue and Red/Green in Adjacent Regions

Do not use red and blue or red and green to define boundaries. Red and blue are difficult to focus on at the same time, whereas it is impossible for many color-blind people to distinguish between red and green (Mr. Magoo).

4. Ensuring That Foreground and Background Have Distinct Colors

Use colors that make the text and graphics in the foreground stand out from the background.

- If the room will be well lit, use dark figures on a light background for maximal ease of reading (Mr. Magoo).
- If the room will be dark, use light figures on a dark background for maximal ease of reading (Mr. Magoo).

- To ensure that colors are easy to distinguish, make them differ in terms of all three qualities: hue, lightness, and saturation (Mr. Magoo).

5. Assigning Colors to the Foreground and Background

Make the text a warmer color than the background. Because of a quirk in how light is focused in the eyes (for details, see my *Graph Design for the Eye and Mind*), "warm" colors, such as red, yellow, or orange, will appear to be in front of "cool" ones, such as green, blue, or violet. So, making the text a warmer color than the background will prevent the background from seeming to fight to move in front of the text (Judging the Book by Its Cover).

Moreover, when two lines cross (as in a line graph), the one with a warmer color should pass over the one with a cooler color; if it does not, the back line will seem to be trying to come forward, trying to snake around the one in front (see Figure 7.1). As entertaining as such effects may be, a good presentation is no place for a visual wrestling match! (Judging the Book by Its Cover)

6. Making More Important Elements Salient

Make the most important element the most salient (i.e., eye-catching; Rudolph the Red-Nosed Reindeer; Judging the Book by Its Cover; Viva la Difference); varying color is one way to control where the audience members look when they first see a slide.

- If no particular element is most important, make the colors equally salient (i.e., equally likely to grab attention; Rudolph the Red-Nosed Reindeer; Judging the Book by Its Cover; Viva la Difference).
- To make elements equally salient, adjust the lightness and saturation until no color dominates (Rudolph the Red-Nosed Reindeer; Viva la Difference). Unfortunately, this must be done based on your subjective impressions: When colors reflect the same objective amount of light, we see blue as the lightest color (or brightest, on a monitor), followed by red, green, yellow, and white. Because our subjective impressions do not line up directly with objective reality, you may need to adjust the colors until they appear comparably salient while still remaining distinct (Rudolph the Red-Nosed Reindeer; Mr. Magoo). If possible, have another person or two check your final product, to ensure that your subjective impressions are shared by others.