

No. 96599-4

No. 49284-9-II

IN THE COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

ROBERT LEE PRY, Appellant

APPEAL FROM THE SUPERIOR COURT
OF KITSAP COUNTY
THE HONORABLE JUDGE JENNIFER FORBES

BRIEF OF APPELLANT

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INTRODUCTION

Robert "Archie" Hood was murdered in mid-December 2015. Sheriffs recovered his body two weeks later. The Kitsap County Prosecutor charged Robert Pry as a principal or an accomplice with first degree felony murder with the predicate felony of robbery in the first or second degree, kidnapping in the first degree, robbery in the first degree, identity theft second degree, possession of stolen property second degree, and witness tampering.

Robert Davis and Joshua Rodgers-Jones were similarly charged and joined as co-defendants. Arnold Cruz, also joined as a co-defendant, was charged with rendering criminal assistance.

The matter proceeded to a 44-day jury trial, with close to 100 witnesses. The State provided generous plea deals to several key witnesses in return for testimony. Over defense objections their statements incriminating Mr. Pry were admitted as statements in furtherance of a conspiracy, admissions by a party opponent, statements against interest, and adoptive admissions.

Witness stories conflicted with each other and, in three instances, surveillance videotapes disproved witness recollections of time and events. Each key witness admitted that during the

relevant time period they were using methamphetamines on a regular and sometimes, hourly basis.

As one witness observed:

...You're high and everything. You can't really depend on what exactly time it is because everything is all the same and you're here, you're there, and you're not, you know. So I mean, you get stuck in different activities and you don't know exactly that ten minutes has transpired because it seems like an hour or it seems like ten minutes and you recognize it's the next morning. ... Like I said, tweaker time runs forever.

37RP 3574;3580.

Mr. Pry was convicted on all charges and makes this timely appeal.

I. ASSIGNMENTS OF ERROR.

- A. The trial court erred when it denied Mr. Pry's request for new counsel without conducting an adequate inquiry.
- B. The trial court committed reversible error when it did not inquire of a juror who had been nodding off and appeared to be sleeping during testimony and closing arguments.
- C. Mr. Pry's Article 1 §22 rights were violated when the prosecutor accused him in closing argument of tailoring his testimony, based on the exercise of his constitutional rights.

- D. The Prosecutor impermissibly appealed to the passion and prejudice of the jury and made arguments outside the record prejudicing Mr. Pry's constitutional right to a fair trial.

Issues Pertaining to Assignments of Error

- A. When a timely motion to discharge counsel is made, a trial court must make an adequate inquiry into the nature and extent of the conflict between the defendant and the attorney. Is reversal required where the trial court fails to inquire into the conflict or consider whether it precludes adequate representation?
- B. Did the trial court commit reversible error in failing to investigate whether a juror was sleeping during trial?
- C. During closing argument, the prosecutor stated that Mr. Pry had had time to think about what happened and had "crafted his statement" to the jury. Does such an accusation violate Mr. Pry's Art.1, §22 right to be present and to testify on his own behalf?
- D. Does a prosecutor commit reversible misconduct by urging the jury to decide a case based on evidence outside the record?

- E. Did the prosecutor commit reversible misconduct by appealing to the passion and prejudice of the jury by stating Mr. Hood never envisioned his murder?
- F. Did the prosecutor commit reversible misconduct by appealing to the passion and prejudice of the jury by urging them to imagine what might have happened and “we can only hope” he was not conscious and to “celebrate” Mr. Hood?

II. STATEMENT OF FACTS

Request for New Counsel

On April 25, 2016, before jury selection Robert Pry asked the court to assign new counsel to him. 18RP 23¹. Mr. Pry told the court:

I don't feel like I'm being adequately represented. I feel like there's been more trying to get me to take a deal than preparing for my defense.

The court responded, “Okay. Mr. Drury, any concern with your ability to move forward as legal counsel of Mr. Pry in this case?”

Defense counsel voiced no concerns. 18RP 23-24. The court denied the motion saying, “Okay. Based on your request, Mr. Pry,

¹ Because of the extraordinarily large record, a chart has been added as an appendix which provides the dates referring to each of the 50 volumes of the report of proceedings.

it's insufficient for me to replace your legal counsel at this time.”

18RP 24.

Juror Number Four

During trial, on May 17th, this exchange occurred outside the presence of the jury:

Ms. LaCross: Your Honor, if I can point out Juror No. 4 looks like he might be dozing a little bit.

The Court: He's been paying attention but when we took a little break there, I think he might have a headache.

Ms. Schnepf (Prosecutor): He's frustrated through the process. Throughout the trial he's been making comments and upset about the length of things. I don't think it has anything to do with him sleeping.

The Court: I'm watching. It is just when we were on the break there he had his eyes closed.

30RP 2320. The court made no inquiry of the juror. During closing argument, outside the presence of the jury, Mr. Pry's defense counsel said:

Your Honor, I would like to put something on the record if I can. I sit almost every day and watch Juror No. -- I guess it would be Juror No. 4 -- basically sleeping during the testimony and during -- he's over there right now sleeping through the closing arguments. I just want to put it on the record that I am viewing Juror No. 4 basically nodding off during the proceedings.

47RP 5122-23. The prosecutor disagreed. The court offered to inquire, stating,

Well, we can certainly inquire of the juror if you would like us to do so. I've watched him closely because he does have the appearance sometimes of nodding off.

But I've watched his attentiveness, while it looks that way, and he takes notes -- I mean, I don't know if that's how he carries himself. I don't know what his situation is. We can certainly inquire into whether or not he's paying attention, if you chose to do that...

I've watched him because he does have that appearance on occasion. And so I paid special attention to him during those occasions. I haven't noticed anything where he looks like he's actually asleep. He does kind of put his head down, and that's all I can say about it.

47RP 5122-24. Defense counsel acquiesced to the court's observations and did not ask the court to query the juror. 47RP 5123.

Opening Statement

In the opening statement, the prosecutor said the following:

When Candy Gratton said goodbye to Robert Hood on December 16, 2015, neither of them knew that two weeks later his body would be decomposing in a barrel. Robert Hood was 89-years-old when Robert Pry and Joshua Rodgers Jones decided to go to his house and rob him. He probably never envisioned that when he opened the door that night that he would be beaten so severely that he would be left paralyzed, that he would then be hog-tied and left to die on his bathroom floor, only to be transferred to the trunk of a vehicle, driven around two counties and eventually placed into a barrel where law enforcement discovered him on December 30, 2015. He never envisioned it, but that's exactly what happened to Robert Hood.

25RP 1393.

Trial Testimony

On the afternoon of December 16, 2015, Candyce Gratton visited with her 89-year-old friend, Robert Hood, (“Hood”) at his home in Kitsap County. 25RP 1437-38. The following Monday, December 21, when she was unable to contact or find him, she called the police. 25RP 1429;1448-1461.

Robert Davis (“Davis”) and his girlfriend lived near Mr. Hood. 39RP 3868. Sometime between late night on the 16th and the early hours of the 17th, Mason Baldwin drove Joshua Rodgers-Jones (“Jones”), Robert Pry (“Pry”), Shawna Dudley-Pry (“Shawna²”), and Ocean Wilson (“Wilson”) to Davis’s home. 44RP 4783.

At some point, early on the morning of the 17th, using Baldwin’s car, Pry and Jones left Davis’s home to go to the home of Trevor Johnson to buy methamphetamines (“meth”) and “Molly”. They were gone for about an hour and returned to Davis’s home before 8 a.m. 27RP 1786; 45RP 57; 39RP 3890;44RP 4787. Upon return, they looked pale, sweaty and dehydrated. 44RP 4786, 4791. Baldwin said they looked like they had been doing drugs. 44RP 4801.

² Shawna Dudley-Pry is Mr. Pry’s sister. For the sake of clarity, she is referred to as Shawna. No disrespect is meant.

The group stayed at Davis's home and in the afternoon loaded Pry's belongings into Baldwin's car. Pry was moving from Davis's home into a nearby duplex with Jones, Wilson, and Shawna. 45RP 54-55.

On that same day, Alisha Small, ("Small"), arranged to buy meth from Davis. 40RP 4025-4027. Small was a confidential drug informant for Detective Bowman but did not report this contact to him. 27RP 1672;40RP 4026. Although they had never met, she testified Davis told her he knew she was "good at accounting", and that he had "a large account he wanted [her] to work on."³ 40RP 4019;4028.

She met Davis at a gas station in Silverdale and followed him to his home. 40RP 4028-4029. Once there she went to a back bedroom and took out her laptop computer. 40RP 4031;4036. She reportedly saw Wilson sitting on a bed putting bank statements with the name "Bob Barker"⁴ into a pink folder. 40RP 4034. Shawna was there also. 40RP 4031.

³ At trial, she referred to her skills as being a "papershark". (40RP 4027).

⁴ The prosecution speculated that "Bob Barker" referred to Robert Hood because he lived on Barker Street. Some witnesses said the account was in the name of "Bob Barker". 14RP 657.

At Davis's request, Small gave him the keys to the green Honda she had driven there. 40RP 4035; 45RP 60; 34RP 2393. According to Pry and Baldwin, Pry loaded more of his belongings into the Honda. 44RP 4796; 45RP 60.

Shawna drove Jones and Pry in the Honda to the new duplex. 45RP 61. On the way, Jones told Shawna to pull the car over near a driveway where he got out of the car. 45RP 61. Baldwin, who was following them, observed the Honda pulling over, but continued driving to the duplex. 44RP 4798.

Pry thought Jones was going into an abandoned home to steal things. 45RP 70-71. He got out of the Honda and smoked a cigarette, while they waited for Jones. 45RP 73. Pry testified he did not enter the house. 45RP 72.

Mr. Hood's neighbor said that at 6:15 p.m. that evening he saw an unfamiliar car in Hood's driveway near the carport. 27RP 1831. He saw a white male with dark hair and a thin build at the front of the car. 27RP 1832-33. He heard a female say, "Get in the car". 27RP 1833. Scholfield wrote down the car's license plate number, which matched that of the Honda. 27RP 1832. Fifteen minutes later, when Scholfield left his home the car was gone. 27RP 1833.

After the confrontation with Sholfield, Pry and Shawna drove to the new duplex, leaving Jones behind at the home. 45RP 74. When they arrived, Pry unloaded his belongings, smoked meth with the others and got ready to go to the Emerald Queen Casino for the night. 45RP 75. Baldwin was already at the duplex with the remainder of Pry's belongings. 45RP 75.

About an hour later Jones arrived at the duplex carrying a pillow case and a backpack. 45RP 78;44RP 4798-99. Baldwin said Jones had a bag full of items. 44RP 4799.

Davis arrived at the duplex with Small and Wilson. 40RP 4038. Jones and Shawna put pillowcases of items into Davis's vehicle. 45RP 78; 31RP 2397; 40RP 4038. Jones and Shawna drove the Honda and the rest rode in Davis's vehicle, headed to the Emerald Queen Casino. 45RP 79-81.

Ocean Wilson gave substantially different testimony about some events. She testified that around the 13th of December, she heard Pry, Jones, Shawna, and Davis talk about having a quick and easy "lick"⁵ that would provide "money, lots of money." 31RP

⁵ A lick was defined as "It's going and taking all the goods out of somebody's house, robbing them. Just taking whatever you feel is worth value." (31RP 2406).

2387-88. She said she was not part of the conversations, and that she was “really really high during most of the time”. 31RP 2385; 2388. She was using \$350 of meth per week and referred to herself as “dazed out” from using so much. 31RP 2488-89; 32RP 2551.

She said that on the 17th of December, Pry, Shawna, Jones, Davis, and herself all left Davis’s home in his Ford Excursion. 31RP 2389-90. While Davis drove, Pry and Jones changed into dark clothing. She believed they were going to rob Mr. Hood. Davis pulled the car over and Pry and Jones got out. Later, in a police interview, Wilson confirmed the exact area where Davis dropped Pry and Jones off that day. 44RP 4672-73. A Kitsap County detective obtained and reviewed video surveillance tape for the area and testified the tape showed that no cars or persons stopped in that area on that date. 44RP 4673-74; 4677.

According to Wilson, Davis then drove the women back to his home where she met Small. Small was already in a bedroom with a laptop. 31RP 2390-91. As they sat in the bedroom, Small injected herself with meth and Wilson smoked it. 32RP 2546.

At Davis’s direction Wilson gave the Honda keys to Shawna. 31RP 2394. When she went outside, she saw Jones sitting in the

Excursion. 31RP 2394. Small, who was also there, said Jones introduced himself and said she may not be getting the Honda back, that they "might have to dispose of it." 40RP 4040. Jones left in the Honda with Shawna. 31RP 2394. Wilson thought they were going to pick up Pry from Hood's home. 31RP 2394-95;2396.

According to Wilson, Jones and Shawna returned with Pry. 31RP 2394-2396. Pry got into Davis's car with Small and Davis. 31RP 2396. Wilson and Small both saw Shawna put a backpack and pillowcases in Davis's car. 31RP 2397; 40RP 4038-4041; 4052;4096.

Shawna and Jones drove the Honda and followed Davis to the casino. 31RP 2397. Small, Wilson, Davis, and Pry smoked meth in Davis's car as they traveled. 31RP 2407. On the ride to the casino Pry opened up the pillowcase and took out ammunition, two baggies of coins, checkbooks, and assorted items. The items were later identified as belonging to Mr. Hood. 31RP 2400; 25RP 1450.

Small said while they were in the car, Pry wrote out two checks to her for \$500. She had no recollection on whose account the check was written, or the bank on which they were drawn. 40RP 4044. Davis handed her \$1,000 in cash, for no apparent reason. 40RP 4046.

At the motel, Wilson reportedly heard statements made by either Jones or Pry. 31RP 2410. Wilson testified:

And that they had tied the old man up and hit him and asked him if he had raped kids in the past. And I guess the old man, Mr. Hood, had confirmed that that was a long time ago.

31RP 2411; CP 2444.

Small testified she overheard Davis, Pry, Jones and Shawna talking in the motel bathroom. 40RP 4060. She was seated on a bed the farthest away from the bathroom door smoking meth. 40RP 4088. The bathroom door was “cracked just a little bit.” 40RP 4060. She heard “something about disposal of a body”, but did not know which male made the statement; she was not paying attention and the television was on. 40RP 4087;4104.

Small also testified she heard Davis say, “it was a messy job” however, she could not remember where she was when she heard the statement. 40RP 4087-88;4097.

Pretending to be Hood and his daughter, Pry and Shawna made phone calls to banks to change Hood’s accounts. 31RP 2420; 40RP 4050.

The group left the motel in the morning. 40RP 4056. Small texted Detective Bowman of the Kitsap County Sheriff’s Office the following day, December 19th. 27RP 1676. After they spoke he

opened an investigation into the robbery and kidnapping of Mr. Hood. 27RP 1679.

Wilson, Pry, Shawna, and Jones left the motel in the Honda and drove to the duplex. 31RP 2422. David Ojeda arrived at the duplex as Pry and Jones drove away in the Honda. 33RP 2749-50. Ojeda was using meth quite heavily, and estimated it was a day and a half before Pry and Jones returned. 33RP 2750.

Miranda Bond said that on the 19th of December Jones and Pry came to Trevor Johnson's home. She heard Pry ask Johnson for help to spray paint a car. 41RP 4187. Bond also said Pry and Jones told her "they went to the old man's house, and Pry said that they assaulted him...[Jones] went and got rope and tied the old man up and that Pry left him tied up in the bathroom." 41RP 4204-05.

Pry and Jones left Johnson's and drove to Port Ludlow. They got the Honda stuck in the mud. 42RP 4448. Pry said he looked in the trunk of the car and there was no body in it. 45RP 122. They eventually got a ride back to the duplex. 29RP 2068.

Pry asked Ojeda to help him retrieve the Honda and Ojeda arranged for someone to assist them. 33RP 2751. When they returned with the Honda, Wilson saw Pry and Ojeda empty the

Honda of items such as bicycle seats, mail, a bear rug, and “weird products and things”. 31RP 2426.

Ojeda, Wilson, and Pry drove to Arnold Cruz’s home. Ojeda testified that Pry told him “an accident happened and there was a pedophile in the trunk.” 33RP 2756. Wilson testified that Ojeda said there was a body in the trunk of the Honda. 31RP 2429. Ojeda denied saying it. 33RP 2779-80. At Arnold Cruz’s home Wilson said she overheard Pry ask for Cruz’s help; however, Ojeda testified Wilson never left the car. 31RP 2435;33RP 2726.

Pry drove Ojeda and Wilson to the Subway store in Port Orchard. They both believed they were there for hours. 31RP 2435;33RP 2777. However, Detective Keeler of the Kitsap Sheriff’s office testified he reviewed several days of video from the shop and neither Wilson nor Ojeda were ever there. 29RP 2129.

Ojeda was later charged with rendering criminal assistance. Part of his plea agreement, which reduced his sentence from seven years to 24 months, required him to testify at the trial. 33RP 2781.

On December 22nd Miranda Bond went to the duplex to talk with Jones and saw Cruz and another man in the driveway with the Honda. 41RP 4190. She reported that Jones told her “he needed

to get rid of the car” and take it to the boat launch. 41RP 4192;4196.

She said Jones grabbed her by the throat, “slammed [her] against the wall and told [her] he didn’t want to listen to her mouth” because he had been driving around with a body in the trunk of a car for three days.” 41RP 4197. She said she overheard Pry tell Cruz, “I need you to help me get rid of it. I need to get rid of it.” 41RP 4200.

Bond gave her statements to police on December 29th and February 5th. 41RP 4219. She admitted she did not tell police about any conversation she allegedly overheard between Pry and Cruz during those interviews. 41RP 4220. She negotiated a plea deal from the State for her testimony. Her felony was changed to a misdemeanor and instead of 75 to 102 months she received credit for time served. 41RP 4222-23. She could not recall when she told officers about the statements. 41RP 4255.

Bond and Jones left the home and were arrested several days later. 41RP 4212. Robert Pry was arrested on December 22. 12RP 288-291. Sheriffs recovered Mr. Hood’s body on December 30th. 26RP 1584. He had been severely beaten. 43RP 4559.

Closing Argument

The prosecutor began closing arguments as follows:

Today would have been Robert Hood's 90th birthday. Today should have been a day of celebration. It should have been a day when Candy and Doug and his friends celebrate his years, maybe a day that his out of town family fly up and see him

Instead, we are here talking about the violence that was done to his body. The violence that was done to his body after he was killed. We are here talking about the night of terror that was issued upon him on December 17th. When Joshua Rodgers Jones and Robert Pry go to his house, knock on the door and say, " It's God."

Now, Robert Hood knew Rodgers Jones, likely trusted Rodgers Jones. There was no signs of a forced entry. I don't know if the door was unlocked or if he let them in.

I don't know what happened in those first moments, whether or not they started in on him right away or whether or not they sat and chatted with him first. Whether Rodgers Jones introduced Archie to Robert Pry. Or whether they started torturing him right away. Whether they started shouting at him and hitting him, demanding his account numbers, his PIN numbers, his cash, his firearms. I can't answer those questions for you....

47RP 5002.

We can only hope that by the time he was hit so hard that he was paralyzed that he was rendered unconscious. We can only hope that when he was dragged into the bathroom and hogtied and left to die on the bathroom floor, that he was unconscious.

47RP 5003.

Celebrate Mr. Hood today by –taking the time --I ask that you...

47RP 5067.

Defense counsel objected to the remark. Id. During closing

argument, defense counsel also objected when the prosecutor said:

“So these are Robert Pry’s words to you when he took the stand. He told you that he would not divulge information freely. He is not a credible witness in this case. These are his words. “My life is on the line, and I’ve had plenty of time to think about what happened.” He is able to craft his statement to you in court.

47RP 5043.

Defense counsel moved for a mistrial based on the prosecutor’s argument that Mr. Pry had tailored his testimony to the facts presented at trial. 47RP 5044. The prosecutor argued that a prosecutor can point out in cross examination that a defendant has tailored his testimony based on what he has already heard at trial. *Id.* The court overruled the objection. 47RP 5046.

The jury found Mr. Pry guilty on all counts. CP 2772-2773. The jury found aggravating circumstances as charged. CP 2774-2777. The court merged the robbery count with the felony murder count. 50RP 11. The court imposed a 958-month sentence, which included all counts to be served consecutive based on the multiple offense policy, and 162 months to be served as the exceptional sentence. CP 1527; 3034-3036. The court waived all legal financial obligations, having found him indigent and without present or future likely ability to pay legal financial obligations. 50RP 56. Mr. Pry makes this timely appeal. CP 3021-3033.

III. ARGUMENT

A. In the Absence of An Adequate Inquiry, The Trial Court Erred In Denying Mr. Pry's Request To Appoint New Counsel.

The Sixth Amendment “commands, not that a trial be fair, but that a particular guarantee of fairness be provided- to wit, that the accused be defended by the counsel he believes to be the best.” *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 146, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).

A criminal defendant has the right to the assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, §22. A substitution of counsel is required where there is a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 723-24, 16 P.3d 1 (2001).

The determination of whether an indigent defendant's dissatisfaction with court-appointed counsel warrants the appointment of substitute counsel rests within the sound discretion of the trial court. *State v. Lytle*, 74 Wn.2d 83, 84, 426 P.2d 502 (1967). The appellate court reviews a denial of a request for new counsel for an abuse of discretion. *State v. Varga*, 151 Wn.2d 179,

200, 86 P.3d 139 (2004). The court abuses its discretion when its decision is based on the application of an incorrect legal standard. *State v. Garcia*, 179 Wn.2d 828, 844, 318 P.3d 266 (2014).

A reviewing court considers three factors in deciding whether the trial court abused its discretion in denying a request to remove counsel: (1) the extent of the conflict; (2) the adequacy of the inquiry; (3) the timeliness of the motion. *Stenson*, 142 Wn.2d at 724. Mr. Pry's motion was timely, as it was made before a jury had been selected. The trial court abused its discretion because it failed to conduct an adequate inquiry into the nature and the extent of the conflict and breakdown in the relationship.

State and federal case law require the trial judge to take the necessary time to inquire into the basis for a client's objection to his counsel. *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970); *State v. Lopez*, 79 Wn.App. 755, 904 P.2d 1179 (1995), *disapproved on other grounds*, *State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998). An adequate inquiry includes a "full airing of the concerns" and a "meaningful inquiry by the trial court." *State v. Cross*, 156 Wn.2d 580, 610, 132 P.3d 80, *cert. denied*, 549 U.S. 1022 (2006).

Generally, a defendant's loss of confidence or trust in his counsel is not sufficient reason to appoint new counsel. *State v.*

Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004) (quoting *State v. Stenson*, 132 Wn.2d 733, 734, 940 P.2d 1239 (1997)). However, because of the potential implications on a defendant's Sixth Amendment rights, a court should "inquire carefully into the defendant's reasons for the distrust." *Lopez*, 79 Wn.App. at 765.

In *Lopez*, the defendant requested a new attorney, stating, "I want a different attorney because this one isn't helping me at all." *Lopez*, 79 Wn.App. at 764. The reviewing court rightly placed the onus on the trial court to have inquired further. A court cannot properly exercise its discretion if it fails to inform itself of the facts. *Id.* at 766.

Here, the court asked Mr. Pry why he wanted new counsel. Mr. Pry answered, "I don't feel like I'm being adequately represented. I feel like there's been more trying to get me to take a deal than preparing for my defense." Under *Lopez* and *DeWeese*, the trial court had a duty to carefully inquire into the reasons for Mr. Pry's distrust and to withhold ruling until the reasons were made known. *Lopez*, 79 Wn.App. at 766; *State v. DeWeese*, 117 Wn.2d 369, 816 P.2d 1 (1991)(emphasis added). Instead, the trial court turned to Mr. Pry's attorney and asked if he had any concern about his ability to move forward as legal counsel. Without further

questioning, the court said, “Okay. Based on your request, Mr. Pry, it’s insufficient for me to replace your legal counsel at this time.”

A trial court abuses its discretion when it bases its ruling on an erroneous view of the law or applies the wrong legal standard. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). The trial court necessarily abused its discretion when it failed to make a meaningful inquiry into the nature and extent of the conflict. The trial court’s satisfaction with defense counsel’s answer that he did not think he had any problem representing Mr. Pry was the wrong legal standard on which to base the decision to deny substitute counsel.

The trial court’s failure to appoint new counsel or conduct a meaningful inquiry into Mr. Pry’s concerns denied him his Sixth Amendment right to counsel. *Cross*, 156 Wn.2d at 607. The conviction must be reversed and the case remanded for a new trial. *Id.*

- B. The Trial Court Committed Reversible Error In Failing To Investigate Whether A Juror Was Sleeping During The Trial.

The United States Constitution and the Washington Constitution guarantee the right to a fair and impartial jury trial. U.S. Const. amend. V,VI; Wash. Const. art. I,§§3, 22.

The right to a trial by jury is not a trivial one. “When a trial judge’s ruling implicates either selection or management of the jury or the trial, the reviewing court must determine whether the judge’s decision affects the defendant’s due process right to a fair trial.” *State v. Latham*, 100 Wn.2d 59, 66, 667 P.2d 56 (1983)(citing *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)). A sleeping juror may prejudice the defendant’s due process rights and the right to an impartial jury. *State v. Hughes*, 106 Wn.2d 176, 204, 721 P.2d 902 (1986). The trial court is tasked with protecting a defendant’s right to an impartial jury.

To protect the right to an impartial jury, RCW 2.36.110 directs the trial court “to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of ...inattention...or by reason of conduct or practices incompatible with proper and efficient jury service. Criminal Rule 6.5 directs the court that “if at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged.” Both the statute and the

court rule “place a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror.” *State v. Jordan*, 103 Wn.App. 221, 227, 11 P.3d 866 (2000).

Here, at two different points in the trial, defense counsels complained to the court about juror number 4. The record establishes that there was a serious question as to whether the juror was sleeping during testimony and again during closing argument. The court did not inquire of the juror at either juncture.

Rather, the first time it was brought to her attention, the court dismissed the concern, saying she thought the juror had been paying attention and that he might have a headache. 30RP 2320. In the second instance, the court acknowledged it certainly looked like the juror was “nodding off”, but she hadn’t “noticed anything where he looks like he’s *actually* asleep. He does kind of put his head down and that’s all I can say about it.” 47RP 5123-24.(emphasis added). The court’s failure to investigate the very real possibility that counsels’ observations about the juror were accurate resulted in a failure to protect Mr. Pry’s right to an impartial and attentive jury.

In *People v. South*, the Court found the trial court committed reversible error when it failed to conduct a proper inquiry into

defense complaints of a sleeping juror. *People v. South*, 177 A.D.2d 607, 607-08, 576 N.Y.S.2d 314 (N.Y. App.Div. 1991).

There, as here, defense counsel told the court a juror was sleeping, and as here, the court found the juror had only closed his eyes for short periods of time. *Id.* In reversing the conviction, the appellate court held the trial court ought to have held “a probing and tactful inquiry to determine whether [the] juror...was unqualified to render a verdict based upon her apparent sleeping episodes.” *South*, 177 A.D.2d at 608.

Similarly, in *Jorden*, the trial court excused a juror who fell asleep during trial. *Jorden*, 103 Wn. App. at 225. The reviewing Court affirmed the dismissal of the juror, finding the court had removed the juror because her fitness was compromised; the judge was required to dismiss her under RCW 2.36.110 and CrR 6.5. *Id.* at 230.

“Uncertainty that a juror is asleep is not the equivalent of finding that the juror is awake...” *Commonwealth v. Braun*, 74 Mass. App.Ct. 904, 905, 905 N.E.2d 124 (2009). The court here should have conducted an inquiry based on counsels’ observations, and *its own observation* that the juror appeared to be nodding off.

A trial court's decision whether to excuse a juror is reviewed for abuse of discretion. *Hughes*, 106 Wn.2d at 204. The court abuses its discretion when its ruling is manifestly unreasonable or exercised on untenable grounds, or for untenable reasons. *State v. Downing*, 151 Wn.2d 265, 87 P.3d 1169 (2004).

Where the trial court prevents itself from obtaining the information necessary to a proper exercise of as to a juror's fitness, there is by necessity an abuse of discretion and a failure to follow the dictates of RCW 2.36.110 and CrR 6.5. Mr. Pry has met his burden and is entitled to a new trial.

C. The Prosecutor Committed Misconduct During Closing Argument When She Accused Mr. Pry Of Tailoring His Testimony, Denying Mr. Pry His Constitutional Right To A Fair Trial.

The right to a fair trial is a basic federal and state constitutional liberty. U.S. Const. amend. XIV; Wash. Const. Art. 1, §22. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). Prosecutorial misconduct may deprive a defendant of this constitutional right. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

During closing argument in this case, the prosecutor stated,

So these are Robert Pry's words to you when he took the stand. He told you that he would not divulge information freely. He is not a credible witness in this case. These are his words. "My life is on the line, and I've had plenty of time to think about what happened." *He is able to craft his statement to you in court.*

47RP 5043. (Emphasis added). Defense counsel immediately objected, asking for a mistrial. The court overruled the objection.

Article 1, §22 explicitly guarantees a criminal defendant the right to exercise his fair trial rights. *State v. Martin*, 171 Wn.2d 521, 252 P.3d 872 (2011). These rights include the right to view the evidence against him, to be present at trial, to testify, and to confront his accusers. Art. 1, §22.

In the United States Supreme Court case, *Portuondo v. Agard*, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000), the Court held that a defendant's rights under the Sixth Amendment were not violated when a prosecutor, during *closing argument*, drew attention to the fact that the defendant had had an opportunity to hear all the evidence and witnesses and then tailor his testimony accordingly. *Martin*, 171 Wn.2d at 526.

In her dissent, Justice Ginsburg "criticized the majority for 'transform[ing] a defendant's presence at trial from a Sixth Amendment right into an automatic burden on his credibility.'"

Martin, 171 Wn.2d at 534 (citing *Portuondo*, 529 U.S. at 76).

Justice Ginsburg reasoned that if a prosecutor were to make an accusation of tailoring during closing argument, a jury is, at that point, unable to “measure a defendant’s credibility by evaluating the defendant’s response to the accusation, for the broadside is fired after the defense has submitted its case.” *Portuondo*, 529 U.S. at 78.

Eleven years later, our Supreme Court reviewed, under a *Gunwall* analysis, whether a defendant’s Article I, §22 rights were violated where a prosecutor posed questions to the defendant on *cross-examination* that implied the defendant had tailored his testimony to be consistent with the testimony of prior witnesses.

In *Martin*, the defendant specifically said that his testimony was based on the information he heard from other testifying witnesses. *Martin*, 171 Wn.2d at 524. Our Supreme Court agreed with Justice Ginsburg, holding that under Article I, §22, suggestions of tailoring are appropriate during *cross-examination*, *not closing argument*. *Id.* at 536-536.

Additionally, Washington courts have held that a generic closing argument, accusing the defendant of tailoring, which is unrelated to the defendant’s trial testimony is improper. *State v.*

Hilton, 164 Wn.2d 81, 93, 261 P.3d 683 (2011). Here, the State accused Mr. Pry of tailoring his testimony because he said he had had time to think about what happened over the course of those several days in December. In closing argument, the State did not argue that Mr. Pry had changed his story or that he had opened the door to tailoring. Rather, the State argued that Mr. Pry, by his presence at trial, had been able to “craft” a story.

In *State v. Wallin*, 166 Wn.App. 364, 269 P.3d 1072 (2012), the court held that where the State suggested the defendant tailored his testimony based on nothing more than his presence at trial the remedy is reversal and remand for a new trial. *Id.* at 365. Like *Wallin*, Mr. Pry had a constitutional right under both federal and state constitutions to confront witnesses and participate in his own defense. The remedy here is reversal and remand for a new trial.

**D. The Prosecutor Committed Reversible Misconduct By
Appealing To The Passion And Prejudice Of The Jury.**

To establish prosecutorial misconduct, the defendant must first show the prosecutor’s conduct was improper. He must then show the improper comments resulted in prejudice that had a

likelihood of affect the verdict. *State v. Emery*, 174 Wn.2d 741, 759-61, 278 P.3d 653 (2012). Where a defendant has not objected to the improper comments, he must also show they were “so flagrant and ill-intentioned that an instructed would not have cured the resulting prejudice.” *Id.* at 760-61. Under Washington case law, arguments that have an “inflammatory effect” on the jury are generally not curable by a jury instruction. *Id.* at 763.

A prosecutor commits reversible misconduct when he urges the jury to decide a case based on evidence outside of the record, and appeals to passion and prejudice. *State v. Pierce*, 169 Wn.App. 533, 553, 280 P.3d 1158 (2012).

Here, there are four examples of the prosecutor appealing to passion and prejudice and arguing facts outside the evidence: (1) by arguing that Mr. Hood could not have imagined he would be beaten so severely that he would be left paralyzed, then hog-tied, and left to die on his bathroom floor; (2) telling the jury “we can only hope that by the time he was hit so hard that he was paralyzed that he was rendered unconscious. We can only hope that when he was dragged into the bathroom and hogtied and left to die on the bathroom floor, that he was unconscious”; (3) a fabricated description of the first moments when Mr. Hood encountered his

attacker(s); and (4) by telling the jury it was Mr. Hood's birthday and urging them to "celebrate" him as they went into deliberations.

In *Pierce*, this Court held the prosecutor improperly invited the jury to imagine themselves in the victims' shoes when he said "never in their wildest dreams Or in their wildest nightmare" would the victims have expected to be murdered on the day of the crime. *Pierce*, 169 Wn.App. at 555-56. This Court held that such an improper appeal could not have been cured by a jury instruction. *Id.*

Similarly, here, the prosecutor argued, "Mr. Hood could not have imagined he would be beaten so severely that he would be left paralyzed, then hog-tied, and left to die on his bathroom floor." And again, "we can only hope that by the time he was hit so hard that he was paralyzed that he was rendered unconscious. We can only hope that when he was dragged into the bathroom and hogtied and left to die on the bathroom floor, that he was unconscious."

As in *Pierce*, this language invites the jury to imagine Mr. Hood's internal thought process and to see themselves in Mr. Hood's position. As this Court held in *Pierce*, "whether the [victims] never expected the crime to occur was not relevant to [defendant's] guilt." *Id.* at 555. The prosecutor here further invited the jury to step

outside of the facts and improperly drew on their sympathy by encouraging them to “hope” that he was unconscious before he died. This is a direct appeal to a jury’s emotions and passion.

While “a prosecutor is not barred from referring to the heinous nature of a crime,” he has a duty to ensure a verdict which is “free of prejudice and based on reason.” *State v. Clafflin*, 38 Wn.App. 847, 849-50, 690 P.2d 1186 (1984). An appeal to the jury’s passion and prejudice, as here, violates this duty.

The prosecutor also, as in *Pierce*, fabricated a description of the encounter between Mr. Hood and his attackers.

I don't know what happened in those first moments, whether or not they started in on him right away or whether or not they sat and chatted with him first. Whether Rodgers Jones introduced Archie to Robert Pry. Or whether they started torturing him right away. Whether they started shouting at him and hitting him, demanding his account numbers, his PIN numbers, his cash, his firearms. I can't answer those questions for you.

47RP 5002.

The evidence at trial showed that Mr. Hood had been physically beaten. However, the prosecutor’s tale of how the encounter might have happened encouraged the jury to consider “facts” not in evidence: there was no evidence anyone shouted at him, or demanded his account numbers, or his PIN numbers, or his cash or his firearms. It is misconduct for a prosecutor to testify to

“facts” that have not been properly admitted into evidence. *In re Glassman*, 175 Wn.2d 696, 705, 286 P.3d 673 (2012). The argument here was designed to appeal to the jury’s passions, fears, and sympathy and went outside the evidence presented at trial.

Lastly, the prosecutor began by telling the jury that it was Mr. Hood’s birthday that day. She then imagined how he might have celebrated it with friends and family. The argument closed with the prosecutor encouraging the jury to “celebrate” Mr. Hood. This can only be understood to be inviting the jury to be part of the family and friends celebration by returning with of a gift of guilty verdicts. This was a direct appeal to the emotions and sympathies of the jury. The State committed misconduct by asking the jury to convict based on emotions instead of the evidence. *State v. Fuller*, 169 Wn.App. 797, 821, 282 P.3d 126(2012). The prosecutor’s statements in opening and closing argument invited the jury to step into the shoes of Mr. Hood and decide the case based on sympathy for him.

Because Mr. Pry objected only to the “celebrate” argument by the prosecutor, the inquiry for the remaining 3 remarks is whether the misconduct was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice, which could not have

been neutralized by a curative jury instruction. *State v. Brown*, 132 Wn.2d 529, 564-65, 940 P.2d 546 (1997).

There comes a time when the cumulative effect of repetitive prejudicial error is so flagrant that no instruction or series of instructions can erase it and cure the error. *State v. Walker*, 164 Wn.App. 724, 737, 265 P.3d 191 (2011)(internal citation omitted). Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend special weight to it, “not only because of the prestige associated with the prosecutor’s office, but also because of the fact-finding facilities presumably available to the office.”⁶ *In re Glassman*, 175 Wn.2d at 706.

The prosecutor committed misconduct at Mr. Pry’s trial by repeatedly appealing to the jury’s passion and prejudice during argument. Mr. Pry’s convictions should be reversed and he should be afforded a new trial. *In re Glassman*, 175 Wn.2d at 714.

⁶ Commentary to the *American Bar Association Standards for Criminal Justice* std. 3-5.8.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Pry respectfully asks this Court to reverse his convictions and remand with instructions for a new trial.

Respectfully submitted this 17th day of July 2017.

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APPENDIX

DATES/VOLUME

12/31/2015	RP
1/4/2016	1RP
1/5/2016	2RP
1/15/2016	3RP
1/29/2016	4RP
2/5/2016	5RP
2/12/2016	6RP
2/19/2016	7RP
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3/14/2016	12RP
3/15/2016	13RP
3/17/2016	14RP
3/22/2016	15RP
3/25/2016	16RP
4/4/2016	17RP
4/25/2016	18RP
4/26/2016	19RP
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4/28/2016	21RP
5/3/2016	22RP
5/4/2016	23RP
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10/3/2016	50RP

CERTIFICATE OF SERVICE

I, Marie Trombley, certify under penalty of perjury of the laws of the State of Washington and the United States, that on July 17, 2017 I sent an electronic copy, by prior agreement between the parties, or sent by USPS mail, first class, postage prepaid, a true and correct copy of the Brief of the Appellant to the following:

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