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COURT OF APPEALS
STATE OF WASHINGTON
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No. 64366-5-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GERALD STARLING,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Cheryl Carey

APPELLANT'S OPENING BRIEF

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CITE FED DJ AMEND #

No. 58779-0-1

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence of unlawful imprisonment of Denise Anderson where there was no “restraint” of the complainant.

2. In the alternative, the defendant’s conviction for unlawful imprisonment must be vacated on the ground that any “restraint” was incidental to the taking of the car in which she was present.

3. The prosecutor committed flagrant misconduct and caused manifest constitutional error in closing argument.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was there insufficient evidence of unlawful imprisonment where there was no “restraint” of the complainant as required for conviction, since the defendant immediately stopped the vehicle to let her out?

2. In the alternative, must the conviction be vacated on ground that any “restraint” was incidental to the taking of the car in which the defendant found the complainant, and did not constitute an independent offense?

3. Did the prosecutor commit flagrant misconduct and cause manifest constitutional error in closing argument, by

a. Offering his personal opinion of the case by describing it as a "prosecutor's dream come true";

b. Offering his personal opinion as to the guilt of the defendant by telling the jury that the defendant was guilty, but was nonetheless taking the case to trial (in order to throw red herrings to the jury);

c. Thereby commenting negatively on the defendant's exercise of his right to a jury trial and to demand proof beyond a reasonable doubt to the jury;

d. Demeaning defense counsel's exercise of his proper function by stating that it was counsel's job to nit-pick the case; and/or

e. Demeaning defense counsel's exercise of his proper function by stating that it was counsel's job to throw red herrings in an attempt to distract the jury and see "what sticks"?

C. STATEMENT OF THE CASE

Gerald Starling was charged in King County with the felony offenses of second degree robbery, unlawful imprisonment, and attempting to elude a pursuing police vehicle. CP 1-2. According to the affidavit of probable cause and police report, on April 25, 2009, Damian Lewis was inside his 1983 Monte Carlo with Denise Anderson, in the 100 block of S. Washington Street, next to Occidental Park. The key was in the ignition and the engine was running, when Lewis exited the car to talk to some friends. CP 2-3.

Anderson remained in the front passenger seat when an unknown male entered the car and drove away. Anderson told the suspect to stop the vehicle several times, but he refused. The suspect, later identified as Gerald Starling, told Anderson at one point "I'll blow your fucking head off," implying that he had a gun. While the car was still in motion Anderson opened the passenger door and jumped out.

CP 2-3.

Once Anderson was out of the car, the vehicle continued southbound. Mr. Lewis called 911 to report the incident. Seattle Police Department detectives Mooney, Boggs and Belshay heard the radio call and located the car on Interstate-5 near South Center and got behind it. They followed the vehicle and waited for backup when the vehicle abruptly changed lanes and exited at 188th Street. CP 3-4. The vehicle then accelerated quickly and made a right turn, and the rear end of the car fishtailed into the oncoming traffic lanes. The officers activated their emergency equipment (lights and siren) as the vehicle continued to accelerate to excessive speed above 80 MPH. When the vehicle reached S. 188th Street, it ran a red light and lost control before slamming into the NE corner of the intersection. CP 3-4.

Mr. Starling was convicted as charged following a jury trial.

CP 8-10. He was ordered to serve concurrent standard range terms of 25, 16, and 6 months incarceration on the respective convictions. CP 37-45.

Mr. Starling timely appeals. CP 46.

D. ARGUMENT

1. MR. STARLING'S CONVICTION FOR UNLAWFUL IMPRISONMENT UNDER RCW 9A.40.040(1) MUST BE VACATED.

a. Mr. Starling's conviction for unlawful imprisonment under RCW 9A.40.040(1) must be reversed absent proof beyond a reasonable doubt of "restraint." Sufficient evidence must support a criminal conviction. U.S. Const. amend. 14; Wash. Const. Art. 1, § 3; Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Valencia, 148 Wn. App. 302, 313, 198 P.3d 1065 (2009).

To determine whether sufficient evidence exists to affirm a jury verdict of guilty, the reviewing court views the evidence in the light most favorable to the State and decides whether any rational trier of fact could have found the essential elements of the charged crime were proved by the prosecution beyond a reasonable doubt.

State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). When a defendant challenges the sufficiency of evidence in a criminal case, all reasonable inferences from the evidence are drawn in favor of the State. State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977).

Even under that liberal standard, the evidence in the present case was constitutionally inadequate. Here, Mr. Starling was charged with and convicted of Unlawful Imprisonment. A person commits unlawful imprisonment if “he knowingly restrains another person.” RCW 9A.40.040(1). To restrain someone is to restrict their movements without consent and without legal authority in a manner which “interferes substantially” with the person’s liberty. RCW 9A.40.010(1).

A substantial interference is a real or material interference with the liberty of another, and mere petty annoyance, a slight inconvenience, or an imaginary conflict is certainly inadequate to establish guilt. State v. Robinson, 20 Wn. App. 882, 884, 582 P.2d 580 (1978), affirmed, 92 Wn.2d 357 (1979).

By placing the word “substantial” in the statutory definition of “restraint,” the Legislature demonstrated its intent that the law

reach only significant conduct restricting a person's freedom of movement in "important" and "essential" ways. Robinson, 20 Wn. App. at 885; see also State v. Washington, 135 Wn. App. 42, 50, 143 P.3d 606 (2006), review denied, 160 Wn.2d 1017, 161 P.3d 1028 (2007) (real or material interference with liberty is required). For example, sufficient evidence of restraint existed where a defendant threatened a victim with death if the victim tried to escape his custody. State v. Lansdowne, 111 Wn. App. 882, 889, 46 P.3d 836 (2002). In comparison, here, the actual facts of Ms. Anderson's presence in the car demonstrate that Mr. Starling immediately allowed and indeed assisted Ms. Anderson in exiting the car when she so requested.

Ms. Anderson's trial testimony indicated the car's engine was running when Mr. Starling jumped in, and he responded to Ms. Anderson's protestations it was not his car by telling her to shut up. 8/19/09RP at 151. Mr. Starling immediately began driving away:

[He] threw the car into drive and he sped out of the parking lot going out on to Washington, and at that point I had told him to – he need [sic] to please let me out of the car, that I had no intention of going with him in the car and that I just wanted to please be let out of the car.

8/19/09RP at 151.

The prosecutor attempted to establish that Mr. Starling then drove for some distance refusing to allow Ms. Anderson to exit the vehicle, but Ms. Anderson testified that the car simply surged forward approximately 10 to 15 feet from where the it was stopped, toward the exit of the parking lot, and then “kicked” Ms. Anderson out of the car. 8/19/09RP at 152-53, 174. Ms. Anderson actually described the distance the car traveled as merely “a few feet,” since the car had been sitting idling right at the parking lot exit anyway. 8/19/09RP at 152-53.¹

Instead of holding or in any way restraining Ms. Anderson in the vehicle, Mr. Starling in fact affirmatively ejected her. This is the opposite of unlawful imprisonment. The State, plainly aware of the paucity of the evidence to support the charge, attempted to get Ms. Anderson to describe her requests to be let out of the car as five separate pleadings, followed each time by a refusal from Mr. Starling. 8/19/09RP at 153-54 (“And the second time you said it

¹Mr. Lewis had started the car as the couple were preparing to drive out of the parking lot, but he then got out of the vehicle to speak briefly with some friends. 8/19/09RP at 147-48.

did he stop the car?").² The prosecutor also asked Ms. Anderson if she felt the defendant was "being responsive" when she was begging to get out of the vehicle. 8/19/09RP at 166.

But Ms. Anderson's multiple requests that she needed to be let out of the vehicle were simply repeated statements made in the "rapid succession" of one long sentence that took a matter of seconds to utter. 8/19/09RP at 188-89. Indeed, the State's own evidence demonstrates that Mr. Starling drove only 10 to 15 feet, contemporaneously hearing Ms. Anderson's demands to be let out of the car, and he immediately obliged her. 8/19/09RP at 151, 153.

There was no "substantial interference" with Ms. Anderson's freedom of movement. The Court of Appeals has held that obstruction of a solitary doorway exit is sufficient evidence to support an unlawful imprisonment conviction. State v. Allen, 116 Wn. App. 454, 466, 66 P.3d 653 (2003). In that case, the victim was at an apartment with the defendant, and screamed repeatedly

²The prosecutor's similar elicitation of statements that Ms. Anderson felt "restrained," which would have been inadmissible following a proper objection to the witness testifying to a conclusion of law and the defendant's guilt, see State v. Olmedo, 112 Wn. App. 525, 532, 49 P.3d 960 (2002), and is ultimately unhelpful to the State on the question of sufficiency on the element restraint, since her testimony did not provide any factual statement, but merely repeated words from the statute. See 8/19/09RP at 184-85.

as she tried to exit the apartment, but Allen prohibited her from leaving by standing in the only doorway. Allen, at 458.

The Court of Appeals has also upheld an unlawful imprisonment conviction where the victim could move about an apartment but could not leave or get help because the defendant physically threatened the victim and her mother. State v. Davis, 133 Wn. App. 415, 425, 138 P.3d 132 (2006), reversed on other grounds, 163 Wn.2d 606, 184 P.3d 639 (2008).

Here, the defendant, far from holding the complainant in the vehicle, promptly stopped the car as Ms. Anderson demanded, and then “[k]ind of pushed” her out the door when she opened it. 8/19/09RP at 155-56. This was perhaps an ungentlemanly manner of assisting the lady in alighting from the motor vehicle, but it certainly demonstrated Mr. Starling’s complete lack of any interest in restraining her, as opposed to simply getting her out of the car, so that he could take off with it.

There was insufficient evidence of “restraint,” and therefore Mr. Starling’s conviction for unlawful imprisonment must be reversed as the entry of judgment violated due process. U.S. Const. amend. 14; Wash. Const. Art. 1, § 3.

(b) In the alternative, vacation of Mr. Starling's unlawful imprisonment conviction as "incidental" to the robbery is required based on Double Jeopardy, merger, and insufficiency of the evidence under State v. Green.

- (i). *The incidental nature of an offense with respect to a larger crime involves issues of sufficiency, double jeopardy, and merger.*

As noted, the State's own evidence at trial demonstrates that Mr. Starling likely had just enough time, while accelerating forward for 10 to 15 feet, to hear Ms. Anderson's rapidly repeated demands to be let out of the car, and he immediately stopped to let her out, with some physical encouragement. 8/19/09RP at 151, 153.

After looking at the courtroom clock, Ms. Anderson estimated that 45 seconds passed from the time the defendant got in the car, threw it into gear and pulled away, then let Ms. Anderson out. 8/19/09RP at 179.

These facts compel reversal of Mr. Starling's unlawful imprisonment conviction because any "restraint" (but see Part D.1.a, supra) was merely incidental to the commission of the

robbery of the car. Any “restraint” of the complainant by the act of driving the vehicle away with her inside for a few seconds was nothing more than the force used in effecting the taking of the car, and was incidental conduct that plainly had no independent purpose except to facilitate the taking that amounted to robbery.

The act of restraining a person that is merely “incidental” to another offense does not establish an independent crime of unlawful imprisonment. See State v. Green, 94 Wn.2d 216, 226-27, 616 P.2d 628 (1980) (analyzing aggravated murder statute’s requirement of killing in the course of kidnap).

The issue implicates questions of sufficiency of the evidence, double jeopardy, and related merger.³ In Green, the question presented was a sufficiency issue with regard to the kidnap aggravator for a murder. Green, *supra*; see also State v. Saunders, 120 Wn. App. 800, 816-17, 86 P.3d 232 (2004) (discussing use of Green test in merger and sufficiency of the evidence cases).

³Sufficiency of the evidence is a question of constitutional magnitude and may be raised initially on appeal. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Similarly, double jeopardy arguments not raised below may be raised for the first time on appeal, because such error is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

Additionally, the double jeopardy clauses of both the federal and Washington State Constitutions protect a defendant from multiple punishments for the same offense. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998).⁴

Thus in State v. Johnson, 92 Wn.2d 671, 672, 678, 600 P.2d 1249 (1979), a case addressing the incidental nature of restraint with respect to a larger crime, the Court analyzed the issue as one of whether offenses were intended by the legislature to receive separate punishment where merely incidental to another crime. And in State v. Brett, 126 Wn.2d 136, 164, 892 P.2d 29 (1995), the issue was deemed one of whether the incidental nature of an offense required it to be merged in order to avoid a double jeopardy violation. Brett, 126 Wn.2d at 164.

Finally, the analysis of whether separate and distinct effects of the allegedly incidental crime were present is a determinative

⁴U.S. Const. amend. 5 provides: "No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb." The Fifth Amendment applies to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). And Wash. Const. art. I, § 9 provides: "No person shall be ... twice put in jeopardy for the same offense." Because the double jeopardy clauses of the federal and state constitutions are identical in substance and purpose, the Washington courts interpret them in the same manner. In re Pers. Restraint of Davis, 142 Wn.2d 165, 171, 12 P.3d 603 (2000).

factor in other cases that have addressed the question of “incidental” in the context of merger. State v. Larkin, 70 Wn. App. 349, 358, 853 P.2d 451 (1993); see also State v. Hudlow, 36 Wn. App. 630, 633, 676 P .2d 553 (1984) (one kidnapping count merged with rape conviction).

- (i). *Any restraint of Ms. Anderson was of an incidental nature with respect to the offense of second degree robbery.*

Mr. Starling’s argument regarding unlawful imprisonment as “incidental” to the robbery of the car from Ms. Anderson was addressed by analogy in a related context in State v. Johnson, supra, 92 Wn.2d at 678. The case invoked the idea to prevent the “pyramiding” of charges to increase punishment. Johnson involved convictions for first degree rape, first degree kidnapping, and first degree assault. Johnson, at 672. The Court overturned the kidnapping and assault charges, because the legislature did not intend separate punishments for first degree rape, and the assault and kidnapping, where the latter crimes were merely incidental. Johnson, at 676-77.

[T]he legislature intended that conduct involved in the perpetration of a rape, and not having an independent

purpose or effect, should be punished as an incident of the crime of rape and not additionally as a separate crime.

Johnson, at 676. The Court concluded, “an additional conviction cannot be allowed to stand unless it involves some injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.” Johnson, at 680.

All of the analysis in these cases involving arguments about “incidental” crimes involves kidnapping and an additional crime. See, e.g., State v. Green, 94 Wn.2d at 226-27 (movement of the victim was incidental to the homicide and did not support additional kidnapping conviction); State v. Korum, 120 Wn. App. 686, 703, 86 P.3d 166 (2004) (restraint of victims during a robbery was solely to facilitate robberies and not kidnappings), affirmed in part, reversed in part on other grounds, 157 Wn.2d 614 (2006); State v. Saunders, 120 Wn. App. at 819 (kidnapping was not merely incidental to rape); State v. Harris, 36 Wn. App. 746, 754, 677 P.2d 202 (1984) (rational trier of fact could reasonably have found the abduction as a separate offense from the rape); see also State v. Brett, 126 Wn.2d at 164 (applying incidental analysis).

These cases explain that “mere incidental restraint and movement of the victim during the course of another crime which has no independent purpose or injury is insufficient to establish a kidnapping.” Brett, 126 Wn.2d at 166. The concern is whether the restraint or movement has independent purpose. The determination of whether a kidnapping is incidental to another crime thus requires a case-by-case factual analysis.

Whether actions are merely incidental to or distinct from the actual crime charged is determined from all the facts and circumstances surrounding the crime and the nature of the acts and their relation to the crime.

Harris, 36 Wn. App. at 752-53.⁵

For example in Green, the Supreme Court held that there is insufficient evidence to prove kidnapping as an aggravator of murder beyond a reasonable doubt where the restraint and movement of the victim was merely "incidental" to and not "an integral part of and was independent of the underlying homicide."

⁵Of course, these cases do not apply the “incidental” analysis to the specific offense of unlawful imprisonment. But, unlawful imprisonment is a lesser included offense of kidnapping and requires knowing restraint of another person. RCW 9A.40.040(1); State v. Russell, 104 Wn. App. 422, 449, 16 P.3d 664 (2001). The restraint issue is at the heart of a question of “incidental” kidnapping, and unlawful imprisonment is “restraint.” Therefore, the kidnapping cases are instructive on determining whether Mr. Starling’s unlawful imprisonment charge had an independent purpose or was incidental to the robbery of the car.

Green, 94 Wn.2d at 227.

[T]he mere incidental restraint and movement of a victim which might occur during the course of a homicide are not, standing alone, indicia of a true kidnaping.

Green, 94 Wn.2d at 227. In Green, an eyewitness saw a man snatch a child from a public sidewalk and take her behind a nearby apartment building out of view, where he killed her. State v. Green, 94 Wn.2d at 222-23. Another witness also saw the victim being grabbed and taken around the building. Green, 94 Wn.2d at 224.

Just as in Green, any brief knowing holding or restraint of Ms. Anderson by Mr. Starling was merely incidental to the larger crime, here, the taking of the Monte Carlo. In fact, the restraint of Ms. Anderson was even less significant in and of itself than the restraint in Green, where the restraint was effected as a planned necessary act to commit the larger crime. Here, Mr. Starling's restraint of Ms. Anderson was not planned, it ended before it began, and was truly an incident of the robbery. It manifestly had no independent purpose, and is insufficient to establish unlawful imprisonment as a separate conviction. See Brett, 126 Wn.2d at 166.

As noted, this “incidental” restraint analysis has been applied by the Washington courts in several contexts, including to challenges in aggravated first degree felony cases, such as Green; to questions of merger, see State v. Allen, 94 Wn.2d 860, 864, 621 P.2d 143 (1980); and to issues involving elevation of an offense to the first degree by an associated crime, see State v. Whitney, 44 Wn. App. 17, 21, 720 P.2d 853 (1986).

The present case quite obviously does not involve some independent plan by Mr. Starling to hold Ms. Anderson, much less for any period longer than necessary to rob the car from her. The opposite is true, as the force with which he spirited her away for a period of seconds, followed by her allegedly being forced out of the car, was truly incidental to the taking by force of the desired vehicle.

In this respect, particularly on point with the present case is the Court of Appeals decision in State v. Korum, in which this Court held that certain charged kidnappings committed by the defendants were merely incidental to the purposeful crime, which was the robbery of several drug dealers. State v. Korum, 120 Wn. App. 686, 690, 86 P.3d 166 (2004), reversed in part on other grounds,

157 Wn.2d 614, 141 P.3d 13 (2006).⁶ In Korum, the defendant was a participant in several home invasion robberies in which the perpetrators “planned to disguise themselves, to invade the homes after midnight, and to bind anyone they encountered inside to facilitate the gathering of items to steal.” State v. Korum, 120 Wn. App. at 690-92. The individual crimes involved binding and tying up the victims with duct tape and moving them short distances around their homes or to different structures on the property, while the defendants conducted the robberies of personal property and contraband from the home.⁷ State v. Korum, 120 Wn. App. at 690-

⁶The State of Washington did not seek review of the Court of Appeals resolution of the kidnaping/sufficiency of the evidence issue, and the case was litigated in the Supreme Court on other issues. State v. Korum, 157 Wn.2d at 623-24.

⁷In one of the offenses, the defendants, armed and wearing ski masks, invaded a condominium. At gunpoint, the robbers restrained the victim with duct tape, “dragged him across the floor,” and stole methamphetamine. State v. Korum, 120 Wn. App. at 690.

In another of the offenses, the defendants identified themselves as police officers as they broke through the doors of a home, where they used duct tape to restrain two adult victims and a child at gunpoint, and stole drugs, money, jewelry, and one victim’s car. State v. Korum, 120 Wn. App. at 691.

In a third offense, the defendants entered a trailer home and bound various people at gunpoint; and stole drugs, money, a car, and other valuables.

The robbers yelled at, kicked, hit, and threatened to burn Judy Beaty with acid if she did not say where the money and drugs were. Beaty remained bound for about 20-30 minutes during the robbery and was inadvertently cut when one of the robbers used a knife to remove the zip ties and release her. The robbers initially tied Beaty’s friend Jennifer McDonald to a chair, and taped her mouth and eyes. They then took her outside, removed

92. On appeal, Korum argued that any restraint of the victims in these cases was merely incidental to the robbery offenses, and that there was therefore insufficient evidence of kidnap to support those counts. State v. Korum, 120 Wn. App. at 702-03. In analyzing the question, the Korum Court noted that the analysis of whether a true kidnap was established beyond a reasonable doubt, both for the purposes of aggravated murder in Green and the separate kidnap charges in Korum, involved not only the question whether there was restraint as defined in the crime of kidnap, but also whether any restraint that did occur was merely “incidental” to the murder.

We note Justice Utter's similar combination of evidentiary insufficiency and the incidental nature of the kidnaping in his explanation of Green in a later case: “In that case, the defendant had been charged with aggravated first degree murder committed in the furtherance of either rape or kidnaping. We noted that this required separate proof of either the crime of rape or the crime of kidnaping. We then concluded that there was insufficient evidence to support a

the duct tape from her eyes at her request, and led her into the Molina trailer behind the Beaty residence, where she observed Sherrita Vernon-Thompson, Tonya Molina, and Brandon Vernon-Thompson on their knees on the floor. When Sherrita Vernon-Thompson had yelled at the intruders to produce a search warrant, they had taped her head, except for her nose. The robbers took McDonald to a room and left her there with two unbound children, Miguel Lopez and Robert Warner.

State v. Korum, 120 Wn. App. at 691-92. In response to a neighbor's 911 call, police arrived, and the defendants fled and were all ultimately arrested.

finding of kidnaping. Our conclusion in Green was not, however, based solely on the lack of any restraint but was also based on the fact that what restraint and movement had taken place was incidental to the murder.

State v. Korum, 120 Wn. App. at 703, n. 13 (quoting State v. Vladovic, 99 Wn.2d 413, 432-33, 662 P.2d 853 (1983) (Utter, J., dissenting)⁸ (citations omitted).

Analyzing the crimes before it under Green, the Korum Court said that the restraint of the victims in that case was merely incidental to the robberies. Here, any restraint of Ms. Anderson was simply an incident of the act of Mr. Starling entering the vehicle and immediately taking it, and driving away quickly to effect the robbery. There was no underlying, independent offense of unlawful imprisonment. See State v. Korum, 120 Wn. App. at 702-03.

Also particularly on point is State v. Allen, 94 Wn.2d at 864, where the defendant robbed a gas station and forced the victim into his car and drove away. Because the abduction and restraint of the victim occurred after the robbery, the Court found there was an

⁸The Vladovic majority held that the kidnaping convictions in that case did not merge into the conviction for robbery because the robbery was based on stealing money at gunpoint from the wallet of one victim, Jensen, and the multiple kidnaping counts were based on the defendant's restraint of four other persons in a laboratory room, not including Jensen. Vladovic, 99 Wn.2d at 416, 421-22.

independent kidnapping; however, the Court revealingly noted that if the robbery had occurred in the car, any restraint would be incidental to the robbery. State v. Allen, 94 Wn.2d at 864.

Here, the facts are even stronger in favor of finding the restraint incidental than the Allen Court's fact scenario. The robbery and the brief distance of feet that Mr. Starling drove before letting Ms. Anderson out of the car show that any restraint of Ms. Anderson cannot be said to have had independent purpose, and the conviction must be vacated. State v. Green, 94 Wn.2d at 226-27; State v. Korum, 120 Wn. App. at 702-03, 707.

**2. THE PROSECUTOR COMMITTED
FLAGRANT MISCONDUCT AND
CAUSED MANIFEST
CONSTITUTIONAL ERROR IN
CLOSING ARGUMENT.**

The prosecutor engaged in multiple instances of misconduct in closing argument, to which, unfortunately, there was no objection by the defense. Mr. Starling contends, however, that the instances of misconduct were flagrant, and in some cases bore directly on the defendant's exercise of his constitutional rights. Mr. Starling may therefore seek relief from this misconduct on appeal.

a. The prosecutor must not commit misconduct in

closing argument. A public prosecutor is a quasi-judicial officer charged with the duty to seek a verdict based upon reason. State v. Avendano-Lopez, 79 Wn. App. 706, 904 P.2d 324 (1995) (citing State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978)).

Prosecutors must therefore act impartially and "with the object in mind that all admissible evidence and all proper argument be made, but that inadmissible evidence and improper argument be avoided." (Emphasis added.) State v. Torres, 16 Wn. App. 254, 263, 554 P.2d 1069 (1976).

As a general principle, when prosecutorial misconduct is alleged, the defendant bears the burden of establishing its prejudicial effect. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995); State v. Belgarde, 110 Wn.2d at 508.

To prevail on the claim, a defendant must show that the improper conduct prejudiced the outcome of his trial. State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006), cert. denied, 551 U.S.1137, 127 S.Ct. 2986, 168 L.Ed.2d 714 (2007).

**b. The prosecutor's misconduct in this case was
flagrant and incurable, and caused manifest constitutional
error under RAP 2.5(a)(3).** Mr. Starling may appeal the instances
of prosecutorial misconduct in the closing argument of his trial,
despite his trial attorney's failure to object contemporaneously,
under several rationales.

This Court will review prosecutorial misconduct even in the
absence of an objection in the trial court where the misconduct is
flagrant and ill-intentioned. Belgarde, 110 Wn.2d at 507.

In addition, the Court of Appeals in State v. Reed, 25 Wn.
App. 46, 48, 604 P.2d 1330 (1979), closely interlinked the
prohibition on prosecutorial misconduct that impinged on a
constitutional right to be misconduct of the "flagrant" variety, also
requiring no objection to be challenged on appeal. Reed, 25 Wn.
App. at 48-50. Either analysis permits Mr. Starling to appeal the
State's misconduct in closing.

(i) Flagrant misconduct.

In the present case, it was flagrantly improper under these
rules for the prosecutor to engage in the following argument:

Offering his personal opinion of the case by describing it as a “prosecutor’s dream come true.”

In closing, the State told the jury that there was evidence in the case from multiple sources, including eyewitness testimony and, in particular, video from the police squad car that pursued the defendant in the stolen vehicle. 8/20/09RP at 66. However, the prosecutor, Mr. Starling argues, went beyond this assessment of the evidence when he told the jury, “This case is a prosecutor’s dream come true.” 8/20/09RP at 66. This was improper. A prosecutor’s statement that clearly expresses his personal opinion as to the defendant’s guilt constitutes misconduct. State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006) (citing State v. Armstrong, 37 Wash. 51, 54-55, 79 P. 490 (1905)).

Offering his personal opinion as to the guilt of the defendant by telling the jury that the defendant was guilty, but was nonetheless taking the case to trial (in order to throw red herrings to the jury). The prosecutor argued:

As we talked about in jury instruction there are many reasons why people would go to trial. One very legitimate reason is because they didn’t do it. I would submit to you that based on all the evidence that you’ve heard and all the evidence you’ve seen that’s

not the reason Mr. Starling is taking this case to trial. I would submit to you Mr. Starling is hoping that just one of you gets caught up on one of the many red herrings that Defense Counsel has just mentioned[.]

8/20/09RP at 93. Misconduct occurs when it is clear and unmistakable that counsel is expressing a personal opinion, not just arguing an inference from the evidence. McKenzie, 157 Wn.2d at 54 (quoting State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59 (1983)). The prosecutor's improper argument above is not saved by slipping in a reference to the evidence and the prefatory language "I submit."

Rather, the prosecutor was stating his personal opinion that the defendant was exercising his right to trial in order to distract the jury from his guilt. The prosecutor's opinion informed the jury that he possessed broad knowledge of why certain cases are taken to trial ("because they didn't do it"), and thus the prosecutor's statement was expressing a personal opinion that "this case" was not taken to trial for that reason.

Demeaning defense counsel's exercise of his proper function by stating that it was counsel's job to nit-pick the case; and

Demeaning defense counsel's exercise of his proper

function by stating that it was counsel's job to throw red herrings in an attempt to see "what sticks."

The prosecutor also improperly argued in a manner and theme that demeaned defense counsel's exercise of his proper function, which is to raise reasonable doubt:

Now, defense counsel is doing what he has to do. He's doing his job. But I ask you to consider the concept of the red herring or the concept of throwing it up against the wall and seeing what sticks.

8/20/09RP at 92-93. This was improper. The deputy prosecutor may not impugn the character of the defendant's lawyer or disparage defense lawyers in general as a means to argue the defendant's guilt. See State v. Gonzales, 111 Wn. App. 276, 284, 45 P.3d 205 (2002) (deputy prosecutor impugned the integrity of defense counsel by suggesting the prosecutors, unlike defense attorneys, take an oath to "see that justice is served"), review denied, 148 Wn.2d 1012, 62 P.3d 890 (2003). The State's earlier comment was deeply aggravated by the prosecutor's subsequent comment that defense counsel was merely "nit picking the minutia" of the charges. 8/20/09RP at 92-93.

(ii) Constitutional error.

Mr. Starling's appellate challenge to the prosecutor's improper comments on constitutional matters may be premised on RAP 2.5(a)(3), as manifest constitutional error. State v. French, 101 Wn. App. 380, 387, 4 P.3d 857 (2002); see, e.g., State v. Fleming, 83 Wn. App. 209, 213-15, 921 P.2d 1076 (1996) (comments on failure to testify, and improper argument that acquittal required jury to conclude State's witnesses were lying, established manifest constitutional error, which was not harmless beyond a reasonable doubt).

By virtue of the above, the prosecutor commented negatively on the defendant's exercise of his right to take the case to trial and demand proof beyond a reasonable doubt to a jury.

The prosecutor's argument as to why the defendant was taking the case to trial was improper for the additional reason that it impugned Mr. Starling's lawful exercise of his right to take the case to trial. Mr. Starling argues that this comment was egregious in its impugnement of the defendant's lawful exercise of his right to a jury trial, as it faulted the defendant for wasting the jury's time by taking a case to trial when he was in fact guilty

c. The incurability of the prosecutor's misconduct, its constitutional dimension in certain aspects, and also its overall deprivation of Mr. Starling's right to a fair trial requires reversal despite the strength of the evidence.

- (i). *This Court's assessment of the prejudice caused by errors in a trial court criminal case provides authority for reversal under several doctrines.*

Where prosecutorial misconduct in closing argument is incurable for purposes of appellate review even in the absence of an objection, it is also reversible error, for similar reasons: that no curative instruction could have obviated the prejudice. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

Additionally, where prosecutorial misconduct impacts a specific constitutional right, such as the right to proof of every element of the offense beyond a reasonable doubt, constitutional error has occurred. See State v. Easter, 130 Wn.2d 228, 241-43, 922 P.2d 1285 (1996) (prosecutor's comment on defendant's pre-arrest silence, and evasive behavior, as showing guilt); Belgarde, 110 Wn.2d at 511-12 (prosecutor's reference to defendant's post-arrest silence); State v. Curtis, 110 Wn. App. 6,

13-14, 37 P.3d 1274 (2002) (prosecutor elicited testimony that defendant exercised Miranda rights); State v. French, 101 Wn. App. 385, 386, 4 P.3d 857 (2002) (prosecutor's comment on fact defendant did not testify), review denied, 142 Wn.2d 1022 (2001).

In this context of incurable error and error that infringes upon a defendant's constitutional rights – the latter carrying with it the requirement that error be shown by the State to be “harmless beyond a reasonable doubt,” the prosecutor's comments in Mr. Starling' trial require reversal. See State v. Easter, 130 Wn.2d at 241-43.

In addition, Mr. Starling argues in the alternative that the cumulative effect of the several instances of misconduct that occurred deprived him of a constitutionally fair trial. The constitutional right to due process of law demands that a criminal defendant receive a fair trial. U.S. Const. amend. 14; Wash. Const. art. 1 §§ 3, 22. For the very reason that a prosecutor, as a quasi-judicial officer, has the duty to act impartially and seek a verdict free from prejudice and based on reason, see State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976), a prosecutor's misconduct may deny the defendant a fair trial and due process of

law. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978).

Importantly, the Washington courts in criminal cases have specifically authorized reversal based on trial errors, even if inadequately preserved, when the Court sees that such errors had a cumulatively prejudicial effect that deprived the defendant of a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). In so doing, the courts are exercising discretion under RAP 2.5(a)(3) to review all of the defendant's claims. See State v. Curry, 62 Wn. App. 676, 679, 814 P.2d 1252 (1991); State v. Noel, 51 Wn. App. 436, 439, 753 P.2d 1017, review denied, 111 Wn.2d 1003 (1988).

(ii). *Incurable and flagrant error, considered together with closing argument misconduct that impinged specifically on Mr. Park's constitutional rights, require reversal in the present case despite a strong State's case.*

In assessing prejudice, it is pertinent to note that improper comments in closing argument may not require reversal of a conviction if "they were invited or provoked by defense counsel and are in reply to his or her acts and statements." State v. Russell,

125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

However, the State's comments above in the context of closing argument, amounted to prosecutorial misconduct that violated Mr. Starling's right to a fair trial. Allegedly improper comments are reviewed for misconduct "in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given." State v. Bryant, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998).

In this case, the prosecutor improperly, for some reason, emphatically and specifically, went beyond a summation of the evidence in this case and implied to the jury that the case was a "prosecutor's dream." Plainly, a prosecutor's personal opinion about the defendant's guilt is misconduct if expressed. Expressions of personal opinion by a prosecutor about the guilt of the defendant or the credibility of the witnesses are improper. State v. Dhaliwal, 150 Wn.2d 559, 577-78, 79 P.3d 432 (2003); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984) (reversing conviction).

These comments were tremendously improper and

prejudicial, because they implied strongly to the jury that amongst a comparison of the cases the prosecutor had handled, this case was one in which the evidence was stronger than all of them, in the prosecutor's personal opinion based on his depth of experience.

As the Court of Appeals has stated:

It is irrelevant what a prosecutor thinks about the evidence and the jury is already aware, based on the very fact of a criminal prosecution, that the prosecutor believes that he or she had sufficient evidence to prevail.

State v. Jackson, 150 Wn. App. 877, 889, 209 P.3d 553 (2009)

(prosecutor's personal assessment of strength of evidence was misconduct).

It was also highly prejudicial for the prosecutor to compare the present case with others and tell the jurors, or indeed reveal to them, that the particular case before him, and the jury, is among the strongest the deputy prosecuting attorney had seen.

For similar reasons, it was deeply harmful to Mr. Starling's fair trial rights to tell the jury that this was a case in which a guilty defendant was taking a case to trial to try to somehow escape his due punishment. The State made this remark, once again, in the context of the prosecutor's personal experience handling cases

against criminal defendants.

These are incurable errors. Once the jury has heard the expert lawyer/prosecutor's personal assessment of the case, and his comparison of the case to others he has handled, this secret "insider" information would carry great weight with the jury, and would sway the jury in a close case. For example, in State v. Heaton, 149 Wn. 452, 271 P. 89 (1928), the Supreme Court reversed the defendant's conviction where the prosecutor stated he had worked with the police witnesses for a long time and therefore knew their character. The court found that the declarations by the prosecutor transcended the bounds of legitimate argument and offered an insider's assessment of the strength of the case, based on the prosecutor's personal experience outside the courtroom.

Such argument is incurable:

Such a statement as this cannot be met by any answering argument, and it is vain to attempt to do away with the prejudicial effect of such assertions by an instruction of the court to the effect that argument of counsel is not to be regarded as evidence.

Heaton, at 460-61 (cited with approval in State v. Smith, 67 Wn. App. 838, 844, 841 P.2d 76 (1992)).

The prosecutor's acts of demeaning defense counsel's

proper role were also incurable, and similarly require reversal. A prosecutor's closing arguments are improper if he or she makes comments that demean defense counsel or defense counsel's role. See State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008), cert. denied, ___ U.S. ___, 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009); see also State v. Gonzales, 111 Wn. App. at 282. Such comments impugn the integrity of the adversary system and are inconsistent with the prosecutor's obligation to ensure a verdict free from prejudice and based on reason rather than passion. Viereck v. United States, 318 U.S. 236, 247-48, 63 S.Ct. 561, 87 L.Ed. 734 (1943); State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993).

The present case is similar to Gonzales, where the Court of Appeals found misconduct when the prosecutor implied that his job was to seek justice, and the defense attorney's was not. Gonzales, 111 Wn. App. at 283. On appeal, this Court of Appeals found the comment rose to the level of prosecutorial misconduct because it disparaged defense counsel and sought to “draw a cloak of righteousness” around the State's position. Gonzales, 111 Wn. App. at 282.

Mr. Starling argues that these comments alone require reversal. They were a proverbial bell of outcome-determinative prejudice that once rung during rebuttal closing argument, could not have been “unrung.” State v. Powell, 62 Wn. App. 914, 816 P.2d 86 (1991) (citing State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1976)). In this case, the prosecutor, by all of these remarks, quite simply told the jury to not take the defense arguments in closing seriously.

But defense counsel raised significant, viable concerns in argument that he propounded as establishing reasonable doubt. It was materially prejudicial for the prosecutor to disparage the defendant, the defense, and the defendant’s counsel in the manner that the State repeatedly did in this case.

Mr. Starling recognizes that the Court of Appeals has held in one case that a prosecutor’s characterization of defense counsel’s closing argument as “smoke” and “an attempt to confuse the evidence” was not reversible misconduct. State v. Guizzotti, 60 Wn. App. 289, 298, 803 P.2d 808 (1991). However, in Guizzotti, defense counsel had argued that the victim had not reported the rape to the police or security patrol, and the prosecutor simply

responded that no evidence showed that any police or security officers were present to take a report. Guizzotti, 60 Wn. App. at 297-98. The Court found counsel's choice of words not reversible only because the prosecutor was pointing out that defense counsel raised unfounded contentions during closing argument. Guizzotti, 60 Wn. App. at 298.

Here, the prosecutor's argument generally disparaged defense counsel's role, in a case where counsel had raised issues of concern that manifestly could have created reasonable doubt – but for the diminishment of the defendant's lawyer's proper role. Mr. Starling's lawyer questioned whether Mr. Lewis falsely told the 911 operator or police that the defendant had a gun. 8/20/09RP at 86. He also pointed out that Ms. Anderson lied on several matters to the investigating officer and asked the jury to use this fact to assess her credibility. 8/20/09RP at 75-76. In this connection, counsel noted correctly that Ms. Anderson in particular was a critical witness; she indeed provided the only evidence of force necessary for the robbery conviction, and of the timing of her departure from the car, a matter important for purposes of the unlawful imprisonment charge. 8/20/09RP at 77, 84; see

8/19/09RP at 152-54. The State's misconduct cannot be excused from its reversibly prejudicial effect on the ground that Mr. Starling's counsel proffered such a fallacious and frivolous argument on behalf of his client, that he somehow 'deserved' to hear such a rebuttal by the State.

Reversal is also required under a constitutional error standard. A well-settled body of law holds that constitutional error is presumed prejudicial unless the State shows that it is harmless beyond a reasonable doubt. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997); State v. Olmedo, 112 Wn. App. 525, 533, 49 P.3d 960 (2002).

The prosecutor in this case repeatedly impugned Mr. Starling's exercise of his right to take the State's charges to trial. But it is highly prejudicial to ask the jury to determine that the defendant is guilty because he exercised a right. State v. Charlton, 90 Wn.2d 657, 660, 585 P.2d 142 (1978) (improper reference to the exercise of the marital privilege). The prejudicial gravamen that rises to the level of constitutional misconduct occurs when the State refers to the defendant's exercise of the right or privilege for the purpose of inciting the jury to infer guilt. See Easter, 130

Wn.2d at 242 (officer's testimony that the defendant remained silent was "elicited to insinuate Easter's guilt").

Here, the prosecutor precisely asked the jury to conclude that the defendant was exercising his right to a jury trial (apparently as opposed to just pleading guilty) because he was indeed guilty and wanted to try to distract the jury from his guilt by the "red herring" and "seeing what sticks" strategies.

Overall, the State's repeated crafting of these improper arguments exacerbated the harm of the prosecutor's misconduct to the level of ill-intentioned and flagrant, and was of such nature and force as to deprive Mr. Starling of his due process right to a fair trial. The State must therefore demonstrate these errors were harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Easter, 130 Wn.2d at 242. And this Court must be convinced the errors did not contribute to the jury verdicts in Mr. Starling' case. Chapman, 386 U.S. at 24.

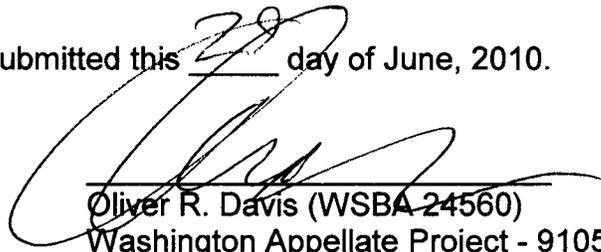
Based on the foregoing, this Court, in this case, cannot be convinced beyond a reasonable doubt that the prosecutor's misconduct did not affect the jury's determination of guilt. Mr.

Starling's convictions must be reversed. Easter, 130 Wn.2d at 242-43.

E. CONCLUSION

Mr. Starling respectfully requests this Court reverse his judgment and sentence.

Respectfully submitted this 29 day of June, 2010.



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Attorneys for Appellant.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 64366-5-I
v.)	
)	
GERALD STARLING,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JUNE, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF JUNE, 2010.

X _____ 

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