

65703-8

65703-8

NO. 65703-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

DION EARL JOHNSON,

Appellant.

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1000 4TH AVENUE  
SEATTLE, WA 98101

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

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APPELLANT'S OPENING BRIEF

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## A. SUMMARY OF ARGUMENT

In a credibility contest between the State's key and complaining witness, Denise Hunter, and defendant Dion Johnson, a jury convicted Mr. Johnson of all but one charge against him. Trial errors warrant reversal of Mr. Johnson's convictions on three independent grounds: he was denied the right to cross-examine Ms. Hunter and present expert evidence on an issue key to the defense; the prosecutor committed misconduct by vouching for Ms. Hunter and disparaging a defense witness in closing argument; and an outburst by a spectator during opening statements denied Mr. Johnson's right to a fair trial. In the alternative, Mr. Johnson's sentence suffers from two errors: first, the special verdict instruction violated State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010) by requiring unanimity even to find the State had not met its burden; second, the State failed to prove and the court failed to analyze the comparability of a federal offense included in Mr. Johnson's offender score.

## B. ASSIGNMENTS OF ERROR

1. Mr. Johnson was denied his constitutional right to confront and cross-examine witnesses and present a defense when the trial court ruled defense counsel could not cross-examine

Denise Hunter regarding her drug use and could not present related expert testimony.

2. The trial court abused its discretion by excluding testimony and expert evidence regarding Denise Hunter's drug use.

3. Mr. Johnson was denied a fair trial when the prosecutor vouched for the State's key witness.

4. Repeated instances of prosecutorial misconduct denied Mr. Johnson his right to a fair trial safeguarded by the Fourteenth Amendment and Article 1, sections 3 and 22.

5. The trial court erred in giving Instruction 30, which improperly instructs on the issue of unanimity for the special verdict.

6. The trial court erred in including a federal conviction in the offender score without any proof or analysis of its classification.

7. Mr. Johnson's constitutional right to a fair trial was denied when a spectator interjected herself into the trial during opening statements.

8. Cumulative error denied Mr. Johnson his due process right to a fair trial.

### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A criminal defendant has the constitutional right to present a defense and to confront and cross-examine witnesses. The rules of evidence provide discretion to the trial court regarding cross-examination related to a witness's truthfulness. But that discretion is constrained when the witness is crucial to the State's case. Did the trial court violate Mr. Johnson's constitutional right and abuse its discretion when it prevented Mr. Johnson from cross-examining the complaining witness and presenting expert testimony regarding the effect of her drug use on her ability to perceive and recall the events in question?

2. A criminal defendant has a constitutional right to due process, including a fair trial. As quasi-judicial officers, prosecutors have the obligation to ensure an accused person receives a fair and impartial trial. A prosecutor commits misconduct if he or she acts partially or fails to seek a verdict free from prejudice. Prosecutorial misconduct occurs when the prosecutor vouches for a witness or relates to the jury information or argument not in evidence. Was Mr. Johnson denied a fair trial where during closing argument the prosecutor vouched for the State's primary witness

and tried to minimize the credibility of a defense witness through facts not in evidence?

3. A jury does not need to be unanimous in a special verdict finding when it determines that the State has not met its burden of proof. Jury instructions must be manifestly clear to the average juror. The trial court instructed the jury that it had to be unanimous to answer “no” to the special verdict for an aggravator. This Court has held that the issue of an improper unanimity instruction can be raised for the first time on appeal. Where the deliberative process requires accurate instructions on the requirement of unanimity, does the incorrect instruction undermine the jury’s special verdict finding and require this Court to strike the special verdict?

4. A sentence based on a miscalculated offender score is not authorized by law. A court may not include a prior federal conviction in an offender score unless its classification is proved by the State by a preponderance of the evidence. If a prior conviction is improperly included in an offender score, the proper remedy is to vacate the sentence and remand the matter to the trial court for an evidentiary hearing. Where the State failed to introduce any evidence or argument relating to the classification of Mr. Johnson’s prior federal conviction and the trial court conducted no analysis,

must Mr. Johnson's sentence be vacated and the matter remanded to the trial court for an evidentiary hearing?

5. A criminal defendant has a constitutional right to a fair trial, which must be preserved by the court. Spectators may not participate in the trial. Was the fairness and impartiality of Mr. Johnson's trial jeopardized when a spectator burst into the courtroom during oral argument and exclaimed to the judge "your honor, I am scared of this woman"?

6. Cumulative error may deprive an accused person of a fundamentally fair trial, in violation of the due process clauses of the Washington and federal constitutions. In light of the errors assigned above, should this Court conclude that the cumulative effect of the errors denied Mr. Johnson a fundamentally fair trial?

#### D. STATEMENT OF THE CASE

##### 1. Background.

Mr. Johnson and Denise Hunter have two children together. 1/27/10RP 145.<sup>1</sup> They have known each other approximately

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<sup>1</sup> All cites to reports of proceedings herein refer to the "Revised/Corrected Transcript" version. The consolidated verbatim report of proceedings for January 27, January 28 and February 1, 2010 are referred to herein by the first date transcribed, 1/27/10.

eleven years and have dated on and off. 1/27/10RP 145. At times, the couple lived together. 1/27/10RP 146.

Mr. Johnson was convicted of assaulting Ms. Hunter in 2005. Exhibit 24. The sentence included a 10-year no contact order. Id.; 4RP 75-76. Nonetheless, after Mr. Johnson served his jail time, Ms. Hunter and he lived together and conceived their second child. 1/27/10RP 153-54.

## 2. The Instant Charges Against Mr. Johnson.

This case arose out of charges against Mr. Johnson for felony violation of the no-contact order (five counts), felony harassment (one count), and witness tampering (three counts). CP 6-8, 20-27. For each of these nine counts, the State sought an aggravating factor for an ongoing pattern of psychological, physical or sexual abuse of Ms. Hunter evidenced by multiple incidents over a prolonged period of time or deliberate cruelty or intimidation of Ms. Hunter. CP 40-47 (Third Amended Information). Mr. Johnson was also charged with one count of bail jumping. Id.

### a. *Count One: Felony Violation of a No-Contact Order*

Ms. Hunter alleged that Mr. Johnson approached her at a health clinic on November 18, 2008. 1/27/10RP 157. Her daughter

was with her and her grandmother was waiting outside the clinic in her car. 1/27/10RP 158. Ms. Hunter testified that she was preparing to leave the clinic when she saw Mr. Johnson out of the corner of her eye; he approached and tried to kiss her saying, “you don’t love me anymore?” 1/27/10RP 158-59. Ms. Hunter testified she pushed Mr. Johnson away and he tried to pull her toward him. Id. Ms. Hunter returned to the clinic to complete her appointment, leaving her daughter and grandmother outside where she had last seen Mr. Johnson. Id. The nurse who assisted Ms. Hunter did not see Mr. Johnson—even when she accompanied Ms. Hunter outside after her appointment. 2/3/10RP 18-19, 22. Ms. Hunter did not call the police. 2/2/10RP 60-61; 2/3/10RP 17.

b. *Count Two: Felony Violation of a No-Contact Order*

Ms. Hunter alleged that she came into contact with Mr. Johnson next on February 14, 2009. She was nine months pregnant and stopped by Champ’s, a restaurant and bar in Skyway, with some friends. 1/27/10RP 163-64. Ms. Hunter testified that she saw Mr. Johnson’s sister and cousin when she arrived in the parking lot and did not feel comfortable going in. 1/27/10RP 165. She waited in the car while her companion went into Champ’s.

1/27/10RP 166. Ms. Hunter testified that Mr. Johnson came towards her and grabbed her by the hair, using force. 1/27/10RP 166.

Ms. Hunter testified that Mr. Johnson told her “I got something for you and whoever you’re calling on the phone” and then went to the trunk of his car. 1/27/10RP 167. She believed he had a gun and was going to shoot her. 1/27/10RP 168-69. Ms. Hunter called 911 only after she got back in the car to leave Champ’s; but her phone malfunctioned and she never completed the call. 1/27/10RP 170. There was a Sheriff’s station across the street, but Ms. Hunter did not go there to report the incident. 1/27/10RP 172-73.

Marie Reed, who was with Mr. Johnson that evening, testified that Mr. Johnson did not speak to or touch Ms. Hunter. 2/4/10RP 26-27. Instead, Ms. Hunter grabbed Mr. Johnson’s hair as he was walking into Champ’s. 2/4/10RP 26. Their group then walked out of the bar, intending to leave. Id.

When the police arrived, they found Mr. Johnson sleeping in a car behind Champ’s. 2/2/10RP 119-20.

c. *Count Three: Felony harassment*

Based on this February 14, 2009 incident at Champ's, the State also charged Mr. Johnson with one count felony harassment. CP 42-43.

d. *Count Four: Tampering with a witness*

Ms. Hunter alleged Mr. Johnson next contacted her on August 3, 2009. She testified he called her from a blocked phone number, and they had a 25-minute conversation. 2/2/10RP 16-18, 21-22. Ms. Hunter testified she was looking for an apology from Mr. Johnson. 2/2/10RP 22. He offered her 5,000 dollars and a car if she did not appear in court to testify against him. 2/2/10RP 18-19. The State charged Mr. Johnson with tampering with a witness under RCW 9A.72.120. CP 43.

e. *Count Five: Felony Violation of a No-Contact Order*

On August 23, 2009, Ms. Hunter alleged Mr. Johnson called her twice, and they spoke for short periods of time. 2/2/10RP 22. She testified he offered her 3,000 dollars—less money than on August 3—to not appear in court and testify. 2/2/10RP 22-23. The State accordingly charged Mr. Johnson with felony violation of a no-contact order. CP 43.

f. *Count Six: Tampering with a witness*

Based on this August 23, 2009 contact, the State also charged Mr. Johnson with one count tampering with a witness. CP 44. The jury acquitted Mr. Johnson of this count. CP 94.

g. *Count Seven: Bail jumping*

The State charged Mr. Johnson with a single count of bail jumping for failing to appear for a court hearing on September 11, 2009. CP 45; see Exhibits 19-22.

h. *Count Eight: Felony Violation of a No-Contact Order*

Ms. Hunter further alleged Mr. Johnson called her on September 18, 2009, around their son's birthday. 2/2/10RP 28. She testified that he called from a blocked number while she was sleeping. 2/2/10RP 29-30. He was "frantic" and sounded "trapped" and said not to let the police get him. 2/2/10RP 30. According to her testimony, he offered to give back clothes, jewelry, electronics and shoes he had stolen from her if she did not testify in court and told her his family was going to be mad at her. 2/2/10RP 30-31.

i. *Count Nine: Tampering with a witness*

Based on this September 18, 2009, contact with Ms. Hunter, the State also charged Mr. Johnson with one count tampering with a witness. CP 46.

j. *Count Ten: Felony Violation of a No-Contact Order*

Ms. Hunter finally alleged that she was contacted by Mr. Johnson through a third party on December 8, 2009. She testified she received a phone call from Toni Washington, her uncle's niece. 2/2/10RP 32-33. Ms. Hunter alleged Ms. Washington stated Mr. Johnson had just called her and that her charges were the only thing preventing him from being released from jail and she needs to drop the charges. 2/2/10RP 33-34.

Ms. Washington testified during the defense case and told the jury she did not talk to Ms. Hunter on December 8 and never told her that Mr. Johnson wanted her to drop charges against him. 2/4/10RP 29-30. A recording of the alleged jail call from Mr. Johnson to Ms. Washington was admitted at trial. Exhibit 7. The contents of the recording do not identify the caller, the recipient, Ms. Washington or any obvious request that the recipient contact

Ms. Hunter about dropping the charges against Mr. Johnson. CP \_\_\_ (Sub # 62A (Transcript of Jail Call)).<sup>2</sup>

### 3. The Trial, Conviction and Sentence

During the State's opening argument, a woman burst into the courtroom exclaiming "she's scaring me." Opening Statement RP 11.<sup>3</sup> The trial court instructed the woman to leave the courtroom, but did not provide a limiting instruction to the jury. Id. The defense did not object at the time, but subsequently moved for a new trial under Criminal Rule 7.5 because the outburst denied Mr. Johnson a fair trial. CP 102-04.<sup>4</sup> The court never ruled on the motion.

Denise Hunter, the complaining witness, was the State's first and main witness at trial. See generally 1/27/10RP 144 through 2/2/10RP 103. The defense presented two witnesses: Marie Reed, a friend of Mr. Johnson's who was with him on the evening of February 14, 2009, and Toni Washington, who was the recipient of

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<sup>2</sup> A supplemental designation of clerk's papers has been filed requesting the trial court transmit the transcript of jail call to the Court.

<sup>3</sup> To avoid confusion the verbatim report of proceedings for the statements, which were delivered on February 1, 2010, is referred to as "Opening Statement RP" and not by date.

<sup>4</sup> The motion identifies the woman who made the exclamations as Mr. Johnson's wife. CP 104.

a jail call from Mr. Johnson that formed the basis of one of the felony violation of a no-contact order charges. See 2/4/10RP 24, 29.

Mr. Johnson was acquitted of one count of witness tampering. CP 94. He was convicted of the remaining counts as charged. CP 84, 86, 88, 90, 92, 95, 96, 98, 100. Using special verdict forms, the jury also found Mr. Johnson guilty of the aggravator for eight counts. CP 85, 87, 89, 91, 93, 97, 99, 101.<sup>5</sup> The trial court consequently imposed an exceptional sentence. CP 124.

Additional facts are set forth in the relevant argument sections below.

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<sup>5</sup> The trial court merged the two counts of witness tampering at sentencing. CP 124.

## E. ARGUMENT

1. BY REFUSING TO ALLOW MR. JOHNSON TO CROSS-EXAMINE THE COMPLAINING WITNESS ABOUT THE EFFECT OF SERIOUS DRUG USE ON HER ABILITY TO PERCEIVE AND RECALL, THE TRIAL COURT VIOLATED MR. JOHNSON'S CONSTITUTIONAL RIGHTS AND ABUSED ITS DISCRETION.

- a. In a pretrial ruling, the trial court denied Mr. Johnson the right to cross-examine Denise Hunter and present expert testimony related to her ability to accurately perceive and recall.

The State's case against Mr. Johnson rested entirely on Denise Hunter, the complaining witness. Only Ms. Hunter could testify as to each of the charges against Mr. Johnson and she was the only one present, aside from Mr. Johnson, for most of the alleged conduct. Thus, she was *the* key State witness.

Ms. Hunter has previously been arrested for driving while under the influence of phencyclidine ("PCP") and has admitted to using PCP. 2/2/10RP 104; 1/27/10RP 46; CP 36 (Defense Trial Brief). "PCP is a hallucinogenic drug that produces symptoms similar to schizophrenia, and can cause the user to believe things that are not true and lose substantial portions of time." CP 36; accord State v. Campas, 59 Wn. App. 561, 565, 799 P.2d 744 (1990) ("PCP is a drug that, with chronic abuse, induces psychosis

and violent behavior, tending to result in organic cognitive problems which may not begin to clear for 6 to 12 months.”). On December 3, 2009, Ms. Hunter tested positive for PCP. 1/27/10RP 46, 116-17. Though the record does not reflect when Ms. Hunter’s arrest occurred or the dependency initiated, her daughter was removed from her home prior to the date of any of the incidents alleged here. See 2/2/10RP 92-93 (testimony about events occurring before the allegation in Count One); 2/2/10RP 95-96 (testimony that daughter was removed from home prior to the same events). Her use of drugs, including her DUI arrest, formed part of the basis for the State initiating dependency proceedings as to her daughter. See 2/2/10RP 104; CP 35-37. At a pretrial hearing, she admitted using PCP in late November and early December 2009. 1/27/10RP 117. Count ten against Mr. Johnson arose from events allegedly occurring on December 8, 2009. CP 46.

Prior to trial, Mr. Johnson moved to cross-examine Ms. Hunter regarding her drug use and how it affected her ability to testify accurately, recall and perceive. CP 35 (Defense Trial Brief, Motion 7); 1/27/10RP 42-43, 45. Defense counsel also secured an expert to testify to “the effects of PCP upon one’s ability to recall

and perceive.” 1/27/10RP 100, 101-02, 129.<sup>6</sup> The State moved to exclude all such evidence. See 1/27/10RP 42.

The trial court ruled that the defense could not elicit testimony about Ms. Hunter’s “drug use because there just isn’t any way of tying that into what’s going on here” and, without having heard from the defense expert, the court further ruled “there is no evidence that it affects either her perception or her ability to recall or ability to testify truthfully now.” 1/27/10 RP 142.

- b. The pretrial ruling precluding cross-examination of Denise Hunter on her ability to perceive and recall violated Mr. Johnson’s constitutional right to confront and cross-examine witnesses and was an abuse of discretion.

A criminal defendant must be allowed to confront and cross-examine adverse witnesses under the federal and state constitutions. Const. art. I, § 22;<sup>7</sup> U.S. Const. amend. VI;<sup>8</sup> State v.

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<sup>6</sup> The trial court indicated during argument on the pretrial motion that expert testimony would likely be necessary. 1/27/10RP 49.

<sup>7</sup> Article I, section 22 provides in relevant part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases . . . .

O'Connor, 155 Wn.2d 335, 348, 119 P.3d 806 (2005). Though the right is not absolute, it “must be zealously guarded.” State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). The right to confront and cross-examine is limited by “general considerations of relevance.” Id. at 621.

Though evidence of a witness’s character is not typically admissible “for the purpose of proving action in conformity therewith on a particular occasion[.]” ER 608 specifically provides for inquiry on cross-examination into specific instances of a witness’s conduct for the purpose of attacking her credibility. Compare ER 404(a) with ER 608(b). It is within the discretion of the trial judge to admit evidence under ER 608. ER 608(b). “In exercising its discretion, the trial court may consider whether the instance of misconduct is relevant to the witness's veracity on the stand and whether it is germane or relevant to the issues presented at trial.” O'Connor, 155 Wn.2d at 349; see ER 405.

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<sup>8</sup> The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The trial court abuses its discretion where its decision is manifestly unreasonable or based on untenable grounds. Id. at 351. It is an abuse of discretion not to allow cross-examination where a witness is crucial and the alleged misconduct constitutes the only available impeachment. State v. Clark, 143 Wn.2d 731, 766, 24 P.3d 1006 (2001). “The more essential the witness is to the prosecution’s case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters.” Darden, 145 Wn.2d at 619.

Evidence of a witness’s drug use is admissible to the extent it affects her ability to perceive or testify accurately about the events in question, at least if it is supported by medical or scientific evidence. The Washington Supreme Court, in State v. Renneberg, 83 Wn.2d 735, 737, 522 P.2d 835 (1974), held that where medical or scientific evidence connects the witness’s drug use to a lack of veracity, evidence of drug use may be admissible as relevant to credibility.<sup>9</sup> Going further, the Court held that evidence of drug use is admissible as proof of character against a defendant who puts his or her character into evidence. Id. at 738.

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<sup>9</sup> In Renneberg, it was the State who sought to admit drug use evidence against a defendant. Because the State proffered no medical or scientific evidence connecting defendant’s drug use to her veracity, it was inadmissible for that purpose. 83 Wn.2d at 737.

Particularly where the evidence is crucial to the defense, exclusion of drug use evidence is reversible error. In State v. Brown, this Court reviewed the trial court's exclusion of (1) evidence that the complaining witness used LSD on the night of the alleged crime and (2) expert testimony that LSD may affect the user's ability to perceive. State v. Brown, 48 Wn. App. 654, 655, 739 P.2d 1199 (1987). During her testimony, the complaining witness denied using LSD. See id. at 659. Defendants sought to admit testimony that the complaining witness said she was using LSD around the time of the crime and from a psychiatrist who would testify that "the drug can cause perceptual distortions and mood swings." Id. at 657. The trial court excluded the evidence under ER 403, finding that the prejudicial effect outweighed its probative value. Id. at 658. On appeal, this Court found that the evidence of the witness's ability to perceive was crucial to the defendant. Id. at 660. Consequently, the trial court's ruling was held an abuse of discretion and not harmless. Id. at 660-61. This Court reasoned that such "crucial evidence relative to the central contention of a valid defense" could not properly be excluded under ER 403. Id. at 660.

Like the allegations of rape in Brown, the domestic violence-related charges against Mr. Johnson were for the most part supported only by the testimony of the complaining witness, Denise Hunter. Ms. Hunter's ability to testify accurately about the events in question, accordingly, was central to Mr. Johnson's defense. Mr. Johnson proffered (1) evidence that Ms. Hunter had used PCP within the time period of at least some of the alleged crimes and (2) expert scientific evidence that PCP affects the ability to perceive and recall after the instance of use. CP 35 (Defense Trial Brief, Motion 7); 1/27/10RP 42-43, 45, 100, 101-02, 129. The trial court thus prevented Mr. Johnson from presenting evidence crucial to his defense and supported by expert testimony, in contravention of Brown and Renneberg. 48 Wn. App. at 660-61; 83 Wn.2d at 737.

Mr. Johnson's proffer is unlike the evidence a defendant sought to admit in a case relied on by the State below. In State v. Tigano, Division Two considered the admissibility of evidence of drug use to impeach a witness's veracity where defendant's offer of proof failed to show the witness's drug use might have affected his ability to perceive the events in question. State v. Tigano, 63 Wn. App. 336, 344-45, 818 P.2d 1369 (1991). Because there was no evidence to "show that [the witness] used drugs at a time when

such use might have affected his ability to perceive[,]" Division Two held the exclusion of such evidence proper. Id. at 345. Mr. Johnson's evidence against Ms. Hunter here was distinct from the evidence in Tigano because Mr. Johnson specifically linked the witness's PCP use to her ability to perceive *at the time of the events in question* and to recall accurately those events *at trial*.

Tigano is also distinguishable on other grounds. In reciting relevant case law, the Division Two Tigano court read the holding in Renneberg broadly. It cited Renneberg to support the statement "[e]vidence of drug use on other occasions, or of drug addiction, is generally inadmissible on the ground that it is impermissibly prejudicial." Id. at 344. However, Renneberg is more accurately limited to the holding that absent scientific or medical evidence connecting the witness's drug use to a lack of veracity, bare evidence of drug use (other than at the exact time of the event in question or while on the stand) should be excluded. 83 Wn.2d at 737.

Division Two relied on this overly broad reading of Renneberg to hold expert testimony that a "general pattern of drug use could have affected his perception of the events about which he testified" was also not admissible because defendant could not

show use at the time of the events in question. 63 Wn. App. at 345. In addition to reading Renneberg too broadly, this part of the Tigano decision lacks reason. If a defendant can show through expert testimony that a witness's drug use could affect her ability to perceive at the time of the events in question or to later (e.g., at trial) recall those events accurately, the evidence is of precisely the same nature allowed by this Court and the Supreme Court to show a witness's lack of veracity. See Brown, 48 Wn. App. 654; Renneberg, 83 Wn.2d 735. Moreover, such evidence is no more prejudicial than evidence of drug use at the instant of the alleged crime, which Tigano does not hold inadmissible. In each case, furthermore, any concern over prejudice can be mitigated through a limiting instruction. See ER 403. Tigano, accordingly, does not control here.

The trial court's refusal to allow Mr. Johnson to present evidence of Ms. Hunter's drug use and expert evidence of its effect on her ability to perceive and recall was an abuse of discretion and constitutional violation.

- c. Regardless of the pretrial ruling, once the door was opened, Mr. Johnson should have been allowed to cross-examine Ms. Hunter regarding her ability to perceive and recall.

Regardless of the propriety of excluding key evidence about Ms. Hunter's ability to perceive and recall prior to trial, the trial court committed reversible error by again denying Mr. Johnson the opportunity to present such evidence once Ms. Hunter opened the door. As discussed above, Ms. Hunter's daughter had been found dependent and removed from the home in part because of Ms. Hunter's illicit drug use. On re-cross-examination by defense counsel, Ms. Hunter responded to a question about the age of her daughter by testifying, "My daughter wasn't living with me. She's living with my grandmother because of the abuse [by Mr. Johnson]." 2/2/10RP 96. Her testimony was incomplete, and thus provided the jury an inaccurate portrayal, because it blamed her daughter's removal on Mr. Johnson's alleged abuse without any acknowledgment of the effect of Ms. Hunter's own drug use.

Defense counsel accordingly requested that she be allowed to cross-examine Ms. Hunter on the issue and show that the living arrangement as to her daughter was also the result of Ms. Hunter's drug use. 2/2/10RP 103-04. The defense argued that the door had

been opened by Ms. Hunter's incomplete testimony. Id. The trial court nonetheless ruled that the cross-examination would not be allowed. 2/2/10RP 104-05.

This ruling was at least as erroneous as the court's pretrial ruling. As a result, the jury heard negative testimony about Mr. Johnson's alleged abuse and the effects it had on his family. But the court denied Mr. Johnson the opportunity to offer the jury a more complete picture. It is the function of the jury to weigh evidence. State v. Atsbeha, 142 Wn.2d 904, 925, 16 P.3d 626 (2001) ("This court has long recognized that it is the function and province of the jury to weigh the evidence and determine the credibility of the witnesses and decide disputed questions of fact." (quoting State v. Dietrich, 75 Wn.2d 676, 677-78, 453 P.2d 654 (1969))). The trial court's ruling denied the jury that opportunity and prevented Mr. Johnson from presenting evidence and cross-examining Ms. Hunter on an issue key to his defense.

- d. Mr. Johnson's conviction must be reversed because the exclusion of evidence crucial to his defense cannot be harmless.

An error of this constitutional magnitude can only be harmless if the State shows beyond a reasonable doubt that any reasonable jury would have reached the same result absent the

error. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). This case came down to whether the jury believed Denise Hunter. The evidence related to the continuing effects of Ms. Hunter's drug use was crucial to Mr. Johnson's defense that Ms. Hunter was not accurately portraying events. Like Brown, where this Court could not "characterize[] the error" of excluding such testimony "as harmless[,] Mr. Johnson's convictions must be reversed. 48 Wn. App. at 661; accord Darden, 145 Wn.2d at 626, 628 (exclusion of cross-examination of key witness not harmless and remanding for new trial); Jones, 168 Wn.2d at 724-25 (exclusion of defendant's version of events not harmless even where evidence was "not airtight").

2. THE PROSECUTOR COMMITTED MISCONDUCT IN VIOLATION OF MR. JOHNSON'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY VOUCHING FOR THE STATE'S PRIMARY WITNESS IN CLOSING ARGUMENT.

- a. Principles of due process forbid prosecutors from engaging in misconduct to obtain convictions.

As a representative of the State, a prosecuting attorney has the obligation to ensure due process in a criminal case.

Prosecutors, as quasi-judicial officers, have the duty to seek verdicts free from prejudice and based on reason and "to act

impartially in the interest only of justice.” State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); accord State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). This is consistent with the prosecutor’s obligation to ensure an accused person receives a fair and impartial trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Monday, No. 82736-2, Slip. Op. at 10, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (June 9, 2011); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978); U.S. Const. amends. V, XIV; Const. art. I, §§ 3, 22.

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger, 295 U.S. at 88.

A defendant who fails to object to an improper remark may assert prosecutorial misconduct where the prosecutor’s argument was so “‘flagrant and ill intentioned’ that it causes enduring and

resulting prejudice that a curative instruction could not have remedied.” State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005) (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995)); accord State v. Fleming, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996).

- b. The prosecutor committed flagrant misconduct when she vouched for the State’s primary witness during closing argument.

It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness. Monday, Slip. Op. at 11; State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008); State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995); State v. Horton, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). The error is prejudicial if it is “clear and unmistakable” that counsel is expressing a personal opinion. Brett, 126 Wn.2d at 49; State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598 (1985). “Improper prosecutorial vouching occurs when the prosecutor places the prestige of the government behind the witness by providing personal assurances of the witness’s veracity.” United States v. Ortiz, 362 F.3d 1274, 1278 (9th Cir.2004) (emphasis added) (quoting United States v. Smith, 962 F.2d 923, 933 (9th Cir.1992)).

No bright-line rule dictates when vouching requires reversal. State v. Korum, 120 Wn. App. 686, 86 P.3d 166 (2004), rev'd on other grounds, 157 Wn.2d 614, 141 P.3d 13 (2006). But “[w]here the prosecutor during closing argument gives a personal opinion on the credibility of witnesses, misconduct occurs.” State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996); accord Monday, Slip. Op. at 11. A prosecutor’s bolstering of the State’s key witness and attempts to introduce evidence not admitted at trial during closing argument can be “flagrant and ill-intentioned.” State v. Alexander, 64 Wn. App. 147, 155-56, 822 P.2d 1250 (1982) (reversing convictions and remanding after determining cumulative error).

Here, the prosecutor vouched for the alleged victim and the State’s primary witness, Denise Hunter, during closing argument. First, she told the jury there was “no reason to doubt” Ms. Hunter:

Denise’s testimony is corroborated by other witnesses’ testimony and by the other evidence you have heard in this case [which prosecutor stepped through]. Because of that *there is no reason to doubt her*.

2/8/10RP 36 (emphasis added).<sup>10</sup>

Even more flagrantly, the prosecutor stated:

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<sup>10</sup> The consolidated verbatim report of proceedings for February 8, March 1, May 14 and June 11, 2010 is referred to herein by the first date transcribed, 2/8/10RP.

In opening, defense told you that Denise was a scorned woman. *I don't believe Denise is scorned and I believe that hell hath no fury like a woman who's gone through nine years of physical and emotional abuse and has come out the other side through domestic violence support advocacy.*

2/8/10RP 43 (emphasis added). These arguments were intended to inflame the jury and enrage their emotions. In particular, the latter statement further has no basis in the evidence and constituted the prosecutor's personal injection into the case.

2/8/10RP 43 ("*I don't believe Denise is scorned and I believe that hell hath no fury like a woman . . . .*" (emphasis added)). Even the statement that "there is no reason to doubt Ms. Hunter" lacks basis in the record as defense witnesses Marie Reed and Toni Washington contradicted Ms. Hunter's testimony.

- c. The prosecutor's misconduct prejudiced Mr. Johnson's due process right to a fair trial, requiring reversal of his convictions.

This prosecution boiled down to a credibility contest between the State's complaining witness, Denise Hunter, and the accused's theory and witnesses. Because the evidence supporting the charges was equivocal, the prejudicial effect of the improper argument was amplified by the prosecutor's bolstering of Ms. Hunter's credibility. The prosecutor's vouching for Ms. Hunter's

honesty and integrity rendered the jury's decision a moot point. Cf. Atsbeha, 142 Wn.2d at 925 (jury's responsibility to assess credibility). Had the jury been required to assess Ms. Hunter's credibility, there is a substantial likelihood the jury would have found Ms. Hunter not credible and the result would have been different.

Notably, the prosecutor's improper comments were not ideas which could have been mitigated by a curative instruction. A "bell once rung cannot be unring." State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1976), review denied, 88 Wn.2d 1004 (1977). In Fleming, notwithstanding trial counsel's failure to object, this Court concluded that "the misconduct, taken together and by cumulative effect, rose to the level of manifest constitutional error, which we cannot find harmless beyond a reasonable doubt given the nature of the evidence at trial." 83 Wn. App. at 216. Here, similarly, this Court should conclude the prosecutor's argument was flagrant misconduct that prejudiced Mr. Johnson's right to a fair trial. His conviction must be reversed.

- d. The prosecutor committed additional misconduct which, in the alternative, cumulatively denied Mr. Johnson a fair trial.

The prosecutor committed additional misconduct by arguing facts not in evidence and stating her belief regarding Mr. Johnson's witness Toni Washington. The prosecutor stated:

And then December 8<sup>th</sup>, really, Toni Washington was going to get up on that stand and spill it for me, really, she was. I don't think so. Because Toni is exactly where Denise was 14 months, 24 months, five years ago. She's hooked into a bad relationship - -

2/8/10RP 60. The prosecutor inserted her belief that Ms. Washington would not tell the truth on the stand. She further argued to the jury that Ms. Washington would lie because she is in a bad relationship, like Ms. Hunter was. But there was no evidence at trial demonstrating Ms. Washington was in an abusive relationship. See 2/4/10RP 29-31 (complete testimony of Toni Washington). Mr. Johnson objected and the court sustained the objection. 2/8/10RP 60. However, no limiting instruction or other admonition was provided.

These errors "compounded" one another. Fleming, 213 Wn. App. at 215-16. Taken "together and by cumulative effect," as the Fleming court found, they "rose to the level of manifest constitutional error" and could not be harmless. Id.

As in Fleming, because the multiple flagrant instances of misconduct denied Mr. Johnson a fair trial, this Court must reverse his convictions and remand for retrial. 83 Wn. App. at 214-16.

3. THE COURT GAVE A FATALLY FLAWED UNANIMITY INSTRUCTION IN THE SPECIAL VERDICT FORM FOR THE SENTENCING AGGRAVATOR .

In the alternative to the complete relief requested above and in Section E.5, infra, this Court should vacate the special verdict findings because the jury was improperly instructed that a negative finding must be unanimous.

- a. The court must properly instruct the jury on the unanimity required for an aggravating circumstance.

When the jury is asked to make an additional finding beyond the substantive offense, the jury need not be unanimous to find the State has not sufficiently proven the aggravating factor. State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010); State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003); State v. Ryan, 160 Wn. App. 944, \_\_ P.3d \_\_, 2011 WL 1239796, \*1 (April 4, 2011). In Bashaw and Goldberg, the jurors were told that their answer in a special verdict form addressing an additional aggravating factor must be unanimous for either a “yes” or “no” answer. Bashaw, 169 Wn.2d

at 139; Goldberg, 149 Wn.2d at 894. The Supreme Court held that such an instruction is incorrect, and unanimity is required only when the jury answers “yes.”

The rule from Goldberg<sup>[11]</sup> then, is that a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant’s maximum allowable sentence.

Bashaw, 169 Wn.2d at 146.

The jury instruction given in Bashaw for the special verdict form told the jurors, “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” Id. at 139. The Bashaw court held that jurors need not be unanimous in a special finding. Rather, any jury’s less than unanimous verdict “is a final determination that the State has not proved that finding beyond a reasonable doubt.” Id. at 145.

Bashaw and Goldberg are predicated on the right to trial by jury, an “inviolable” right guaranteed and strictly protected by the Washington Constitution, article I, sections 21 and 22. State v.

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<sup>11</sup> In Goldberg, when the jury was not unanimous in its finding on an aggravating factor in a first degree murder prosecution, the trial court instructed the jury to continue deliberations and reach a unanimous verdict, either “yes” or “no.” 149 Wn.2d at 891. After further deliberations, the jury returned with a unanimous verdict favoring the aggravating factor. Id. at 892. The Supreme Court reversed, ruling that the trial court erred by insisting on unanimity to answer a special verdict form. Id. at 894.

Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010). The jury’s verdict must authorize the punishment imposed. Id. at 899.

This Court recently applied Bashaw in State v. Ryan. In that case, the trial court instructed the jury that “If you unanimously have a reasonable doubt as to this question [of aggravating circumstances to support an enhanced sentence], you must answer ‘no’.” Ryan, 2011 WL 1239796, at \*1. Applying Bashaw, this Court held the instruction was erroneous. Id. The erroneous instruction relieved the State of its burden: “To require the jury to be unanimous about the negative—to be unanimous that the State has not met its burden—is to leave the jury without a way to express a reasonable doubt on the part of some jurors.” Id. at \*2. This Court further held that the defendant may raise a challenge to the unanimity instruction for a special verdict for the first time on appeal. Id. (“Bashaw compels the conclusion the error is both manifest and constitutional. . . . We are constrained to conclude that under Bashaw, the error must be treated as one of constitutional magnitude and is not harmless.”).

In an instruction identical to Ryan, the trial court here instructed the jury “If you unanimously have a reasonable doubt as to this question, you must answer ‘no’.” CP 83. The error is plain.

The court's special verdict instruction did not make manifestly clear that a negative finding need not be unanimous. See, e.g., State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984); State v. LeFaber, 128 Wn.2d 896, 913 P.2d 369 (1996). Moreover, as in Ryan, Mr. Johnson may raise this error for the first time on appeal. 2011 WL 1239796, at \*2.

The jury instruction in the case at bar consequently presents the identical error identified in Bashaw, Goldberg, and Ryan. The court erroneously told the jury that they needed to be unanimous to vote "no" in the special verdict form.

b. The improper jury instruction requires reversal of the special verdict.

The court in Bashaw characterized the problem as an error in "the procedure by which unanimity would be inappropriately achieved." 169 Wn.2d at 147. This instructional error creates a "flawed deliberative process" and does not let the reviewing court simply surmise what the result would have been had it been given a correct instruction. Id. In Bashaw, moreover, the trial court polled the jury and the jury said its verdict was unanimous, but the Supreme Court found the fundamental, structural nature of the

incorrect explanation about the deliberative process denied Bashaw a fair trial. Id. at 147-48.

Where the trial court improperly insisted on a unanimous determination for a “no” finding, this Court “cannot say with any confidence what might have occurred had the jury been properly instructed,” and cannot conclude that the error was harmless beyond a reasonable doubt. Id.; accord Ryan, 2011 WL 1239796, at \*3 (holding error not harmless based on Bashaw). As in Bashaw and Ryan, the jury was incorrectly informed that their special verdict finding must be unanimous. CP 83 (Instruction 30). This Court may not guess the outcome of the case had the jury been correctly instructed, and thus the special findings imposing additional punishment because the crimes involved an ongoing pattern of psychological, physical, or sexual abuse must be stricken. Bashaw, 169 Wn.2d at 147; Ryan, 2011 WL 1239796, at \*3 (vacating sentence); CP 83 (Instruction 30); CP 85, 87, 89, 91, 93, 97, 99, 101 (special verdict forms); CP 124 (Judgment & Sentence with exceptional sentence).

4. THE TRIAL COURT ERRED IN INCLUDING THE FEDERAL BANK FRAUD CONVICTION IN THE OFFENDER SCORE WHERE THE STATE DID NOT PROVE IT WAS COMPARABLE TO A WASHINGTON FELONY.

“[F]undamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record.” State v. Ford, 137 Wn.2d 472, 481, 973 P.2d 452 (1999). In establishing a defendant’s criminal history for sentencing purposes, the State must prove the existence of a prior conviction by a preponderance of the evidence. E.g., State v. Ammons, 105 Wn.2d 175, 186, 713 P.2d 719, 718 P.2d 796, cert. denied, 479 U.S. 930, 107 S. Ct. 398, 93 L. Ed. 2d 351 (1986). To increase an offender score through an out-of-state conviction, the State must prove the crime is a felony in Washington. State v. Cabrera, 73 Wn. App. 165, 168, 868 P.2d 179 (1994). “To properly classify an out-of-state conviction according to Washington law, the sentencing court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes.” Ford, 137 Wn.2d at 479. “If the elements are not identical, or if the Washington statute defines the offense more narrowly than does the foreign statute, it may be necessary to look into the record of

the out-of-state conviction to determine whether the defendant's conduct would have violated the comparable Washington offense.”

Id.

Classification of an out-of-state conviction is a mandatory step. Ford, 137 Wn.2d at 483. “[T]he sentencing court must engage in some comparison of the elements and any conclusion must be supported by evidence in the record.” Id. at 483 n.4.<sup>12</sup> Even where the State makes “[c]onclusory argument” regarding classification, it is “an insufficient basis upon which [the trial court can] determine classification.” Id.

This Court reviews de novo the sentencing court’s calculation of the offender score. State v. Rivers, 130 Wn. App. 689, 699, 128 P.3d 608 (2005). Appellate review is proper even if a defendant fails to object specifically to the classification. Id. at 483-85; cf. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50

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<sup>12</sup> To determine whether a foreign conviction is comparable to a Washington offense, the court engages in a two-step analysis. First, the court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes. Ford, 137 Wn.2d at 479 (citing State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). If the elements of the foreign conviction are comparable to the elements of a Washington offense on their face, the foreign offense counts toward the offender score as if it were the comparable Washington offense. In re Pers. Restraint of Lavery, 154 Wn.2d 259, 255, 111 P.3d 837 (2005). If the elements of the prior offense are not comparable, or are broader than the pertinent crime in Washington, then the court may look to the facts admitted by the defendant or proved at trial to determine if the prior offense is comparable. Id. at 256-57.

P.3d 618 (2002) (defendant may not stipulate to a sentence in excess of that authorized by statute). Where a non-Washington conviction that was not adequately proved forms the basis of an offender score, the proper remedy is to reverse the sentence and remand for an evidentiary hearing to allow the State to prove the classification. Ford, 137 Wn.2d at 485-86; Cabrera, 73 Wn. App. at 170.

At sentencing here, the State included a federal bank fraud conviction as part of Mr. Johnson's offender score. In support, the State provided only a certified copy of the judgment and a copy of the federal statute. 2/8/10RP 77; CP 114-22. The State presented no evidence to show Mr. Johnson's federal conviction for bank fraud was comparable to a Washington felony. Similarly, the State presented no evidence of the facts of Mr. Johnson's federal conviction. The judgment presented at sentencing also contains none of the underlying facts. See CP 114-21. The State accordingly did not prove the offense was comparable to a Washington felony. The trial court furthermore, conducted no comparability analysis. The trial court therefore erred in including the offense in Mr. Johnson's offender score. CP 130 (Judgment & Sentence, Appendix B: Criminal History).

If a comparison had been undertaken, it would have shown that the federal bank fraud conviction cannot be counted in Mr. Johnson's score. Mr. Johnson was convicted of federal bank fraud under 18 U.S.C. § 1344. CP 115. That statute makes it a crime

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations or promises.

CP 122. In Washington, the comparable crime is likely theft by deception. RCW 9A.56.020(1)(b). While the state definition of theft is arguably broader than federal bank fraud, Washington has three degrees of theft, which range from a gross misdemeanor to a class B felony. See RCW 9A.56.030-.050. The State did not submit facts sufficient to show, and the court did not find, which degree was comparable. Accordingly, it has not been shown that the federal crime was at least equivalent to a class C felony in Washington.

The federal elements are broader than the other potentially comparable crime in Washington, which only criminalizes production and possession of payment instruments, a personal identification device or card or other instruments of financial fraud.

See RCW 9A.56.320 (financial fraud—unlawful possession, production of instruments of). Thus, the federal conviction can be counted only if it is comparable based on the facts of the federal crime admitted by the defendant or proved at trial. Lavery, 154 Wn.2d at 256-57. Because the federal judgment and sentence references the information but contains no facts admitted by Mr. Johnson and because the State produced no other evidence of the factual basis of the conviction, Mr. Johnson's federal conviction is not comparable to a Washington State crime. See Lavery, 154 Wn.2d at 258 (foreign conviction that is neither legally nor factually comparable to Washington crime cannot be included as strike for persistent offender purposes).

Mr. Johnson's sentence must be reversed and the matter remanded for an evidentiary hearing. Ford, 137 Wn.2d at 485-86; Cabrera, 73 Wn. App. at 170.

5. MR. JOHNSON'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND AN IMPARTIAL JURY WERE VIOLATED BY A SPECTATOR OUTBURST DURING OPENING STATEMENTS.

Under the federal and state constitutions, criminal defendants are entitled to due process of the law, including a fair trial. U.S. Const. amends. V, XIV; Const. art. I, §§ 3, 21, 22. A

defendant is entitled to be tried by an impartial jury. U.S. Const. amend. VI; Const. art. I, § 22. Thus, “Courts have a constitutional obligation to ensure a fair and impartial trial.” State v. Lord, 161 Wn.2d 276, 298, 165 P.3d 1251 (2007) (Chambers, J., concurring in part/dissenting in part). Similarly, a defendant has grounds for a new trial where an irregularity in the proceedings prevented him from having a fair trial. CrR 7.5(a)(5).

Though spectators are entitled to be present at trial, they may not participate in the trial. Lord, 161 Wn.2d at 298 (Chambers, J., concurring in part/dissenting in part); Const. art. I, § 22. “The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.” Patterson v. Colorado, 205 U.S. 454, 462, 27 S. Ct. 556, 51 L. Ed. 879 (1907). “When spectators become participants, fairness and impartiality are jeopardized and the constitutional promise of due process under law is undermined.” Lord, 161 Wn.2d at 298 (Chambers, J., concurring in part/dissenting in part (citing Const. art. I, §§ 3, 21, 22)).

On these grounds, several courts have reversed convictions where extraneous circumstances and influences were presented to

the jury. Woolfolk v. Georgia, 8 S.E. 724, 727, 81 Ga. 551 (1889) (new trial granted where observers cried “hang him” during prosecutor’s rebuttal oral argument); Manning v. Texas, 39 S.W. 118, 184-85, 37 Tex. Crim. 180 (Crim. App. 1897) (conviction reversed in part because large crowd gathered around jury throughout trial and interrupted prosecutor’s opening statement with “laughter or applause at the severe strictures and condemnations of the defendant and his witnesses”); Louisiana v. Henry, 198 So. 910, 919-21, 196 La. 217 (1940) (extraneous circumstances and influences held prejudicial to substantial rights of defendant).

Mr. Johnson was denied a fair trial when a woman burst into the courtroom during opening statements and twice exclaimed: “she’s scaring me.” Opening Statement RP 11. This outburst was not part of the parties’ evidence or argument. The woman was unidentified to the jury,<sup>13</sup> which was left to extrapolate and wonder at issues beyond those presented to it.<sup>14</sup> Consequently, the

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<sup>13</sup> Defendant’s motion for a new trial identifies the exclaimant as his wife. CP 104.

<sup>14</sup> The trial court attempted to control the spectator during the outburst. Opening Statement RP 11. Mr. Johnson accordingly did not object during the course of oral argument. However, he later moved for a new trial on this basis. CP 102. The motion was never ruled on by the trial court.

convictions should be reversed and the case remanded for a new trial.

6. CUMULATIVE ERROR DENIED MR. JOHNSON HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Each of the errors in Sections E.1, E.2, and E.5 requires reversal. But if this Court disagrees, then certainly the aggregate effect of these trial court errors denied Mr. Johnson a fundamentally fair trial.

Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together the combined errors denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; e.g., Williams v. Taylor, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); Taylor v. Kentucky, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Venegas, 153 Wn. App. 507, 530, 228 P.3d 813 (2010). The

cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Here, each of the errors set forth in Sections 1, 2, and 5 merits reversal standing alone. Viewed together, the errors created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict.

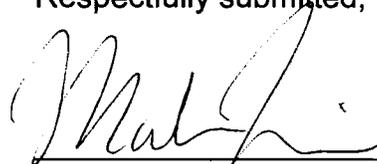
The evidence against Mr. Johnson hinged on the testimony of a single witness. Though some of Ms. Hunter's testimony was corroborated by other State witnesses, their testimony was largely confined to events relayed to them by Ms. Hunter. Moreover, only Ms. Hunter offered evidence as to virtually every charge. Yet the trial court limited Mr. Johnson's right to cross-examine Ms. Hunter and impeach her veracity. And the prosecutor vouched for Ms. Hunter in her final presentation to the jury. Compounded with the irregularity in the proceedings from the spectator outburst, even if this Court determines no single issue merits reversal, this Court should conclude the combined effect of the errors materially affected the jury's verdict, in violation of due process. Mr. Johnson's convictions accordingly must be reversed.

F. CONCLUSION

On one or more of the alternative grounds set forth in Sections E.1, 2 and 5, Mr. Johnson's convictions should be reversed in full. In the alternative, the sentence should be reversed and remanded for an evidentiary hearing because the State and trial court failed to justify inclusion of a federal conviction in Mr. Johnson's offender score as set forth in Section E.4. Finally, the special verdict should be vacated because its premised on an improper jury instruction as set forth in Section E.3.

DATED this 24th day of June, 2011.

Respectfully submitted,



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Marla L. Zink – WSBA 39042  
Washington Appellate Project  
Attorney for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 65703-8-I
	)	
DION JOHNSON,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24<sup>TH</sup> DAY OF JUNE, 2011, 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	(X)	U.S. MAIL
APPELLATE UNIT	( )	HAND DELIVERY
KING COUNTY COURTHOUSE	( )	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

[X] DION JOHNSON	(X)	U.S. MAIL
797217	( )	HAND DELIVERY
AIRWAY HEIGHTS CORRECTIONS CENTER	( )	_____
PO BOX 1899		
AIRWAY HEIGHTS, WA 99001-1899		

**SIGNED** IN SEATTLE, WASHINGTON THIS 24<sup>TH</sup> DAY OF JUNE, 2011.

X \_\_\_\_\_ 

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