

66632-1

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STATEMENT OF ADDITIONAL  
GROUNDS FOR REVIEW

STATE OF WASHINGTON

Respondent,

No. 66632-1-I

v.

STATEMENT OF ADDITIONAL  
GROUNDS FOR REVIEW

Jesse M. White  
(your name)  
Appellant

I, Jesse White, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

See attached: Additional Ground 1, pages 1-2

Additional Ground 2

See attached: Additional Ground 2, pages 1-12

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2012 JAN 19 AM 10:47

If there are additional grounds, a brief summary is attached to this statement.

Date: January 16, 2012

Signature: JESSE WHITE

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## Assignments of Error

1. (Ground 1): Jury Instruction 38 instructs jury to reach unanimity in deciding on special verdicts if there is reasonable doubt or "no" verdict.
2. (Ground 2): During closing argument, prosecutor's misconduct impaired the jury's truth-finding function by undermining the presumption of innocence and the reasonable-doubt standard.
3. (Ground 3): Trial court violates CrR 6.15 (f)(1), Fourteenth Amendment and Article I, section 22 of the Washington Constitution by failing to notify Counsel of jury inquiries during deliberations.
4. (Ground 4): Trial counsel deprived defendant of his constitutional right to effective assistance by failing to object to jury instruction 38 and the  
(I)

repeated misconduct by prosecutor.

5. (Ground 5): Sentencing court erred in sentencing defendant to firearm sentencing enhancement when charging information uses deadly weapon language.

### Issues Pertaining to Assignments of Error

1. Jury Instruction 38 instructs jury: "on the special verdict form, you unanimously have a reasonable doubt as to this question or you cannot agree as to the answer, you must answer 'no'." Is the trial court permitted to instruct the jury to reach unanimity when a non-unanimous decision is a finding of "not guilty" concerning special instructions?

2(a). Does the defendant receive a fair criminal trial when the prosecutor, in closing argument, discusses

the reasonable doubt standard by comparing the certainty required to convict with the certainty people require in completing a puzzle?

2(b). In closing, can the prosecutor instruct the jury that: "the law requires you to find him guilty...?"

2(c). During closing argument, is it proper for the prosecutor to present "evidence" or "facts" to the jury in the guise of argument?

2(d). During closing argument, does the prosecutor step outside his role as an impartial officer of the State when he states as "fact" that the defendant is "guilty"?

2(e). During closing, is it appropriate for the prosecutor to make "testimony" of the defendant's  
(III)

credibility in the guise of argument?

3. During jury deliberations, does the trial court violate the defendant's Fourteenth Amendment, Article I, Section 22 of Washington's Constitution, and CrR 6.15 (f)(i) by failing to notify counsel of jury inquiries?

4. Was defense counsel ineffective for failing to object to incorrect jury instruction 38 and the prosecutor's repeated misconduct?

5. Is it error when the sentencing court imposed firearm sentencing enhancement when charging documents and instructions use deadly weapon language?

## ADDITIONAL GROUND 1

~~Criminal Law-Punishment-Sentence-Enhanced Penalty-Special Verdict-Jurror-Unanimity-~~  
**Instruction Validity.:** In this case the court erroneously instructed the jury that unanimity was required for either a "yes" or "no" finding pertaining to the special instructions that would enhance the sentence. Jury instruction # 38 instructs the jury twice that they reach unanimity in returning all verdicts whether special or not. The first erroneous instruction asks if "on the special verdict form, you unanimously have reasonable doubt as to this question or you cannot agree as to the answer, you must answer "no". The second erroneous instruction is where it states: "Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision."

The reason that these instructions are erroneous is because unanimity is not required to find the absence of a special finding. Here, the instruction stated that unanimity was required for either determination. That was error. A special finding that is nonunanimous by the jury is final decision that the State has not proved it's case beyond a reasonable doubt, and the sentence cannot be enhanced.

The first of these erroneous instructions is almost identicle to State v. Bashaw, 169 Wn. 2d 133 (2010), where the Supreme Court held that this is a reversible error. In Bashaw, the jury had to determine whether the State had proved the fact giving rise to a sentence enhancement. In Bashaw, and this present case, the trial court erred in "the procedure by which unanimity would be appropriately achieved." Because the trial court gave the direction to reach unanimity preemptively, it "flawed the deliberative process". Also in Bashaw it states: "when unanimity is required, jurors with reservations might not hold to their positions or may raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless."

The second erroneous instruction is almost identicle to State v. Ryan, 160 Wn. App. 944 (2011), wherein the Appellate Court stated: "it is manifest constitutional error to instruct a jury that it must be unanimous in order to find the State

failed to prove either an aggravating factor or the facts supporting a sentencing enhancement." Ryan goes on to state: "The State relies on the statute governing jury determination of aggravating circumstances. Unlike statutes pertaining to sentence enhancements, which say nothing about unanimity, RCW 9.94A.537(3) states, in pertinent part, 'The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special finding.'" This quoted section of the statute " convinces us that unanimity is only required for an affirmative finding. subsection 6 empowers the court to sentence a defendant to the maximum term of confinement '[i]f the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence.' This language plainly contemplates the possibility that the jury will not be unanimous, in which case the court may not impose the aggravated sentence." Because this instruction in this present case, twice instructed the jury that they come to an unanimous agreement to return a "yes" or "no" verdict, the Court should reverse all sentence enhancements in this case and be sent back to the sentencing courts to resentence the defendant without those enhancements, like Bashaw and Ryan.

# APPENDIX A

INSTRUCTION NO. 38

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and Verdict Forms, 1A, 1B, 2A, 2B, 3A, 4, 5A. Some exhibits and visual aids may

have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing the Verdict Form 1A, you will first consider the crime of Assault in the First Degree. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form 1A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form 1A.

If you find the defendant guilty on Verdict Form 1A, do not use Verdict Form 1B. If you find the defendant not guilty of the crime of Assault in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Assault in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form 1B the words "not guilty" or the word "guilty", according to the decision you reach.

When completing the Verdict Form 2A, you will first consider the crime of Assault in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form 2A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form 2A.

If you find the defendant guilty on Verdict Form 2A, do not use Verdict Form 2B. If you find the defendant not guilty of the crime of Assault in the Second Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Assault in the Fourth Degree.

If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form 2B the words "not guilty" or the word "guilty", according to the decision you reach.

When completing the Verdict Form 3A, you will consider the crime of Harassment. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form 3A the words "not guilty" or the word "guilty," according to the decision you reach.

When completing the Verdict Form 4, you will consider the crime of Unlawful Possession of a Firearm in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form 4 the words "not guilty" or the word "guilty," according to the decision you reach.

When completing the Verdict Form 5A, you will consider the crime of Reckless Endangerment. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form 5A the words "not guilty" or the word "guilty," according to the decision you reach.

You will also be given special verdict forms for the crimes charged in Counts I, II, III, and V. If you find the defendant not guilty of these crimes, and the lesser included crimes as to Counts I and II, do not use the special verdict forms. If you find the defendant guilty of these crimes, or the lesser included crimes as to Count I or II, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach.

For each special verdict form, you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer in order to answer "yes" on a

special verdict form. If, after full and fair consideration of the question on the special verdict form, you unanimously have a reasonable doubt as to this question or you cannot agree as to the answer, you must answer "no".

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

## ADDITIONAL GROUND 2

### **Prosecutor Misconduct-Closing Argument:**

During the prosecutor's closing argument and rebuttal, the prosecutor made several improper, highly prejudicial and apparently ill intentioned statements. He used these arguments to guise inappropriate "testimony" that was never introduced as fact or evidence to appeal to the jury's passion and prejudice. In making these flagrant, prejudicial remarks he stepped outside his role of prosecutor, who has the duty to remain an impartial officer of the State. He clearly impaired the jury's truth-finding function by stating that the defendant is "guilty" multiple times. He undermined the presumption of innocence and reasonable-doubt standard fundamental to our criminal justice system by discussing the reasonable doubt standard in the context of a partially completed puzzle. In stepping outside his role he violated the defendant's right to due process. The following improper statements, the context of the total argument, the issues in this case, "evidence" addressed in the argument, and false instructions given to the jury, is evidence that will prove there is "substantial likelihood that the prosecutor's misconduct effected the jury's verdict."

(1) Verbatim Reports, Page 598: "...Nhyia White was a tool for Jesse in this game and he was angry."

Verbatim Reports, Page 599: "And he explained it by pulling out a gun and pointing it at her because the only thing he had left was her life, and then he exploded... There was nothing he could do but hurt Raina Stevens."

Here, the prosecutor uses "testimony" in the guise of argument with little, if any evidence to support it. There is no evidence that "Nhyia White was a tool for Jesse" or that he was "angry", nor was there evidence to suggest that "There was nothing he could do but hurt Raina Stevens". Here, the prosecutor is clearly failing his duty to remain impartial, and uses no evidence to support these prejudicial claims. Neither of the two primary witnesses' accounts of events support these statements. This inappropriate statement by the prosecutor totally disregards the defendant's presumption of innocence as well as his plea of self-defense.

(2) Verbatim Reports Page 600: "Now, what's interesting is when you go to the picture where the bag was moved from, what do you see? Lo and behold, dirt."

Verbatim Reports Page 642: "I'm going to cover with you just a few things that hadn't been testified that counsel said happened. Deputy Weinbaum said nothing about finding dirt on the bag. He said he didn't know, because it wasn't an important factor to law enforcement... That's not a fact that he didn't find dirt. He said he didn't know."

Here, the prosecutor contradicts his earlier claim that there was dirt where the officers found the bag to discredit the defense. The fact is that there was no dirt around the bag entered as evidence. The prosecutor is attempting to mislead the jury into something that was never testified to or authenticated during trial. Then, after the defense counsel addressed the issue during cross, the prosecutor contradicts his earlier claim in an attempt to impeach the defense. The reason this is an important issue is that the alleged victim claimed to have buried the revolver at some point before the alleged assault. However, there was never evidence to support this claim. This "testimony" the prosecutor made to the jury that there had been dirt on or around the weapon is misleading with the intent to invalidate the defense's claim that the gun was never, to their knowledge, buried. Had the prosecutor remained impartial and relied solely on actual evidence without stating "facts" never brought to evidence. This contradiction never would have occurred. Instead he inappropriately called to the attention of the jury matters or considerations which the jury had no right to consider by inventing "evidence" as "testimony" in the guise of argument. In doing this he deprived the defense of its right to confront and cross-examine the "facts" presented to the jury. Thus violating the defendant's right to due process.

(3) Verbatim Reports Page 600: "...Mr. White admitted during his own testimony that he strangled her."

Verbatim Reports Page 605: "No. 1, that the defendant assaulted Raina Stevens. There is really no dispute as to that either. Mr. White admits that he assaulted her."

Verbatim Reports Page 614: "And of course he knowingly had the firearm. He admitted that he knowingly had the firearm. He claims it was both of theirs. He knowingly had it. He got it off Craigslist. It's his. He admitted to Count 4 also."

Verbatim Reports Page 613: "And of course if you find him guilty, it would be counterintuitive that he wouldn't be armed with a firearm."

In making these statements of "fact" the prosecutor violates the defendant's Washington State Constitution Article I, subsection 22, right to an impartial jury because he appeals to bias impeaching comments to achieve convictions. The defendant never "admitted during his own testimony that he strangled her". The defendant never "admitted" to any crimes, especially taken into account the definitions of these offenses given as Jury Instructions numbers 8, 21, 22, 31 and 32. Where all of these are described as illegal activities or assaults. The only testimony pertinent to this "strangulation" remark made by the prosecutor is in the Verbatim Reports, on page 574 in which defense states: "she wouldn't let go..." (of gun) "so at that point I started to choke her and I said, 'Raina, let go of the gun.'" This, the only evidence pertinent to the prosecutor's improper "strangulation" comment, the defense never uses "strangulation" language and is acting in self-defense; not with the intent to assault/strangle the alleged victim. Next, with regard to Count 4, the defendant did not "admitt to Cout 4". The defendant testified that the alleged victim brought the weapon into the home that day. Never that he acted in any way outside of the scope of the law regarding self-defense.

State v. Warren 165 Wn. 2d 17, 195 P. 3d (2008), recognized that: "A defendant is entitled to the benefit of a reasonable doubt. Whether doubt exist, and, if so, whether that doubt is reasonable may be subject to debate in a particular case. However, it is an unassailable principle that the burden of the State to prove every element and that the defendant is entitled to the benefit of any reasonable doubt. It is error for the State to suggest otherwise." Here, the prosecutor's comments were improper because they eliminate the presumption of innocence and unconstitutionally relieve the prosecutor of having to prove the elements of their case while reasonable-doubt exists. Here again, the prosecutor departs from his role by inventing "testimony" in the guise of argument with the intent to coerce the jury into the belief that the defendant is guilty of crimes he did not commit. It is the jury's function to decide whether the defendant was "assaulting" the alleged victim or acting in self-defense by weighing the evidence during deliberations. It is particularly grievous that the prosecutor misled the jury regarding the "bedrock" principle of the presumption of innocence, the foundation of our criminal justice system.

Then, for the prosecutor to continue with inappropriate, misleading statements of:

"it would be counter intuitive that he wouldn't be armed with a firearm" and "He admitted that he knowingly had the firearm." is in no way impartial, and detrimental to the defense's case. At no time throughout the trial did the defense "admitt" to any crime. The defense entered a plea of **not guilty**. Once that plea was entered the presumption of innocence is to "continue throughout the entire trial" until jury deliberations.

Here, the prosecutor stepped outside his role as a quasi-judicial officer presumed to act impartially, and misinterprets testimony to procure a conviction at any cost.

(4) Verbatim Reports, Page 607: "Oh, we can't agree on assault one. We all think he did something here, so let's just find him guilty of assault two. Remember, fully and fairly consider all of the evidence. If after you discussed it, if after you can't agree on it and you've worked so hard that you just can't figure that out, **the law requires you to find him guilty of the lesser crime of assault two.**"

This instruction that the prosecutor gave to the jury completely undermines the criminal trial by jury process. There is no "law" which "requires" the jury to find a defendant guilty. This flagrant, highly prejudicial remark substantially impaired the jury's truth-finding function and raises a serious question about the accuracy of the "guilty" verdicts in this trial.

The Constitution's framers put a jury-trial guarantee in the Constitution because they were unwilling to trust the government to mark out the roll of the jury. This apparent intentional misconduct completely undermines the defendant's presumption of innocence, a bedrock principle. In a criminal trial the burden is on the State to prove every element of the crime beyond a reasonable doubt. In this case, we cannot say that the misconduct did not contribute to the verdict because the verdict is what the prosecutor instructed that the "law requires" them to find. WPIC 4.01 at 85 states: Burden of proof-Presumption of Innocence-Reasonable Doubt [The] [Each] defendant has entered a plea of not guilty. That plea puts in issue every element of [the] [each] crime charged. The [State] [City] [County] is the plaintiff and has the burden of proving each element of [the] [each] crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists [as to these elements].

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

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.]

A "fair trial" implies a trial by which the attorney representing the State does not misrepresent the State by intentionally making untrue definitions of the law which cripple the jury's fact-finding function. In this case there is a substantial likelihood that the prosecutor's improper and prejudicial false interpretation of the "laws' requirements" affected the jury's verdict. Also that these remarks completely violated the defendant's right to due process, and right to an impartial jury.

(5) Verbatim Reports, Page 599: "Isn't it the case when someone tells the truth that all the pieces of the puzzle just seem to fit? We don't need to come up with explanations for why things happened. They all just seemed to fit very nicely together just like a puzzle. And that's exactly what the evidence in this case does. The Physical evidence, the medical evidence, the medical testimony, the phone records, the officer's testimony, it all just fit's together when you believe Raina Staven's story. There is no excuse for why this happened or that happened. It all just fits."

Verbatim Reports, Page 600: "That's no coincidence. Those are the pieces of the puzzle that fit together."

Verbatim Reports, Page 602: "She wrote a statement that day because she returned it that night. All Mr. White had to say that day was, 'shoot me. Please shoot me. Shoot me in the face.' She didn't have time to think about what it is she wanted to say. She said it and it all seems to fit together."

Verbatim Reports, Page 603: "All of the physical evidence, the medical evidence, the phone records, every piece of the puzzle fits together. There is no strange excuses given by Ms. Stevens about what happened. There is nothing we have to go 'Is that really true?'"

Verbatim Reports, Page 608: "And once again, I will point out to you that all of the evidence, without excuse, without explanation, points that Raina Stevens is the one who is telling the truth here."

Verbatim Reports, Pages 610-611: "He told her if she went to the police, he would kill them. And of course it's right there on the 911 tape for you to hear. Again. the puzzle just fits together. We don't have to come up with explanations. We don't have to come up with excuses. We don't have to come up with weird or strange stories about why something was done and when it was done. It seems to make sense."

Verbatim Reports, Page 616-617: "And when you listen to what their evidence is, does it make sense? Do they come up with strange explanations? Do they come up with excuses that don't really make sense to make it all fit together? And when you look at all of the State's case, when you look at Raina Stevens' statement from the very outset of this case, it all just fits together? Why does it fit together? Because it's the truth. Because that's what happened on April 12, 2010."

Verbatim Reports, Page 646; "If you listen to Mr. White's testimony there are little clues that are given that isn't exactly what he said it was."

Verbatim Reports Page 648: "Mr. White talks about being a victim of police brutality. 'Well they let the dog chew on my arm, but I was saying, no, no, no, get the dog off me.' He wants you to believe that the police officers sat around while they watched a dog maul him because he was cooperating. I told you before, the State doesn't have to come up with strange explanations. The State doesn't have to come up with excuses or weird stories to explain all of the evidence and how it fits together. That is one weird and strange story that you have to accept in order to believe Mr. White."

Verbatim Reports, Page 617: " Okay, we have another possible explanation for this little piece of evidence over here, but when I put it all together it makes more sense, when I put it together in the story that Raina Stevens told. When you put it all together, when you look at the entirety of the evidence in this case, Mr. White is guilty. He's guilty of assault in the first degree with a firearm. He's guilty of assault in the second degree by strangulation. He's guilty of harassment for his threats to kill Raina Stevens when he told her if she went to the police he would kill her. He's clearly guilty, Without any doubt, of unlawful possession of a firearm in the second degree. And he's clearly guilty of reckless endangerment. And we ask you to find him guilty of all five counts."

"Applying the predecessor to this rule, this Supreme Court has noted that it is just as reprehensible for one appearing as a public prosecutor to assert in his argument his personal belief in the accused guilt." State v. Case, 49 Wn. 2d 66, 298 P.2d 500 (1956).

"It violates our jurisprudence for a prosecutor, a representative of the State, to comment on the credibility of the witness or the guilt or veracity of the accused."

**" [A]n attorney shall not**

Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position herein. "

Here, the prosecutor clearly violated CPR DR 7-106 (c)(4) by asserting his personal opinion of the credibility of the witness and the guilt or innocence of the accused. State v. Reed, 102 Wn. 2d 140, 145-46, 684 P.2d 699 (1984) (citing former Code of

Professional Responsibility DR 7-106(c)(4). Plainly violated these precepts. These comments were clearly improper. They also violate the Rules of Professional Conduct under the Washington State Court Rules 2010 and 2011 RPC 3.4 (e) which states that a lawyer shall not: (e) in trial allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused."

RPC 3.5 (a) "A lawyer shall not: seek to influence a judge, juror, prospective juror or other official by means prohibited by law".

It is clear that the prosecutor violated CPR DR7-106, correspondingly he violated the Rules of Professional Conduct 3.4 (e) and 3.5 (a). In addition, *State v. Johnson*, 158 Wn. App. 677 (2010), recognized that "It is improper for a prosecutor, in closing argument, to discuss the reasonable doubt standard in the context of making an affirmative decision based on a partially completed puzzle. By comparing the certainty required to convict with certainty people require in a puzzle, the prosecutor trivializes the State's burden, focuses on the degree of certainty that the jurors need to act, and implies that the jury has a duty to convict without reason to do so."

In *State v. Anderson*, Wn. App. 417 (2009), This court held that the prosecutor's comments were improper because "they trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing" the State's case against the defendant and because they implied, by "focusing on the degree of certainty the jurors would have to have to be willing to act," that the jury should convict the defendant unless it found a reason not to do so. *Anderson* at 431-32. Similarly in *State v. Venegas*, 155 Wn. App. 507 (2010), the prosecutor argued, "In order to find the defendant guilty you have to say to yourselves: I doubt the defendant is guilty, and my reason is blank." This court held that this argument was improper. Like *Anderson* and *Venegas* the prosecutor made the same fill-in-the-blank argument.

In this case the defense counsel did not object to any of the prosecutor's improper arguments. Defense counsel's failure to object to the prosecutor's misconduct as trial constitutes a waiver on appeal unless that misconduct is "so flagrant and ill intentioned that it evinces an enduring and resulting in prejudice" and is

incurable by a jury instruction. Fisher, 165 Wn. 2d 747 quoting Gregory, 158 Wn. 2d 759.

Following Venegas, these flagrant and ill intentioned arguments were incurable by a trial court's instruction in response to a defense objection. Although the trial court's instruction regarding the presumption of innocence may have minimized the negative impact on the jury, a misstatement about the law and the presumption of innocence due a defendant, the "bedrock upon which [our] criminal justice system stands," constitutes great prejudice because it reduces that State's burden and undermines the defendant's due process rights. State v. Bennett, 161 Wn. 2d 303, 315, 165 P.3d 1241 (2007); (supra Anderson at 432).

State v. Warren, 165 Wn. 2d 17, 26 n.3, 195 P.3d 940 1241 (2008), cert. denied, 129 S. Ct. 2007 (2009), our Supreme Court declined to apply Constitutional harmless error analysis to improper prosecutorial arguments involving the application and undermining the presumption of innocence. In a criminal trial the burden is on the State to prove every element of a crime beyond a reasonable doubt. In this case we cannot say beyond a reasonable doubt that the prosecutor's misconduct did not contribute to the jury's verdict. The prosecutor stated as "testimony" under the guise of argument that: "Raina Stevens is the one telling the truth here"; "If you listen to Mr. White's testimony there are little clues that isn't exactly what he said it was." Then concuded with "Mr. White is guilty. He's guilty of all five counts...He's guilty." These flagrant, highly prejudicial, ill intentioned comments were the last argument that the jury heard before deliberations. The prosecutor's misconduct in closing and rebuttal obliterate the presumption of innocence. Under these circumstances we cannot conclude that the prosecutor's misstatements did not effect the jury's verdict.

(6) Verbatim Reports, Page 646: "And he's got the wherewithall to stick his finger behind the trigger. Is this a made-for-hollywood movie? Really? He can figure out to put the finger behind the trigger? Come on. Is that really credible?"

Verbatim Reports, Page 647: "He didn't happen to end up following her. Boy, that's a big coincidence. He didn't happen to end up following her. He got in his car after he went out and couldn't find his gun and he chased her down because he was ticked off that he couldn't find the gun. Because he didn't have control. And that's what he wanted, control. Every action in this case showed it."

The prosecutor's arguments here are inappropriate because he is making impeaching "testimony" in the guise of argument. He is also again "testifying" his opinion

which is an abuse of his authority (supra WPIC 4.01 at 85 and DR 7-106(c)(4)). State v. Monday 171 Wn. 2d 677 (2011), held that "For the prosecutor to invent evidence and himself "testify" as to his opinion is to deny the defendant his right to confront and cross-examine the "witness". The prosecutor stepped outside his roll as quasi-judicial officer to give this highly inflammatory "information". This testimony is similar to State v. Reed, 102 Wn. 2d 140, 684 P.2d 699 (1984), where the prosecutor called the defendant a liar. The prosecutor had no testimony or evidence to support these impeaching comments apparently intentioned to prejudice the jury. "A prosecutor engages in improper conduct by commenting as a matter of personal belief on the credibility of witness or the guilt or innocence of an accused may only be in the context of analysing evidence on record." Prosecutor misconduct is grounds for reversal if "the prosecuting attorney's conduct is both improper and prejudicial." State v. Fisher, 165 Wn. 2d 727, 747, 202 P.3d 221 (2006) 9citing State v. Gregory. 158 Wn. 2d 759, 858, 147 P.3d 1202 (2006)).

(7) Verbatim Reports, Page 616: In the type of woods behind the house that is described by all the officers that was described before you? Is that reasonable? The evidence doesn't show it. And Mr. White's conduct doesn't show it. It's reckless. He placed his daughter unnecessarily at risk."

Verbatime Reports, Page 649-650: "If he was so worried about how the police were going to act, why wasn't he worried about his daughter's safety as well? And of course he ends up sticking her right in the way. Oops. If their going to shoot me, I guess I should stick my daughter in front of me or right here...he sticks her right in front, right in harm's way, and then sticks her out where the dog is coming."

This flagrant, prejudicial and ill intentioned remark that the prosecutor made to appeal to the jury's passion and prejudice is incorrect and, in fact, oposite of what evidence/testimony was brought before the court. The only testimony pertinent to these statements made by the prosecutor is in the Verbatim Report, Page 587 which states: Q:"And the whole time you kept Nhyia right in front of you?"

A: "Yeah, I wanted to show--wanted them to see her and I didn't want her to be right next to me in case they wanted to use those guns."

Q: "So you put her in harm's way?"

A: "You're absolutely incorrect."

It is clear that the prosecutor's false statements made in closing had no merit. He again, steps outside his roll by making false "testimony" in the guise of argument with the intent to place fear and revulsion of the defendant if the jury believes

the prosecutor's description of the events. Again, the prosecutor relieves the State of its burden to prove this case. Thus violating the defendant's constitutionally protected right to due process.

(8) Verbatim Reports, Page 651: "This was about power and control. Mr. White lost it. He didn't like it. He was ticked off about it and he was going to do something about it. And that's exactly what he did. He took a gun out and explained it."

Verbatim Reports, Page 651: "Mr. White is guilty. He's guilty of all five counts. He's guilty of assault in the first degree. He's guilty of assault in the second degree. He's guilty of harassment. He's guilty of unlawful possession of a firearm. He's guilty of reckless endangerment. He was armed with a firearm. He was a family member or household member, and this was aggravated domestic violence...He's guilty."

State v. Claflin, 38 Wn. App. 847, 690 P.2d 1186 (1984); recognized that "[m]ere appeals to jury passion and prejudice are inappropriate." The effect of a prosecutor's improper conduct is not determined by looking at the conduct in isolation, but examining the conduct in the text of the trial as a whole, including the evidence presented, the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. The prosecutor serves two functions: first, a prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. Second, a prosecutor functions as the representative of the people in the quasi-judicial capacity in the search of justice. Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a Constitutionally fair trial are not violated. Thus, a prosecutor must function within the boundaries while zealously seeking justice. State v. Russell, 125 Wn. 2d 24, 85, 882 P.2d 747 (1994); recognized that "The presumption of innocence is the bedrock upon which this criminal justice system stands...The presumption of innocence can be diluted and even washed away if reasonable doubt is defined as to be illusive or difficult to achieve. This court, as guardians of all Constitutional protections, is vigilant to protect the presumption of innocence." "Due process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt." In re. Winship 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). During trial in this case, when the prosecutor states: "the law requires you to find him guilty..." "They all just seemed to fit very nicely together just like a puzzle."; "Mr. White admits he assaulted her."; "Mr. White's testimony...isn't exactly what he said it was."; and "Mr. White's

guilty of all five counts...He's guilty." These comments coupled with all of the afore mentioned quoted remarks made by the prosecutor during trial completely removed the State's burden of proof, (supra WPIC 4.01 at 85). Several times in closing and rebuttal the prosecutor clearly violates CPR DR 7-106 (c)(4) (supra Reed), by asserting his personal opinion of the credibility of the witness and the guilt or innocence of the accused.

In this case, the prosecutor needlessly risks the reversal of these convictions by neglecting the presumption of innocence throughout the entire closing argument. The prosecutor, as an officer of the State, knows that the presumption of innocence may only be overcome, if at all, only during jury deliberations. Yet he chose to repeatedly impair the jury's truth-finding function and violate the defendant's Constitutionally protected right to due process, by stepping outside his role in the criminal trial process. Winship expressly held that the reasonable doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides substance for the presumption of innocence-- that bedrock 'axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law...','due process commands that no man shall lose his liberty unless the government has born the burden of... convincing the fact finder of his guilt.'" To this end, the reasonable doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue."

"In cases of prosecutorial misconduct, the touchstone of due process analysis is the fairness of the trial, ie, did the misconduct prejudice the jury by denying the defendant a fair trial guaranteed by the due process clause?" (State v. Davenport, 100 Wn. 2d at 762). Prosecutor misconduct is grounds for reversal if "the prosecuting attorney's conduct is both improper and prejudicial." (supra Fisher). Generally the prosecutor's improper comments are prejudicial "only where there is a substantial likelihood the misconduct affected the jury's verdict." (State v. Yates, 161 Wn. 2d 714, 774, 168 P.3d (1007\_) Quoting McKenzie, 157 Wn. 2d at 52)(quoting Brown, 132 Wn. 2d at 561)). In this case the prosecutor clearly violated these precepts. These afore proven quotes from the verbatim reports show that the prosecutor's comments in closing and rebuttal were improper. The prosecutor's intentional, highly prejudicial misconduct violated the defendant's right to due process; made several "facts" of "testimony" in the guise of argument which called to the attention of the jury "facts" in which the jury had no right to consider,

completely undermining the defendant's credibility and the presumption of innocence, a bedrock principle; last, he trivialized the State's burden by discussing the reasonable doubt standard in the context of making an affirmative decision based on a partially completed puzzle. Thus implying that the jury has a duty to convict without a reason not to do so.

In this case, we cannot say beyond a reasonable doubt that the misconduct did not contribute. It is arguable that the jury, as law abiding citizens, followed the prosecutor's instruction that "the law requires" that they find the defendant guilty. The prosecutor clearly misstated the law's requirements and tainted the witnesses testimony before the jury. Under these circumstances we cannot say that the prosecutor's misconduct did not affect the jury's verdict.

For the reasons stated above, the trial court should reverse all the convictions and remand for a new trial.

# APPENDIX B

INSTRUCTION NO. 8

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

INSTRUCTION NO. 21

To convict the defendant of the crime of Assault in the Second Degree in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about 12<sup>th</sup> day of April, 2010, the defendant intentionally assaulted Raina Stevens by strangulation; and
- (2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 22

"Strangulation" means to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe.

INSTRUCTION NO. 31

To convict the defendant of the crime of Unlawful Possession of a Firearm in the Second Degree in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 12<sup>th</sup> day of April, 2010, the defendant knowingly had a firearm in his possession or control;

(2) That the defendant had previously been convicted of Forgery in the First Degree; and

(3) That the possession or control of the firearm occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 32

Possession means having a pistol or firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession.

Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the item and whether the defendant had dominion and control over the premises where the item was located. No single one of these factors necessarily controls your decision.

### ADDITIONAL GROUND 3

#### **Right of the defendant to be present during jury inquiries during deliberations:**

The trial court violated Superior Court Criminal Rules (CrR 6.15) (f)(1) by responding to queries by the deliberating jury without notifying the parties or counsel. This also violates the defendant's confrontation clause of the Fourteenth Amendment, and Article I, section 22 of the Washington Constitution, a criminal defendant has the right to be present during all critical stages of the criminal trial proceedings. Criminal Rule 6.15 expressly requires all parties be notified of any jury questions posed to the trial court during deliberations and be afforded an opportunity to comment upon an appropriate response: CrR 6.15 (f)(1)"The jury shall be instructed that any questions it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the baliff. The court shall notify both parties of the contents of the question and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing... Any additional instructions upon any point of law shall be given in writing." "Any communication between the court and the jury in the absence of the defendant [or defense counsel] is error." State v. Langdon, 42 wn. App. 715, 717, 713 P.2d 120 (1986).

In this case the deliberating jury posed three questions to the court during deliberations. All of which the court responded to without the presence of the parties. The first question, posed at 2:10 p.m. 12/10/2010, asked: "Are there specific instructions related to special verdict form 5B? If so, where are they located?" The court responded: "Please refer to instruction #38 for the use of each special verdict form." Here the defendant was prejudiced because had the trial court acted appropriately and notified the parties or counsel, defense could have added that the jury also refer to jury instructions 17, 18, 19, and 20, all of which pertain to the self defense and defense of others instructions.

The second question the jury posed at 3:30p.m. 12/10/2010, asked: "Verdict form 3A (1) does this mean with a firearm by saying 'the defendant knowingly threatened to kill?'" The court responded: "Please reread instruction #26 which concerns Count III." For this question the defense counsel again could have reminded the jury of:

jury instructions 17, 18, 19, and 20, which may have reminded the jury that the defendant may not have said those things if he was acting in self defense and the defense of his daughter.

The last inquiry that I'm aware of states: "verdict Form 1B not guilty of second degree second degree looks like it should say 1st degree" The trial court responded: "You are correct. There is a typographical error on verdict 1B as given to you. Attached hereto is a correct form 1B. Please disregard verdict form 1B previously given + (can't read word) only to 'Corrected Verdict 1B'". Here, the jury is given a verdict form that has not been read in open court and carried great potential to prejudice and/or harm the defendant. Had the trial court not violated CrR 6.15 (f)(1) and the defendant's constitutionally protected rights, counsel could have reminded the jury of instruction 2 of the State's burden to prove this charge beyond a reasonable doubt, as well as the self defense and defense of others instructions. The fact that the defense and the prosecutor did not object to the previous verdict form 1B which stated the defendant was not guilty of Assault II was, in fact, part of the defense's strategy, primarily because the prosecuting attorney brought the jury instructions and verdict forms before the court.

State v. Johnson, 56 Wn. 2d 700, 355 P.2d 13 (1960), our Supreme Court held that trial court's written response to a jury inquiry without informing counsel was improper, but the error was not prejudicial because the trial court "communicated no information to the jury that was not in any manner harmful to the [defendant]." 56 Wn. 2d at 709. Here, the jury inquired about verdict forms that resulted in a conviction. It could be argued that the trial court's response resulted in a manner harmful to the defendant.

The fact that the court violated the defendant's due process three times during deliberations is more proof that the defendant did not receive a fair trial due to him under the United States Constitution. For this reason combined with the previous "Additional Grounds", the defendant should have all convictions reversed, and be given a new trial.

After reviewing my Verbatim reports, it has come to my attention that the jury submitted another instruction at 2:00 p.m. on 12/10/2010: Inquiry: "We ask about the initials N.W. on the special verdict form 5B what do they stand for?" Response: "N.W. refer to Nhyia White." Although this was not prejudice, it still violated CrR 6.15 (f)(1).

# APPENDIX C

①



Filed in Open Court  
12-10, 20 10  
SONYA KRASKI  
COUNTY CLERK  
By [Signature]  
Deputy Clerk

**SUPERIOR COURT OF WASHINGTON  
IN AND FOR SNOHOMISH COUNTY**

<u>State of Washington</u> Petitioner/Plaintiff(s)	VS.	NO. 10-1-00690-1  INQUIRY FROM THE JURY AND COURT'S RESPONSE
<u>Jesse White</u> Respondent/Defendant(s)		

JURY INQUIRY: WE ASK ABOUT THE INITIALS N.W. ON SPECIAL VERDICT FORM 5B WHAT DO THEY STAND FOR?

<u>[Signature]</u>	<u>12/10/10</u>
PRESIDING JUROR'S SIGNATURE	DATE/TIME

DATE AND TIME RECEIVED BY THE COURT: 1 PM

COURT'S RESPONSE: N.W. refers to Nhyia WHITE

[Signature]  
JUDGE

DATE & TIME RETURNED TO JURY: 2 PM

SAVE - MUST BE FILED



CL14340983

Filed in Open Court

12-10-2010

SONYA KRASKI

COUNTY CLERK

By [Signature]  
Deputy Clerk

**SUPERIOR COURT OF WASHINGTON  
IN AND FOR SNOHOMISH COUNTY**

State of WA  
Petitioner/Plaintiff(s)

NO. 10-1-00690-1

VS.

INQUIRY FROM THE JURY AND  
COURT'S RESPONSE

White  
Respondent/Defendant(s)

JURY INQUIRY: Are there specific instructions related to  
Special Verdict form 5B? If so,  
Where are they located

[Signature]  
PRESIDING JUROR'S SIGNATURE

12/10/10  
DATE/TIME

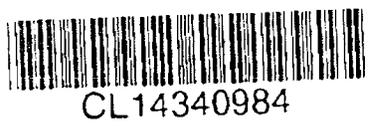
DATE AND TIME RECEIVED BY THE COURT: 2:10 PM

COURT'S RESPONSE: Chaw refer to instruction # 38  
for the use of each special verdict  
form  
[Signature]  
JUDGE

DATE & TIME RETURNED TO JURY: 2:30 PM

SAVE - MUST BE FILED

3



Filed in Open Court  
12-10, 20 10  
SONYA KRASKI  
COUNTY CLERK  
By B. Maliszewski  
Deputy Clerk

**SUPERIOR COURT OF WASHINGTON  
IN AND FOR SNOHOMISH COUNTY**

State of Washington  
Petitioner/Plaintiff(s)

NO. 10-1-00690-1

VS.

INQUIRY FROM THE JURY AND  
COURT'S RESPONSE

Jesse White  
Respondent/Defendant(s)

JURY INQUIRY: Verdict Form 3A

(1) does this mean with A FIREARM by saying "the defendant knowing threatened to kill"

Francis A. King  
PRESIDING JUROR'S SIGNATURE

12/10/10 3:30 pm  
DATE/TIME

DATE AND TIME RECEIVED BY THE COURT: \_\_\_\_\_

COURT'S RESPONSE:

Please reread Instruction # 26  
which concerns Count III

[Signature]  
JUDGE

DATE & TIME RETURNED TO JURY: \_\_\_\_\_

SAVE - MUST BE FILED

52

4



CL14340985

Filed in Open Court

12-10-20 10

SONYA KRASKI  
COUNTY CLERK

By B. Malouin  
Deputy Clerk

**SUPERIOR COURT OF WASHINGTON  
IN AND FOR SNOHOMISH COUNTY**

State of WA  
Petitioner/Plaintiff(s)

NO. 10-1-00690-1

VS.

INQUIRY FROM THE JURY AND  
COURT'S RESPONSE

Jesse White  
Respondent/Defendant(s)

<sup>iv</sup> Verdict  
JURY INQUIRY: Form 1B not guilty of second degree  
second degree looks like it should say 1<sup>st</sup> degree

Francis X Key  
PRESIDING JUROR'S SIGNATURE

12-10-10 3:52  
DATE/TIME

DATE AND TIME RECEIVED BY THE COURT: \_\_\_\_\_

COURT'S RESPONSE: *You are correct. There is a typographical error on ~~submitted~~ verdict Form 1B as given to you. Attached hereto is a corrected form 1B. Please disregard Verdict 1B previously given + use only the "Corrected Verdict 1B"*  
JUDGE Donald Carter

DATE & TIME RETURNED TO JURY: \_\_\_\_\_

SAVE - MUST BE FILED

53



CL14340957

Filed in Open Court

12-10, 20 10

SONYA KRASKI  
COUNTY CLERK

By *[Signature]*  
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

THE STATE OF WASHINGTON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JESSE MARION WHITE )  
 )  
 Defendant. )

No. 10-1-00690-1

VERDICT FORM 1B

We, the jury, having found the defendant not guilty of the crime of  
Assault in the Second Degree as charged in Count I, or being unable to  
*SEE CORRECTED*  
unanimously agree as to that charge, find the defendant, JESSE MARION WHITE

\_\_\_\_\_ of the lesser included crime of Assault in the Second  
(write in "not guilty" or "guilty")

Degree.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
Presiding Juror

*SS*

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

THE STATE OF WASHINGTON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JESSE MARION WHITE )  
 )  
 Defendant. )

No. 10-1-00690-1  
*CORRECTED*  
VERDICT FORM 1B

We, the jury, having found the defendant not guilty of the crime of  
Assault in the First Degree as charged in Count I, or being unable to  
unanimously agree as to that charge, find the defendant, JESSE MARION WHITE  
\_\_\_\_\_ of the lesser included crime of Assault in the Second  
(write in "not guilty" or "guilty")  
Degree.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
Presiding Juror

---

INSTRUCTION NO. 2

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

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

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

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INSTRUCTION NO. 17

A person is entitled to act on appearances in defending himself or another, if he believes in good faith and on reasonable grounds that he or another is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

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INSTRUCTION NO. 18

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force.

The law does not impose a duty to retreat. Notwithstanding the requirement that lawful force be "not more than is necessary," the law does not impose a duty to retreat. Retreat should not be considered by you as a "reasonably effective alternative."

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INSTRUCTION NO. 19

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

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INSTRUCTION NO. 20

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense or defense of another and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense or defense of another is not available as a defense.

ADDITIONAL GROUND 4

**Right to effective assistance of counsel:**

I just want to expand a little bit on the ineffective assistance of counsel that Mr. Zinner argued to some of the grounds that I am arguing in this RAP 10.10.

First, on page 3 of the verbatim reports, defense counsel made an objection to the prosecutor amending the charges to assault in the first degree, and assault in the second degree, along with the other three counts. The reports state: Mr. Denes: "We will object."

The court: "On what basis?"

Denes: "I don't believe that assault one and assault two are appropriate. The prosecutor should pick one and go with that one, not both. It seems that assault two is a lower charge."

The court: "Are these charged in the alternative?"

Mr. Goodkin: "No, your honor. One is charged with a weapon and one is charged with strangulation."

Here, the prosecutor clearly separates the charges. However, when trial proceeded the prosecutor gave the jury charging information and instructions for three assaults. Two with a weapon and one by strangulation. At this point defense counsel should have made an objection to the prosecutor's changing his intent and apparently intentional dishonesty during the previous proceedings. Had the prosecutor not changed his intent on the fifth day of trial, it could be argued that the defendant would not have any convictions for the assault with the deadly weapon.

There were several points during the trial when the defense counsel should have objected to the prosecutor's inappropriate behavior. During closing when the prosecutor misstates the law's requirements, page 607 of the verbatim report:

"...the law requires you to find him guilty of the lesser crime of assault two."

No objection or intervention from the court allowed for the jury to believe this incorrect statement of the law's requirement. Had defense counsel made an objection, or the court stepped in to give a corrective instruction, it could be argued that the convictions may not have yielded the same results.

Defense counsel failed to object to jury instruction 38, which states a false fact, that the jury come to a unanimous decision for the special instructions in which trigger the sentencing court to enhance the defendant's sentence.

There were several times in which the defense counsel should have objected to

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the prosecutor stepping outside his role. When the prosecutor diluted the reasonable doubt standard to comparing the jury's reason to convict to a puzzle, should have been objected to by the defense counsel.

The several times in which the prosecutor made "testimony" in the guise of argument should have been objected to. The prosecutor should not have been allowed to state as "fact" that the defendant "admitted" to any crimes. There also should have been objections to the prosecutor's stating his opinions of the defendant's credibility, when he stated he was attacked by a police dog, or the prosecutor comparing the defendant's testimony to a "made-for-Hollywood-movie" should have been objected to. The prosecutor should not have been allowed to make impeaching "testimony" without objection from defense, and/or the defense being allowed to cross examine this "witness".

The fact that the defense counsel was not effective coupled with the fact that the prosecutor stepped outside his role to remain an impartial officer of the state is reason that all convictions should be vacated, and remanded to the trial courts for a new trial.

ADDITIONAL GROUND 5

**Enhanced punishment, deadly weapon charge; firearm enhancement:**

The charging documents given to the jury state deadly weapon as the weapon used in the commission of the alleged crime. The instructions specified that deadly weapon includes a firearm, whether loaded or not. But, the charging documents only use deadly weapon language. A sentencing court should not be allowed to instate a firearm enhancement to a charge in which only uses deadlywepon language. RCW 9A.36.021(2)(a)"...assault II is a class B felony" RCW 9A.36.021 (1)(c): ".assaults another with a deadly weapon". It is clear that the language for the assault two only intends for the assault to be defined to using a deadly weapon. RCW 9.94A.825 gives the deadly weapon definition to include a "pistol, revolver, or any other firearm...". The assault I, in this case, was instructed with the spefic use of a firearm, and given that definition. However, this is not the case for the assault two. *Blakely v. Washington* 159 L. Ed. at 405, quoting Criminal Laws § 84: "Exceptional sentence-factors 2. Under the criminal law of the State of Washington, a reason offered to justify an exceptional sentence - a sentence greater than the maximum under the statutory standard range- could be considered only if the reason took into account factors other than those used in computing the standard-range sentence for the offense." It is clear in this case that the factors used during sentencing included an assault with a deadly weapon. Under this reasoning, the judge should not have imposed any exceptional sentence or enhanced sentencing.

*State v. Williams-Walker* 167 Wn. 2d 889, 225 P. 3d 913 (2010), recognized that when the jury is given an instruction on a specific enhancement and makes it's finding, the sentencing judge is bound by those findings. I will reiterate that the assault two only uses deadly weapon language. It is obvious that the legislation only allowed authorization of the deadly weapon enhancement. They did not include firearm. It's important to note *state v. Recuenco*, 163 Wn. 2d 428, 180 P. 3d 1276 (2008), Justice Ginsburg noted how RCW 9.94A.602 overlaps handguns, shot guns and rifles as deadly weapons. So they are both a deadly weapon and a firearm. Therefore it would be a structural error to be given a firearm sentencing enhancement for the assault two.

In a similar case, *State v. Pierce*, 155 Wn. App. 701, 230 P. 3d 237 (2010), Pierce raises the enhancements on his direct appeal, that the charging information "being armed with a deadly weapon" as to several of his counts. The sentencing courts erroneously imposed firearm sentencing enhancements. In this case, the jury instructions clearly separate, the Assault I, with a firearm, to the Assault II, with a deadly weapon, to wit-firearm. The charging documents give the firearm definitions for the Assault I, however, they only give the firearm, deadlyweapon instructions for the Assault II.

This case is also similar to the Personal Restraint Petition of Delgado, Wn. App. 149. 233. 204 P. 3d 936 (2009), in which the court only gave the instruction for the deadly weapon, and no definition of the firearm.

Last, I would like to bring up double jeopardy and ambiguity concerns regarding the sentencing courts sentence to 9.94A.825, deadly weapon special verdict in addition RCW 9.94A.533 (3) the firearm sentencing enhancement. It seems to me that the court should have to chose one or the other. Because the charging information only uses the deadly weapon language, it would only be appropriate to enforce the deadly weapon enhancements.

For these reason the court should vacate the firearm sentencing enhancements and remand the sentencing courts to resentence the defendant to the deadly weapon sentencing enhancements.

State of Washington

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) Respondent,  
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) v.  
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NO. 66632-1-I

AFFIDAVIT OF SERVICE  
BY MAILING

Jesse M. White  
Appellant,

I, Jesse M. White, being first sworn upon oath, do hereby certify that I have served the following documents:

Statement of additional grounds for review

Upon: Washington State	Seth Aaron Fine	Andrew Peter Zinner
Court of Appeals, Div. I	Attorney at Law	Nielsen, Broman & Koch, PLLC
One Union Square	Snohomish Co. Pros. Ofc	1908 E. Madison St.
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By placing same in the United States mail at:

WASHINGTON STATE PENITENTIARY  
1313 NORTH 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA. 99362

On this 16 day of January, 2012.

Jesse White  
Jesse White #347132  
Name & Number

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 JAN 19 AM 10:46

Affidavit pursuant to 28 U.S.C. 1746, Dickerson v. Wainwright 626 F.2d 1184 (1980); Affidavit sworn as true and correct under penalty of perjury and has full force of law and does not have to be verified by Notary Public.