Supreme Court No. ____
(COA No. 58414-0-II)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAYAIRUS JOHNSON,

Petitioner.

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

A. IDENTITY OF PETITIONER 1

B. COURT OF APPEALS DECISION 1

C. ISSUE PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 2

E. ARGUMENT 8

The prosecutor committed reversible misconduct, and the Court of Appeals decision sanctioning such improper statements conflicts with clear precedent and erodes longstanding constitutional principles. 8

1. *As this Court and the Court of Appeals have repeatedly held, it is misconduct for the prosecutor to misstate or trivialize the burden of proof by using puzzle and game analogies.* 8
2. *The prosecutor committed reversible misconduct when he equated the jury's evaluation of the evidence as completing a jigsaw puzzle throughout the case.* 12
3. *The prosecutor committed reversible misconduct when he equated the jury's evaluation of the evidence as playing a game.* 20
4. *This Court should accept review to clarify such misconduct must not be tolerated.* 24

F. CONCLUSION 25

TABLE OF AUTHORITIES

Washington Supreme Court Cases

In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012) 9, 13, 22, 23

State v. Allen, 182 Wn.2d 364, 341 P.3d 268 (2015)..... 19

State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007)..... 8

State v. Lindsay, 180 Wn.2d 423, 326 P.3d 125 (2014).... passim

State v. Loughbom, 196 Wn.2d 64, 470 P.3d 499 (2020)..... 22

State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994)..... 23

State v. Zamora, 199 Wn.2d 698, 512 P.3d 512 (2022)..... 15, 18

Washington Court of Appeals Cases

State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009) 10, 11, 17, 21

State v. Curtiss, 161 Wn. App. 673, 250 P.3d 496 (2011). 16, 17

State v. Fleming, 83 Wn.2d 209, 921 P.2d 1076 (1996)..... 14

State v. Fuller, 169 Wn. App. 797, 272 .3d 126 (2012).... passim

State v. Gonzales, 111 Wn. App. 276, 45 P.3d 205 (2002) 19

State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010). 9, 10

State v. Salas, 1 Wn. App. 2d 931, 408 P.3d 383 (2018).... 9, 11, 13

United States Supreme Court Cases

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 8

Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) 9

United States Court of Appeals Cases

United States v. Bradley, 917 F.3d 493 (9th Cir. 2019)..... 11, 15

Constitutional Provisions

Const. art. I, § 3 9

U.S. Const. amend. XIV 9

Rules

RAP 13.4 24

Other Authorities

Ronald J. Bacigal, *Putting the People Back Into the Fourth Amendment*, 62 George. Wash. L. Rev. 359 (1994) 21

A. IDENTITY OF PETITIONER

Jayairus Johnson asks this Court to accept review of the Court of Appeals decision under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Johnson appealed, alleging the prosecutor committed reversible misconduct in closing arguments. The Court of Appeals affirmed. *State v. Johnson*, No. 58414-0-II, 2025 WL 689787 (Wash. Ct. App. Mar. 4, 2025).

C. ISSUE PRESENTED FOR REVIEW

The United States and Washington State Constitutions protect a person's right to a fair trial. The prosecutor violates this constitutional right when they commit misconduct by misstating or trivializing the State's burden of proof. Over Mr. Johnson's objection, the court allowed the prosecutor to repeatedly equate the jury's evaluation of the evidence to completing a jigsaw puzzle or playing a game. The Court of Appeals decision affirming the conviction conflicts with

published decisions and violates Mr. Johnson's right to a fair trial. This Court should accept review. RAP 13.4(b)(1), (2), (3).

D. STATEMENT OF THE CASE

Asha McMullen was walking in Illahee State Park in Bremerton when a car pulled up and a man jumped out, demanding her belongings. RP 1182. Ms. McMullen gave the man her blue backpack, then he got back in the car and drove away. RP 1188, 1190.

Ms. McMullen called 911. RP 812. She described the car as a maroon SUV with a Seahawks logo on the front license plate. RP 1180. She described the person as a tall, slim, Black man, wearing a green gaiter over his face, reflective sunglasses, and a Seahawks sweatshirt. RP 1184-85, 1204.

Officers Ring and Wolner responded and met Ms. McMullen at the park. RP 812, 896. As Officer Wolner drove her home, they saw a maroon SUV drive past. RP 900, 901, 1205. Officer Ring went to look for the car. RP 818, 904.

Officer Ring did not see the maroon SUV, but he saw Mr. Johnson walking on the side of the road where Officer Wolner had seen the car driving. RP 820-21. He was not wearing a face covering, sunglasses, or a Seahawks sweatshirt. RP 822, 1208, 1223.

Officer Ring stopped Mr. Johnson and had him sit on the side of the road as Officer Wolner drove by with Ms. McMullen in the car. RP 822, 1208. Ms. McMullen did not recognize Mr. Johnson as the man who took her backpack, so Officer Ring let him go. RP 823.

Officer Ring continued driving on the same road in the opposite direction that Mr. Johnson was walking and saw a maroon SUV with a Seahawks license plate parked on a driveway. RP 823. Another officer, Officer Myers, stopped Mr. Johnson again on the same road. RP 995.

Officer Myers told Mr. Johnson they were investigating a robbery that happened in Illahee State Park and they had found a car nearby that matched the description. RP 999. Mr. Johnson

said it was his car and he had found it at Illahee State Park about an hour before. RP 999.

While Officer Myers was talking to Mr. Johnson, Officer Ring looked through the windows of the parked SUV and saw sunglasses and a blue backpack. RP 830, 836, 841. The police arrested Mr. Johnson, searched him, and found the keys to the SUV. RP 911, 1000. The police searched the car and found a green gaiter and a Seahawks sweatshirt. RP 837.

The State charged Mr. Johnson with one count of second-degree robbery. CP 1-2. The case proceeded to trial. Ms. McMullen and the police officers testified as described above.

During voir dire, the prosecutor repeatedly compared the jury's evaluation of the evidence to doing a puzzle. He asked the potential jurors, "Who in this room has done a jigsaw puzzle? When you do a jigsaw puzzle . . . when you look at one piece, do you know what it is, and where it goes, and what's the fit?" RP 530. He emphasized putting individual pieces together and making assumptions "to reach a final result." RP 531.

Defense counsel objected, arguing, "it is entirely inappropriate to spend as much time as [the prosecutor] is spending on discussing direct and circumstantial evidence comparing and putting together a puzzle to see a complete picture. He is planting in the jury's head that this is a jigsaw puzzle that they need to put together." RP 532. Defense counsel said, "it is, essentially, a misstatement of the law." RP 534. The prosecutor acknowledged he could not use a puzzle analogy to discuss the State's burden of proof, but alleged he could use the same analogy to discuss circumstantial evidence. RP 536. Defense counsel pointed out discussing the jury's evaluation of the evidence, either direct or circumstantial, is the same as discussing the burden of proof. RP 537.

The court overruled the objection, saying, "I don't find any error in questioning the jury about circumstantial evidence." RP 537-38. But it directed the prosecutor to move on from the puzzle analogy. RP 538.

During opening statement, the prosecutor told the jury the pieces of evidence are "the puzzle pieces" presented to the jury. RP 757.

During closing arguments, the prosecutor repeated the puzzle metaphor again. He told the jury to think about the jigsaw puzzle analogy they talked about during voir dire. RP 1279, 1286-87. He discussed the evidence—the police stopping Mr. Johnson, that the maroon SUV with the vanity plate was found nearby, that Mr. Johnson had the keys to that SUV, and that the police found sunglasses, a gaiter, a Seahawks sweatshirt, and a blue backpack in the SUV—and told the jury: "Those are the jigsaw pieces to work with." RP 1281.

The prosecutor told the jury to look at the evidence like pieces of a jigsaw puzzle: "you should use all of this evidence like puzzle pieces and put it together to create the full picture of what happened." RP 1288. He also compared the case to an easy game, stating, "It's not much of a whodunit." RP 1281.

Defense counsel repeatedly objected. RP 1281, 1286, 1288, 1292. Defense counsel also moved the court to dismiss the case for prosecutorial misconduct. RP 1288-89. The court overruled each objection, but noted defense counsel's "standing objection." RP 1281, 1287, 1292.

In rebuttal, the prosecutor continued to analogize the jury's evaluation of the evidence to a game. He again compared the case to a dinner party game, calling it "a whodunit," and also brought up the board game, "Clue." RP 1302. He encouraged the jury to evaluate the evidence and convict based on "[t]he simplest explanation." RP 1303. In his final words to the jury, the prosecutor again urged the jury to "[p]iece the evidence together like a puzzle" and convict. RP 1306.

The jury returned a guilty verdict. CP 203. The Court of Appeals affirmed. App. 1-14.

E. ARGUMENT

The prosecutor committed reversible misconduct, and the Court of Appeals decision sanctioning such improper statements conflicts with clear precedent and erodes longstanding constitutional principles.

1. As this Court and the Court of Appeals have repeatedly held, it is misconduct for the prosecutor to misstate or trivialize the burden of proof by using puzzle and game analogies.

It is fundamental that the State must prove every element of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The beyond a reasonable doubt standard "provides concrete substance for the presumption of innocence." *Id.* at 363. That presumption is "the bedrock upon which the criminal justice system stands." *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). "[B]y impressing upon the factfinder the need to reach a subjective state of *near certitude of the guilt* of the accused, the [beyond a reasonable doubt] standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself." *Jackson v. Virginia*, 443

U.S. 307, 315, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (emphasis added).

"Closing argument provides an opportunity for counsel to summarize and highlight relevant evidence and argue reasonable inferences from the evidence." *State v. Salas*, 1 Wn. App. 2d 931, 940, 408 P.3d 383 (2018). The prosecutor commits misconduct when they make improper and prejudicial arguments during closing, and this misconduct deprives the accused of a fair trial. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). The accused's right to a fair trial is a fundamental liberty secured by the federal and state constitutions. *Id.* at 703-04; U.S. Const. amend. XIV; Const. art. I, § 3.

As this Court and the Court of Appeals have clearly held, it is misconduct for the prosecutor to misstate or trivialize the State's burden to prove guilt beyond a reasonable doubt. *State v. Lindsay*, 180 Wn.2d 423, 434, 326 P.3d 125 (2014); *State v. Johnson*, 158 Wn. App. 677, 684, 243 P.3d 936 (2010). "When

a prosecutor compares the reasonable doubt standard to everyday decision making, it improperly minimizes and trivializes the gravity of the standard and the jury's role." *Lindsay*, 180 Wn.2d at 436 (citing *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009)); *accord Johnson*, 158 Wn. App. at 684.

Analogizing the State's burden to doing a jigsaw puzzle or an everyday decision improperly minimizes the burden of proof. *Lindsay*, 180 Wn.2d at 434-37. In *Lindsay*, the prosecutor compared jury deliberations to putting together a puzzle and knowing what image is depicted even if half the pieces are missing. *Id.* at 429. This Court held this was misconduct because it misrepresented the standard of proof. *Id.* at 436. This Court also held the prosecutor committed misconduct when he compared the reasonable doubt standard to an everyday decision such as crossing the street. *Id.*

The impermissible use of a puzzle analogy is not limited to a situation where the prosecutor depicts the burden of proof

as a specific portion of a puzzle, as occurred in *Lindsay*. A prosecutor cannot misrepresent or minimize its burden to the jury, whether by express words or by implication. *See Salas*, 1 Wn. App. 2d at 945-46. Offering a partly completed puzzle as a metaphor for what the prosecution has to prove is inherently improper and encourages jurors to use "a far less demanding standard of proof than true proof beyond a reasonable doubt." *United States v. Bradley*, 917 F.3d 493, 508 (9th Cir. 2019); *accord Lindsay*, 180 Wn.2d at 436.

Telling the jury they are putting together a puzzle or playing a game is simply incorrect. The jury's role is to "determine whether the State has proved its allegations against a defendant beyond a reasonable doubt." *Anderson*, 153 Wn. App. at 429. A prosecutor commits misconduct when they misrepresent or minimize this important task.

2. *The prosecutor committed reversible misconduct when he equated the jury's evaluation of the evidence as completing a jigsaw puzzle throughout the case.*

During closing arguments, the prosecutor misrepresented the State's burden of proof and repeatedly told the jury to approach the evidence like a jigsaw puzzle. He discussed evidence as a "the jigsaw pieces [the jury is] to work with." RP 1281. He acknowledged the evidence was circumstantial and required the jury to make certain assumptions because "every one piece by itself doesn't mean much." RP 1287. But he urged the jury to "use all of this evidence like puzzle pieces and put it together to create a full picture of what happened." RP 1288. He encouraged the jury to "put [those pieces] together" and convict. RP 1293. In his final statement before the jurors went to deliberate, he told them to "[p]iece the evidence together like a puzzle" and "go ahead and convict." RP 1306.

By repeatedly comparing the case to a jigsaw puzzle, the prosecutor "improperly minimize[d] and trivialize[d] the gravity of the standard [of proof] and the jury's role." *Lindsay*,

180 Wn.2d at 436 (citation omitted). The puzzle analogy tells the jury it should not consider the lack of evidence in deciding whether the State has met its burden and instead should jump to conclusions based on circumstantial evidence.

A prosecutor certainly commits misconduct by comparing the State's burden of proof to an incomplete puzzle and specifically referencing a particular number or percentage. *Lindsay*, 180 Wn.2d at 436. But a prosecutor need not utter specific words to convey the same impropriety. *See Glasmann*, 175 Wn.2d at 708 ("A prosecutor could never shout in closing argument that '[the defendant] is guilty, guilty, guilty!'" and cannot convey this same sentiment using visuals.); *Salas*, 1 Wn. App. 2d at 945-46 ("PowerPoint slides should not be used to communicate to the jury a covert message that would be improper if spoken aloud.").

The prosecutor in this case effectively quantified the burden of proof when he invited the jury to make assumptions when putting together the circumstantial evidence like pieces of

a puzzle. RP 1288. He acknowledged each "piece" of circumstantial evidence did not paint a complete picture but urged the jury to draw conclusions to "create the full picture." RP 1287-88. Even though the prosecutor did not explicitly quantify its burden, he still conveyed to the jury it could make assumptions and convict just like determining the image depicted on an incomplete puzzle.

In addition, the prosecutor is presumed to know the law. *State v. Fleming*, 83 Wn.2d 209, 214, 921 P.2d 1076 (1996) (holding the prosecutor's misconduct was in contravention of a published opinion holding such arguments to be improper). Numerous cases caution prosecutors against using such metaphors, and this Court has clearly held that comparing the State's burden of proof to a jigsaw puzzle or an everyday experience is improper. *E.g. Lindsay*, 180 Wn.2d at 436-37.

Further, the prosecutor's repeated use of the puzzle analogy, through voir dire, opening statements, and closing arguments, in a case that hinged on circumstantial evidence

made it especially improper. This conveyed to the jury that, despite the lack of direct evidence, it should fill in the gaps and solve the case. The prosecutor's comments diluted the burden of proof and led jurors to understand it to be a game rather than the "demanding standard" of proof beyond a reasonable doubt. *Bradley*, 917 F.3d at 508.

The prosecutor's repeated comparison of the case to jigsaw puzzles misrepresented and trivialized the State's burden of proof. This was incorrect and improper. Instead of "solving" a puzzle, the jury is tasked with holding the State to its burden to prove every element of the offense beyond a reasonable doubt. The prosecutor committed misconduct.

The Court of Appeals acknowledged the prosecutor repeated the puzzle analogy during voir dire, opening statements, and closing argument, and agreed all of these statements implicated Mr. Johnson's right to a fair trial. App. 11 (citing *State v. Zamora*, 199 Wn.2d 698, 711-12, 512 P.3d 512 (2022)). However, it concluded these statements were not

improper because the State never explicitly quantified the puzzle analogy. App. 11.

A single, unquantified reference to puzzles during closing argument may be permissible. *State v. Fuller*, 169 Wn. App. 797, 827, 272 .3d 126 (2012); *State v. Curtiss*, 161 Wn. App. 673, 700, 250 P.3d 496 (2011). But in this case, the State's repeated comparisons to a puzzle throughout the case, despite decades of published cases cautioning prosecutors against such statements, after the court overruled numerous objections but directed the prosecutor to "move on" from the metaphor, is exactly what makes these statements so improper. As defense counsel pointed out, the prosecutor knew exactly what words to avoid, and the trial court effectively gave the State the green light to repeat the analogy over and over. RP 532 ("He is planting in the jury's heads [during voir dire] that this is a jigsaw puzzle that they need to put together."), 1291 ("[H]e's just trying to employ a strategy that was unconstitutional in a different and new way."), 1292 ("He knew

what he was going to do. He's been planning on doing it the entire time. This is inappropriate.").

Even absent specific quantification, the puzzle analogy is improper, and repeating it throughout a case trivializes the burden of proof by comparing it to an everyday task or game. *Fuller*, 169 Wn. App. at 827; *Lindsay*, 180 Wn.2d at 436 (citing *Anderson*, 153 Wn. App. at 431). This was not an isolated metaphor. *Cf. Fuller*, 169 Wn. App. at 827; *Curtiss*, 161 Wn. App. at 700. Rather, it was the State's entire theme throughout the case, beginning as early as voir dire, and the State knew the court would not stop it. The Court of Appeals was wrong to conclude it was not misconduct.

Where a prosecutor's statements were improper and an objection was lodged, reversal for a new trial is required if there was a substantial likelihood the misconduct affected the jury. *Anderson*, 153 Wn. App. at 427. To determine prejudice, this Court reviews the prosecutor's misconduct in the context of the entire case. *Id.*

Here, there is a substantial likelihood the prosecutor's improper puzzle analogy affected the jury's verdict. The jurors likely misunderstood the burden of proof to be less than what the constitution requires. The prosecutor encouraged them to evaluate circumstantial evidence like a jigsaw puzzle and make assumptions. Like when solving a puzzle, it invited the jury to guess or jump to conclusions. Notwithstanding the jury instructions, the jurors may have thought that a lack of evidence is not a basis for a reasonable doubt.

The likelihood of prejudice is even greater because the prosecutor's improper puzzle analogy was a common theme throughout trial, starting during voir dire. *See Zamora*, 199 Wn.2d at 711-12. Indeed, at the beginning of his closing statements, the prosecutor told the jurors to think back to their discussion during voir dire about the "skills good jurors need in order to be good jurors," which apparently meant being good at jigsaw puzzles. RP 1279.

The prosecutor's final words to the jury cemented the harm. "[C]omments at the end of a prosecutor's rebuttal closing are more likely to cause prejudice." *Lindsay*, 180 Wn.2d at 443. In his very last statement before the jurors left for deliberations, the prosecutor urged them to "[p]iece the evidence together like a puzzle" and convict Mr. Johnson. RP 1306.

And by repeatedly overruling Mr. Johnson's objections, the court compounded the likelihood of prejudice by creating "an aura of legitimacy" to the prosecutor's improper arguments. *State v. Allen*, 182 Wn.2d 364, 378, 341 P.3d 268 (2015) (citation omitted); *see State v. Gonzales*, 111 Wn. App. 276, 283-84, 45 P.3d 205 (2002) (court's overruling of objection to misconduct compounded effect of improper argument by giving it credence). The court emboldened the prosecutor to continue using this improper theme and told the jurors the prosecutor's false analogy to a puzzle was the proper weight to give its deliberations. The prosecutor committed reversible misconduct.

3. *The prosecutor committed reversible misconduct when he equated the jury's evaluation of the evidence as playing a game.*

During closing arguments, the prosecutor also misrepresented the State's burden of proof and repeatedly compared the case to an easy game. He stated, "It's not much of a whodunit." RP 1281. In rebuttal, he again said this case was a simple game: "this case is simple. It's a whodunit, but it isn't Clue." RP 1302. He compared the evidence to clues in a game that is easy to solve: "That's why it's a whodunit. But it isn't much of one." RP 1303.

Comparing the case to solving a dinner party game of "whodunit" or playing the board game "Clue" improperly minimized and trivialized both the seriousness of the standard of proof and the role of the jury. *See Lindsay*, 180 Wn.2d at 436-37; *Fuller*, 169 Wn. App. at 827. The jury does not "exist[] merely to determine 'Whodunnit'"; the jury's role is a critical "check upon government power." Ronald J. Bacigal, *Putting*

the People Back Into the Fourth Amendment, 62 George. Wash. L. Rev. 359, 383 (1994).

There is nothing similar about playing a game and deciding whether the State has met its burden of proving guilt beyond a reasonable doubt. Comparing the jury's task to a dinner party mystery or board game trivialized "the gravity of the standard and the jury's role." *Lindsay*, 180 Wn.2d at 436 (citing *Anderson*, 153 Wn. App. at 431). The State cannot "equate[] its burden of proof to making an everyday choice." *Fuller*, 169 Wn. App. at 827. A criminal trial is not a game of "whodunit," and the jury's task "is not to 'solve' a case." *Anderson*, 153 Wn. App. at 429. These comments were misconduct.

The Court of Appeals concluded Mr. Johnson did not object so the argument was waived. App. 12-13. But defense counsel clearly objected to the prosecutor's use of puzzle and game metaphors, arguing the law "does not allow [the prosecutor] to make this a game and make it puzzle pieces." RP

1288. In addition, defense counsel moved the court to dismiss the case for prosecutorial misconduct. RP 1288-89 (referencing CrR 8.3). Like in *Lindsay*, even if counsel did not object to the specific word, a motion alleging prosecutorial misconduct preserves the issue for review. 180 Wn.2d at 430-31.

Even if the issue was not properly raised, prosecutorial misconduct requires reversal if it was so flagrant and ill intentioned that an instruction could not have cured the prejudice. *State v. Loughbom*, 196 Wn.2d 64, 74-75, 470 P.3d 499 (2020). This analysis focuses on the impact of the misconduct and "whether the defendant received a fair trial in light of the prejudice." *Id.*; *Glasmann*, 175 Wn.2d at 681.

The prosecutor's repeated, thematic comparison of the jury's role at trial to an easy game of "whodunit" or the board game "Clue," in the context of his repeated comparison of the trial to a jigsaw puzzle, was so prejudicial that no instruction could have cured the prejudice. The prosecutor's improper theme of puzzles and games permeated the entire case,

beginning in voir dire, and invited the jury to approach the case like a fun, inconsequential game. The combined prejudicial effect of the prosecutor's repeated use of those metaphors "buttressed" the improper implications of the comparisons and invited the jury to convict based on a lower standard of proof. *See Fuller*, 169 Wn. App. at 816; *see also Glasmann*, 175 Wn.2d at 707 (repeating improper statements can constitute reversible misconduct).

The Court of Appeals was wrong to examine these references in isolation. App. 13. It acknowledged comparing a case to a board game such as "Clue" "could be improper." App. 13 n.14. However, it concluded "the singular, fleeting reference to the game of Clue was de minimis." App. 13. This ignores the entire context of the case and the impact of these references. The fact that the jury was properly instructed does not resolve the issue. *See State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994) (prosecutor's improper statements must be viewed "in the context of the total argument, the issues in the case, the

evidence addressed in the argument, and the instructions given"). Rather than being an isolated, harmless reference to games, it was part of the prosecutor's theme throughout the case. This was reversible misconduct.

4. This Court should accept review to clarify such misconduct must not be tolerated.

The Court of Appeals's decision conflicts with and undermines numerous holdings cautioning prosecutors from improperly trivializing or misstating the burden of proof, as discussed above. It also erodes Mr. Johnson's constitutional right to a fair trial. This Court should not permit such court-sanctioned gamesmanship by the State to flout the duties and obligations of its office. *See Lindsay*, 180 Wn.2d at 442. This Court should accept review. RAP 13.4(b)(1), (2), (3).

F. CONCLUSION

Due to the prosecutor's improper argument and the Court of Appeals's disregarding of settled precedent, Mr. Johnson requests this Court grant review pursuant to RAP 13.4(b).

This brief is in 14-point Times New Roman, contains 3,969 words, and complies with RAP 18.17.

Respectfully submitted this 27th day of March 2025.

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APPENDIX

Table of Contents

Court of Appeals Opinion ..... App. 1-14

Filed
Washington State
Court of Appeals
Division Two

March 4, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAYAIRUS JOSHUA JOHNSON, Appellant.	No. 58414-0-II UNPUBLISHED OPINION

VELJACIC, J. — Jayairus Joshua Johnson appeals his conviction for robbery in the second degree. Johnson argues that the State's reference to a puzzle analogy, the term "whodunit," and the game of Clue allegedly shifted the burden of proof to Johnson and trivialized the role of the jury. To that end, Johnson claims the State's actions amounted to prosecutorial misconduct, denying him the right to a fair trial protected by the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 22 of the Washington State Constitution. Because the State's comments were not improper or Johnson waived review, we affirm Johnson's conviction.

FACTS

I. BACKGROUND

In October 2022, Asha McMullen was walking in Illahee State Park. McMullen frequented the park after she moved to Bremerton. McMullen was by herself, talking on the phone as she walked to the waterfront. Before reaching the water, a maroon sport utility vehicle (SUV) abruptly

stopped at an intersection in close proximity to McMullen. A Black man, wearing a Seahawks hoodie, sweatpants, "a gaiter over his face," and reflective sunglasses, jumped out of the vehicle and demanded McMullen give him all of her belongings. 5 Rep. of Proc. (RP) at 1184. McMullen complied with the demand and gave the man her backpack, which contained her sweatshirt and keys for a rental car. The man also tried to take McMullen's cell phone but was unsuccessful. After the encounter, the man "walked back to the car, and drove away." 5 RP at 1189.

McMullen called 911 just after the man left. Deputies Joseph Ring and David Wolner responded shortly thereafter. After interviewing McMullen, Ring drove around the area in search of "a maroon SUV with a decorative Seattle Seahawks plate on the front." 4 RP at 817. Wolner observed a vehicle matching that description pass his patrol car while he was taking McMullen back to her apartment. After receiving this information from Wolner, Ring drove to the general location where the vehicle was spotted. After a few minutes had passed, Ring saw a Black male matching the general description McMullen provided walking alongside the street. Ring stopped the man, later identified as Johnson, and had Wolner drive by so McMullen could attempt to identify him. McMullen could not positively identify Johnson as the man who took her items, so Ring let him leave.

Ring found the vehicle used in the robbery shortly after his encounter with Johnson. Ring notified his colleagues that he found the vehicle at issue. Sergeant Brandon Myers, who was patrolling in the area, drove toward Ring's location. While Myers was en route, he encountered Johnson walking alongside the street. Myers stopped Johnson and proceeded to ask him questions

about the robbery. After Myers described the maroon SUV, Johnson explained that "he had located that vehicle at the Illahee State Park about an hour prior and that it was left on his property." 4 RP at 999. Johnson also "indicate[d] it was his vehicle." 4 RP at 999. Myers ultimately searched Johnson and found car keys "for a Toyota style vehicle." 4 RP at 1000. Johnson was taken into custody and read his *Miranda*[1] rights.

Ring obtained a search warrant and accessed the maroon SUV with the keys obtained by Myers. Ring retrieved what was later determined to be McMullen's backpack, which also contained her personal items, including the keys to her rental car. Ring also found "a green bandana gaiter," a "dark blue colored Seahawks jersey," several pairs of sunglasses, and an iPad. 4 RP at 836.

The State charged Johnson with robbery in the second degree in violation of RCW 9A.56.210(1) and RCW 9A.56.190.

II. TRIAL

During voir dire, the State questioned prospective jurors about their understanding of direct and circumstantial evidence. During this exchange, the State analogized circumstantial evidence to a jigsaw puzzle.

> [PROSECUTOR]: Okay. Juror Number—I'll start with someone new. Juror Number 2, have you ever done a jigsaw puzzle?
> PROSPECTIVE JUROR 2: Oh, yeah.
> [PROSECUTOR]: Oh yeah. Who in this room has done a jigsaw puzzle? When you do a jigsaw puzzle, Juror Number 23, when you look at one piece, do you know what it is, and where it goes, what's the fit?
> PROSPECTIVE JUROR 23: No. It's part of the bigger picture.
> [PROSECUTOR]: Right. So when you do it, do you just look at every piece and say, "I don't know; throw it away?" . . . Or is it putting the whole picture together to get you the answer?
> PROSPECTIVE JUROR 23: It's putting the whole picture together to get to the answer.

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

3 RP at 530-31. Shortly after, Johnson objected, arguing this exchange amounted to prosecutorial misconduct.[2] Outside of the jury's presence, Johnson, based on prior case law, urged the court to prevent any similar analogies to be used during voir dire. The State countered, explaining that Johnson's assertion was an inaccurate statement of law. The State presented that it was "not talking about the burden of proof at all"; rather, it was "talking about using circumstantial evidence and the separate things to reach a conclusion from that." 3 RP at 536. The State added that "even if [it] were to use that puzzle to talk about the burden of proof, it is permissible." 3 RP at 536. The court overruled the objection, advising the State that it should move on from the line of discussion and continue with the proceedings.

At the conclusion of the State's opening statement, there was another reference to puzzle pieces. The State commented:

> Ladies and gentlemen of the jury, during this trial, it's a criminal trial, I have the burden of proof. That means it's my duty to prove this case beyond a reasonable doubt. I embrace that burden. When all of the evidence is presented, all of the puzzle pieces are given to you, you will have to decide if I met it. The evidence will establish [Johnson] targeted and robbed Asha McMullen as she tried to go on a morning walk. Convict him for his crime.

4 RP at 757-58.

Prior to closing arguments, the court correctly instructed the jury on the relevant law.[3] The State, during its closing, reintroduced the puzzle analogy. After discussing the facts of the case, the State commented:

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[2] Specifically, Johnson stated that "[i]t is not permissible . . . to discuss cases or burdens of proof as they relate to puzzles" during closing argument. 3 RP at 532.

[3] Specifically, the court instructed the jury on the State's burden of proof, the defendant's presumed innocence, and that that State had to prove every element of the offense beyond a reasonable doubt.

> [PROSECUTOR]: Those are the puzzle pieces to work with.
> [JOHNSON]: Objection, Your Honor.
> THE COURT: Overruled.
> [PROSECUTOR]: It's not much of a whodunit.

5 RP at 1281.

At another point, the State referenced the jigsaw analogy for circumstantial evidence presented during voir dire. The exchange is as follows:

> [PROSECUTOR]: And we talked a lot in voir dire about the jigsaw and circumstantial evidence—
> [JOHNSON]: Objection, Your Honor.
> THE COURT: Overruled.
> [PROSECUTOR]: —and how, when you are looking at the evidence, you don't just look at one piece. Because we have talked a lot about all of the different [indiscernible]. It's right to say every one piece by itself doesn't mean much.
> . . . .
> [PROSECUTOR]: And you should use all of this evidence like puzzle pieces and put it together to create the full picture of what happened.

5 RP at 1286-88. Johnson objected again, requesting to address the court outside the jury's presence. Raising similar points, Johnson explained that the State's conduct was improper, emphasizing that "puzzle analogies should not be used." 5 RP at 1290. In defense of its analogy, the State argued that it was "addressing the use of circumstantial evidence," noting that "[e]vidence should be considered as a whole." 5 RP at 1290. The court overruled the objection. Johnson requested, and the court granted, a standing objection to the use of the puzzle analogy to avoid further interruption.[4]

During rebuttal, the State remarked that it had "the burden of proof. [And that the] weight of this case [was on its] shoulders," emphasizing that Johnson didn't have to prove anything; the State did. 5 RP at 1302. The State later questioned "[h]ow could [Johnson] have ended up with the stolen items and the robber's disguise if he wasn't involved in the robbery?" 5 RP at 1302.

[4] Defense counsel specifically objected to the "puzzle piece analogy," not the use of "whodunit."

The State went on to comment, "I want to stress one word for you: Reasonable. Because this case is simple. It's a whodunit, but it isn't Clue."[5] 5 RP at 1302. Using the "whodunit" reference again, the State noted that Johnson "was smart enough to hide his face after the robbery and change shirts. . . . That's why it's a whodunit. But it isn't much of one."[6] 5 RP at 1303. And before concluding, the State instructed the jury to "[p]iece the evidence together like a puzzle, follow it, and if you reach the abiding belief that [Johnson] committed this crime, go ahead and convict him of the crime." 5 RP at 1306.

The jury found Johnson guilty of robbery in the second degree. Johnson moved to dismiss the case or declare a mistrial based on the State's alleged misconduct. The court denied Johnson's motion. Johnson was ultimately sentenced to 14 months of confinement and 18 months of community custody.

Johnson appeals.

ANALYSIS

I. THE STATE'S COMMENTS REGARDING PUZZLE PIECES AND "WHODUNIT" DID NOT AMOUNT TO PROSECUTORIAL MISCONDUCT

A criminal defendant has a constitutional right to a fair trial. U.S. CONST. amend. VI, XIV; WASH. CONST. art. I, § 22. As quasi-judicial officers, prosecutors "have a duty to ensure that defendants receive a fair trial." *State v. Fuller*, 169 Wn. App. 797, 812, 282 P.3d 126 (2012). Consequently, prosecutorial misconduct may deprive a defendant of this right. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012).

[5] This was the only reference to the game of Clue throughout all proceedings.

[6] Defense counsel did not object to the State's use of "whodunit" at any point of the trial.

When a defendant demonstrates a prosecutor's conduct was improper, we engage in one of two standards of review. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). If the defendant fails to object at trial, "the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Id.* at 760-61. This more stringent standard of review requires the defendant to show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Id.* at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). Alternatively, if the defendant objects at trial, "the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." *Id.* at 760.

"[T]he question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict." *Glasmann*, 175 Wn.2d at 711. We review the prosecutor's conduct in the context of the entire case. *Thorgerson*, 172 Wn.2d at 443. And we presume that the jury follows the court's instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

Prosecutors have "wide latitude to argue reasonable inferences from the evidence," but they must "'seek convictions based only on probative evidence and sound reason.'" *Glasmann*, 175 Wn.2d at 704 (quoting *State v. Castenada-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)). To that end, there are several limitations on a prosecutor's conduct at trial. For example, prosecutors "'should not use arguments calculated to inflame the passions or prejudices of the

jury.'" *Id.* (quoting AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE stds. 3-5.8(c) (2d ed. 1980)). Also, a prosecutor may not misstate the law or its burden to establish a defendant's guilt beyond a reasonable doubt. *State v. Lindsay*, 180 Wn.2d 423, 434, 326 P.3d 125 (2014); *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015).

A. Puzzle & Jigsaw Pieces

Johnson argues the State's analogy of puzzle and jigsaw pieces constituted misconduct. We disagree.

This court has addressed the use of puzzle analogies on several occasions. *See State v. Johnson*, 158 Wn. App. 677, 682, 684-85, 243 P.3d 936 (2010); *State v. Curtiss*, 161 Wn. App. 673, 698-702, 250 P.3d 496 (2011); *Fuller*, 169 Wn. App. at 811, 823-28. In *Johnson*, the State, during closing argument, explained, "[y]ou add a third piece of the puzzle, and at this point even being able to see *only half*, you can be assured beyond a reasonable doubt that this is going to be a picture of Tacoma." 158 Wn. App. at 682 (emphasis added). We held that this was improper because discussing "the reasonable doubt standard in the context of making an affirmative decision based on a partially completed puzzle trivialized the State's burden, focused on the degree of certainty the jurors needed to act, and implied that the jury had a duty to convict without a reason not to do so." *Id.* at 685.

In *Curtiss*, we held that the puzzle analogy was not improper. 161 Wn. App. at 700-01. In that case, the State, when discussing the burden of proof in closing argument, commented:

> [R]easonable doubt is not magic. This is not an impossible standard. Imagine, if you will, a giant jigsaw puzzle of the Tacoma Dome. There will come a time when you're putting that puzzle together, and even with pieces missing, you'll be able to say, with some certainty, beyond a reasonable doubt what that puzzle is: The Tacoma Dome.

Id. at 700. Without referencing *Johnson*, we explained that, in context, the State was describing the relationship between circumstantial evidence, direct evidence, and the standard of proof, without shifting the burden to the defendant. *Id.* And unlike *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009), "the State's comments about *identifying* the puzzle with certainty before it is complete [was] not analogous to the weighing of competing interest inherent in a *choice* that individuals make in their everyday lives."[7] *Curtiss*, 161 Wn. App. at 701 (emphasis in the original).

We came to a similar outcome in *Fuller*. 169 Wn. App. at 823-28. In that case, the State, also during closing argument, made several remarks about puzzles. *Id.* at 825. They include:

> What I am going to do now is use a jigsaw puzzle to illustrate the concept of beyond a reasonable doubt. Let's say that someone is telling us that this is a picture of Tacoma. We get a few of the pieces of the puzzle. We get a few pieces of evidence and this is what we can see. From that we might think it looks like Tacoma, but we don't know—
>
> . . . .
>
> So we look at that portion of the puzzle and we do not have enough pieces or enough evidence beyond a reasonable doubt that it's pieces of Tacoma. But let's say we get some more pieces. Now, we have more pieces, more evidence that suggests this is Tacoma. But we may not yet have enough pieces, enough evidence to know beyond a reasonable doubt that it's Tacoma.
>
> Now, we have more pieces. We have more evidence and we can see beyond a reasonable doubt that this is a picture of Tacoma. We can see the freeway. We can see Mount Rainier and we can see the Tacoma Dome.
>
> A trial is very much like a jigsaw puzzle. It's not like a mystery novel or [the *Crime Scene Investigation* television series (CSI)] or a movie. You're not going to have every loose end tied up and every question answer[ed]. What matters is this: Do you have enough pieces of the puzzle? Do you have enough evidence to believe beyond a reasonable doubt that the defendant is guilty?

[7] In *Anderson*, the State commented, among other things, "beyond a reasonable doubt is a standard that you apply every single day. . . . [For example, in choosing to have] elective surgery, . . . [you] might get a second opinion. You might be worried, do I really need it? If you go ahead and do it, you were convinced beyond a reasonable doubt." 153 Wn. App. at 425. The court found this comment to be improper because it "minimized the importance of the reasonable doubt standard and . . . the jury's role in determining whether the State had met its burden." *Id.* at 431.

Id. (footnote omitted) (alterations in the original). We reasoned that "the State neither equated its burden to making an everyday choice nor quantified the level of certainty necessary to satisfy" the burden of proof. *Id.* at 827. This fact, in addition to the jury being correctly instructed about the burden of proof, resulted in the State's comments not amounting to misconduct. *Id.* at 828.

In *Lindsay*, our Supreme Court concluded the State's remarks were improper. 180 Wn.2d at 434-36. In *Lindsay*, the State, during closing argument, announced:

> [O]ne of the simplest [ways to explain reasonable doubt] is the idea of a jigsaw puzzle. . . . [T]he first thing you do is you get all the pieces that have edges on them, start to lock them together, you're trying to get the outline. . . . [Y]ou put a few more pieces in . . . and you start to get a better idea of what that picture is. . . . And then you put in about 10 more pieces and see this picture of the Space Needle. Now, you can be halfway done with that puzzle and you know beyond a reasonable doubt that it's Seattle. You could have 50 percent of those puzzle pieces missing and you know it's Seattle.

Id. at 434. The court took issue with this comment because it quantified the burden of proof rather than suggesting "that one could be certain of the picture beyond a reasonable doubt even with some pieces missing." *Id.* at 436. Critically, the court did not proscribe the use of puzzle and or jigsaw piece analogies when discussing the burden of proof.[8] *Id.* at 434-36.

[8] Johnson cites to *United States v. Bradley*, 917 F.3d 493, 507-08 (6th Cir. 2019), for the proposition that the use of "a puzzle analogy can be improper even without any explicit quantification." Br. of Appellant at 12-13. Federal circuit precedent is not binding on this court. *See State v. Pippin*, 200 Wn. App. 826, 836-37, 403 P.3d 907 (2017) ("[W]e *may* utilize well-reasoned, persuasive authority from federal courts and sister jurisdictions to resolve a question.") (emphasis added). Because we conclude that our state authorities permit the puzzle analogy on the particular facts before us, we will not read the persuasive Sixth Circuit authority to reject our state authorities on this issue.

Here, Johnson objected to the State's use of the puzzle analogy throughout the trial. Therefore, he need not overcome waiver and we review his claim to determine whether the prosecutor's remarks were improper and, if so, whether the remarks "resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." *Emery*, 174 Wn.2d at 760. Johnson does not make this showing.

The alleged misconduct took place during both voir dire, opening statements, and closing argument. Existing precedent does not address the issue during voir dire, only closing argument. *Johnson*, 158 Wn. App. at 682; *Curtiss*, 161 Wn. App. at 700-01; *Fuller*, 169 Wn. App. at 823-28; *Lindsay*, 180 Wn.2d at 434-36. It stands to reason, however, that holdings from existing precedent would be applicable here. *See State v. Zamora*, 199 Wn.2d 698, 711-12, 512 P.3d 512 (2022) ("[W]hat occurs during voir dire is equally as important as what occurs during trial proceedings. Voir dire is a significant aspect of trial because it allows parties to secure their Sixth Amendment and article 1, section 22 right to a fair and impartial jury through juror questioning.").

Contrary to Johnson's protestations, the State's reliance on the puzzle analogy, on these facts, was not improper. Unlike *Johnson* or *Lindsay*, the State did not quantify or trivialize the burden of proof by analogizing the case to a puzzle or jigsaw pieces. *Johnson*, 158 Wn. App. at 682; *Lindsay*, 180 Wn.2d at 434-36. Rather, in all points of the trial, the State relied on the example to explain the importance of considering all of the evidence to see the larger picture. The State also emphasized that it was not using the analogy to discuss the burden of proof, even though that would have been permissible based on the substance of its comments here.[9] *See Fuller*, 169 Wn. App. at 823-28. Like *Fuller*, the State acknowledged that it had the burden to prove all elements

[9] During rebuttal, for example, the State said, "[p]iece the evidence together like a puzzle, follow it, and if you reach the abiding belief that the defendant committed this crime, go ahead and convict [Johnson] of this crime." 5 RP at 1306.

of the crime beyond a reasonable doubt.[10] 169 Wn. App. at 828-29. The jury was also correctly instructed by the court, which emphasized the gravity of the proceedings. *See Fuller*, 169 Wn. App. at 828-29. In context, these remarks did not amount to misconduct.[11]

Therefore, we conclude that the State's use of the puzzle piece analogy did not constitute misconduct.

B. "Whodunit" & the Game of Clue

Johnson argues the State's use of the term "whodunit" and "Clue" during closing argument constituted misconduct. We disagree.

The State used the term "whodunit"[12] three times during closing argument. The State referenced the game of Clue once during closing argument. Unlike the puzzle analogy, Johnson did not object to the use of either term.[13]

Assuming without deciding that each of these remarks were improper, Johnson waives these claims unless he demonstrates that the "misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Emery*, 174 Wn.2d at 760-61. On these facts, Johnson does not overcome this hurdle.

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[10] Specifically, during rebuttal, the State explained that it had "the burden of proof. [And that the] weight of this case [was on its] shoulders," emphasizing that Johnson didn't have to prove anything; the State did. 5 RP at 1302.

[11] Because we conclude that the State's comments were not improper, we need not address whether they "resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." *Emery*, 174 Wn.2d at 760.

[12] "Whodunit" is a noun, defined as "a detective story or a mystery story." MERRIAM-WEBSTER UNABRIDGED DICTIONARY, https://unabridged. merriam-webster.com/unabridged/whodunit (last visited Feb. 20, 2025).

[13] Johnson raised a standing objection to avoid repeated interruptions during closing argument, but defense counsel specifically stated that it was directed towards the State's "puzzle piece analogy." 5 RP at 1292.

The State's use of the term "whodunit" was not "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Id.* Like with the State's use of the puzzle analogy, the State did not misstate the burden of proof when using the term "whodunit." As the State explained, the use of the term was in light of the fact that the suspect's face was covered, requiring the jury to rely on circumstantial evidence to infer identity. And importantly, the State also acknowledged its burden, and the court correctly instructed the jury. Accordingly, the use of the term "whodunit," if improper, could have been resolved by a curative instruction.

The State's reference to the boardgame of "Clue" was also not "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Id.* To be clear, the State did not compare Johnson's case to the game of Clue. When questioning how Johnson could not be involved in the crime, even though he had the stolen items in his possession, the State commented, "I want to stress one word for you: Reasonable. Because this case is simple. It's a whodunit, *but it isn't Clue*." 5 RP at 1302 (emphasis added). Even if it was improper, the singular, fleeting reference to the game of Clue was de minimis and could have been resolved by a curative instruction.[14]

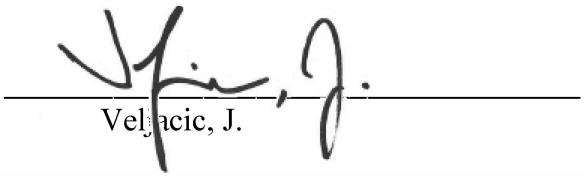
Therefore, we conclude Johnson's claim regarding the State's use of "whodunit" and "Clue" during closing argument is waived.

[14] On a different set of facts, analogizing the case to a game of Clue could be improper because it would trivialize the State's burden of proof. *See Johnson*, 158 Wn. App. at 682.

CONCLUSION

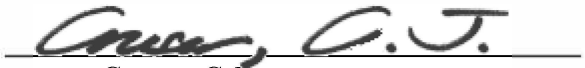
Accordingly, we affirm Johnson's conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

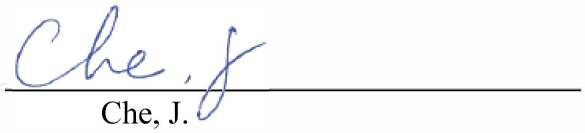


Veljacic, J.

We concur:



Cruser, C.J.



Che, J.

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