

No. 44533-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jimmy Perkins,

Appellant.

Cowlitz County Superior Court Cause No. 12-1-01152-1

The Honorable Judge Michael H. Evans

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct that was flagrant and ill-intentioned.
2. The prosecutor committed misconduct that infringed Mr. Perkins's Fourteenth Amendment right to due process.
3. The prosecutor committed misconduct by arguing "facts" not in evidence.
4. The prosecutor committed misconduct by asking jurors to convict based on passion, prejudice, and propensity "evidence."

ISSUE 1: A prosecutor may not seek a conviction based on passion and prejudice, and may not suggest that an accused person has the propensity to commit the charged crime. Here, the prosecutor told jurors he was afraid Mr. Perkins might assault him, and suggested that he was an assaultive type of person. Did the prosecutor commit misconduct that was flagrant, ill-intentioned, and prejudicial despite the court's attempt at a curative instruction?

5. The prosecutor committed misconduct by misstating the law of self-defense during closing argument.
6. The prosecutor's improper arguments relieved the state of its burden to prove the absence of self-defense.
7. The prosecutor improperly argued that Mr. Perkins had a duty to retreat.

ISSUE 2: A person who believes he is about to be attacked may stand his ground; the law imposes no duty to retreat. Here, the prosecutor argued that Mr. Perkins had a duty to retreat from Mayfield, and thus was not entitled to claim self defense. Did the prosecutor's improper argument relieve the state of its burden to prove the absence of self defense, in violation of Mr. Perkins's Fourteenth Amendment right to due process?

8. The prosecutor improperly argued that Mr. Perkins could not lawfully use force in self-defense until he'd actually been physically attacked.

ISSUE 3: The use of force is justified whenever used by a person about to be injured in preventing an offense against his or her person. Here, the prosecutor argued that Mr. Perkins could not use force until Mayfield actually launched a physical attack. Did the prosecutor's argument improperly suggest that Mr. Perkins could not use force to prevent an offense against his person?

9. The prosecutor committed misconduct that infringed Mr. Perkins's Sixth and Fourteenth Amendment right to counsel.

10. The prosecutor committed misconduct by disparaging the role of defense counsel.

ISSUE 4: A prosecutor may not malign an accused person's attorney or disparage the role of defense counsel. Here, the prosecutor argued that defense attorneys get paid to divert the jury's attention from what really happened. Did the prosecutor's misconduct infringe Mr. Perkins's Sixth and Fourteenth Amendment rights to counsel and to due process?

11. The prosecutor committed misconduct by claiming that Mr. Perkins had fabricated an incident at trial as a diversion to avoid difficult questions on cross-examination.

12. The prosecutor improperly provided a personal opinion on Mr. Perkins's credibility.

ISSUE 5: A prosecutor may not "testify" to "facts" not in evidence and should not express a personal opinion as to the credibility of the accused person. Here, the prosecutor accused Mr. Perkins of fabricating an incident at trial and expressed a personal opinion regarding Mr. Perkins's credibility. Did the prosecutor's improper arguments infringe Mr. Perkins's Fourteenth Amendment right to due process?

13. The trial court erred by adding a point to Mr. Perkins's offender score as a result of his community custody status.

ISSUE 6: A sentencing court may not add a point to an offender score when the offender was on community custody but residing in jail at the time of the crime. Here, Mr. Perkins was in jail at the time of the offense. Did the trial court err by adding a point to his offender score?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jimmy Perkins and John Mayfield were cellmates at the Cowlitz County Jail. RP 33, 228. Mayfield was in on an assault charge. RP 94. Mr. Perkins was serving a three-day hold for a probation violation. RP 227.

On Mr. Perkins's last night in jail, Mayfield accused him of leaving toenail clippers on Mayfield's bunk. RP 235-36. The disagreement became physical and the fight ended with Mayfield confining Mr. Perkins in a chokehold. RP 98, 101, 191, 217, 238. An inmate trustee had to ask Mayfield to let Mr. Perkins go because he couldn't breathe. RP 102, 191, 197-98, 217, 238.

For the next half-hour, Mayfield circled the dayroom, calling Mr. Perkins a "punk" and a "bitch." RP 215-16, 239. Mayfield told Mr. Perkins that, as soon as they were locked in their cell for the night, Mayfield was going to rape and beat him.¹ RP 241.

Mr. Perkins kicked off his flip flops and took a fighting stance. RP 108, 242. The two fought again and Mayfield gained the upper hand. RP 108, 134. 192, 244. Mayfield was on top of Mr. Perkins, but jumped off

¹ Mayfield testified that he told Mr. Perkins that, once they were locked in the cell, he was going to "take care of it in there." RP 102.

when corrections officers entered. RP 134. The officers found Mr. Perkins and Mayfield lying on opposite sides of a table. RP 62, 149. Mayfield was taken to the hospital where he found out he had a fractured cheekbone. RP 170.

The state charged Mr. Perkins with second-degree assault. CP 1. At trial, Mr. Perkins argued that he had acted in self-defense. RP 307-334.

During Mr. Perkins's testimony, he felt intimidated by Mayfield watching through the courtroom window. RP 253. Mr. Perkins brought the issue up and it was quickly resolved. RP 253-5.

In closing, the prosecutor insisted that Mr. Perkins had fabricated the story that Mayfield was watching him testify in order to divert attention from his testimony:

He wanted you all to think, "Oh, my goodness." He was really being intimidated by John Mayfield. So what does the Defendant do? "Tell your client, tell your victim to quit intimidating me." And what did you guys all do? You all turned and looked at doors. You looked out there, and you forget for a brief moment what he was saying.
RP 302.

The prosecutor also argued that he feared that Mr. Perkins was going to attack him during cross-examination:

And if you want to talk about being threatened, you saw how the Defendant acted when I pushed his buttons. I thought I was being threatened. I thought I was going to be attacked...
RP 339-40.

Mr. Perkins objected to this argument and moved for a mistrial.

RP 340. The court denied the motion, but admonished the jury that the lawyers' arguments aren't evidence and instructed them to disregard the prosecutor's statement. RP 345-46.

After the court's instruction, the prosecutor continued to argue that Mr. Perkins's demeanor on cross-examination demonstrated that he is a threatening person:

The point of everything is that the Defendant is the aggressor. He was and is the aggressor. You did see his temper. You did see how quickly he was to rise to anger, and that is suggestive of someone who's going to go attack someone. It is very suggestive of someone who is going to attack someone.
RP 346.

In response to Mr. Perkins's self-defense claim, the prosecutor argued that threatening words are not sufficient to permit the use of force in self-defense. RP 294, 338. The prosecutor relied on the adage that "sticks and stones may break my bones but words will never hurt me." RP 294.

The prosecutor claimed that one must be physically attacked in order to make the use of force lawful:

Now his being attacked -- that is a really, really important distinction here yet, again, and this whole idea of what's [sic] self-defense is about. That the Defendant had to have reasonable grounds for believing that he is being attacked and to stand his ground. Is being attacked. That's present tense. Right then, right there, he gets to defend himself. Not something in the future, not

something an hour-and- a-half later, then, right then, right now, present tense -- is being. That's what has to be going through his brain. Is being attacked. That's what justifies his right to go and beat up John Mayfield.
RP 338.

Next, the prosecutor contended that Mr. Perkins could have avoided the situation by asking to be placed in protective custody:

And if there was such a concern, he had a number of options aside from that. He could have gone to, you know, exclusive custody. He could have gone, pushed one of any of these buttons here, and asked, say, "You know what, I feel like I'm being threatened." "I've got just a little bit of time left to serve out on my DOC hold, and can go." "Can you guys help me?" "Can you get me into protective custody?" He didn't do that.
RP 294-95.

Finally, the prosecutor asserted that defense counsel had also used diversion tactics in order to sway the jury away from the truth:

... [T]hen he used diverting tactics. That's what his defense counsel did here earlier. And that's what they get paid to do. Come here and divert your attention from what really happened.
RP 346.

The jury convicted Mr. Perkins of assault in the second degree. RP 356. The court added a point to his offender score for being under community custody when the offense occurred. CP 4. This timely appeal follows. CP 16.

ARGUMENT

I. PROSECUTORIAL MISCONDUCT DENIED MR. PERKINS A FAIR TRIAL.

A. Standard of Review.

A prosecutor commits misconduct by making improper statements that prejudice the accused. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Absent an objection, a court can consider prosecutorial misconduct for the first time on appeal, and must reverse if the misconduct was flagrant and ill-intentioned. *Id.*

Furthermore, an appellant can argue prosecutorial misconduct for the first time on review if it creates manifest error affecting a constitutional right. RAP 2.5(a)(3). A reviewing court analyzes the prosecutor's statements during closing in the context of the case as a whole. *State v. Jones*, 144 Wn. App. 284, 291, 183 P.3d 307 (2008).

B. The prosecutor committed numerous instances of prejudicial misconduct.

Prosecutorial misconduct can deprive the accused of a fair trial. *Glasmann*, 175 Wn.2d at 703-04; U.S. Const. Amend VI, XIV, Wash. Const. art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight “not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.” Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

1. The prosecutor committed misconduct by arguing that he feared Mr. Perkins would assault him.

An accused person enjoys a constitutional right to an impartial jury. Wash. Const. art. I, § 22. A prosecutor must “seek conviction based only on probative evidence and sound reason.” *Glasmann*, 175 Wn.2d at 704. It is misconduct for a prosecutor to make arguments designed to inflame the passions or prejudices of the jury. *Id.* Likewise, a prosecutor may not use “his or her position of power and prestige” to sway the jury by expressing a personal opinion of guilt independent of the evidence in the case. *Id.*

Additionally, evidence of the accused's character is not admissible to prove action in conformity therewith on a particular occasion. ER 404(a). A prosecutor commits misconduct by arguing that the accused's "bad character" is evidence of guilt. *Washington v. Hofbauer*, 228 F.3d 689, 699 (6th Cir. 2000). Finally, it is misconduct for a prosecutor to use "other acts" evidence to argue that the accused had the propensity to commit a crime. *State v. Fisher*, 165 Wn.2d 727, 748-49, 202 P.3d 937 (2009).

Prosecutorial misconduct can be so flagrant and prejudicial that it cannot be remedied by a curative instruction. *State v. Stith*, 71 Wn. App. 14, 22-23, 856 P.2d 415 (1993); *see also Fisher*, 165 Wn.2d at 749. For example, misconduct that is flagrant, highly prejudicial, and based on "facts" not in evidence requires reversal even if the trial court gives a curative instruction. *Stith*, 71 Wn. App. at 23.

Similarly, a curative instruction is insufficient if it tells the jury to disregard the improper argument's evidentiary value but does not tell jurors not to use the information to assess the accused person's propensity to commit the crime. *Fisher*, 165 Wn.2d at 749.

Here, the prosecutor argued that he thought Mr. Perkins was going to attack him:

And if you want to talk about is being threatened, you saw how the Defendant acted when I pushed his buttons. I thought I was being threatened. I thought I was going to be attacked...
RP 339-40.

Mr. Perkins objected and moved for a mistrial. RP 340. The court denied the motion but gave the following admonition to the jury:

[R]emember that the lawyers' statements are not evidence. You must disregard any remark, statement, or argument ... that is not supported by the evidence or the law in my ... instructions... The Prosecutor made an argument regarding Mr. Perkins' demeanor on the stand yesterday and his feelings about that. You are instructed to disregard that.
RP 345-46.

After the court's instruction, however, the prosecutor continued in the same vein:

The point of everything is that the Defendant is the aggressor. He was and is the aggressor. You did see his temper. You did see how quickly he was to rise to anger, and that is suggestive of someone who's going to go attack someone. It is very suggestive of someone who is going to attack someone.
RP 346.

The prosecutor's argument impermissibly encouraged the jury to convict Mr. Perkins based on passion, prejudice, and propensity evidence rather than the facts of the case. *Fisher*, 165 Wn.2d at 748-49. It also impermissibly put forward Mr. Perkins's "bad character" as evidence of guilt. *Hofbauer*, 228 F.3d at 699. Mr. Perkins's defense relied on the idea that he had fought Mayfield not because he wanted to but because he had

to. The prosecutor's improper arguments portraying Mr. Perkins as the type of person who attacks people prejudiced his defense.

The court's instruction was insufficient to cure the prejudicial effect of the improper argument. *Stith*, 71 Wn. App. at 22-23. The court should have ordered jurors not to consider any alleged propensity toward assaultive behavior. *Fisher*, 165 Wn.2d at 749. In addition, the prosecutor continued the line of argument after the court's attempt to cure. RP 346. This exacerbated the error, and further blunted the effect of the court's instruction.

The prosecutor's statement that he feared that Mr. Perkins would assault him and that Mr. Perkins is the type of person who would attack someone constituted flagrant, ill-intentioned, and prejudicial misconduct that could not be cured by the court's instruction. *Fisher*, 165 Wn.2d at 748-49. Mr. Perkins's conviction must be reversed. *Id.*

2. The prosecutor committed misconduct by mischaracterizing the law of self-defense.

When an accused person properly raises self-defense, the state must prove beyond a reasonable doubt that the use of force was not lawful. *State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013).

An accused person is denied a fair trial when the prosecutor mischaracterizes the law, if there is a substantial likelihood that the mischaracterization affected the jury verdict. *State v. Walker*, 164 Wn. App. 724, 736, 265 P.3d 191 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded*, 164 Wn.2d 724, 295 P.3d 728 (2012).² A prosecutor’s misstatement of the law is “a serious irregularity having the grave potential to mislead the jury.” *Id.* Specifically, it is misconduct for a prosecutor to misstate the law in a way that lowers the state’s burden of proof regarding the lawful use of force. *McCreven*, 170 Wn. App. at 471.

Improper argument mischaracterizing the law of self-defense requires reversal unless the state can show that it was harmless beyond a reasonable doubt. *Id.*

- a. The prosecutor mischaracterized the law of self-defense by arguing that Mr. Perkins had a duty to retreat.

In Washington, a person who believes s/he is being attacked has no duty to retreat. S/he is entitled to use force in self-defense. *State v. Jordan*, 158 Wn. App. 297, 301 n. 6, 241 P.3d 464 (2010).

In Mr. Perkins’s case, the jury was instructed that a person does not have the duty to retreat to avoid the lawful use of force. CP 50.

² In an unpublished decision, the Court of Appeals affirmed its prior decision on remand.

Nonetheless, the prosecutor argued that Mr. Perkins's use of force was unreasonable because he could have asked to be placed in protective custody:

And if there was such a concern, he had a number of options aside from that. He could have gone to, you know, exclusive custody. He could have gone, pushed one of any of these buttons here, and asked, say, "You know what, I feel like I'm being threatened." "I've got just a little bit of time left to serve out on my DOC hold, and can go." "Can you guys help me?" "Can you get me into protective custody?" He didn't do that.
RP 294-95.

Later, referring to the locations of the buttons to call for help from corrections officers, the prosecutor argued that:

He had other options, and he chose to show that he wasn't a punk bitch. All these red "X's" are other options, and not once did he take those other options. Instead, he created an option.
RP 339.

The prosecutor's argument that Mr. Perkins's use of force was not lawful because he had the option of retreat misstated the law of self-defense and lowered the state's burden of proof. *McCreven* 170 Wn. App. at 471. Mr. Perkins's self-defense claim made up his entire case. The prosecutor's mischaracterization of the law prejudiced Mr. Perkins. The state cannot show that the improper argument was harmless beyond a reasonable doubt. *Id.* The prosecutor's improper argument requires reversal of Mr. Perkins's conviction. *Id.*

- b. The prosecutor mischaracterized the law of self-defense by arguing that Mr. Perkins was not entitled to defend himself until he was being physically attacked.

The use of force is lawful “whenever used by a party about to be injured.” RCW 9A.16.020(3). A self-defense claim is evaluated “from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.” *State v. Irons*, 101 Wn. App. 544, 549-50, 4 P.3d 174 (2000); *McCreven* 170 Wn. App. at 462. The accused must believe that s/he is in imminent danger. *State v. George*, 161 Wn. App. 86, 99, 249 P.3d 202 (2011) *review denied*, 172 Wn.2d 1007, 259 P.3d 1108 (2011). Imminent danger does not require a physical attack – a danger that is “hanging threateningly over one’s head” can suffice. *Id.* (quoting *State v. Janes*, 121 Wn.2d 220, 241, 850 P.2d 495 (1993)).

The court instructed the jury that if Mr. Perkins reasonably believed that he was about to be injured, that entitled him to use necessary force to prevent or attempt to prevent that injury. CP 48.

Nonetheless, the prosecutor argued that Mayfield’s threatening words did not entitle Mr. Perkins to use self-defense:

[T]here’s an old saying "Sticks and stones may break my bones, but words may never hurt me." And you heard something about the code of the jail... [When] you call someone ... a "bitch" or a "punk," you've just made them into a "bitch" or a "punk" unless

they stand up for themselves... That's a choice that someone makes to either abide by that code or not abide by that code. RP 294.

Similarly, the prosecutor argued that Mr. Perkins was not entitled to use force against Mayfield until he was being physically attacked:

[T]he Defendant had to have reasonable grounds for believing that he is being attacked and to stand his ground. Is being attacked. That's present tense. Right then, right there, he gets to defend himself. Not something in the future, not something an hour-and-a-half later, then, right then, right now, present tense -- is being. That's what has to be going through his brain. Is being attacked. That's what justifies his right to go and beat up John Mayfield. RP 338.

This argument was misconduct, because it misstated the law of self-defense. *Janes*, 121 Wn.2d at 241.

Mr. Perkins was legally entitled to use force against Mayfield if, knowing what he knew, he reasonably feared that he was about to be injured. *McCreven*, 170 Wn. App. at 462. Mr. Perkins knew that Mayfield said he was going to attack him as soon as they were locked together in their cell. RP 114, 239, 241. He knew that Mayfield had subdued him in a chokehold when they had fought less than an hour before. RP 98, 191. He knew that a trustee had to tell Mayfield to release him from the chokehold when he couldn't breathe. RP 191, 217, 238. A reasonable person in Mr. Perkins's position would have believed that he was about to be injured even if Mayfield had not yet physically attacked

him. *George*, 161 Wn. App. at 99. The danger was “hanging threateningly over his head.” *Id.*

The prosecutor’s argument that the law only permits self-defense when one is being physically attacked misstated the law and lowered the state’s burden of proof. *McCreven*, 170 Wn. App. at 471; *George*, 161 Wn. App. 99. The misconduct was flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 704. Mr. Perkins’s case turned on his self-defense claim. The state cannot show that the misconduct was harmless beyond a reasonable doubt. *Id.* Mr. Perkins’s conviction must be reversed. *Id.*

3. The prosecutor committed misconduct by disparaging the role of defense counsel.

A prosecutor commits misconduct by disparaging the role of defense counsel. *State v. Gonzales*, 111 Wn. App. 276, 282, 45 P.3d 205 (2002). Such an argument improperly attempts to “draw a cloak of righteousness” around the state’s case. *Id.*

At Mr. Perkins’s trial, the prosecutor argued that defense attorneys are paid to divert the jury’s attention from the truth:

... [T]hen he used diverting tactics. That’s what his defense counsel did here earlier. And that’s what they get paid to do. Come here and divert your attention from what really happened. RP 346.

The prosecutor's statement was improper. *Gonzales*, 111 Wn. App. at 282. Mr. Perkins's case was a matter of his word against Mayfield's. The prosecutor's attempt to "draw the cloak of righteousness" around his case was flagrant and ill-intentioned and likely tipped that balance in the jurors' minds. Mr. Perkins was prejudiced by the prosecutor's improper argument.

The prosecutor committed flagrant, ill-intentioned, and prejudicial misconduct by disparaging the role of defense counsel. *Id.* Mr. Perkins's conviction must be reversed. *Id.*

4. The prosecutor committed misconduct by introducing "facts" not in evidence and giving a personal opinion of Mr. Perkins's credibility.

It is misconduct for a prosecutor to argue facts that have not been admitted into evidence. *Glasmann*, 175 Wn.2d at 696. It is a long-standing rule that "consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is reasonable ground to believe that the defendant may have been prejudiced." *Id.*

It is also misconduct for a prosecutor to give a personal opinion of the credibility of the accused. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

While on the witness stand, Mr. Perkins stated that Mayfield was in the courthouse hallway intimidating him through the window. RP 253-

54. The issue was quickly resolved. RP 254. Nothing in the record contradicted Mr. Perkins's contention that Mayfield had been watching his testimony through the window. RP 253-54.³

In closing, the prosecutor argued that Mr. Perkins had fabricated the situation as a diversion tactic:

He wanted you all to think, "Oh, my goodness." He was really being intimidated by John Mayfield. So what does the Defendant do? "Tell your client, tell your victim to quit intimidating me." And what did you guys all do? You all turned and looked at doors. You looked out there, and you forget for a brief moment what he was saying.
RP 302.

There was no evidence to contradict that Mayfield had been watching Mr. Perkins through the window. RP 253-55. The prosecutor's argument improperly "testified" to "facts" not in evidence and provided a personal opinion of Mr. Perkins's credibility. *Glasmann*, 175 Wn.2d at 696; *Reed*, 102 Wn.2d at 145. Mr. Perkins's self-defense claim relied on his credibility. Rather than argue the facts of the case, the prosecutor claimed that a courtroom-management issue was indicative of Mr. Perkins's guilt. The prosecutor's improper argument was flagrant, ill-intentioned, and prejudicial. *Glasmann*, 175 Wn.2d at 707.

³ The court put on the record that it did not see anyone in the window shortly after Mr. Perkins said that Mayfield was intimidating him. RP 263. Mr. Perkins had already stated, however, that Mayfield was walking away. RP 293-95.

The prosecutor committed flagrant, ill-intentioned, and prejudicial misconduct by asserting “facts” that were not in the record and by giving a personal opinion on credibility. Mr. Perkins’s conviction must be reversed. *Id.*

C. The cumulative effect of the prosecutor’s misconduct requires reversal of Mr. Perkins’s conviction.

The cumulative effect of repeated instances prosecutorial misconduct can be “so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.” *Walker*, 164 Wn. App. at 737.

At Mr. Perkins’s trial, the prosecutor committed numerous instances of flagrant and ill-intentioned misconduct, including: arguing that he was afraid that Mr. Perkins was going to assault him, mischaracterizing the law of self-defense, disparaging the role of defense counsel, “testifying” to “facts” not in evidence, and providing a personal opinion of Mr. Perkins’s credibility.

All of these instances of misconduct, whether considered individually or in the aggregate, require reversal of Mr. Perkins’s convictions. *Id.*

II. THE COURT CALCULATED MR. PERKINS'S OFFENDER SCORE INCORRECTLY.

A. Standard of Review.

Interpretation of the Sentencing Reform Act (SRA) is a question of law reviewed *de novo*. *State v. Crawford*, 164 Wn. App. 617, 622, 267 P.3d 365 (2011).

B. The court erred by adding a point to Mr. Perkins's offender score for being on community custody at the time of the offense.

The SRA requires a one-point increase in an offender score if the accused was "under community custody" when the offense was committed. RCW 9.94A.525(19). "Community custody" is a portion of a sentence served in the community. *Crawford*, 164 Wn. App. at 622. A person is not "under community custody" while in jail. *Id.* at 623. Therefore, a sentencing court may not add a point to an offender score based on community custody for an offense committed while in jail. *Id.*

Mr. Perkins was in jail when the assault occurred. RP 63. Nonetheless, the court added a point to Mr. Perkins's offender score for being under community custody at the time of the offense. CP 4.

The court erred in adding a point to Mr. Perkins's offender score for an offense that occurred while he was in jail. *Crawford*, 164 Wn. App. at 622. The case must be remanded for resentencing. *Id.*

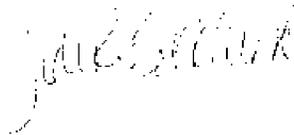
CONCLUSION

Prosecutorial misconduct denied Mr. Perkins a fair trial. The prosecutor committing prejudicial misconduct by stating that he was afraid that Mr. Perkins was going to assault him, mischaracterizing the law of self-defense, arguing “facts” not in evidence, disparaging the role of defense counsel, and providing a personal opinion of Mr. Perkins’s credibility. Mr. Perkins’s conviction must be reversed.

The sentencing court erred by adding a point to Mr. Perkins’s offender score for being on community custody. In the alternative, Mr. Perkins’s case must be remanded for resentencing.

Respectfully submitted on September 25, 2013,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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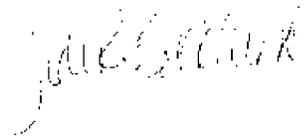
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 25, 2013.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

September 25, 2013 - 10:23 AM

Transmittal Letter

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