No. 80454-5-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RUBEN T. MELEGRITO,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION.

Defending himself against two friends who seemed to have turned against him, Ruben Melegrito fired his gun at them. One man died several weeks later from his gunshot wounds. Mr. Melegrito explained he acted in self-defense.

His jury trial was marred by a number of distinct errors. The court rejected multiple challenges to potential jurors who were unable to promise they could be fair and impartial. The court admitted evidence that unfairly portrayed Mr. Melegrito as dangerous and allowed argument that disparaged his right to counsel. The court failed to clearly instruct the jury on the separate requirements to convict him of murder and attempted murder against two different people. The court refused to accept the verdict the jury rendered for enhancements because it thought it was inconsistent and ordered further deliberations. The court imposed a sentence that doubled the length of the firearm enhancements without evidence that Mr. Melegrito had a prior conviction authorizing this increased sentence.

These errors, considered separately or cumulatively, denied Mr. Melegrito a fair trial.

B. ASSIGNMENTS OF ERROR.

1. The jury's verdict for counts 1 and 2 violates the double jeopardy prohibitions of the Fifth Amendment and article I, section 9 of the Washington Constitution.

2. The court's overlapping jury instructions failed to protect the requirement of a unanimous jury verdict under article I, sections 21 and 22 and the Fourteenth Amendment's due process clause.

3. The court improperly pressured the jury to continue deliberations after it announced its verdict.

4. The prosecution did not meet its burden of proof at sentencing as required by due process.

5. The court erred by doubling the firearm enhancements without proof of the necessary prior conviction that authorizes this increased sentence.

6. The court improperly denied Mr. Melegrito's motion to strike for cause three jurors who could not promise to be fair and this error deprived Mr. Melegrito of his jury trial rights under article I, sections 21 and 22 of the Washington Constitution.

7. The court's admission of unfairly prejudicial and

inflammatory evidence undermined the fairness of the trial.

8. The prosecutor's improper denigration of the defense substantially affected the fairness of the trial.

9. The cumulative effect of multiple errors violated Mr. Melegrito's right to a fair trial by jury.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The jury's verdict must rest on unanimous agreement of separate and distinct conduct in order to impose separate punishments. The jury received to-convict instructions for counts 1 and 2 that permitted convictions based on the same conduct against the same person. Does the jury's verdict violate double jeopardy and fail to ensure all jurors unanimously found two separate offenses?

2. The court may not suggest a deliberating jury must reach a verdict. Here, the court instructed the jury it did not need to fill out the special verdict form if it did not unanimously agree but when the jury returned a blank special verdict form, the court refused to accept it. It told the jury it must continue deliberations and complete this verdict form. Did the court improperly interfere in jury deliberations?

3. The court may not increase a person's sentence unless the prosecution has proven the factual basis for this sentence. The court doubled the length of the firearm enhancements because the State alleged Mr. Melegrito had a prior deadly weapon enhancement, but it did not offer evidence of this prior conviction and the court did not find this prior enhancement existed. Did the court improperly increase Mr. Melegrito's firearm enhancements without adequate proof?

4. A court should grant a motion to strike a juror for cause when the juror cannot promise to serve fairly and impartially. The court refused to strike three jurors who were not sure they could put aside their strongly held personal beliefs and serve impartially. Did the court err in denying Mr. Melegrito's request to strike these jurors for cause?

5. The right to trial by jury under the Washington Constitution provides greater protection than its federal analog. Historically, the state constitution required reversal when a party was forced to use a peremptory challenge to remove a juror who should have been removed for cause, if the party exhausted all their peremptories. Is Mr. Melegrito entitled to a

new trial because he exhausted all his peremptories when striking three jurors who should have been removed for cause?

6. The admission of unfairly prejudicial evidence and use of improper tactics to urge the jury to convict denies an accused person a fair trial. Over objection, the court admitted evidence speculating about Mr. Melegrito's dangerousness and forced him to reenact the shooting in an unrealistic fashion. The prosecutor told the jury the defense counsel was tricking them using common ploys. Did these errors deny Mr. Melegrito a fair trial?

D. STATEMENT OF THE CASE.

Ruben Melegrito had a long but sometimes rocky relationship with Mark Gallardo and John Bacani. 7/17RP 995, 1044-46.[1] Mr. Gallardo was "shocked" Mr. Melegrito came to his house on the day of the incident because Mr. Gallardo had recently accused Mr. Melegrito of stealing property from him and he had confronted Mr. Melegrito at his workplace. 7/8RP

[1] The verbatim report of proceedings is referred to by the date of the proceeding and page number. All cited hearings occurred in 2019.

216, 150-51, 155, 233, 246-47.

Mr. Melegrito knew both men always carried weapons. 7/17RP 1049, 1054. When he heard them whispering and felt as if they were turning against him, he feared they would shoot him, although he did not know why they were trying to kill him. 7/17RP 1015, 1017, 1034. He saw Mr. Bacani reach as if pulling out a gun and he fired his own gun in Mr. Bacani's direction. 7/17RP 1020-23. He similarly saw Mr. Gallardo reach as if arming himself and he shot in Mr. Gallardo's direction. 7/17RP 1023-24. Mr. Melegrito moved very quickly because he was scared and "didn't want to die." 7/17RP 1023. Then he ran to his car and fled. 7/17RP 1028-29. He did not know if his shots hit or harmed either man when he left. 7/17RP 1028, 1032.

Mr. Bacani died several weeks later after his wounds became infected and organs failed. 7/10RP 561, 578. Mr. Gallardo was hit in the shoulder and stomach, and survived. 7/8RP 190-91. Later investigation showed that neither man was carrying a gun when shot, although Mr. Gallardo agreed he usually did. 7/8RP 230, 245. Mr. Gallardo denied taking any action that provoked Mr. Melegrito. 7/8RP 205.

The prosecution charged Mr. Melegrito with intentional murder in the second degree and attempted murder in the second degree. CP 75-76.

During jury selection, a number of potential jurors expressed doubts about their abilities to serve based on the allegations of violence or due to their views on guns and people claiming to act in self-defense. 7/1RP 116-19; 7/2RP 231-32, 262-67, 318-32. The court denied Mr. Melegrito's challenges to three jurors. 7/2RP 232, 267, 320. Mr. Melegrito had to use three of his peremptory strikes to remove these jurors. CP 354.

At his trial, the prosecution directed Mr. Melegrito to reenact the shooting in front of the jury, directing him to point and shoot a fake gun at the lead detective pretending to be Mr. Bacani. 7/17RP 1101-08. Mr. Melegrito objected to the prejudicial impact of this unrealistic reenactment and the noticeable increase in security guards due to this demonstration, but the court overruled him. 7/17RP 1090, 1096-97, 1100.

The court also overruled Mr. Melegrito's objection to a police sergeant describing the force they used to arrest him. 7/10RP 498-501. Jurors heard the SWAT team deployed to

arrest Mr. Melegrito. When these officers feared Mr. Melegrito could take a hostage or arm himself, even though he had not tried to do either, they shot a non-lethal bullet at him to arrest him. 7/10RP 517-18, 522, 525-27. During the rebuttal portion of its closing argument, the prosecutor told the jury defense counsel was "spinning" the bad facts and tricking them by using ploys that "every defense attorney" uses. 7/18 RP 1290-91, 1295.

The jury announced its verdict and handed the court verdict forms stating they found Mr. Melegrito guilty of counts 1 and 2. 7/22RP 1310-11. The special verdict form for the firearm enhancements was blank. 7/22RP 1311. Rather than accepting this form, the court delayed the proceedings, required the foreperson read the special verdict instructions again in the courtroom, then provided new special verdict forms and told the jurors they must continue their deliberations. 7/22RP 1311-26. After this interaction, the jurors returned with new special verdict forms convicting Mr. Melegrito of the firearm sentencing enhancements. 7/22RP 1329.

At sentencing, the prosecution alleged Mr. Melegrito's two firearm enhancements doubled because he had a prior

conviction that included a deadly weapon enhancement. 9/6RP 235. It did not produce any evidence of this prior conviction. The court did not enter any findings that Mr. Melegrito had a prior deadly weapon enhancement but it doubled the firearm enhancements, imposing two consecutive terms of 120 months for each firearm enhancement as well as 419 months for the convictions of second degree murder and attempted murder, totaling 659 months. CP 284, 287.

E. ARGUMENT.

1. Where the court's instructions allowed jurors to use the same conduct to convict Mr. Melegrito of counts 1 and 2, it violates double jeopardy and the guarantee of a unanimous jury verdict to impose separate punishments.

a. Convictions violate double jeopardy when they rest on the same factual and legal elements.

The constitutional protection against double jeopardy prohibits multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 726, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989);

State v. Mutch, 171 Wn.2d 646, 661, 254 P.3d 803 (2011); U.S. Const. amend. V; Const. art I, § 9.

When multiple charges involve the same legal criteria and factual circumstances, jurors must unanimously agree the prosecution proved a separate act constituting a particular charged count. *State v. Noltie*, 116 Wn.2d 831, 842-43, 809 P.2d 1990 (1991); *State v. Borsheim*, 140 Wn. App. 357, 365, 165 P.3d 417 (2007). Without this agreement of separate and distinct conduct, convictions based on the same legal and factual questions will violate double jeopardy. *State v. Robinson*, 8 Wn. App.2d 628, 638, 439 P.3d 710 (2019). This agreement is also required to satisfy the constitutional mandate of a unanimous jury verdict. *Borsheim*, 140 Wn. App. at 370.

The court avoids violating double jeopardy and unanimity guarantees by issuing clear instructions on the nature of the agreement required to convict. *See State v. Vander Houwen*, 163 Wn.2d 25, 37, 177 P.3d 93 (2008) ("In the absence of a unanimity jury instruction, each juror could have convicted Vander Houwen based on different criminal acts"). As this Court explained,

> where multiple identical counts are alleged to have occurred within the same charging period, the trial court must instruct the jury "that they are to find 'separate and distinct acts' for each count."

Borsheim, 140 Wn. App. at 370 (quoting *State v. Hayes*, 81 Wn. App. 425, 431, 914 P.2d 788 (1996); *Noltie*, 116 Wn.2d at 846).

A double jeopardy violation, and the failure to give a unanimity instruction, are constitutional issues that may be raised for the first time on appeal. *State v. Hanson,* 59 Wn. App. 651, 659, 800 P.2d 1124 (1990); *State v. Jackman,* 156 Wn.2d 736, 746, 132 P.3d 136 (2006). These constitutional errors are reviewed de novo. *State v. Bradshaw,* 152 Wn.2d 528, 531, 98 P.3d 1190 (2004).

b. The court's instructions allowed the jury to use the same conduct to convict Mr. Melegrito of counts 1 and 2.

The court's instructions defining the essential elements of murder in the second degree overlapped with its instruction explaining what the jury needed to find for attempted murder in the second degree. The court also never told the jurors the verdicts require unanimous agreement of separate and distinct acts.

The to-convict instruction is a "yardstick by which the jury measures the evidence" to determine whether to convict an accused person. *State v. Oster*, 147 Wn.2d 141, 146-47, 52 P .3d 26 (2002) (quoting *State v. Smith,* 131 Wn.2d 258, 263, 930 P.2d 917 (1997)). It must convey all essential elements underlying a conviction. *State v. Jackson,* 137 Wn.2d 712, 727, 976 P.2d 1229 (1999). The omission of an element from the to-convict instruction is reversible error. *Id*.

Jury instructions "must make the relevant legal standard manifestly apparent to the average juror." *State v. Ackerman*, 11 Wn. App. 2d 304, 312, 453 P.3d 749 (2019). Jurors are lay people and they are not expected to parse the language of instructions by "interpretive tools" as a lawyer or judge would. *State v. LeFaber*, 128 Wn.2d 896, 902, 913 P.2d 369 (1996). Manifest clarity requires instructions that make the law "unmistakable, evident, or indisputable." *Ackerman*, 11 Wn. App.2d at 312-13.

The court provided the following to-convict instructions to the jury:

> To convict the defendant of the crime of Murder in the Second Degree as charged in Count I, each of the

> following elements must be proved beyond a reasonable doubt:
> (1) That on or about November 2, 2016, the defendant acted with intent to cause the death of John Bacani;
> (2) That John Bacani died as a result of the defendant's acts;
> (3) That any of these acts occurred in the state of Washington.

CP 263 (Instruction 9).

The court also instructed the jury:

> To-convict the defendant of the crime of Attempted Murder in the Second Degree, as charged in Count II, each of the following elements must be proved beyond a reasonable doubt:
> (1) That on or about November 2, 2016, the defendant did an act that was a substantial step toward the commission of Murder in the Second Degree;
> (2) That the act was done with intent to commit Murder in the Second Degree; and
> (3) That the act occurred in the state of Washington.

CP 270 (Instruction 16).

Instruction 9 required jurors to find Mr. Melegrito acted with the intent to cause Mr. Bacani's death to enter a guilty verdict for count 1. CP 263. Instruction 16 directed jurors to find Mr. Melegrito acted with the intent to commit murder in the second degree and did substantial act toward committing that offense to enter a guilty verdict for count 2. CP 270.

Instruction 16 did not ask the jury to find Mr. Melegrito intended to commit second degree murder against someone other than Mr. Bacani. It did not compel the jury to rely on conduct separate from count 1. *Id*. It only asked the jury to find the prosecution proved Mr. Melegrito intended to commit second degree murder and he did some act that constituted a substantial step toward that offense. *Id*.

No other instruction distinguished the essential elements of count 2 from count 1. The jury was not instructed that count 2 must be based on conduct toward a different person or that it could not be predicated on the same conduct as in count 1.

The instructions never informed the jury it must unanimously agree that "one particular act" was proved beyond a reasonable doubt or that "a single" different act must be unanimously proven for each count. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.25 and 4.26 (4th ed.2015) (WPIC).

These instructions invited jurors to focus their verdicts on the conduct involved in Mr. Bacani's death. Instead of clearly instructing the jury that counts 1 and 2 rested on different

conduct directed toward different people, the instructions asked the jury to find the same general acts and intent to convict Mr. Melegrito of both counts. *See Mutch*, 171 Wn.2d at 664.

c. It violates double jeopardy to punish a person for murder and attempted murder based on the same acts

Attempted murder and murder convictions that rest on conduct directed toward the same person, at the same time, violate double jeopardy. *See In re Pers. Restraint of Orange*, 152 Wn.2d 795, 820, 100 P.3d 291 (2004); *see also Harris v. Oklahoma*, 433 U.S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977) (holding the Double Jeopardy clause "bars prosecution for the lesser crime, after conviction of the greater one.").

If any juror voted to convict Mr. Melegrito of count 2 based on his intentional, substantial step toward causing Mr. Bacani's death, that conviction would violate double jeopardy and the constitutional guarantee of a unanimous jury verdict.

When jury instructions permit jurors to base their verdicts on the same conduct, reversal is required unless it was "manifestly apparent" that the conviction for each count was based on a separate act. *Mutch*, 171 Wn.2d at 664. This Court's

"review is 'rigorous and among the strictest' to protect against double jeopardy." *Robinson*, 8 Wn. App. 2d at 638, quoting *Mutch*, 171 Wn.2d at 663. It will be "a rare circumstance" where the appellate court should affirm despite deficient jury instructions. *Mutch*, 171 Wn.2d at 664-665.

As *Mutch* explained:

> if it is not clear that it was "*manifestly apparent* to the jury that the State [was] not seeking to impose multiple punishments for the same offense" and that each count was based on a separate act, there is a double jeopardy violation.

Id., quoting *Berg,* 147 Wn. App. at 931 (emphasis added in *Mutch*). "The remedy for such a violation is to vacate the potentially redundant convictions." *Id.*

The prosecution's closing argument alone does not prove the basis of the jury's verdict. *State v. Kier*, 164 Wn.2d 798, 813, 194 P.3d 212 (2008). The court instructed the jury not to rely on the attorneys' arguments for the decisions the court would ask them to make. CP 254. Instead, the "law is contained" solely in the jury instructions. *Id.* The instructions told jurors they "must disregard any remark, statement or argument" that is not supported by the law as defined by the court's instructions. *Id.*

A similar issue arose in *Kier* where the jury considered two potentially overlapping charges of robbery and assault. 164 Wn.2d at 805. The prosecution theorized that after forcibly stealing a car from the driver, the defendant separately assaulted the car's passenger, so the robbery and assault were distinct crimes that did not merge. *Id*. at 811.

However, the jury instructions did not make the same distinction between the offenses that the prosecution made. The to-convict instruction for assault named the car's passenger as the alleged victim, but the to-convict instruction for robbery was silent about the potential victim's identity. *Id*. at 808-09. If the jury considered the force used to assault the car's passenger as part of the force required to commit robbery, these convictions would merge under double jeopardy rules. *Id*. at 814.

Because the jury instructions did not unambiguously direct the jury to specifically consider a particular victim for the robbery, and the evidence could be viewed as showing either person was a victim, the Supreme Court concluded the basis of the conviction was ambiguous. *Id*. at 813. It was possible the jury found the car's passenger was the victim of both the robbery

and assault. *Id*. Given this possibility, the court concluded "it is unclear from the jury's verdict whether the assault was used to elevate the robbery to first degree." *Id*. Where the evidence and instructions "allowed the jury" to treat the two offenses as based on the same victim, the *Kier* Court ruled the rule of lenity requires the ambiguous verdict be treated as requiring the merger of the overlapping offenses. *Id*. at 814.

The instructions created a similar ambiguity here. The to-convict instruction is the critical yardstick for the jury. *Oster*, 147 Wn.2d at 146-47. The to-convict instruction for count 2 permitted the jury to rely on the same conduct as it used to convict Mr. Melegrito of murder in count 1. Jurors were instructed not to rely on the arguments of counsel to define the law. CP 254. Jurors are "presumed to follow the court's instructions." *State v. Foster*, 135 Wn.2d 441, 472, 957 P.2d 712 (1998); *Kier*, 164 Wn.2d at 813.

In *Mutch*, the defendant was charged with five counts of rape against the same person. The jury instructions did not explicitly state each count must be based on separate and distinct conduct. The Supreme Court deemed these instructions

flawed and presented a risk of a double jeopardy violation. 171 Wn.2d at 663. But it ultimately affirmed the five convictions because there was no dispute that five acts of sexual intercourse had occurred; the only contested issue involved whether they were consensual acts. *Id*. at 665-66. The *Mutch* Court cautioned that issuing flawed instructions which do not make the basis of the verdict manifestly clear would create an intolerable risk of a double jeopardy violation in most cases and the prosecution must prove no double jeopardy violation occurred beyond a reasonable doubt. *Id*. at 664-65.

Unlike *Mutch*, the instructional error here involves overlapping instructions that define greater and lesser charges for the same offense. As in *Kier*, the instructions did not compel the jury to focus on proof of two separate acts. *See Kier*, 164 Wn.2d at 813-14.

The prosecutor's closing argument focused on the incident as a whole and Mr. Melegrito's involvement. He discussed circumstantial evidence and credibility assessment at length. *See, e.g.*, RP 1218-35. He only rarely drew specific distinction between the essential elements of the two counts. RP 1211-14.

Even if jurors understood two men were shot during the incident, the jury instructions only asked the jury to find Mr. Melegrito intended to kill, and either killed or committed a substantial step toward killing, one person.

The court's instructions did not unmistakably or indisputably direct all jurors to rest their verdict in count 2 on the intent to commit murder and a substantial step that was separate and distinct from count 1. *Ackerman*, 11 Wn. App.2d at 312-13. As a result, the overlap violates double jeopardy as well as Mr. Melegrito's right to be convicted only after all essential elements of separate offenses are unanimously proven to the jury.

d. The jury's verdict violates double jeopardy and guarantees of unanimity.

When a conviction violates double jeopardy, the remedy is to vacate the less serious offense. *In re Pers. Restraint of Francis*, 170 Wn.2d 517, 532, 242 P.3d 866 (2010). A double jeopardy violation occurred here, because the overlapping instructions directed jurors to rest their verdicts in count 1 and 2 on the same acts at the same time, with the same intent.

Alternatively, if the error is viewed solely as a lack of unanimity based on the failure of the instructions to require all jurors to unanimously agree on separate acts for counts 1 and 2, the remedy is to reverse the flawed conviction and permit a new trial. *See State v. Sassen Van Elsloo*, 191 Wn.2d 798, 825, 425 P.3d 807 (2018). Because both errors occurred here, the lesser offense of attempted murder in the second degree must be vacated. *Francis*, 170 Wn.2d at 532.

2. The court's behavior after the jury returned a blank special verdict form impermissibly coerced the jury's verdict.

a. The court may not pressure jurors into reaching a unanimous verdict.

The right to a fair trial by an impartial jury prohibits a judge from taking action that places any coercive pressure on the jury's deliberations, including suggesting to jurors that they need to reach an agreement. *Jenkins v. United States*, 380 U.S. 445, 446, 85 S. Ct. 1059, 13 L. Ed. 2d 957 (1965); *State v. Boogaard*, 90 Wn.2d 733, 736-37, 585 P.2d 789 (1978); U.S. Const. amends. VI, XIV; Const. Art. I, §§ 21, 22. Each juror must render a verdict uninfluenced by factors outside the evidence or

by improper instruction. *State v. Jones*, 97 Wn.2d 159, 164, 641 P.2d 708 (1982). The constitutional right to a jury trial "includes the right of a jury to fail to agree." *State v. McCullum*, 28 Wn. App. 145, 149, 662 P.2d 870 (1981), *rev'd on other grounds*, 98 Wn.2d 484 (1983).

To effectuate these constitutional rights, CrR 6.15(f)(2) places strict restrictions upon the court's interactions with deliberating jurors. CrR 6.15(f)(2) provides:

> After jury deliberations have begun, the court *shall not instruct the jury in such a way as to suggest* the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate.

(Emphasis added). CrR 6.15(f)(2) is intended to prevent a judge from suggesting the jurors need to reach an agreement. *Boogaard*, 90 Wn.2d at 736.

When a jury appears genuinely deadlocked, the trial court, in its discretion, may ask the jurors if there is a reasonable probability of reaching a verdict in a reasonable time. *Id.*; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.70 (4th Ed. 2016). But, as the WPIC cautions, it is "not proper to give any further instruction to an apparently deadlocked jury as

to the need for agreement, or the consequences of no agreement . . . ." WPIC 4.70, Note on Use.

Once verdicts are delivered, a judge may not second-guess jurors when the verdicts appear inconsistent. Courts accept the jury verdicts may be inconsistent for a variety of reasons, including mistaken understanding of the law, a desire to compromise, or interests of lenity. *State v. Goins*, 151 Wn.2d 728, 732–34, 92 P.3d 181 (2004); *Dunn v. United States,* 284 U.S. 390, 393-94, 52 S. Ct. 189, 76 L. Ed. 356 (1932); *United States v. Powell,* 469 U.S. 57, 65, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984). Due to the principles of "jury lenity" and "problems inherent in second-guessing the jury's reasoning," the jury has the power to rest its verdicts on impermissible reasons or conflicting determinations. *Goins*, 151 Wn.2d at 734, quoting *State v. Ng,* 110 Wn.2d 32, 48, 750 P.2d 632 (1988) and *Powell,* 469 U.S. at 63.

It is "no less problematic to second-guess the jury when a general verdict conflicts with a special verdict than when two general verdicts conflict." *Goins*, 151 Wn.2d at 734, citing *State v. McNeal*, 145 Wn.2d 352, 359, 37 P.3d 280 (2002). "[R]espect

for the jury's resolution of the case" and the strict prohibition against intruding into jury deliberations require courts to accept the verdict as the jury delivers it even if the judge thinks the jury made a mistake. *Id.*

b. The court improperly refused to accept a permissible blank special verdict form and signaled this verdict was unacceptable.

Jurors are authorized to "leave a special verdict form blank" if they cannot agree. *State v. Guzman Nunez*, 174 Wn.2d 707, 719, 285 P.3d 21 (2012). Courts should instruct them they have this option. *Id.* This instruction accurately reflects the State's burden of proof and serves the purposes of jury unanimity. *Id.*

Here, the court instructed the jurors to "not fill in" the special verdict form if they were not able to agree unanimously on the answer, consistently with *Guzman Nunez*. CP 279 (Instruction 22). Despite this accurate instruction, the court refused to accept the jurors' blank special verdict form because it thought it was inconsistent with the general verdict. 7/22RP 1312-13.

After several days of deliberations, the jury reported deliberations were complete and returned its verdicts to the court, handing the judge Verdict Forms A, B, and C. 7/22RP 1310-11. Verdict Form A stated they found Mr. Melegrito guilty of the crime charged in count 1. CP 247. Verdict Form B was blank. CP 248. Verdict Form C stated the jurors found Mr. Melegrito guilty of count 2. CP 249.

The blank Verdict Form B involved a lesser included offense for count 1 that the jurors did not use. CP 248. The court did not question jurors about why they left this form blank.

Like Verdict Form B, the special verdict form for the firearm weapon enhancements was blank. 7/22RP 1311.

When the court saw the blank special verdict form, it immediately told the jurors they must return to the jury room. 7/22RP 1310-11. The court did not explain the reason for sending them away but promised, it is "just going to be a second." 7/22RP 1310-11. Forty-one minutes passed until the court brought the jurors back to the courtroom, and more time passed before the jury completed a different special verdict form as the court later told it to do. CP 351-52.

The defense immediately objected after the court sent the jurors out of the courtroom and told the parties it intended to press the jury about why the verdict form was blank rather than accepting this blank form. 7/22RP 1313-15, 1317, 1320.

Defense counsel told the judge it had an obligation to accept the verdict form as blank. RP 1320. Returning a blank verdict form was proper under the instructions, and the court lacked authority to require the jury to fill it out. *Id*. Counsel asked the judge to treat the form as originally submitted, showing the jury was unable to agree. *Id*. The court refused.

After making the jurors wait for over 40 minutes, the judge called all jurors back into the courtroom and explained had "needed to work out an issue with counsel." RP 1322. The judge turned to the foreperson, Juror 2, and said, "I need to discuss something with you." RP 1322. The judge handed the foreperson copies of Instruction 22 and the special verdict form and directed the juror to "read through" both documents. *Id*. After Juror 2 assured the judge she read these documents, the court asked her if the jurors "considered the special verdict form during deliberations." RP 1323. Juror 2 said "yes." RP 1323. The

court announced that the special verdict form is blank and asked Juror 2 if it was "intentionally" left blank. *Id*. Juror 2 said, "No. It was accidentally left blank." *Id*.

The court told the jurors to leave the courtroom again but gave no further instructions at that time. RP 1323. The defense again objected to the court's intervention in jury deliberations. RP 1325-26. Defense counsel said it was "inappropriate" to direct further deliberations on the special verdict and the court had "already invaded the jury's province." RP 1326.

The judge called the jurors back to the courtroom. RP 1326. He told them he was keeping their original verdict forms and was now giving them a new copy of the special verdict form with the jury instructions. RP 1326. He said to the jury, "go back to the jury room and continue your deliberations." RP 1327.

The jury returned with a special verdict form that answered "yes," to the question of Mr. Melegrito's possession of a firearm. The court polled the jury and each agreed this was their final verdict. The court did not ask whether this final verdict was different from the verdict the jurors had rendered earlier.

c. Reversal of the special verdict is required when it is the product of improper judicial intervention.

By refusing to accept a blank special verdict form, spending an hour conferring with counsel about this blank form, then giving the jurors a new copy of the special verdict form and directing them to "continue your deliberations" the court signaled its displeasure with the form as submitted and its expectation that a different result was required. The time that elapsed between when the court first received the blank form and later sent the jury to continue deliberations with a new special verdict form underscored the court's message that the initially offered blank form was not satisfactory. The court's specific inquiry with the foreperson, asking whether the jury "considered" its jury instructions on the special verdict form cemented the idea that the jurors had not properly considered this instruction when returning a blank special verdict form.

The court's reaction to a permissible blank verdict form violated the strict commands of CrR 6.15 (f)(2), which bars even the *suggestion* of the need for agreement. Whether a judge intentionally or unintentionally influences jurors to reach a

unanimous verdict, such possible influence requires reversal. *Boogaard*, 90 Wn.2d at 740. The jury returned a permissible, blank special verdict form. *Guzman Nunez*, 174 Wn.2d at 719. In this situation, the court must accept the form as delivered. CP 279. Its failure to do so requires vacation of the special verdicts.

3. The prosecution did not prove and the court did not find the necessary evidence of Mr. Melegrito's criminal history to double the firearm enhancements

a. The court may not increase the punishment imposed without adequate proof.

A court may only impose a sentence that is authorized by statute and rests on adequate proof justifying its length. *State v. Hunley*, 175 Wn.2d 901, 915, 287 P.3d 584 (2012); U.S. Const. amend. XIV; Const. art. I, § 3. It "violates due process" to rest a sentence on "the prosecutor's bare assertions" about prior convictions and to treat a defendant's failure to object to the prosecution's assertions as adequate proof of criminal history. *Hunley*, 175 Wn.2d at 915.

Sentencing authority derives strictly from statute. *State v. Ammons*, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986). In broad terms, when a court determines the authorized sentence

under RCW 9.94A.525 it must "(1) identify all prior convictions; (2) eliminate those that wash out; (3) "count" the prior convictions that remain in order to arrive at an offender score." *State v. Moeurn*, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010). RCW 9.94A.500(1) requires the court "shall specify the convictions it has found to exist," based on the evidence presented and must make this information "part of the record."

"[A] defendant cannot waive a challenge to a miscalculated offender score." *State v. Wilson*, 170 Wn.2d 682, 688, 244 P.3d 950 (2010). A sentence "based on an improperly calculated score lack[s] statutory authority" and "cannot stand." *Id*. Such a sentence "is a fundamental defect that inherently results in a miscarriage of justice." *Id*. at 688-89, quoting *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 867-68, 50 P.3d 618 (2002). A sentencing court's failure to follow the dictates of the Sentencing Reform Act may be raised on appeal even if not objected to below. *Ford*, 137 Wn.2d at 484-85.

The prosecution does not satisfy its burden of proving the defendant's prior convictions by offering an "unsupported summary of criminal history." *State v. Cate*, 194 Wn.2d 909, 913,

453 P.3d 990 (2019); *Hunley*, 175 Wn.2d at 910. "It is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination." *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). This Court reviews the trial court's offender score calculation de novo. *State v. Ortega,* 120 Wn. App. 165, 171, 84 P.3d 935 (2004).

In *Cate*, the prosecution filed briefing that included information about the defendant's criminal history "from NCIC" and discussed the cause numbers and details of two recent cases. *See State v. Cate*, 8 Wn. App. 2d 1036, 2019 WL 1657165 *4, *reversed by* 194 Wn.2d at 914 (details of sentencing argument contained in Court of Appeals opinion, which is unpublished and cited pursuant to GR 14.1). The defense agreed that the same offender score controlled and asked for a sentence consistent with same offender score alleged by the State. *Id.*

But the Supreme Court reversed because the prosecution had not produced evidence of all prior convictions necessary to prove the offender score the court used. 194 Wn.2d at 914. The defendant had "directly admitted" two of his prior convictions

when testifying, but he had not "directly admitted" other convictions the prosecution alleged. *Id*.

The prosecution is not relieved of its burden of proving prior convictions unless the defendant "affirmatively acknowledges" the "facts and information" of the underlying criminal history. *Hunley*, 175 Wn.2d at 912; *Mendoza*, 165 Wn.2d at 928; *see also Cate*, 194 Wn.2d at 914. Acknowledging the *offender score* is not an affirmative acknowledgment of *the facts and information* regarding criminal history. *State v. Ramirez*, 190 Wn. App. 731, 734, 359 P.3d 929 (2015) (explaining there must be "an *affirmative* acknowledgement by the defendant of *facts and information* introduced for the purposes of sentencing" to excuse the prosecution from not producing evidence) (emphasis in original).

The court is also obligated to "specify the convictions it has found to exist" and make this finding "part of the record." RCW 9.94A.500(1). The criminal history section of the judgment and sentence must accurately reflect the convictions used for purposes of calculating the offender score. RCW 9.94A.525.

b. The prosecution did not prove and the court did not find the criminal history required to double the firearm enhancements.

The prosecution alleged Mr. Melegrito had a prior conviction for assault in the second degree with a deadly weapon enhancement. 9/6/19RP 235. It contended this prior conviction authorized the court to double the two firearm enhancements and impose 120 months for each enhancement, consecutively, for a total of 240 months. *Id.*; RCW 9.94A.533(4)(d) (doubling the duration of a firearm enhancement if the person sentenced "has previously been sentenced for any deadly weapon enhancements after July 23, 1995" under this statute).

The prosecution did not offer a certified copy of the judgement and sentence or any documents proving this prior conviction and deadly weapon enhancement. CP 355-69. It only submitted an unsigned "prosecutor's understanding of defendant's criminal history" summarizing alleged criminal history. CP 367.

The court listed the criminal history on which it relied in Appendix B of the judgment and sentence. CP 282. Appendix B merely states Mr. Melegrito had one adult felony described as

"assault-2 substantial bodily" with a sentencing date, cause number, and location of the court. CP 287. The court did not enter any finding that Mr. Melegrito's criminal history included a prior deadly weapon enhancement necessary, even though this underlying fact is necessary to authorize the court to double the firearm enhancements. RCW 9.94A.533(4)(d).

The prosecution did not prove Mr. Melegrito had the required prior deadly weapon enhancement to allow the court to double the firearm enhancements. It only offered a summary alleging this scenario applied. A summary allegation is insufficient to meet the prosecution's burden of proof. *Cate*, 194 Wn.2d at 913-14; *Hunley*, 175 Wn.2d at 913; *Mendoza*, 165 Wn.2d at 925.

Mr. Melegrito did not affirmatively agree to the "facts and information" necessary to double the firearm enhancements. *Hunley*, 175 Wn.2d at 912 ("There must be some *affirmative* acknowledgement of the facts and information alleged at sentencing," to excuse the prosecution from failing to offer evidence proving prior criminal history) (emphasis in original).

Defense counsel did not object to the standard range the prosecution alleged applied and recited the same standard range, including the 240-months of firearm enhancements. 9/6/19RP 247. However, relying on a certain offender score does not relieve the prosecution of its burden of proving the criminal history necessary to authorize the degree of punishment the State seeks. *Hunley*, 175 Wn.2d at 912; *Ramirez*, 190 Wn. App. at 734. Mr. Melegrito did not acknowledge facts and information underlying the score to his criminal history.

The prosecution did not file "copies of the relevant judgment and sentence forms" or otherwise prove the existence of the prior conviction and deadly weapon enhancement used to increase Mr. Melegrito's offender score. *Cate*, 194 Wn.2d at 911. Resentencing is required when the State does not meet its burden of proving criminal history and the defense does not affirmatively agree to the underlying facts used to increase the sentence imposed. *Id*. at 913; *Hunley*, 175 Wn.2d at 915.

c. A new sentencing hearing is required.

The court must also determine the prior conviction and the necessary enhancement have been proven by a

preponderance of evidence before it is authorized to double a firearm enhancement based on the existence of a prior conviction for a deadly weapon enhancement. RCW 9.94A.525; RCW 9.94A.533(4)(d).

The Supreme Court has said "[i]n the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue." *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) (citing *Smith v. King*, 106 Wn.2d 443, 451, 722 P.2d 796 (1986); and *State v. Cass*, 62 Wn. App. 793, 795, 816 P.2d 57 (1991), *review denied*, 118 Wn.2d 1012 (1992)).

The court entered a judgment and sentence that states, "criminal history is attached in Appendix B," but Appendix B only lists a prior conviction for assault in the second degree. CP 282, 287. It does not mention any prior deadly weapon enhancement. CP 287. The judgment and sentence does not contain a factual finding of the necessary predicate to double the firearm enhancement.

Without finding the necessary prior conviction, the court cannot "count" it as part of the criminal history. *Moeurn*, 170

Wn.2d at 175. If the court does not identify a prior conviction as part of the criminal history, it cannot be used in determining the sentence imposed. RCW 9.94A.500(1). Even if identified, the court needs to find it is properly counted under the criteria of RCW 9.94A.525.

The court's imposition of a sentence that was not supported by evidence in the record or adequate findings of fact is a fundamental defect in the sentence. Mr. Melegrito cannot be ordered to serve an unlawful sentence solely because he did not object to the offender score miscalculation at sentencing. *Wilson*, 170 Wn.2d at 690. Remand for resentencing is required.

4. The court's denial of numerous cause challenges for jurors who could not commit to being fair and following the law denied Mr. Melegrito his right to a fair trial by jury.

a. Mr. Melegrito has the right to a fair trial by an impartial jury.

People accused of a crime have a federal and state constitutional right to a fair and impartial trial by jury. U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22; *State v. Irby*, 187 Wn. App. 183, 192, 347 P.3d 1103 (2015); *United States v. Kechedzian*, 902 F.3d 1023, 1027 (9th Cir. 2018). "The bias or

prejudice of even a single juror is enough to violate that guarantee." *Kechedzian*, 902 F.3d 1027.

A juror who cannot try the issue impartially and without prejudice to the substantial rights of a party is actually biased. *Irby*, 187 Wn. App. at 194; *see* RCW 4.44.170(2); CrR 6.4(c) "A trial judge has an independent obligation to protect" the accused's right to remove a biased juror, "regardless of inaction by counsel or the defendant." *Id*. at 193.

If "a juror has formed an opinion that could prevent impartial judgment of the facts, the trial judge should excuse that juror." *State v. Slert*, 186 Wn.2d 869, 877-78, 383 P.3d 466 (2016). When jurors are unsure if they can be fair and impartial, the court does not cure this ambiguity by extracting promises from the jurors that they will inform the court later if they feel unable to fairly serve. *Kechedzian*, 902 F.3d at 1030.

Directing potential jurors to wait until the trial and then let the parties know if their biases have been triggered by the testimony "undermines the very purpose of voir dire and its indispensable role in preserving for the accused an impartial jury." *Id*. It is "unrealistic" for jurors to later assess their

feelings after hearing evidence in the case and ascertain whether their feelings are the result of evidence they have heard or due to earlier life experiences. *Id*.

Although review of cause challenges is for an abuse of discretion, "appellate deference to trial court determinations of the ability of potential jurors to be fair and impartial is not a rubber stamp." *State v. Fire*, 100 Wn. App. 722, 729, 998 P.2d 362 (2000) (*reversed on other grounds*, 145 Wn.2d 152, 34 P.3d 1218 (2001)). Any doubts about bias must resolved in favor of striking the juror. *Kechedzian*, 902 F.3d at 1027.

b. The court must excuse a juror who expresses doubt about the ability to be fair and impartial.

Jurors who respond equivocally when asked about their ability to sit fairly on a case should be excused. *Kechedzian*, 902 F.3d at 1030; *State v. Gonzales*, 111 Wn. App. 276, 45 P.3d 205 (2002).

In *Kechedzian*, a juror said she "would try to be fair" and put aside her personal experience as the victim of identity theft, in a case where the defendant was accused of identity theft. 902 F.3d at 1026. She promised to alert the court if she felt she was

unable to sit impartially. *Id*. The *Kechedzian* Court ruled this juror should have been excused for actual bias because she remained equivocal when asked about her ability to put aside concern about her potential bias. *Id*. at 1030.

In *Gonzalez*, a potential juror said she would presume that the police were telling the truth. 111 Wn. App. at 278-79. She "did not know if she could presume [the defendant] innocent in the face of officer testimony indicating guilt." *Id*. at 281. She never stated confidently that she could deliberate fairly or abide by the presumption of innocence. *Id*. at 282. This Court ruled her remarks met the criteria for actual bias and the trial court erred by denying the defendant's challenge for cause. *Id*. at 281-82.

In *Fire*, a juror initially claimed strong personal feelings about the charge of child molestation and said it was "a possibility" these feelings would affect him at trial. 100 Wn. App. at 725. But the juror also said he was able to follow the court's instructions on the law. *Id*. The prosecutor asked if he could follow the law despite his strong feelings about the case and he said, "yes." *Id*. This Court ruled the juror should have

been dismissed for cause and the error was not cured by the defense using a peremptory challenge to remove him. The Supreme Court later disagreed on the remedy of a new trial in a divided opinion, but presumed the juror should have been dismissed for cause. 145 Wn.2d at 159 (lead opinion); *Id.* at 176 (dissent).

Here, three jurors expressed continued doubts in their abilities to be fair yet the court did not remove them from the panel for cause, despite defense objection.

c. Three different jurors cast doubt on their own abilities to fairly serve as jurors but the court did not excuse them for cause.

i. Juror 34

Juror 34 repeatedly informed the court it would be difficult to serve as a juror and he did not know if he could do so. He said he was "uneasy and actually nauseous" about serving as a juror in a murder case. 7/1RP 118. He had a very strong dislike of violence. 7/1RP 117, 119. Despite being repeatedly pressed to say whether he could be fair, Juror 34 continually said, "I don't know it's hard to say" and "I think I would be fair but it is hard to say." 7/1/RP 116, 117, 118; 119 ("When violent

acts occur, I think that it would definitely taint my viewpoint, that sort of thing. Again, it's hard for me to be 100 percent confident without knowing the circumstances of this particular case."); *Id.* at 119 ("Q. And listening to the evidence would be hard? A. Potentially.").

Immediately after the court excused two jurors for cause due to their inability to view autopsy photographs, the prosecutor asked if anyone else had a similar concern. 7/2RP 229-31. Juror 34 volunteered, "I'm in line with them." 7/2RP 231. He explained "the concept of violent crime of this magnitude is disturbing to the point where I feel like it would be difficult to put myself in front of that evidence." 7/2RP 232.

The prosecutor asked if he felt similarly to excused jurors 7 and 49, who said they would not be able to look at the photos. *Id.* Juror 34 responded, "I'd say that would be very difficult. I don't know if I could." 7/2RP 232.

Then the prosecutor asked if the judge told him he had a "duty to consider the evidence, could you follow that instruction?" 7/2RP 232. Juror 34 answered, "I don't know." *Id.*

Finally the prosecutor asked if he would "make every best effort to follow" the court's instruction, and the juror said, "Certainly." *Id.*

Similarly to the juror's responses in *Kechedzian*, juror 34 never stated any confidence in his ability to serve as a juror. Instead, he indicated strong reservations. He aligned his feelings with other disqualified jurors. He did not know if he could follow the court's instructions. 7/2RP 232.

The only assurance he gave the court was that he would try to follow the court's instructions. But his good intentions were not at issue; rather, he harbored such a strong aversion to violence that he said it would be "very difficult" to serve. 7/2RP 232. Juror 34 should have been excused for cause.

ii. Juror 63.

Juror 63 had strongly held personal beliefs about self-defense, which was the theory of defense in the case. He refused to "commit to following the law" under the circumstances of the case even if he "can abstractly follow the law." 7/2RP 263.

Juror 63 believed that valid self-defense must involve a person who legally owns a firearm and was trained in using one.

7/2RP 262-63. He had a military background and did not think "the civilian populace" was properly trained and "is too quick to fire." 7/2RP 262.

When asked if someone "didn't have proper training or they weren't legally to have a gun, do you still think it's possible they could be acting in self-defense?" The juror said, "No." When asked why, the juror said he had already explained why. 7/2/19RP 263.

When asked again to explain, he said if "someone illegally had a firearm or did not have proper training with a firearm . . . No, I would not see that as self-defense. . . . I would not classify it as self-defense." 7/2RP 263.

Juror 63 described his view as "a bias shaped by my circumstances." He agreed he had a narrow view of self-defense and society had "too broad" of a view. 7/2RP 264.

When asked how he would react if the judge's explanation of the law is different than his set of beliefs, he said he would still have these feelings in his gut about self-defense. 7/2RP 265. When asked if it would be hard for him to follow the law he said, "Perhaps." 7/2RP 265.

The court intervened following the defense's cause

challenge and asked, "could you commit to the court that you would follow that law in deciding this case?" 7/2RP 266. The juror said, "If I understand your question correctly, sir, given what was shared earlier, I don't know that I stand in a position where -- that I could support that." 7/2RP 266.

The court then told him to put aside what he might have assumed about the case from the questions asked in voir dire and if he could "commit to the court to follow the law that I instruct you on?" 7/2RP 266-67. The juror said "To answer your question separate from the other questions, yes, I can. But I'm not -- sir, with all due respect, the question she just asked me given the context with how you asked that question, I feel like I kind of gave my sentiment on how I feel." 7/2RP 267.

Following that ambiguous explanation of his ability to be fair in this case, the court ruled, "So as far as the challenge for cause, it's denied." 7/2RP 267.

After the court denied the defense's challenge for cause, Juror 63 responded to a question from the prosecutor about whether topics of "gang affiliation or drug use" raised any concern about being fair and impartial. 7/2RP 279. Juror 63 referred to

his prior comments and said "talking about drug use" and such things, he felt the case was "more of a justification of an action versus an innocent until proven guilty." 7/2RP 279.

He also agreed that his deeply held beliefs might conflict with the law. 7/2RP 309. "[T]here could be the possibility of conflict" between his beliefs and the law." *Id*. He would "do my best to avoid the conflict and adhere to the letter of the law." *Id*. But he also agreed that he had "some deeply held beliefs" and never promised that he would put those aside if they conflicted with the law. *Id*.

Juror 63 never voiced confidence in his ability to follow the court's instructions on the law in light of his strongly held opinions that he would have difficulty putting aside. He should have been removed for cause.

iii. Juror 53

Juror 53 refused to assure the court he would follow the law if he did not agree with it. Juror 53 had a firm, "personally held belief" regarding self-defense. 7/2RP 318. It was based on a "long personal evaluation of the role guns play in our society." *Id*. He believed the "proliferation of guns causes people who

possess guns to make poor decisions about self-defense" when they have a gun. *Id*. He felt everyone has a "moral obligation to pick the least lethal, least dangerous method of self-defense available to them," including "running away" or finding some other protective barrier. 7/2RP 317.

When asked if he could "set aside his deeply held personal beliefs and follow the law" he answered, "I don't know" and explained that without knowing what the law of self-defense was, he could not say if he would follow it. 7/2RP 318-19. He believed, and thought "everyone in this room would agree that just laws should be followed and *unjust laws should not be followed*." 7/2RP 319 (emphasis added).

When asked if he would follow an instruction on the law if he believed it was unjust, he answered that "it would have to depend on what the law would be and the gravity of the injustice of it." 7/2RP 319. When asked again if he would follow the court's instructions or his own belief about what the law should be, he said he would do his "absolute best to follow the court's instructions" but he never agreed that would, in fact, accept the law as instructed by the court. 7/2RP 320.

Immediately after this exchange, the court cut off questioning to Juror 53, telling defense counsel he was out of time. The defense challenged Juror 53 for cause. 7/2RP 320. The court summarily ruled, "As far as 53, that motion is denied, so 53 is going to stay on the panel." *Id.*

d. These jurors should have been excused for cause.

A "reasonable suspicion of bias" remained with these three jurors, who could not confidently state they would set aside their preconceptions. *City of Cheney v. Grunewald*, 55 Wn. App. 807, 811, 780 P.2d 1332 (1989). Thus, each juror should have been dismissed. *See id.* (holding that there was a reasonable suspicion of bias due to juror's contradictory answers and therefore it was error to deny challenge for cause); *Kechedzian*, 902 F.3d at 1029-31 (error to deny challenge for cause where juror never unequivocally stated she could be fair and impartial, and only gave equivocal answers).

e. Under the Washington Constitution, the wrongful denial of a challenge for cause requires reversal when the defendant exhausts all their peremptories.

Because the court denied these validly made cause challenges and failed to recognize the compromised nature of

these potential jurors, Mr. Melegrito was forced to use three of his invaluable peremptory challenges on these jurors. Supp CP __, sub. no. 111. He exhausted all his peremptories. *Id*. As a result, Mr. Melegrito was deprived of a substantial right and he did not receive the trial he was entitled to. The remedy is reversal and a new trial.

Since the founding of this state and for over a century, this was the rule in Washington. *Fire*, 145 Wn.2d at 168 (Sanders, J, dissenting); *State v. Parnell*, 77 Wn.2d 503, 508, 463 P.2d 134 (1969) (*abrogated by Fire*); *State v. Patterson*, 183 Wash. 239, 244, 48 P.2d 193 (1935); *McMahon v. Carlisle-Pennell Lumber Co.*, 135 Wash. 27, 30, 236 P. 797 (1925); *State v. Stentz*, 30 Wash. 134, 147, 70 P. 241 (1902); *Rutten*, 13 Wash. at 204 ("if the court wrongfully compelled him to exhaust peremptory challenges on jurors who should have been dismissed for cause, his rights were invaded as much as though the jurors had been accepted after his peremptory challenges were exhausted."); *see State v. Moody*, 7 Wash. 395, 396-97, 35 P. 132 (1893) (finding error in court's refusal to strike juror for cause harmless because defendant did not use all his

peremptories). The rule is firmly set out in *Parnell*, 77 Wn.2d at 508.

In *Fire*, five justices refused to apply the rule explained in *Parnell*. 145 Wn.2d at 165. The majority relied on *United States v. Martinez-Salazar*, 528 U.S. 304, 780-82, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000), where the United States Supreme Court held a similar rule is not required under the Fifth Amendment's due process clause or the right to an impartial jury under the Sixth Amendment. The lead opinion in *Fire* reasoned the *Parnell* rule flowed from similar constitutional principles, so *Martinez-Salazar* controlled. *Fire*, 145 Wn.2d at 163.

However, in *Fire*, the defendant did not argue the Washington Constitution guaranteed more protections to jury trial rights. *Id*. at 163-64. Because *Fire* did not consider the state constitutional protections separately from the federal constitution, it "does not control a future case in which counsel properly raises that legal theory." *State v. Granath*, 200 Wn. App. 26, 35, 401 P.3d 405 (2017) (internal quotation omitted), *affirmed*, 190 Wn.2d 548, 415 P.3d 1179 (2018); *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 600, 316 P.3d 1007

(2014) (internal quotation omitted) ("where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis"). *Fire* does not address what rule is required under the state constitution.

This Court should hold that the *Parnell* rule is required under the Washington Constitution. The "nonexclusive" factors set out in *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986) support this conclusion. These factors are: (1) the text of the state constitutional provision, (2) the differences in the texts of the parallel state and federal provisions, (3) state constitutional history, (4) pre-existing state law, (5) structural differences between the two constitutions, and (6) matters of particular state interest and local concern. *Gunwall*, 106 Wn.2d at 61-62.

i. The text of Washington's jury trial right is different than the federal guarantee, lending itself to independent interpretation.

Article I, section 21 states the "right of trial by jury shall

remain inviolate." Const. art. I, § 21.[2] This right encompasses a right to an impartial jury. *Alexson v. Pierce Cty.*, 186 Wash. 188, 193, 57 P.2d 318 (1936) ("The right to trial by jury includes the right to an unbiased and unprejudiced jury, and a trial by a jury, one or more of whose members is biased or prejudiced, is not a constitutional trial."). Article I, section 22 reinforces this right in criminal cases, guaranteeing "the accused shall have the right . . . to have a speedy public trial by an impartial jury . . . ." Const. art. I, § 22.

The jury trial rights under the federal constitution are set forth in the Sixth and Seventh Amendments. In guaranteeing an impartial jury in criminal cases, the Sixth Amendment has language similar to article I, section 22: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." U.S. Const. amend. VI. But there is no provision similar to the "inviolate"

[2] In full, article I, section 21 reads: "The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto."

jury trial right set out in article I, section 21. The other federal provision on jury trials, the Seventh Amendment, only applies in civil cases and is dissimilar. U.S. Const. amend. VII.

That there is no provision comparable to article I, section 21 supports independent interpretation. But even similarly worded state constitutional provisions need not be interpreted the same as a federal constitutional provision. *See* Justice Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 514-16 (1983-1984) (arguing provisions should always be interpreted independently); *Gunwall*, 106 Wn.2d at 61 (language or text is not decisive); *see, e.g.*, *State v. Bartholomew* 101 Wn.2d 631, 639-40, 683 P.2d 1079 (1984).

The Sixth Amendment right to a jury trial was not construed to apply to states until about 50 years ago. *Duncan v. Louisiana*, 391 U.S. 145, 149-50, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). Before then, the Sixth Amendment was inapplicable to the States. *Palko v. Connecticut*, 302 U.S. 319, 324, 58 S. Ct. 149, 82 L. Ed. 288 (1937), *overruled by Benton v. Maryland*, 395

U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969); *Howard v. Kentucky*, 200 U.S. 164, 172, 26 S. Ct. 189, 190, 50 L. Ed. 421 (1906); *Gensburg v. Smith*, 35 Wn.2d 849, 855, 215 P.2d 880 (1950). More recently, the court has issued conflicting decisions on whether juror unanimity is required in state prosecutions under the Sixth Amendment. *Ramos v. Louisiana*, _ U.S. _, Supreme Court No. 18-5924, 2020 WL 1906545. *6 (2020), overturning *Apodaca v. Oregon*, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972). It has also said the Sixth Amendment does not require a jury of 12. *Williams v. Florida*, 399 U.S. 78, 86, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970). The Seventh Amendment civil jury trial right does not apply against the States. *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 765 n.13, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010); *Gonzalez-Oyarzun v. Caribbean City Builders, Inc.*, 798 F.3d 26, 29 (1st Cir. 2015) ("The Supreme Court has consistently held that states are not constitutionally required to provide a jury trial in civil cases").

In contrast, the state constitutional right to a jury trial requires jury unanimity. *State v. Lamar*, 180 Wn.2d 576, 583 & 584 n.3, 327 P.3d 46 (2014) (citing article I, sections 21 and 22).

It also mandates 12 jurors agree in criminal cases. *State v. Stegall*, 124 Wn.2d 719, 728-29, 881 P.2d 979 (1994). The right to jury trials extends to civil cases. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 644, 771 P.2d 711 (1989).

ii. State constitutional history and pre-existing state law strongly supports independent interpretation of Washington's jury trial right and retention of the Parnell rule.

History and pre-existing state law supports retention of the *Parnell* rule under our state constitutional jury trial right. Washington's jury trial right is stronger than that provided under the federal constitution. *State v. Williams-Walker*, 167 Wn.2d 889, 896 n.2, 225 P.3d 913 (2010); *State v. Smith*, 150 Wn.2d 135, 151, 75 P.3d 934 (2003); *City of Pasco v. Mace*, 98 Wn.2d 87, 99, 653 P.2d 618 (1982) ("the right to trial by jury which was kept 'inviolate' by our state constitution was more extensive than that which was protected by the federal constitution when it was adopted in 1789"). The meaning of the jury right and what it entails "must be determined from the law and practice that existed in Washington at the time of our constitution's adoption in 1889." *State v. Clark-El*, 196 Wn. App.

614, 621, 384 P.3d 627 (2016) (internal citation omitted).

Applying this analysis, our Supreme Court held that the right to trial by jury under the state constitution extends to every criminal case, including misdemeanors. *Mace*, 98 Wn.2d at 101. When the state constitution was adopted in 1889, the law in effect provided a right to jury trials for misdemeanors and municipal violations. *Id.* at 98-100. Due to the "treasured" right to trial by jury under territorial laws, the constitution preserved the right to jury trials for misdemeanors, unlike the federal law in effect. *Id.* at 100; *D.C. v. Clawans*, 300 U.S. 617, 624, 57 S. Ct. 660, 81 L. Ed. 843 (1937).

The protections for selecting jurors discussed in *Parnell* are constitutionally mandated. Peremptory challenges were guaranteed in civil and criminal cases at the time the state constitution was adopted. Code 1881 §§ 207, 208, 1079. The first statutes passed in 1854, as territorial law, provided them. Laws of 1854, p. 118 § 102; p. 165 § 186. Subsequent territorial laws reaffirmed Washington's commitment to awarding these challenges in trials. Laws of 1877, p. 43, §§ 211-212; Laws of 1873, p. 236 § 240; Laws of 1869, p. 51 § 212.

The right to exercise peremptory challenges has been an essential part of the jury right in article I, sections 21 and 22 since the time of the state constitution's adoption. *Cf. State v. Strasburg*, 60 Wash. 106, 123-24, 110 P. 1020 (1910) (construing right to insanity defense based on this doctrine's existence "at the time of the adoption of our Constitution"); *see State v. Saintcalle*, 178 Wn.2d 34, 66-67, 309 P.3d 326 (2013) (Stephens J., concurring) (recognizing potential "that the state jury trial right enshrines peremptory challenges").

In *Martinez-Salazar*, the U.S. Supreme Court ruled peremptory challenges are not mandated by the federal constitution. 528 U.S. at 311. Federal cases did not authorize them until 1790, after the federal constitution's ratification. *Id.* at 311-12. In contrast, Washington included peremptory challenges in its territorial laws when enacting the constitution.

Peremptory challenges and the *Parnell* rule are part of the jury trial right in the state constitution. Washington courts applied this rule for over a century, using the state constitutional right to trial by jury as a foundation. For example, in 1895, the court reversed a conviction because the

court "wrongfully compelled" the defendant to "to exhaust peremptory challenges on jurors who should have been dismissed for cause." *Rutten*, 13 Wash. at 204, 208. This state constitutional rule was applied for over century in criminal and civil cases. *Parnell*, 77 Wn.2d at 508; *Patterson*, 183 Wash. at 244; *McMahon*, 135 Wash. at 30; *Stentz*, 30 Wash. at 147.

iii. The structure of the Washington constitution, along with state and local concerns, supports an independent interpretation of Washington's jury trial right.

The fifth *Gunwall* factor, differences in structure between the state and federal constitutions, always supports an independent analysis because the federal constitution is a grant of power from the people, while the state constitution represents a limitation on the State. *State v. Bassett*, 192 Wn.2d 67, 82, 428 P.3d 343 (2018). As for the sixth factor, state and local concerns, this factor also favors independent interpretation because there is no need for national uniformity in whether a jurisdiction must or must not follow this jury selection right. *See Rivera v. Illinois*, 556 U.S. 148, 162, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009) ("States are free to decide, as a matter of state law, that a trial

court's mistaken denial of a peremptory challenge is reversible error *per se*"); *see State v. Gregory*, 192 Wn.2d 1, 42-43, 427 P.3d 621 (2018) (Johnson, J., concurring) (interpretation of state provision is not constrained by principles of federalism).

In short, the meaning of a state constitutional provision does not change whenever the United States Supreme Court interprets an analogous federal provision. *See Penick v. State*, 440 So.2d 547, 552 (Miss. 1983) ("The words of our Mississippi Constitution are not balloons to be blown up or deflated every time, and precisely in accord with the interpretation of the U.S. Supreme Court, following some tortuous trail").

iv. The Parnell rule is required under article I, sections 21 and 22.

Under a state constitutional analysis, the court's erroneous refusal to strike jurors who indicate an inability to fairly serve invades the accused's right to an impartial jury when the defendant must remove those jurors by peremptory strikes. This rule is a constitutional rule compelled by article I, sections 21 and 22 of the Washington Constitution.

The Kentucky Supreme Court returned to a similar rule it

initially abandoned after *Martinez-Salazar*. *Shane v. Com.*, 243 S.W.3d 336, 341 (Ky. 2007). It held the court's incorrect denial of a for-cause challenge, "deprived the defendant of a substantial right" so that he "did not get the trial he was entitled to get."*Id.*

This rule is also fundamental to the fairness of the proceedings because without it, the State is afforded an unfair advantage and essentially gets more peremptory challenges. *State v. Good*, 43 P.3d 948, 961 (MT 2002). *Good* explained:

> when jurors who should have been removed for cause are not removed, they must be removed by peremptory challenge, thereby effectively reducing that party's number of peremptory challenges. When the State has more peremptory challenges than the accused, the State has an unmistakable tactical advantage and the impartiality of the jury is compromised. Errors which affect the impartiality of the jury are, by definition, structural and require reversal.

Id.

f. Because Mr. Melegrito's challenges for cause were improperly denied and he exhausted all his peremptories, reversal is required.

Because Mr. Melegrito's challenges for cause were erroneously denied for jurors 34, 63, and 53, he was forced to use three peremptories to remove these jurors. CP 354. He exhausted all his peremptories. *Id*. The prosecution was not

similarly burdened. Under our state constitution, he did not receive the jury trial to which he was entitled. This Court should reverse the conviction and remand for a new trial.

5. Mr. Melegrito was denied a fair trial by the cumulative effect of improper evidentiary rulings and prosecutorial misconduct.

a. The cumulative effect of evidentiary errors and improper arguments may deny a person the right to a fair trial.

An accused person's right to a fair trial is a fundamental part of due process of law. *United States v. Salerno*, 481 U.S. 739, 750, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987); U.S. Const. amend. XIV; Const. art. I, §§ 3, 22. Erroneous evidentiary rulings violate due process when they deprive an accused person of a fundamentally fair trial. *Estelle v. McGuire*, 502 U.S. 62, 75, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); *Dowling v. United States*, 493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990) (introduction of improper evidence deprives a defendant of due process where "the evidence is so extremely unfair that its admission violates fundamental conceptions of justice"). Likewise, the prosecution may deprive a person of a fair trial by urging the jury to convict for improper reasons.

The "cumulative effect of repetitive prejudicial error" may deprive a person of a fair trial. *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956).

b. The court allowed the prosecution to elicit a police officer's opinion that Mr. Melegrito was particularly dangerous and posed a threat to others.

Evidence an accused person fled before being arrested, "tends to be only marginally probative" of the person's guilt and may be markedly prejudicial. *State v. Freeburg*, 105 Wn. App. 492, 498, 501, 20 P.3d 984 (2001). Due to the tenuous probative value and likely prejudicial effect, jurors may only conclude a person's flight demonstrates consciousness of guilt if the inference is based on a "substantial and real" connection between the flight and guilt of the offense charged, not a "speculative, conjectural, or fanciful" connection. *Id*. at 498.

To admit evidence of flight, the court must confidently find the required connection between the evidence of flight and the inference of guilt, by drawing each of the following inferences: (1) the defendant's behavior constituted flight, (2) this flight shows consciousness of guilt, (3) this consciousness of guilt concerns the crime charged; and (4) this consciousness of

guilt shows actual guilt of the crime charged. *Id*. These inferences were not established in the case at bar.

First, Mr. Melegrito's alleged "flight" occurred when police went to his home to arrest him. He stepped outside his home as directed, with his hands empty and held visibly for police. 7/10RP 489. After walking slowly as instructed, he turned "as if going" back to his house. *Id*. The police believed he could be turning to re-enter his home; the State claimed this behavior constituted evidence of flight.

By turning "as if going back into the house," Mr. Melegrito did not exhibit clear evidence of flight as required. *Freeburg*, 105 Wn. App. at 498. He exited his house cooperatively, with his hands "in plain view" to show he was not carrying anything, as the police directed over a loudspeaker. 7/10RP 488-89, 492. He did not run or scramble back to the house. He did not say anything. 7/10RP 523. At most he took a step or two in the direction of his home. 7/10RP 492. This evidence is too ambiguous to pass the first threshold question in the inquiry. *Freeburg*, 105 Wn. App. at 498. Even the court

deemed it only "potential flight," not actual evidence of flight. 7/10RP 501.

Second, the remainder of the required inferences were not shown. *Freeburg*, 105 Wn. App. at 498. The court did not find the State proved these inferences. Instead, the court ruled Mr. Melegrito's conduct in turning away and then being shot by a "non-lethal" police bullet amounted to "potential consciousness of guilt, potential flight." 7/10RP 501.

Mr. Melegrito's hesitancy at the time of his arrest did not show he actually committed intentional murder, as the test for admissibility requires. *Freeburg*, 105 Wn. App. at 498, 501. At the time of his arrest, he knew he had fired a gun but had no idea if either man was harmed or critically injured. 7/10RP 499. His behavior in turning away before his arrest does not show he was conceding his "actual guilt" of the charged crimes. *Freeburg*, 105 Wn. App. at 498, 501.

By allowing this "flight" evidence describing Mr. Melegrito's arrest, the court let the prosecution elicit a police sergeant's depiction of Mr. Melegrito as a person they deemed to be particularly dangerous. 7/10RP 518, 520, 525-27. Jurors

heard a SWAT team gathered to arrest Mr. Melegrito, with 10 or 12 officers and a "Bearcat," which was an armored vehicle the SWAT team uses. 7/10RP 526-27. The police believed it was "too dangerous" to allow Mr. Melegrito to go back into the house. 7/10RP 525. They feared he was going to "create a hostage situation" or get a gun and arm himself. 7/10RP 525. Because of their fears of Mr. Melegrito, the SWAT team fired "less lethal munition" at him in order to arrest him, striking him in the hip and causing him to buckle. 7/10RP 522-23.

Under the guise of "consciousness of guilt" the prosecution offered otherwise inadmissible descriptions of the arrest and speculation by police about the danger they thought Mr. Melegrito posed to the public and his own family. By turning away as a hoard of police were about to arrest him, the unarmed Mr. Melegrito did not display a consciousness of guilt of the actual crime charged. The notion of Mr. Melegrito's "flight" during his arrest lacked probative value and was far more prejudicial than any marginal relevance. *Freeburg*, 105 Wn. App. at 501. The resulting speculative testimony about Mr. Melegrito's dangerousness created an enduring prejudicial

effect. *Id*. (reversing murder conviction because "flight" evidence involving danger defendant posed at time of arrest was too prejudicial without being sufficiently probative).

c. The court required Mr. Melegrito to slowly reenact the shooting in front of the jury with a plastic gun, in an inflammatory and unrealistic manner.

Demonstrative evidence, such as reenacting the charged crime, is admissible only when "the experiment was conducted under substantially similar conditions as the event at issue." *State v. Finch*, 137 Wn.2d 792, 816, 975 P.2d 967 (1999). While the reenactment does not have to be an exact replica, factual inaccuracies can be unduly prejudicial. *Id*. at 17, citing *State v. Stockmyer,* 83 Wn. App. 77, 82, 920 P.2d 1201 (1996). Evidence is unfairly prejudicial if it is likely to elicit an emotional response, rather than a rational decision. *State v. Rice,* 48 Wn. App. 7, 13, 737 P.2d 726 (1987).

In *Stockmyer*, the court excluded a video reenactment of the incident using actors, due to concerns about its factual inaccuracies and the resulting potential prejudice. 83 Wn. App. at 84-85. In *Finch*, the court allowed a police reenactment that was not an effort to re-create the incident, but rather was

intended "only to show what could be seen from the bedroom window under similar circumstances." 137 Wn.2d at 817. The conditions were substantially similar for the purpose the reenactment was intended to show. *Id*. at 817-18.

As the court in *Stockmyer* noted, other courts have warned against admitting reenactments that purport to convey the incident itself. 83 Wn. App. at 84-85. "[T]he concept of recreating human events with the use of actors is a course of conduct that is fraught with danger." *Lopez v. State*, 651 S.W.2d 413, 414–15 (Tex. App.), *rev. granted on other grounds and remanded,* 664 S.W.2d 85 (Tex. Crim. App. 1983).

Jurors may be swayed by a "facial expression or slightest gesture whether intended or not," instead of the trial testimony. *Id*. "[S]taged, re-enacted criminal acts" involving humans "are impossible to duplicate in every minute detail and are therefore inherently dangerous, offer little in substance and the impact of re-enactments is too highly prejudicial" to assure a fair trial. *Id*.

Despite the defense's objection, the court allowed the prosecution to require Mr. Melegrito to reenact the incident in court with the case detective pretending to be Mr. Bacani, who

died. 7/17RP 1101. It had a young, white college intern sitting in a chair, pretending to be Mr. Gallardo. 7/17RP 1094, 1101.

The defense objected to the inability of a slow moving reenactment to capture the speed of the incident and split-second nature of the decision-making. 7/17RP 1091-92. It objected to the prejudicial nature of forcing Mr. Melegrito to hold and use a plastic gun in front of the jury under these artificial circumstances. 7/17RP 1093-94. It noted this demonstration caused a visible increase in the security guards in the courtroom, with three guards now standing near Mr. Melegrito. 7/17RP 1090-92, 1100. Finally, it objected to having a "young white college intern to take the place of the Filipino gangbanging methods for Mr. Gallardo," as "inappropriate" and "intentionally designed to create a particular reaction from the jury." 7/17RP 1094. The court allowed this reenactment. *Id*. at 1096-97.

"Courtroom security measures that single out defendants as particularly dangerous or guilty threaten their right to a fair trial because those measures erode the presumption of innocence." *State v. Gorman-Lykken*, 9 Wn. App. 2d 687, 692,

446 P.3d 694 (2019). The presence of additional guards when the prosecution made Mr. Melegrito act out the incident in front of the jury eroded the presumption of innocence. *Id*.

The reenactment was likely to create an emotional response in the jury. In addition, it was not conducted under substantially similar circumstances, undermining its probative value. The prosecutor told Mr. Melegrito to hold a plastic gun, "point it" at the detective and fire the gun at the detective. 7/17RP 1101, 1108. It had a while college student sitting in a chair as Mr. Gallardo. 7/17RP 1094, 1101.

The inability to accurately portray what happened in court, while slowly stepping through the various locations of the participants and having Mr. Melegrito explain his thought process was unrealistic and likely to mislead as well as scare the jurors, who found themselves facing an armed Mr. Melegrito.

d. The prosecutor impermissibly disparaged the defense attorney.

Prosecutors are quasi-judicial officers who "must subdue courtroom zeal for the sake of fairness to the defendant." *State v. Thorgerson,* 172 Wn.2d 438, 443, 258 P.3d 43 (2011).

Prosecutors "owe[ ] a duty to defendants to see that their rights to a constitutionally fair trial are not violated." *State v. Monday,* 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

Consequently, "a prosecutor must not impugn the role or integrity of defense counsel." *State v. Lindsay*, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014). "Prosecutorial statements that malign defense counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible." *Id.* at 432. Because "the jury will normally place great confidence" in the prosecution's "faithful execution" of its obligations, a prosecutor's "improper insinuations or suggestions are apt to carry more weight against a defendant." *State v. Thierry*, 190 Wn. App. 680, 694, 360 P.3d 940 (2015) (internal citation omitted).

Here the prosecutor mocked defense counsel's closing argument and denigrated his role in presenting a defense and contesting the State's case. The prosecutor started his rebuttal argument by sarcastically "saluting" defense counsel for taking "a very difficult set of facts" and "spinning them" for the jury "as positively as he could." 7/18RP 1290-91.

He told jurors that defense counsel's complaints about the failure to investigate people who were potentially involved in the incident was a ploy to trick them, calling this argument "a red herring designed to throw you off track." 7/18RP 1295.

He told jurors that Mr. Melegrito concocted self-defense because it was the only defense available to him after he was unable to succeed in other defenses. 7/18RP 1297 ("The fact of the matter [is], . . . the only defense he has, to claim self-defense when every other single door has been closed in his face.").

He belittled defense counsel's arguments that the prosecution had not met its burden of proof by claiming all defense attorneys make such arguments. RP 1302. The prosecutor told the jury that, "every defense attorney" claims proof beyond a reasonable doubt is something "on the horizon," and the prosecution "can never ever satisfy it." 7/18RP 1302.

He argued that if the jury considered Mr. Melegrito's behavior reckless, as required for the lesser offense of manslaughter, and not intentional murder, "then there is no such thing as murder in the second degree as intentional murder." 7/18RP 1292.

In *Thierry*, the prosecutor similarly argued the State would have to "give up prosecuting" cases if the jurors found it needed more evidence than complainant's testimony. *Thierry* condemned this argument as an improper "appeal to passion and prejudice." *Thierry*, 190 Wn. App. at 690. "This hyperbole invited the jury to decide the case on an emotional basis, relying on a threatened impact on other cases, or society in general, rather than on the merits of the State's case." *Id.* at 691.

The prosecution's numerous efforts to denigrate and belittle counsel's role, and to deem his arguments a ploy that defense attorneys use to trick jurors, were delivered just before the jury started deliberating, when the defense could not respond. These arguments were flagrant and ill-intentioned efforts to encourage the jury to disregard the defense for improper reasons. By maligning defense counsel personally, the prosecutor made it hard for defense counsel to object or the court to give an effective curative instruction.

e. The cumulative effect of these errors undermined the fairness of the trial.

The prejudicial impact of the prosecutor's improper arguments should be assessed cumulatively with the court's admission of other unfairly prejudicial evidence. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Salas*, 1 Wn. App. 2d 931, 952, 408 P.3d 383 (2018) (reversing where evidence "was not overwhelming" and the "combination of" improperly used photographs in closing argument and the attorney's deficient performance in the motion to suppress denied the defendant a fair trial); U.S. Const. amend. XIV; Const. art. I, § 3.

Mr. Melegrito explained he acted in self-defense. The jury's assessment of this explanation hinged on their perception of his credibility and the reasonableness of his actions. The evidentiary errors and improper argument unfairly undermined these central claims. The jury heard evidence from police speculating about Mr. Melegrito's propensity for dangerous and watched while he yielded a plastic gun and pointed it at the lead detective and in the direction of a young intern in court in an unrealistic effort to undermine his self-defense claim. By

denigrating defense counsel and accusing him of trickery and deception, the prosecution further encouraged the jury to decide the case for improper reasons. These errors, considered cumulatively, denied Mr. Melegrito a fair trial.

F. CONCLUSION.

Mr. Melegrito's conviction for attempted murder should be vacated due to the double jeopardy violation and a new trial ordered due to the use of unfairly prejudicial evidence and the violation of Mr. Melegrito's jury trial rights. Alternatively, the firearm enhancements should be reversed and vacated based on preclusive effect of the jury's original verdict and a new sentencing hearing should be ordered.

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Respectfully submitted,

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