No. 84475-5

WIGGINS, J. (dissenting)—I agree with the lead opinion that the prosecutor in this case improperly expressed a personal opinion about Edward Glasmann's guilt when he superimposed the words "guilty, guilty, guilty" over Glasmann's mug shot in a PowerPoint display. But I disagree that all of Glasmann's convictions should be overturned as a result. While it may appear at first glance that the prosecutor's error is grave enough to warrant a new trial on all of Glasmann's convictions, a closer examination of the facts reveals a different story.

During closing arguments, Glasmann's attorney stated, "You have basically four trials here. You have four counts, four accusations, if you will. Each one of those is a separate trial. Each one of those must be decided separately from the other and we rely on you to do the necessary mental gymnastics to accomplish that." 8 Verbatim Report of Proceedings (VRP) at 471. Glasmann's attorney's advice to the jury is equally applicable to our review. After engaging in the "mental gymnastics" urged by Glasmann's attorney, I cannot agree that we should reverse his convictions for obstruction of a law enforcement officer, attempted second degree robbery, and first degree kidnapping. For each of these convictions, either Glasmann admitted to the crime or the evidence was so overwhelming that the jury would have convicted him regardless of the prosecutor's improper conduct. Nor can I agree that the prosecutor's statements during closing argument shifted the burden of proof to Glasmann. For these reasons, I respectfully dissent.

I. Prosecutorial Misconduct

To prevail on a prosecutorial misconduct claim, a defendant must show not only that the prosecutor's conduct was improper but also that it was prejudicial. *State v. Thorgerson,* 172 Wn.2d 438, 443, 258 P.3d 43 (2011). "'Prejudice is established only if there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict.'" *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (alteration in original) (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995) and citing *State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1991)). "If the prejudice could have been cured by a jury instruction, but the defense did not request one, reversal is not required." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Here, because Glasmann's attorney did not object to the prosecution's slides or request a curative instruction at trial, Glasmann must show that the prejudice[1] was so inflammatory that it could not have been defused by an instruction. *State v. Coleman*, 152 Wn. App. 552, 570, 216 P.3d 479 (2009).

A. Prejudice

Glasmann was convicted of four separate crimes, and factually, each conviction is different. It is a mistake to bunch all four convictions together and conclude that the prosecutor's improper conduct prejudiced each conviction the

[1] "[T]he inherent prejudice standard does not require us to know how jurors reacted to [the PowerPoint slides]. A defendant need not show that jurors 'actually articulated a consciousness of some prejudicial effect.'" *State v. Jaime*, 168 Wn.2d 857, 864 n.4, 233 P.3d 554 (2010) (quoting *Holbrook v. Flynn*, 475 U.S. 560, 570, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986)).

same. After analyzing Glasmann's four convictions separately, it is clear that three of them should stand and only one should be reversed.

1. Obstructing a Law Enforcement Officer

During closing arguments, Glasmann's attorney conceded that Glasmann "clearly obstructed a law enforcement officer in the exercise of their official duties," 8 VRP at 472-73 and admitted, "I'll be the most surprised person in this courtroom if you don't convict Mr. Glasmann of obstructing a law enforcement officer." *Id.* at 472. Not surprisingly, the jury found Glasmann guilty of obstructing a law enforcement officer. In light of his concession, Glasmann cannot seriously contend that he was prejudiced by the prosecutor's actions during closing argument. The jury found Glasmann guilty because he admitted he was guilty, not because of the prosecutor's improper conduct. The lead opinion is wrong to conclude the prosecutor's conduct prejudiced Glasmann on his obstruction charge; I would uphold that conviction.[2]

2. Attempted Second Degree Robbery

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[2] The lead opinion appears to misunderstand our posture on review when it says, "We cannot say that the jury would not have returned verdicts for lesser offense, or even acquittal, i.e., we cannot even presume the jury would have accepted defense counsel's concessions even as to the obstruction charged." Lead opinion at 16-17. This seems to assume that the burden is on the State to show harmlessness, perhaps even beyond a reasonable doubt. This assumption is incorrect. A defendant making a claim of prosecutorial misconduct carries the burden of showing a "'substantial likelihood [that] the instances of misconduct affected the jury's verdict.'" *Magers*, 164 Wn.2d at 191 (alteration in original) (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904, P.2d 245 (1996)). Thus, we are not required to reverse based on unlikely hypotheticals such as the jury acquitting where defense counsel did not even ask for acquittal, saying, for example, that he would be "the most surprised person in the courtroom" if the jury acquitted. 8 VRP at 472. It is, of course, *possible* that the jury would have reached a different outcome absent the misconduct, but that does not equate to a substantial likelihood.

Glasmann also conceded attempted second degree robbery. The State charged him with attempted *first degree* robbery, and he defended by arguing that the facts supported only attempted *second degree* robbery. Glasmann's attorney argued in closing that "Mr. Glasmann admits 'I was trying to steal his car,' and that's attempted robbery. The only issue is attempted first degree robbery or attempted second degree robbery. Clearly what Mr. Glasmann admitted to was attempted robbery in the second degree." *Id.* at 488-89. This was a strategic decision by Glasmann; he admitted to committing attempted second degree robbery because he *wanted* the jury to find him guilty of that crime, which the evidence plainly supported, and not of first degree robbery. Glasmann's gambit worked and the jury found him guilty of attempted second degree robbery.

Glasmann cannot reasonably claim the prosecutor's conduct resulted in any prejudice when the jury returned the same verdict Glasmann sought. Just like with the obstruction charge, the lead opinion is wrong to reverse his conviction. Recognizing this, I would uphold Glasmann's attempted second degree robbery conviction.

3. First Degree Kidnapping

Although Glasmann did not concede he was guilty of first degree kidnapping, the evidence of his guilt is so overwhelming that there is no way the prosecutor's improper conduct prejudiced the jury's guilty verdict.[3] Glasmann defended the first

[3] The lead opinion is correct that "deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts." Lead opinion at 15. I agree there is more to the analysis than that. But the quantity and quality of evidence will often factor into our analysis of whether a verdict would have been different absent an error. For example, where the evidence of guilt is overwhelming, it is less likely that

degree kidnapping charge by arguing that his actions inside the minimart only amounted to unlawful imprisonment. The jury disagreed and convicted him of first degree kidnapping.

"A person commits the crime of kidnapping in the first degree when he or she intentionally abducts another person with intent to hold the person as a shield or hostage." Jury Instruction 30. "Abduct means to restrain a person by using or threatening to use deadly force." Jury Instruction 31. "Restraint or restrain means to restrict another person's movements without consent and without legal authority in a manner which interferes substantially with that person's liberty. Restraint is without consent if it is accomplished by physical force, intimidation or deception." Jury Instruction 32.

The record is replete with video evidence and multiple-eyewitness testimony establishing that Glasmann was guilty of first degree kidnapping. Angel Benson testified that while in the minimart, Glasmann held her around the neck so that she could not breathe, that she was not there willingly, and that she struggled to try and get away. 4 VRP 95, 100, 111. Three officers also testified that Glasmann held Benson in a choke hold, and minimart surveillance tapes confirmed this testimony. 4 VRP at 118-19; 5 VRP at 261; 6 VRP at 302. Officers Borchardt and Butts both testified to hearing Glasmann threaten to kill Benson. 4 VRP at 71; 5 VRP at 246. Further, Dr. Eggebroten testified that application of pressure to someone's neck could be life threatening. 5 VRP at 207. In short, the evidence at trial clearly

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an error affected the outcome of the trial than where evidence of guilt is slight. *See In re Pers. Restraint of Davis*, 152 Wn.2d 647, 698-701, 101 P.3d 1 (2004).

established that Glasmann abducted Benson.

Additionally, the evidence that Glasmann intended to use Benson as a shield was overwhelming. Several officers testified that Glasmann positioned Benson between himself and the officers who had their guns drawn, 4 VRP at 119; 5 VRP at 248; 6 VRP at 305, with Officer Hamilton stating Glasmann positioned Benson "directly in front of him so that she was a physical barrier like a shield." 6 VRP at 305. The surveillance tape captured this scene, confirming the officers' testimony. This tape was played several times for the jurors. Given the abundance of evidence proving Glasmann guilty of first degree kidnapping, there is no question that the jury would have found Glasmann guilty even absent the prosecutor's improper conduct. Therefore, Glasmann was not prejudiced, and we should uphold his first degree kidnapping conviction.

4. Second Degree Assault

In contrast, it does appear that Glasmann was prejudiced on his second degree assault conviction, and I agree with the lead opinion that we should reverse that conviction. Glasmann defended the first degree assault charge by arguing that he did not intentionally assault Benson, a required element of first degree assault,[4] and that running over Benson with his car amounted only to

[4] "A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he assaults another by any force or means likely to produce great bodily harm or death." Jury Instruction 7.

[5] A person commits the crime of assault in the third degree when under circumstances not amounting to assault in either the first or second degree he or she

(1) with criminal negligence causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm, or

third[5] or fourth degree assault.[6] The jury convicted Glasmann of second degree assault, a lesser included offense also requiring proof of intent.[7]

At trial, the evidence that Glasmann intended to run over Benson was limited. Benson admitted to falling down while trying to escape the moving car before being run over. 4 VRP at 82. Additionally, Erika Rusk, the State's witness who called 911, testified that she did not know if Glasmann knew Benson was under the car when he ran her over. 2 VRP at 21. Yet the jury still found that Glasmann intentionally assaulted Benson. Given the limited evidence establishing Glasmann's intent to run over Benson and the nuanced distinctions between the different degrees of assault, I agree with the lead opinion that the prosecutor's improper conduct prejudiced Glasmann by affecting the jury's verdict. Further, this misconduct was so flagrant that no curative instruction could have cured the prejudice. I agree that we should reverse Glasmann's second degree assault conviction.

B. The Prosecution Did Not Improperly Shift the Burden of Proof

While I readily condemn the prosecutor's improper conduct in this case, I cannot countenance the inclusion of any alleged burden shift among that conduct

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> (2) with criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.

Jury Instruction 17.

[6] "A person commits the crime of assault in the fourth degree when he or she commits an assault not amounting to assault in the first, second, or third degree." Jury Instruction 20.

[7] "A person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm." Jury Instruction 13.

because nothing the prosecutor said during closing argument shifted the burden of proof to Glasmann. It is misconduct for a prosecutor to argue that a jury must find that the State's witnesses are either lying or mistaken in order to acquit a defendant. *State v. Fleming,* 83 Wn. App. 209, 213, 921 P.2d 1076 (1996) (citing *State v. Casteneda–Perez,* 61 Wn. App. 354, 362–63, 810 P.2d 74 (1991)). Misstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant is guilty beyond a reasonable doubt. *Id.*

A comparison with the Court of Appeals, Division One, decision in *Fleming* is instructive here. In *Fleming*, the defendants alleged the prosecutor committed misconduct during closing argument by telling the jury that "'*for you to find the defendants . . . not guilty of the crime of rape in the second degree*, . . . *you would have to find either that [D.S.] has lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom*." *Fleming*, 83 Wn. App. at 213 (third alteration in original). Division One held that the prosecutor's statement misstated the law and misrepresented both the role of the jury and the burden of proof. *Id.*

Here, unlike in *Fleming,* the prosecutor neither misstated the law nor shifted the burden of proof. The prosecutor simply highlighted the jury's role in determining the credibility of witnesses and admonished the jury to "[c]ompare Angel Benson's testimony and the testimony of the remainder of the State's witnesses to the defendant's. The defendant got up and he testified in this case, and the question to you is do you believe him?" 8 VRP at 458. The prosecutor never "informed the jury

that in order to reach a verdict, it must decide whether the defendant told the truth when he testified." Lead opinion at 18.

The prosecutor's question asked the jury to do its job and assess Glasmann's credibility vis-à-vis the State's witnesses. "Merely asking questions of the jury does not rise to the level of misstating the law or misrepresenting the role of the jury and the burden of proof as in *Fleming*." *State v. Lewis*, 156 Wn. App. 230, 241, 233 P.3d 891 (2010). In *Fleming,* the prosecutor required the jury to find the victim either lied or was mistaken *in order to find the defendant not guilty*. Here, the prosecutor's question did not impose any prerequisite to finding the defendant not guilty. The prosecutor merely asked the jury to compare the testimony of the State's witnesses to that of the defendant, and to determine if the defendant told the truth. This is a standard credibility determination that our justice system charges to the jury. Thus, the prosecutor neither misstated the law nor shifted the burden of proof and this portion of the prosecutor's closing argument was not misconduct as the lead opinion contends.

C. Prosecutors May Use Visual Aids

Although I agree that the prosecutor's inclusion of an altered version of Glasmann's mug shot proclaiming Glasmann "guilty, guilty, guilty" was improper, I do not condemn the use of visual aids generally. When properly created and employed, visual aids can be both effective and helpful during closing argument and I would not discourage their use. I do not read the lead opinion as limiting the proper use of visual aids either. However, I join the lead opinion in condemning the

improper use of these aids when they are tantamount to improper closing argument, as was the case here.

For the foregoing reasons, I dissent. I would reverse Glasmann's second degree assault conviction and remand for further proceedings consistent with this opinion.

AUTHOR:
Justice Charles K. Wiggins

WE CONCUR:

Justice James M. Johnson

Justice Susan Owens

Justice Mary E. Fairhurst