IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of	)	No. 84475-5
	)	
EDWARD MICHAEL GLASMANN,	)	En Banc
	)	
Petitioner.	)	Filed October 18, 2012
_____	)	

MADSEN, C.J.—Edward M. Glasmann was convicted of second degree assault, attempted second degree robbery, first degree kidnapping, and obstruction arising from incidents that occurred while he was intoxicated. During closing argument, the prosecuting attorney made an electronic presentation to the jury that graphically displayed his personal opinion that Glasmann was "guilty, guilty, guilty" of the crimes charged by the State. The prosecutor's misconduct was flagrant, ill intentioned, and we cannot conclude with any confidence that it did not to have an effect on the outcome of the trial. We reverse the defendant's convictions and remand for a new trial.

FACTS AND PROCEDURAL HISTORY

In celebration of his October 2004 birthday, Edward Glasmann and his fiancée, Angel Benson, rented a motel room in Lakewood, Washington. Over the course of the

evening, the two ingested methamphetamine, ecstasy, and alcohol. Glasmann and Benson had been arguing throughout that day and evening and around midnight, their argument escalated. Glasmann started punching and kicking Benson. He told Benson he wanted to go for a ride and then dragged her out of the motel room. Outside the motel room, another motel guest witnessed Glasmann punch and kick Benson before dragging her to the passenger side of his Corvette. This witness called 911 and provided an account of the events.

From the driver's seat, Glasmann reached over to open the passenger door and attempted to pull Benson into the car by her hair. Benson testified that she was partially in the car and stumbled when Glasmann ran the car up her leg, backed off of her leg, pulled her into the car, and drove out of the parking lot. Benson was then able to get the car into park. She next grabbed the car keys and ran into a minimart adjacent to the motel.

Inside the minimart, she hid on the floor behind the cashier's counter. Police soon arrived and attempted without success to apprehend Glasmann. Shouting at the officers to shoot him and claiming to possess a firearm, Glasmann ran into the convenience store. He ran behind the counter, held Benson in a choke hold, and threatened to kill her. As officers approached, Glasmann held Benson between himself and the officers. Benson was able to wiggle free enough to allow an officer to use a stun gun on Glasmann.

The officers subdued and arrested Glasmann. In the process, Glasmann was held

down by one officer while another officer stomped on his head approximately five times. Glasmann continued to struggle as he was dragged out of the minimart. His booking photograph shows extensive facial bruising. The incident inside the minimart was recorded on the store's security camera.

The State charged Glasmann with first degree assault, attempted first degree robbery, first degree kidnapping, and obstruction. Exhibits admitted into evidence included the minimart security video, photographs of Benson's injuries, the 911 recording, recordings of telephone calls between Glasmann and Benson, and Glasmann's booking photo. The defense offered Glasmann's booking photo to display Glasmann's facial injuries sustained during arrest.

At trial, Glasmann did not deny culpability. Rather, he disputed the degree of the crimes charged. He argued the jury should convict only on lesser included offenses. The prosecution sought to establish that Glasmann acted with intent, a necessary element of all the crimes charged.

In closing argument, the State used an extensive PowerPoint[1] presentation that included numerous slides incorporating the security camera video, audio recordings, photographs of Benson's injuries, and Glasmann's booking photograph. Each of the slides containing a video shot or photograph included a caption consisting of testimony,

[1] "PowerPoint" is a registered trademark of a Microsoft graphics presentation software program.

recorded statements, or the prosecutor's commentary.[2]

One slide showed Glasmann crouched behind the minimart counter with a choke hold on Benson and a caption reading, "YOU JUST BROKE OUR LOVE." State's Resp. to Pers. Restraint Pet. (PRP), App. G at 1. Another slide featuring a photograph of Benson's back injuries appeared with the captions, "What was happening right before defendant drove over Angel . . . ," and ". . . you were beating the crap out of me!" *Id*. at 2. This slide also featured accompanying audio.

In addition, the prosecutor argued that jurors should not believe Glasmann's testimony. He told the jurors that the law required them to "[c]ompare Angel Benson's testimony and the testimony of the remainder of the State's witnesses to the defendant's." 8 Verbatim Report of Proceedings (VRP) at 458. The prosecutor then told jurors that in order to reach a verdict they must determine: "Did the defendant tell the truth when he testified?" *Id*.

At least five slides featured Glasmann's booking photograph and a caption. In one slide, the booking photo appeared above the caption, "DO YOU BELIEVE HIM?" State's Resp. to PRP, App. G at 5. In another booking photo slide the caption read,

[2] Having been obtained by public disclosure request, most of the prosecution's closing argument PowerPoint slides are attached to State's Response to Personal Restraint Petition, Appendix G (Wash. Ct. App. No. 39700-5-II). Although appendix G includes two versions of the presentation, we cite only to the shorter version, appearing second in the appendix. Three of the closing argument slides are attached to the Personal Restraint Petition, Appendix H at 8-10. None of the original slides are in the record.

"WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?" *Id*. Near the end of the presentation, the booking photo appeared three more times: first with the word "GUILTY" superimposed diagonally in red letters across Glasmann's battered face. PRP, App. H at 8. In the second slide the word "GUILTY" was superimposed in red letters again in the opposite direction, forming an "X" shape across Glasmann's face. *Id*. at 9. In the third slide, the word "GUILTY," again in red letters, was superimposed horizontally over the previously superimposed words. *Id*. at 10. As best as we can determine, the prosecutor stated the following while the "GUILTY" slides were being displayed:

> You've been provided with a number of lesser crimes if you believe the defendant is not guilty of the crimes for which the State has charged him, but the evidence in this case proves overwhelmingly that he is guilty as charged, and that's what the State asks you to return in this case: Guilty of assault in the first degree; guilty of attempted robbery in the first degree; guilty of kidnapping in the first degree; and guilty of obstructing a police officer. Hold him accountable for what he did on October 23rd, 2004, by finding him guilty as charged. Thank you.

8 VRP at 465-66. Defense counsel did not object to these slides.

In closing argument, defense counsel emphasized the governing standard, proof beyond a reasonable doubt. He asked the jurors to focus on the actual charges, not Glasmann's drug use, reckless driving, or "hitting Angel Benson in the motel room." *Id*. at 470. Counsel reviewed the elements of each charge and argued that Glasmann's conduct did not meet the definition of the charged crimes:

> The issue for you to decide is[,] is there proof beyond a reasonable doubt that Mike Glasmann committed any crimes that night, and the answer to that is yes, but this case is overcharged.
>
> What do I mean by that? I mean that the charges that the State has leveled against Mr. Glasmann are not reflective of what, in reality, happened that night or reflective of what has been proven beyond a reasonable doubt happened that night. He's charged with Assault 1 when only assault in the third degree or assault in the fourth degree reasonably fit these facts, arguably, beyond a reasonable doubt. He's charged with attempted robbery in the first degree when only attempted robbery in the second degree fits these facts beyond a reasonable doubt. He's charged with kidnapping in the first degree when only unlawful imprisonment fits these facts beyond a reasonable doubt. Obstructing a law enforcement officer is, I said, a proper charge.

Id. at 494.

The jury convicted Glasmann of first degree kidnapping and obstruction, and the lesser included offenses of second degree assault and attempted second degree robbery. Glasmann appealed. He was sentenced to 210 months in prison. The Court of Appeals affirmed in an unpublished decision. *State v. Glasmann*, noted at 142 Wn. App. 1041, 2008 WL 186783. Thereafter, Glasmann filed a personal restraint petition and we granted review limited to whether the prosecutor's closing argument deprived Glasmann of a fair trial and whether assistance of Glasmann's trial counsel was ineffective.[3] *In re Pers. Restraint of Glasmann*, 170 Wn.2d 1009, 245 P.3d 226 (2010).

ANALYSIS

[3] We need not reach the ineffective assistance of trial counsel claim because we remand for a new trial based on the prosecutorial misconduct claim.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 267 (1999). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). "A '"[f]air trial" certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused.'" *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original) (quoting *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956); *see State v. Reed*, 102 Wn.2d 140, 145-47, 684 P.2d 699 (1984)).

Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d (2011), a prosecutor must "seek convictions based only on probative evidence and sound reason," *State v. Casteneda-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74 (1991); *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). "The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." American Bar Association, Standards for Criminal Justice std. 3-5.8(c) (2d ed. 1980); *State v. Brett*, 126 Wn.2d 136, 179, 892 P.2d 29 (1995); *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988).

In order to prevail on a claim of prosecutorial misconduct, a defendant is required to show that in the context of the record and all of the circumstances of the trial, the

prosecutor's conduct was both improper and prejudicial. *Thorgerson,* 172 Wn.2d at 442. To show prejudice requires that the defendant show a substantial likelihood that the misconduct affected the jury verdict. *Id*.; *State v. Ish,* 170 Wn.2d 189, 195, 241 P.3d 389 (2010); *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Because Mr. Glasmann failed to object at trial, the errors he complains of are waived unless he establishes that the misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice. *Thorgerson*, 172 Wn.2d at 443; *State v. Russell,* 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

Our courts have repeatedly and unequivocally denounced the type of conduct that occurred in this case. First, we have held that it is error to submit evidence to the jury that has not been admitted at trial. *State v. Pete*, 152 Wn.2d 546, 553-55, 98 P.2d 803 (2004). The "long-standing rule" is that "'consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.'" *Id*. at 555 n.4 (quoting *State v. Rinkes*, 70 Wn.2d 854, 862, 425 P.2d 658 (1967) (emphasis omitted)); *see also, e.g.*, *State v. Boggs*, 33 Wn.2d 921, 207 P.2d 743 (1949), *overruled on other grounds by State v. Parr*, 93 Wn.2d 95, 606 P.2d 263 (1980).

In *Rinkes*, 70 Wn.2d at 855, for example, a newspaper editorial and cartoon highly critical of what it claimed was lenient court decisions and liberal probation policies was inadvertently sent to the jury room. The court stated that the material in the newspaper should not have gone to the jury and observed that the article was "clearly intended to

influence the readers of it [(the newspaper)] to be concerned about the purported leniency" of area judges and "may well have evoked a jury members feelings or convictions of the necessity for being stricter and less careful about observing legal principles and procedure in dealing with defendants accused of crime." *Id*. at 862-63. The court said the material was "very likely indeed" to be prejudicial and assumed that "the requisite balance of impartiality was upset." *Id*. at 863.

Here, the prosecutor intentionally presented the jury with copies of Glasmann's booking photograph altered by the addition of phrases calculated to influence the jury's assessment of Glasmann's guilt and veracity. In the photograph, Glasmann is unkempt and bloody, a condition likely to have resulted in even greater impact because of captions that challenged the jury to question the truthfulness of his testimony. While the State argues that it merely combined the booking photograph, admitted as exhibit 89, with the court's instructions and argument of the law and facts, the prosecutor's conduct went well beyond this. Indeed, here the prosecutor's modification of photographs by adding captions was the equivalent of unadmitted evidence. There certainly was no photograph in evidence that asked "DO YOU BELIEVE HIM?" *See* State's Resp. to PRP, App. G at 5. There was nothing that said, "WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?" *See id*. And there were no sequence of photographs in evidence with "GUILTY" on the face or "GUILTY, GUILTY, GUILTY." *See id*. Yet this "evidence" was made a part of the trial by the prosecutor during closing argument.

Although this is not a case where unadmitted evidence was sent to the jury room,

as in *Pete* and *Rinkes*, these cases nevertheless establish that a prosecutor must be held to know that it is improper to present evidence that has been deliberately altered in order to influence the jury's deliberations. As in *Rinkes*, the multiple altered photographs here may well have affected the jurors' feelings about the need to strictly observe legal principles and the care it must take in determining Glasmann's guilt.

It is also well established that a prosecutor cannot use his or her position of power and prestige to sway the jury and may not express an individual opinion of the defendant's guilt, independent of the evidence actually in the case. The commentary on *American Bar Association Standards for Criminal Justice* std. 3-5.8 emphasizes:

> The prosecutor's argument is likely to have significant persuasive force with the jury. Accordingly, the scope of argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor's conduct. Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.

Likewise, many cases warn of the need for a prosecutor to avoid expressing a personal opinion of guilt. *E.g.*, *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006) (finding it improper for a prosecuting attorney to express his individual opinion that the accused is guilty, independent of the testimony in the case (citing *State v. Armstrong*, 37 Wash. 51, 79 P. 490 (1905))); *Dhaliwal*, 150 Wn.2d at 577 (permitting latitude to attorneys to argue the facts in evidence and reasonable inferences therefrom, but prohibiting statements of personal belief of a defendant's guilt or innocence); *State v.*

Stith, 71 Wn. App. 14, 21-22, 856 P.2d 415 (1993) (deeming a prosecutor's comment in closing argument that the appellant "was just coming back and he was dealing [drugs] again" impermissible opinion "testimony"); *State v. Traweek*, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986) (concluding it was error for a prosecutor to tell the jury he "knew" the defendant committed the crime). By expressing his personal opinion of Glasmann's guilt through both his slide show and his closing arguments, the prosecutor engaged in misconduct.

The case law and professional standards described above were available to the prosecutor and clearly warned against the conduct here. We hold that the prosecutor's misconduct, which permeated the state's closing argument, was flagrant and ill intentioned.

Moreover, the misconduct here was so pervasive that it could not have been cured by an instruction. "[T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011) (citing *Case*, 49 Wn.2d at 73).

Highly prejudicial images may sway a jury in ways that words cannot. *See State v. Gregory*, 158 Wn.2d 759, 866-67, 147 P.3d 1201 (2006). Such imagery, then, may be very difficult to overcome with an instruction. *Id*. Prejudicial imagery may become all the more problematic when displayed in the closing arguments of a trial, when the jury members may be particularly aware of, and susceptible to, the arguments being presented.

Given the multiple ways in which the prosecutor attempted to improperly sway the jury and the powerful visual medium he employed, no instruction could erase the cumulative effect of the misconduct in this case. The prosecutor essentially produced a media event with the deliberate goal of influencing the jury to return guilty verdicts on the counts against Glasmann.

We also believe there is a substantial likelihood that the misconduct affected the jury verdict. As noted earlier, the State charged Glasmann with first degree assault, attempted first degree robbery, first degree kidnapping, and obstruction. The mental state required for the charged offenses, specifically intent, was critically important. Glasmann presented evidence that he lacked both the opportunity and capacity to form the intent necessary to commit the charged crimes. There was evidence that he consumed alcohol, methamphetamine, and ecstasy the night of the offenses and evidence that the events involving Glasmann, Benson, and law enforcement unfolded rapidly. Glasmann defended on the basis that the facts only supported a guilty verdict as to third or fourth degree assault, attempted robbery in the second degree, unlawful imprisonment, and obstruction. The jury convicted Glasmann of second degree assault, attempted second degree robbery, first degree kidnapping, and obstruction.

A prosecutor could never shout in closing argument that "Glasmann is guilty, guilty, guilty!" and it would be highly prejudicial to do so. Doing this visually through use of slides showing Glasmann's battered face and superimposing red capital letters (red, the color of blood and the color used to denote losses) is even more prejudicial. *See*

Gregory, 158 Wn.2d at 866-67. "[V]isual arguments manipulate audiences by harnessing rapid unconscious or emotional reasoning processes and by exploiting the fact that we do not generally question the rapid conclusions we reach based on visually presented information." Lucille A. Jewel, *Through a Glass Darkly: Using Brain and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 S. Cal. Interdisc. L.J. 237, 289 (2010). Further,

> [w]ith visual information, people believe what they see and will not step back and critically examine the conclusions they reach, unless they are explicitly motivated to do so. Thus, the alacrity by which we process and make decisions based on visual information conflicts with a bedrock principle of our legal system—that reasoned deliberation is necessary for a fair justice system.

Id. at 293 (footnote omitted) (citing William J. Bowers, Benjamin D. Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171, 261 (2001) (citing Jeffrey Ambramson, We, The Jury: The Jury System and the Ideal of Democracy (1994) (generally discussing the basic democratic principle for jury trials is that deliberations should be a rational and reasoned process))).

During the critical closing moments of trial, one of the last things the jury saw before it began its deliberations was the representative of the State of Washington impermissibly flashing the word "GUILTY" across an image of Glasmann's face three times, predisposing the jury to return a harsh verdict. Indeed, the entire 50-plus slide presentation used during closing argument was full of imagery that likely inflamed the

jury.[4] The prosecutor's improper visual "shouts" of GUILTY urged the jury to find Glasmann guilty as charged, and without them, the jury might have returned verdicts on the offenses Glasmann agreed he had committed.[5] Because Glasmann defended by asserting he was guilty only of lesser offenses, and nuanced distinctions often separate degrees of a crime, there is an especially serious danger that the nature and scope of the misconduct here may have affected the jury.

When viewed as a whole, the prosecutor's repeated assertions of the defendant's guilt, improperly modified exhibits, and statement that jurors could acquit Glasmann only if they believed him represent the type of pronounced and persistent misconduct that cumulatively causes prejudice demanding that a defendant be granted a new trial. *See Berger*, 295 U.S. at 89; *Thomas v. Hubbard*, 273 F.3d 1164, 1179-80 (9th Cir. 2001), *overruled on other grounds by Payton v. Woodford*, 299 F.3d 815 (2002); *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996); *see also Matlock v. Rose*, 731 F.2d

[4] "Sometimes, we are unable to rationally consider how images affect our emotions or our decision-making process. As we are processing an image in our pre-conscious sensory system, that image can activate an emotional reaction in our mind without us even knowing about it." Jewel, *supra*, 19 S. Cal. Interdisc. L.J. at 263 (citing Ann Marie Seward Barry, Visual Intelligence: Perception, Image, and Manipulation in Visual Communication 18 (1997); Joseph LeDoux, *The Emotional Brain* 165 (1996)). "[T]he danger in using emotionally vivid imagery is not that it is subliminally persuasive, but that it tends to generate emotionally driven reactions that can unconsciously affect a decision-maker's thought process." *Id*. at 254. "[T]here is evidence that gruesome photographs cause unconscious emotional reactions—reactions that may not be curable with a limiting instruction." *Id*. at 268-69 (citing Kevin S. Douglas, David R. Lyon & James R.P. Ogloff, *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?*, 21 Law & Hum. Behav. 485, 499 (1997) ("[I]f jurors cannot even recognize the extent to which [graphic] evidence affects them, it will be impossible for them to reduce or control the impact of the evidence when instructed to do so by a judge.")).

[5] It is also possible that the jury might have acquitted Glasmann on a charge.

1236, 1244 (6th Cir. 1984).

The dissent, however, believes that reversal is not required with regard to three of the four crimes found by the jury and only the conviction for second degree assault should be reversed. The dissent says that Glasmann conceded the crimes of obstructing a law enforcement officer and second degree attempted robbery, and the jury accordingly convicted him of these crimes. With respect to the first degree kidnapping charge, the dissent maintains the evidence is overwhelming that this conviction must be upheld.

We have on a number of occasions established that reviewing claims of prosecutorial misconduct is not a matter of determining whether there is sufficient evidence to convict the defendant. In *State v. Charlton*, 90 Wn.2d 657, 665, 585 P.2d 142 (1978), we concluded the discussion of prosecutorial misconduct in that case, which required reversal, by noting that "[i]n spite of our frequent warnings that prejudicial prosecutorial tactics will not be permitted, we find that some prosecutors continue to use improper, sometimes prejudicial means in an effort to obtain convictions. *In most of these instances, competent evidence fully sustains a conviction.*" (Emphasis added.) The issue is whether the comments deliberately appealed to the jury's passion and prejudice and encouraged the jury to base the verdict on the improper argument "'rather than properly admitted evidence.'" *State v. Ferman*, 122 Wn.2d 440, 468-69, 858 P.2d 1092 (1993) (quoting and discussing *Belgarde*, 110 Wn.2d at 507-08). The focus must be on the misconduct and its impact, not on the evidence that was properly admitted.

Thus, deciding whether reversal is required is not a matter of whether there is

sufficient evidence to justify upholding the verdicts. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. *Dhaliwal*, 150 Wn.2d at 578. We do not decide whether reversal is required by deciding whether, in our view, the evidence is sufficient. *See Monday*, 171 Wn.2d at 678-80 (racist arguments required reversal; no weighing of evidence by the court); *Belgarde*, 110 Wn.2d at 507-10 (inflammatory remarks associating defendant with an organization the prosecutor described as "deadly group of madmen; misconduct required reversal; no weighing of evidence by the court); *Charlton*, 90 Wn.2d at 664 (prosecutor commented on the defendant's spouse's failure to testify, despite the marital privilege, with the inference being that the defendant was concealing or withholding testimony; reversal required—jury might have been inclined to believe the defendant's version in the absence of the improper argument).

The dissent says it agrees that whether the error requires reversal is not a matter of whether there is sufficient evidence to uphold the verdicts. Dissent at 4-5 n.3. But weighing the evidence is in fact what the dissent does. We do not believe this analysis is appropriate and it is contrary to our precedent, as explained. If the misconduct cannot be linked to a specific count, and the misconduct is so egregious that we must conclude reversal is required on one charge, then how can we conclude the misconduct did not sway the jury on another charged crime without engaging in an inappropriate sufficiency of the evidence analysis, like the dissent has done?

In this case, the use of highly inflammatory images unrelated to any specific count

was misconduct that contaminated the entire proceedings. The prosecutor's unacceptable argument announced to the jury that the defendant was intrinsically GUILTY GUILTY GUILTY. The misconduct distracted the jury from its duty to consider the evidence unaffected by the overlaid message that emphatically and repeatedly conveyed the prosecutor's belief to the jury that Glasmann is "absolutely guilty!", and which constituted an appeal to passion and prejudice on all counts.

There is a substantial likelihood here that the jury returned guilty verdicts for the offenses the jurors found because they were influenced by the prosecutor's improper closing argument and the altered "evidence" presented during argument. We cannot say that the jury would not have returned verdicts for lesser offenses, or even acquittal, i.e., we cannot even presume the jury would have accepted defense counsel's concessions even as to the obstruction charged. The impact of such powerful but unquantifiable material on the jury is exceedingly difficult to assess but substantially likely to have affected the *entirety* of the jury deliberations and its verdicts. Even the dissent agrees that the misconduct mandates reversal of the assault conviction. The requisite balance of impartiality was upset. Mr. Glasmann's right to a fair trial must be granted in full. In this way, we give substance to our message that "prejudicial prosecutorial tactics will not be permitted," and our warnings that prosecutors must avoid improper, prejudicial means of obtaining convictions will not be empty words. *Charlton*, 90 Wn.2d at 665.

Next, we turn briefly to Mr. Glasmann's claim that the prosecutor improperly misstated the burden of proof. Because we reverse Glasmann's conviction based on the

misconduct addressed above, we need not reach this issue, but do so in the interest of fully discussing the prosecutor's conduct.

Shifting the burden of proof to the defendant is improper argument, and ignoring this prohibition amounts to flagrant and ill intentioned misconduct. *E.g.*, *State v. Fleming*, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996); *Casteneda-Perez*, 61 Wn. App. at 362-63. Due process requires the prosecution to prove, beyond a reasonable doubt, every element necessary to constitute the crime with which the defendant is charged. *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Misstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant's guilt beyond a reasonable doubt. *Fleming*, 83 Wn. App. at 213.[6]

Similarly, in this case the prosecutor informed the jury that in order to reach a verdict, it must decide whether the defendant told the truth when he testified. Thus, the prosecutor strongly insinuated that the jury could only acquit (or find him guilty of lesser charges) if it believed Glasmann, when the proper standard is whether the evidence established that he was guilty of the State's charges beyond a reasonable doubt. This misconduct was not as egregious as the conduct in *Fleming*, however, and in and of itself

[6] During the State's closing argument in *Fleming*, the prosecutor stated, "'for you to find the defendants . . . not guilty of the crime of rape in the second degree, . . . you would have to find either that [the victim] has lied about what occurred . . . or that she was confused.'" *Fleming*, 83 Wn. App. at 213 (emphasis omitted) (quoting court proceedings). This was error because it misstated the basis upon which the jury could acquit and shifted the burden to the defendant to disprove the State's case. *Id*. at 214. A prosecutor who argues that to acquit the defendant the jury must find that the State's witnesses are lying or mistaken commits misconduct. *Id*.

would probably not justify reversal. However, it was clearly misconduct for the prosecutor to inform the jury that acquittal was only appropriate if the jury believed Glasmann, and shows the prosecutor's failure to prosecute this case as an impartial officer of the court.

CONCLUSION

The prosecutor's presentation of a slide show including alterations of Glasmann's booking photograph by addition of highly inflammatory and prejudicial captions constituted flagrant and ill intentioned misconduct that requires reversal of his convictions and a new trial, notwithstanding his failure to object at trial. Considering the entire record and circumstances of this case, there is a substantial likelihood that this misconduct affected the jury verdict. The principal disputed matter at trial was whether Glasmann was guilty of lesser offenses rather than those charged, and this largely turned on whether the requisite mental element was established for each offense. More fundamentally, the jury was required to conclude that the evidence established Glasmann's guilt of each offense beyond a reasonable doubt.

It is substantially likely that the jury's verdict were affected by the prosecutor's improper declarations that the defendant was "GUILTY, GUILTY, GUILTY!", together with the prosecutor's challenges to Glasmann's veracity improperly expressed as superimposed messages over the defendant's bloodied face in a jail booking photograph.

We reverse the defendant's convictions and remand for a new trial.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR:

Justice Charles W. Johnson

Justice Debra L. Stephens

Gerry L. Alexander, Justice Pro Tem.