NO. 43706-6

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT HILL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine Stolz

No. 11-1-04556-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did defendant fail to preserve his motion to dismiss on the basis of time for trial in the trial court below? In the alternative, did the trial court abuse its discretion in granting the continuance on April 16, 2012 where there was good cause for the continuance?

2. Has defendant failed to prove prosecutorial misconduct where defendant did not object in the trial court to the statements he now complains about on appeal?

B. STATEMENT OF THE CASE.

1. Procedure

On November 14, 20122, the State charged defendant, Robert Hill, with one count of malicious mischief in the third degree, and two counts of assault in the second degree. CP 1-2.

Defendant's trial was continued on January 3, 2012, February 1, 2012, February 15, 2012, March 20, 2012, April 16, 2012, and May 22, 2012. CP 5, 6, 7, 8, 9, 10. Defendant only objected to the continuance on April 16, 2012. RP 9, CP 9.

On July 12, 2012, defendant was rearraigned on the amended information and the case proceeded to trial in front of the Honorable Katherine Stolz. RP 12, CP 11-12. The amended information reduced

count I to malicious mischief in the third degree and added a third count of assault in the fourth degree. CP 11-12.

The jury found defendant guilty as charged on all four counts. RP 237-238, CP 48-51. Sentencing took place on July 19, 2012. RP 243. The trial court sentenced defendant to 364 with zero days suspended on count I. RP 250, CP 75-81. The time was to be served consecutive to his sentence on a previous case. RP 250, CP 75-81. The trial court sentenced defendant to 364 with 364 days suspended on the other three counts. RP 250, CP 75-81.

Defendant filed a timely notice of appeal. RP 259, CP 85-91.

2. Facts

Jamie Fermin, now Offergeld, was working as a bartender at the Stonegate restaurant and bar on November 8, 2011. RP 102. Ms. Fermin has worked at the bar since it opened three years ago as her dad is the owner. RP 102. Ms. Fermin was working downstairs in the rum lounge. RP 102. The upstairs is called the rock loft. RP 102. The rock loft is where they hold events and was not open that night. RP 106. Defendant, Robert Hill, came into the bar and wanted to know who the bartender was the night before. RP 104. Defendant said he was owed money, wanted the bartender's number and kept asking the same questions over and over.

RP 104. Ms. Fermin told defendant that she was very busy and did not have time to deal with him. RP 105. Defendant asked several more times for the name and number of the bartender and then walked toward the back of the building. RP 105.

One of the regular customers told Ms. Fermin that defendant had gone upstairs. RP 107. The customer also told her that there had been a falling out about the event defendant was supposed to have upstairs. RP 107. Ms. Fermin walked upstairs and found defendant behind the upstairs bar. RP 107, 119. Defendant was screaming, saying he wanted his money, and then took a coffee thermos and slammed it into the point of sale system. RP 107, 121, 122. Defendant did not have permission to be behind the bar. RP 108, 122. Defendant continued to throw things and scream that he wanted his money while Ms. Fermin screamed at him to stop. RP 108, 123. Ms. Fermin told defendant to calm down and that she had no idea what he was talking about. RP 109. Defendant told her that her father had owned him money for a deposit. RP 109. Defendant was acting very strange, very scary, was offensive, and was in attack mode. RP 109-110. Ms. Fermin yelled at him to stop and told him that he needed to leave. RP 110-111. Defendant came out from behind the bar and walked towards her screaming that he wanted his money and then began blowing a rape whistle. RP 111, 123. Defendant than grabbed Ms.

Fermin and shook her. RP 111. Ms. Fermin was nervous and scared because they were all alone upstairs. RP 112.

At that point, a customer, Shannon Schardien, arrived upstairs and told defendant that he needed to stop. RP 112-113, 124. Ms. Schardien tried to pull Ms. Fermin and defendant apart but defendant than grabbed Ms. Schardien and continued to blow his rape whistle. RP 112-113, 124. Ms. Fermin was scared for Ms. Schardien so she ran downstairs and yelled for help. RP 112, 114, 125. Rick Walters was sitting at the bar and he followed her upstairs. RP 114. Mr. Walters pulled Ms. Schardien away from defendant but defendant than grabbed Mr. Walters. RP 115, 126. Defendant was shaking Mr. Walters while Ms. Walter was trying to get defendant to calm down. RP 127. Mr. Walters grabbed defendant, told him he needed to calm down and leave. RP 116. There was a struggle as Mr. Walters tried to direct defendant toward the stairs. RP 116, 127-128. Defendant slammed into everyone and they all fell halfway down the first flight of stairs. RP 116, 127-128. Mr. Walters was trying to gain control, which he eventually did, and then they ran and opened the door, pushed defendant out, and locked the door. RP 116, 128, 131.

Ms. Schardien used to spend a lot of time at the Stonegate and was there on November 8, 2011 from 8:00 p.m. until midnight. RP 134. Ms. Schardien remembered seeing defendant that night as he seemed agitated

and was trying to get the bartender's attention. RP 136. Defendant left the bar and then she saw Ms. Fermin run upstairs. RP 136, 137. She was concerned so she went upstairs to see what was going on and saw that defendant had grabbed Ms. Fermin. RP 136. He was upset, yelling screaming, and blowing a whistle. RP 136. She knew the upstairs was off limits to customers. RP 136-137. There was no party going on and the room was dark. RP 138. It looked like things had been thrown around. RP 136, 138. Defendant was holding Ms. Fermin and was frantic, screaming, and aggressive. RP 138. Ms. Schardien was very concerned for Ms. Fermin. RP 138. It looked as if defendant was trying to throw her down the stairs. RP 139. Ms. Schardien put her arms in between them and told defendant to leave. RP 139, 145. Defendant then grabbed Ms. Schardien's shirt and held her in an aggressive manner, pushing her toward the stairs. RP 139, 141-142, 145. Ms. Schardien grabbed him back. RP 139. She was very frightened but tried to stay calm. RP 140. Defendant was still yelling about money and she was trying to calm him down. RP 140, 148. Mr. Walters then came up the steps and he and defendant grabbed onto each other and tussled. RP 141, 147, 148, 149. Mr. Walters was trying to encourage defendant to leave. RP 142. They tussled as they went down the stairs and eventually defendant left out the back door. RP 149.

Mr. Walters was a patron at the Stonegate on November 8, 2011. RP 47. Mr. Walters was very familiar with the Stonegate and described the upstairs as rock lounge[1] that was out of service with the lights off. RP 47, 49, 67. One of the bartenders, Ms. Fermin, ran down the stairs and said, "help, help, he's crazy." RP 50-51. Mr. Walters followed her to the first flight of stairs. RP 51, 60. Mr. Walters observed that defendant had another woman, Ms. Schardien, pinned against the wall. RP 51. Defendant was blowing his whistle and screaming. RP 51. Defendant was angry and yelling at Ms. Schardien. RP 52. Mr. Walters saw defendant grab Ms. Schardien by her arms. RP 53. Defendant then turned around and said, "where is my money?" RP 53. Defendant was red in the face, his eyes were wide open and he was spitting into Mr. Walters face. RP 53. Mr. Walters descried defendant as being "whacked out." RP 53.

Defendant than released Ms. Schardien, put his hand on Mr. Walters' chest and said, "Where's my money?" RP 54. Defendant hit Mr. Walters hard enough to leave marks and he sustained a scratch on his left pectoral. RP 54, 55. Mr. Walters started to fall backwards and defendant fell on top of him. RP 54. The two of them began a controlled descent down the stairs as Mr. Walters regained his footing. RP 54-55. Mr.

[1] Mr. Walters originally identified the upstairs as the rum lounge but then later called it the rock lounge and indicated the downstairs was the rum lounge.

Walters pushed open the door and escorted defendant into the alley. RP 55. Defendant then opened the door and said, "Where's my money?" one more time. RP 55.

Roxanne White is a bartender at the Stonegate. RP 90. On November 11, 2011, she called 911 because a fellow bartender asked her to. RP 77, 90. She observed Ms. Fermin go upstairs. RP 94. She also observed Mr. Walters go upstairs. RP 94.

Officer Shane Wimbles and his partner Officer Strain were dispatched to the Stonegate. RP 41. The 911 call came in around 10:25 p.m. and indicated that there was an unwanted person at the establishment. RP 43. The officers contacted Ms. Fermin and Ms. Schardien but defendant was not at the scene. RP 44.

Ms. Fermin did not believe defendant had an event planned for that night but even if he did, it would not have started as late as defendant showed up. RP 117-118, 129. Events usually start between 5:00 p.m. and 8:00 p.m. RP 129. Jeff Call, the owner of the Stonegate, said defendant tried to rent space from him twice, the second time being for November 8, 2011. RP 152-154. Mr. Call gave defendant a half price deal for November 8th and had his sound guy show up at 5:30 or 6:00 p.m. to set up. RP 155. No one had showed up so he told the sound guy to leave at 9:00 p.m. if no one showed up. RP 157-158. Later that night, Mr. Call

received a telephone call from his daughter saying there had been an incident at the Stonegate. RP 159. Mr. Call observed a computer flipped over with its screen pixilated, a microwave on the floor, and a thermos on the floor. RP 160. The thermos and the microwave were damaged. RP 160. Mr. Call reiterated that while defendant may have rented the space, he did not have permission to be behind the bar. RP 161, 165.

Defendant testified that he was a candidate for Tacoma City Council and that November 8, 2011 was Election Day. RP 173-174. Defendant had made plans for a big party at the Stonegate and had met with Mr. Call and paid him money. RP 176. On November 8, 2011, defendant still thought the party was going to happen. RP 177. He arrived and went straight to the bartender to ask if Mr. Call or the sound guy was there. RP 177. He then immediately went upstairs. RP 178. The lights were not on. RP 182, 198. No one was there and no party was going on. RP 198. He then jumped and screamed, "It's party time!" and blew his whistle. RP 182. He was making noise, tipping and knocking things over and moving stuff around to release some energy. RP 184. He doesn't recall actually throwing things but admits it's possible he did. RP 185, 200. Ms. Fermin came upstairs. RP 186. She was trying to calm him down while he was still yelling. RP 187-188. Ms. Fermin grabbed his arm. RP 188. Ms. Schardien then talked to him and told him to calm

down and that he wasn't supposed to be there. RP 190-191. Ms. Schardien grabbed his other arm. RP 192. Defendant continued to blow his whistle. RP 192. Defendant said that Mr. Walters then just appeared and grabbed him. RP 194-195. At some point they ended up down the stairs and out the door. RP 196.

C. ARGUMENT.

1. DEFENDANT DID NOT PRESERVE HIS MOTION TO DISMISS. FURTHER, THE TRIAL COURT DID NOT ERROR IN GRANTING THE APRIL 16, 2012 CONTINUANCE WHEN THERE WAS GOOD CAUSE.

a. Defendant did not allege a speedy trial violation in the trial court.

Dismissal of charges for an alleged time for trial violation is mandated "only when the applicable speedy trial period has expired." ***State v. Hall***, 55 Wn. App. 834, 840–841, 780 P.2d 1337 (1989). The court in ***Hall*** explained that, "absent such a violation, a defendant must demonstrate actual prejudice to obtain dismissal." *Id.* at 841. *See also* ***State v. Raschka***, 124 Wn. App. 103, 112, 100 P.3d 339 (2004) (emphasizing that the ***Hall*** ruling pertains to the standard of proof required for dismissal when continuances have been granted within the time for trial period).

In the present case, the motion to dismiss was not raised below and now is raised for the first time on appeal. The Court of Appeals will not consider an issue raised for the first time on appeal unless it involves a manifest error affecting a constitutional right. RAP 2.5(a); *see* ***State v. Brewer***, 148 Wn. App. 666, 673, 205 P.3d 900 (2009). While there is a constitutional right to a speedy trial, the constitutional right does not mandate a trial within 60 days. *See* ***State v. Torres***, 111 Wn.App 323, 44 P.3d 903 (2002). A timely objection must be made to a trial date that is set outside of the time for trial rule so that the trial court has the opportunity to fix the error and comply with the time for trial requirements. ***State v. Chavez-Romero***, 170 Wn. App. 568, 581, 285 P.3d 195 (2012).

CrR 3.3(d) is entitled, "Trial Settings and Notice--Objections--Loss of Right to Object. The rule states in relevant part:

> (2) Resetting of Trial Date. When the court determines that the trial date should be reset for any reason, including but not limited to the applicability of a new commencement date pursuant to subsection (c)(2) or a period of exclusion pursuant to section (e), the court shall set a new date for trial which is within the time limits prescribed and notify each counsel or party of the date set.
>
> (3) Objection to Trial Setting. A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly

> noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.
>
> (4) Loss of Right to Object. If a trial date is set outside the time allowed by this rule, but the defendant lost the right to object to that date pursuant to subsection (d)(3), that date shall be treated as the last allowable date for trial, subject to section (g). A later trial date shall be timely only if the commencement date is reset pursuant to subsection (c)(2) or there is a subsequent excluded period pursuant to section (e) and subsection (b)(5).

In the instant case, there were six continuances. CP 5, 6, 7, 8, 9, 10. Defendant only objected to the fifth continuance which took place on April 16, 2012. CP 9, RP 8-9. Defendant's objection was that he wanted to go to trial. RP 9. He did not object to the prosecutor's reason for the continuance or argue that it was an improper basis for a continuance. RP 9. He simply noted that he thought the scheduling issues could have been dealt with at the last continuance. RP 9. The date that was picked for the new trial date was picked by the attorneys as their schedules allowed. RP 8. When the trial court made its ruling that there was good cause for the continuance, defendant did not object to the finding. RP 9. Defendant did not file a motion to dismiss based on a time for trial violation alleging that the court erred in making the continuance and that the trial date was outside of speedy trial. Instead, at the next trial date, defendant made a

motion to continue his case. CP 10. Defendant only objected to the continuance on the basis that he wanted to go to trial; he did not ever raise a speedy trial or time for trial objection. Defendant did not make a timely objection to the actual setting of the trial date nor did he raise this motion to dismiss in the trial court. The motion to dismiss should not be considered for the first time on appeal.

b. Even if this court addresses defendant's request for dismissal, the trial court did not abuse its discretion in granting the continuance and defendant himself contributed to the delay of his case.

An appellate court reviews a trial court's decision to grant a continuance under CrR 3.3(f)(2) for abuse of discretion. ***State v. Downing***, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). It will not disturb a trial court's decision unless the appellant makes "a clear showing ... [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.*, (quoting ***State ex rel. Carroll v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Under CrR 3.3(f)(2), "the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." Under CrR 3.3(b)(5), "[i]f any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier

than 30 days after the end of that excluded period." Under CrR 3.3(e)(3), continuances are excluded from computing time for trial. There must be an adequate basis in the record for a continuance. ***State v. Saunders***, 153 Wn. App. 209, 219-220, 220 P.3d 1238 (2009). "The unavailability of a key witness is a valid reason for a continuance." ***State v. Iniguez***, 167 Wn.2d 273, 217 P.3d 768 (2009) (The State's witness had left the country and was unavailable. The court noted that even though there may have been a question as to the State' ability to ensure the witness' appearance, the continuance was not unreasonable.) *See also* ***State v. Day***, 51 Wn. App. 544, 754 P.2d 1021 (1988).

Even if the court addresses defendant's request for dismissal, the trial court did not abuse its discretion in granting the State's motion to continue. The unavailability of a key witness is a valid reason for a continuance. The State made it clear that one of the victims of the assault charges was not available as the victim was out of the country due to the military. RP 8, CP 9. A victim of a crime is a key witness. The record was clear as to their unavailability given that they were out of the country and that it was because of being in the military. This is a sufficient record for the trial court to find good cause for a continuance. There is no way to substitute someone else for the testimony of a victim. This is not a case where a different lab tech may be able to retest or testify or where another officer could give the same testimony. *See* ***State v. Wake***, 56 Wn. App.

472, 783 P.2d 1131 (1989) (congestion at crime lab not a valid reason for continuance). There is no way to replace the crime victim with another witness. This is a valid reason under the court rule and under case law. The trial court found good cause for the continuance. In addition, the continuance was granted for a relatively short period of time. The date chosen worked with the attorney's calendars. It was a little over a month out which is not an unreasonable time. The trial court did not abuse its discretion in granting the continuance.

The State does not believe the trial court erred in citing to ***State v. Campbell***, 103 Wn.2d 1, 691 P.2d 929 (1984) as that case addressed that the trial court has discretion to grant a continuance with a proper record. However, even if this court finds that the trial court erred in making the finding under ***Campbell***, there is still no showing that the trial court abused its discretion in granting the continuance based on a victim not being available since the victim was out of the country due to the military. "It is a general rule of appellate practice that the judgment of the trial court will not be reversed when it can be sustained on any theory, although different from that indicated in the decision of the trial judge." ***State v. Norlin***, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998) quoting ***Sprague v. Sumitomo Forestry Co.***, 104 Wn.2d 751, 758, 709 P.2d 1200 (1985).

There is a sufficient basis in the record for the continuance and as such, this court should affirm.

Further, defendant asked for asked for five of the six continuances. The continuances on January 3, 2012, February 1, 2012, March 20, 2012 and May 22, 2012 were all made on defendant's motion. CP 5, 6, 8, 10. The continuance on February 15, 2012 was made on the motions of both the State and defendant after the plea deal fell through. CP 7. The only time the State solely asked for a continuance, defendant objected. RP 8-9, CP 9. This is disingenuous. Defendant delayed the trial several times but objected because he really wanted to go to trial as soon as the State had a witness scheduling issue. Defendant's own delays of the trial likely contributed to the eventual scheduling issue. Regardless, defendant then asked for another continuance on the very next trial date, undercutting his previous argument that he was ready and really wanted to go to trial. Defendant cannot show a violation of the time for trial rules. The trial court did not abuse its discretion and defendant affirmatively asked for the four continuances that lead up to the April 16, 2012 continuance. Defendant has never articulated, either in the trial court or on appeal, how the continuance prejudiced him or his defense. Indeed, since the majority of the continuances were requested by defendant, including the continuance at the very next trial date, it is difficult to see how he would

have been prejudiced. Defendant's rights were not violated, the court rule was followed, the trial court did not abuse its discretion and defendant's motion to dismiss his case should be denied.

2. DEFENDANT DID NOT OBJECT TO THE PROSECUTOR'S STATEMENTS AND CANNOT MEET HIS BURDEN OF SHOWING THAT THE STATEMENTS CONSTITUTE PROSECUTORIAL MISCONDUCT.

"Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard." ***State v. Stenson***, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. ***State v. Manthie***, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (*citing* ***State v. Weekly***, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. ***Stenson***, 132 Wn.2d at 718. Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 718-19.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it

prejudiced the defense. ***State v. Gentry***, 125 Wn.2d 570, 640, 888 P.2d 570 (1995) *citing* ***State v. Hoffman***, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. ***State v. Binkin***, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by* ***State v. Kilgore***, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." ***Stenson***, 132 Wn.2d at 719, *citing* ***Gentry***, 125 Wn.2d at 593-594.

In addition to the general principal of issue preservation, it is important for trial counsel to object to improper argument. Timely objections serve to discourage a prosecutor from escalating improper comments on a topic or theme that has been rejected by the court. *See e.g.,* ***State v. Warren***, 165 Wn.2d 17, 195 P. 3d 940 (2008). Proper objections may stop repetitive or continuing improper questions or argument in trial. *See e.g.,* ***State v. Mckenzie***, 157 Wn.2d 44, 53 n. 2, 134 P.3d 221 (2006). A timely objection gives the trial court the opportunity to instruct the jury or otherwise cure the error, insuring a fair trial and avoiding a costly retrial. *See e.g.,* ***Warren***, 165 Wn.2d at 25. The trial

court is in the best position to determine whether misconduct or improper argument prejudiced the defendant. *See* ***Stenson***, 132 Wn.2d at 718. In other words, the best time and place to address an improper argument is in the trial court, where the court can take remedial action.

Failure to object or move for mistrial at the time of the argument "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." ***State v. Swan***, 114 Wn.2d 613, 661, 790 P. 2d 610 (1990); *see also* ***State v. Monday***, 171 Wn.2d 667, 679, 257 P.3d 551 (2011). In ***Swan***, the Court further observed that "[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." *Id.*, quoting ***Jones v. Hogan***, 56 Wn.2d 23, 27, 351 P.2d 153 (1960).

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. ***State v. Russell***, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994), *citing* ***State v. Graham***, 59 Wn. App. 418, 428, 798 P.2d 314 (1990), ***State v. Green***, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986). "Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in

reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." ***Russell***, 125 Wn.2d at 86, *citing* ***State v. Dennison***, 72 Wn. 2d 842, 849, 435 P.2d 526 (1967). The prosecutor is entitled to make a fair response to the arguments of defense counsel. ***Russell***, 125 Wn.2d at 87.

In the instant case, defendant claims that the very end of the State's rebuttal closing was misconduct. The prosecutor's argument was as follows:

> And the last thing I want to talk about is reasonable doubt. The Defense brought that up, so I am going to show you my artistic abilities and demonstrate reasonable doubt. If I were to take you from this building and drive you around in the back seat of a limousine with a blindfold on for 40 minutes, okay, so 40 minutes --you can go 40 minutes this way, that way, or you can go around in a big circle; you don't know where you're going --and I bring you up to a building that has ten flights of stairs, and I put you in a room, and I take your blindfold off, and you see three windows and a chair in the middle, and I have you sit in the middle, and then I say, let's do a little experiment here; go look out that first window and see what you see, and you do; you go out, and you look out the first window, and you see a mountain, and then I tell you --you know, I say, can you tell me beyond a reasonable doubt where you are? You know you're in Washington because you didn't go that far in the car. You went 40 minutes; but you say to me, I can still be in Tacoma because I can see that beautiful mountain from right out there on the highway, and I show you a body of water. I ask you to look out the next window, and you do; and, of course, you see this large body of water, and you say, wait a minute, you know. I say, can you tell me beyond

> a reasonable doubt where you are? And you say, of course not. I can see the water from Tacoma. I can see it from Seattle. I don't know where I am beyond a reasonable doubt. But then I say, look out the third window, and you do, and you see this thing that you recognize right there: and it's the Space Needle, and it's as big as day, and you see it. You know beyond a reasonable doubt you're in Seattle, and I don't have to show you the EMP. I don't have to show you the Seattle Art Museum. I don't have to show you --I don't have to show you a hundred things. I don't have to show you a thousand things. I've showed you three things, and you were convinced beyond a reasonable doubt; so the argument where there's evidence or lack thereof, there's not a lack of evidence here, folks. There's enough evidence for you to find the defendant guilty beyond a reasonable doubt.

RP 234-236. Defendant did not object to any part of this argument. As such, this court would have to find that the argument was flagrant and ill-intentioned. There is no evidence that this argument was either of those things.

A puzzle analogy is used to show juries that it is possible to have an abiding belief in the truth of the charge, even though there are some "holes" or "pieces" missing, i.e.: questions left unanswered or not every piece of evidence one would like to have. The puzzle analogy does not diminish the State's burden. It is merely one way to argue the concepts of "piecing together" evidence and that of reasonable doubt. This Court has found that such an argument does not shift the burden. ***State v. Curtiss***, 161 Wn. App. 673, 700-701, 250 P.3d 496 (2011). *See also* ***State v. Fuller***, 169 Wn. App. 797, 282 P.3d 126 (2012).

In the instant case, the State's comments were not misconduct. First, the remarks were in rebuttal closing. The State, as stated in the closing, was responding to the defense arguments about reasonable doubt and his emphasis on the lack of evidence. RP 223. Second, the analogy used was not a reference to decisions in every day life or comparing reasonable doubt to taking a trip. The State did not tell the jury that reasonable doubt was the same as deciding whether or not to take a trip. The analogy was used to show that you don't have to have an exhaustive amount of evidence in order to meet the reasonable doubt standard. Third, the State did not tell the jury that they only had to have three pieces of evidence in order to find the defendant guilty. In the analogy the State used, there were only three pieces necessary. However, the State did not tell the jury that was all they needed in order to find defendant guilty. The State had already gone through the evidence in its initial closing and reminded the jurors that there was plenty of evidence in this case to find defendant guilty. The State's remarks were not misconduct.

In that instant case, the court instructed the jury on the law including the reasonable doubt standard and the presumption of innocence.

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The

> defendant has no burden of proving that a reasonable doubt exists as to these elements.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 52-74, Instruction 2, *see also* Washington Pattern Jury Instructions Criminal, WPIC 4.01. Further, the court instructed the jury:

> The lawyer's remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions

CP 52-74, Instruction 1, *see also* Washington Pattern Jury Instructions Criminal, WPIC 1.02.

Jurors are presumed to follow the court's instructions. ***State v. Lough***, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). Any remarks by the prosecutor in closing that were not supported by the instructions, the jury is presumed to disregard. Even if the prosecutor's statements were error, if any prejudice arose in the analogy, a curative instruction could have resolved it. But defendant did not ask for such an instruction. These

comments were not so "flagrant" or "ill intentioned" that a simple curative instruction would not have remedied any possible prejudice. The instant case is also distinguishable from ***State v. Johnson***, 158 Wn. App. 677, 243 P.3d 936 (2010). In ***Johnson***, the State used a fill in the blank argument and also made an argument about a partially completed puzzle. *Id.* at 684. The combined arguments caused the trial court to find misconduct. *Id.* at 684-85. Here, the State did not make any fill in the blank argument or any other argument that defendant either objected to at the trial court or objects to now. Further, the State was not arguing that you only need to partially complete a puzzle in order to satisfy reasonable doubt. The State was responding to defendant's lack of evidence argument and showing that an unlimited number of pieces of evidence are not necessary to satisfy reasonable doubt. The State is entitled to respond to arguments made by defense counsel. There is no error.

The jury was properly instructed and is presumed to follow the court's instructions as to the burden of proof. Even if the court finds that the prosecutor's arguments were error, in the context of the entire argument, the evidence presented and the instructions given to the jury, defendant cannot show prejudice. The court's instructions to the jury that contained the proper burden of proof cured any prejudice that may have resulted. Defendant cannot show error.

Further, even if this court were to find that the State's remarks were error, any error was harmless. Any error in making the argument was harmless error. The central purpose of a criminal trial is to determine guilt or innocence. ***Rose v. Clark***, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." ***Neder v. United States***, 527 U.S. 1, 17, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). "[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials." ***Brown v. United States***, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973) (internal quotation omitted).

Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. ***Rose***, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also* ***State v. Kitchen***, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) ("The harmless error rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.").

In the present case, the State presented evidence that defendant was present at the Stonegate on November 8, 2011. RP 51, 104, 136, 177. The State showed that defendant damaged property at the Stonegate. It was clear that the microwave and thermos were damaged. RP 160. Witnesses testified that defendant was throwing things or it looked like defendant had thrown things. RP 107, 121, 122, 136, 138, 160. Defendant himself admitted to tipping things over, knocking things around and admitted the likely possibility that he threw the microwave. RP 184, 185, 200. As to the assault charges, all three victims testified that defendant grabbed them. RP 54, 55, 111, 139, 141-142, 145. Ms. Schardien saw defendant grabbing Ms. Fermin, Ms. Fermin and Mr. Walters saw defendant grab Ms. Schardien, and Ms Fermin and Ms. Schardien saw defendant grab Mr. Walters. RP 51, 53, 112-113, 115, 124, 126, 127, 136, 138, 141, 147, 148, 149. In addition, defendant admitted to laying hands on all three victims though he claimed it was in response to them laying hands on him. RP 196-197. The amount of evidence was clearly sufficient for the jury to find defendant guilty of the four crimes. There in no evidence that the prosecutor's arguments relieved the State of its burden or affected the jury's verdict. Any error in the argument was harmless.

D. CONCLUSION.

The State respectfully requests this Court affirm defendant's convictions and sentence.

DATED: JULY 23, 2013

MARK LINDQUIST
Pierce County
Prosecuting Attorney

MELODY M. CRICK
Deputy Prosecuting Attorney
WSB # 35453

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/23/13
Date Signature

PIERCE COUNTY PROSECUTOR

July 23, 2013 - 3:14 PM

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