72166-6

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NO. 72166-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

THAN DINH LE,

Appellant.

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

The Honorable Laura Inveen, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. INTRODUCTION

This appeal stems from a judgment and sentence that imposed 60 months of incarceration on Le Dinh Than for selling undercover Seattle police officer Emily Clark crushed aspirin for $30. Notwithstanding that this case is the product of police practices and prosecutorial decision-making that repugnantly target poor, nonviolent, low-level drug users of color for lengthy incarcerations, Le asks this court to reverse for five reasons.

First, there was insufficient evidence to sustain a conviction for bail jumping because the State never produced evidence of any court order that released Le, and a release order is an essential element of the crime. Le's bail jumping conviction must accordingly be reversed and the charge dismissed.

Second, Clark referred to drug users targeted in her sting operations as "criminals" and "bad guys" during her testimony. The trial court overruled defense counsel's objection, which gave credence to Clark's opinion that Le was, indeed, a "bad guy." These impermissible comments on Le's guilt rendered Le's trial unfair and require reversal.

Third, the prosecutor maligned defense counsel during his closing, likening defense counsel's argument to "Alice's rabbit hole" and outside the "reasonable realm of thought." The trial court overruled defense counsel's

objections, again aligning itself with the State's disparagement of Le and his lawyer. The prosecutor's misconduct requires reversal.

Fourth, the mandatory reasonable doubt instruction requires jurors to explain or articulate a reason for having a reasonable doubt. This undermines the presumption of innocence by shifting the burden of proof to defendants. Washington's reasonable doubt instruction is constitutionally infirm.

Fifth, in the event that this court determines that each error standing alone does not warrant reversal, this court should nonetheless reverse because the cumulative effect of these errors requires it.

B. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to sustain Le's conviction for bail jumping.

2. Le was denied a fair trial when the court permitted a law enforcement witness to express improper opinions on his guilt.

3. The prosecutor committed misconduct during his closing argument by disparaging the defense.

4. The reasonable doubt instruction given by the trial court required jurors to have more than a reasonable doubt to acquit and shifted the burden to Le to provide jurors with a reason for acquittal. This reasonable doubt instruction is constitutionally defective.

5. Cumulative error denied Le a fair trial.

Issues Pertaining to Assignments of Error

1. When the State's evidence fails to show that Le was released by court order, an essential element of the crime of bail jumping per the law of the case, was the State's evidence insufficient to support a conviction for bail jumping?

2. Witnesses may not offer an opinion explicitly or implicitly as to a criminal defendant's guilt. A law enforcement witness testified that to facilitate undercover operations she had "to talk about how criminals act . . . even down to the way they stand, the way they dress." This witness also stated, "We are portraying the bad guy and how to get what we need to catch the bad guy in this role." Then this witness described how she acted and dressed to catch Le. Did this deny Le his constitutional right to a fair and impartial trial?

3. In closing argument, the prosecutor disparaged defense counsel by likening defense counsel's arguments to "Alice's rabbit hole" and stating defense counsel's arguments were not within the "reasonable realm of thought." Did this improper disparagement deprive Le of a fair trial?

4a. Did the reasonable doubt instruction stating a "reasonable doubt is one for which a reason exists" tell jurors that they must have more than just a reasonable doubt to acquit?

4b. Did the reasonable doubt instruction undermine the presumption of innocence and impermissibly shift the burden of proof by telling jurors they must be able to articulate a reason to have a reasonable doubt?

4c. Does erroneously instructing a jury regarding the meaning of reasonable doubt vitiate the jury-trial right, constituting structural error?

5. Does the cumulative effect of the assigned errors, if the errors do not each themselves warrant reversal, require reversal?

C. STATEMENT OF THE CASE

1. Charges and motion to sever

The State initially charged Le with two counts of violation of the Uniform Controlled Substances Act for possessing cocaine on February 9, 2013 and for selling a material in lieu of a controlled substance on April 13, 2012. CP 1. The State later amended its charges to include a count for bail jumping for Le's failure to appear at the December 13, 2013 omnibus hearing. CP 45.

Le moved to sever all three of the charges for separate trials. CP 16-21. The prosecutor agreed to severance of the two drug charges and

indicated the State would be dismissing the February 2013 drug charge if the State prevailed on the April 2012 drug charge. 1RP[1] 7-8, 10. After hearing argument, the trial court denied Le's motion to sever the bail jumping charge from the April 2012 drug charge. 1RP 31-32.

2. Buy-bust operation

Regarding the drug charge, police testified they had set up an undercover buy-bust operation in the International District of Seattle on April 13, 2013. 2RP 10, 46.

Seattle police officer Emily Clark was an undercover officer who was in costume to appear as a drug user attempting to purchase crack. 2RP 10-12. According to Clark, she had undergone significant training to conduct undercover operations. 2RP 7. She told jurors about her training:

> The classroom portion of it is mostly undercover safety that we talk about, because we are now playing a role of a criminal, so we have to talk about how criminals act, the way -- even down to the way they stand, the way they dress. So it's talking about how to change your mindset to, now, we are not portraying as police officers. We are portraying the bad guy and how to get what we need to catch the bad guy in this role.

2RP 7. Clark also described how, when working in the International District, "where crack cocaine is prominent, the big transient area is an older

[1] This brief refers to the verbatim reports of proceedings as follows: 1RP—May 1, 2014; 2RP—May 5, 2014; 3RP—May 6, 2014; 4RP—May 7, 2014; 5RP—June 6, 2014; 6RP—July 11, 2014.

crowd, like 40s, 50s, 60s. I will look transient. I will have dirty clothes, a dirty face, dirty fingernails." 2RP 9-10.

Clark testified she was engaged in such a sting on April 13, 2013, when she approached a 50-year-old Asian male with a ponytail and asked if he "had anything," referring to drugs. 2RP 10, 13. He asked her how much she was looking for, and Clark told him she had $30. 2RP 14. At that point, the man walked down the way and moments later signaled Clark to follow him. 2RP 15-16. The man, about 20 yards ahead of Clark, crossed the street and was then with another Asian male, Le. 2RP 16-17.

Le introduced himself as Tony. 2RP 17. Clark repeated her question if Le had anything and again indicated she had $30. 2RP 17-18. Le asked Clark to follow him and the three walked together to a nearby restaurant. 2RP 18-19. Le entered the restaurant and used the payphone inside. 2RP 19. Le exited the restaurant and told Clark someone was coming in a van to meet him. 2RP 20. A vehicle arrived in short order. 2RP 20. Le got inside the vehicle for less than a minute and then walked back, asking Clark for the money. 2RP 20-21.

Le gave Clark a piece of white folded paper that contained "a couple pieces of off-white rock-like substances," which Clark said appeared to be crack cocaine. 2RP 21-22. Clark gave Le one $20 bill and two $5 bills, and then gave a "predetermined good-buy signal to" the surveillance officers to

call in the arrest teams. 2RP 22-23. The teams responded and Le was arrested. 2RP 24, 50-51; 3RP 50-51.

Steven Reid, a forensic scientist at the Washington State Patrol Crime Lab, testified that he tested two white rocks that Le gave Clark and that they contained aspirin and caffeine only. 3RP 34, 36-37. That is, the "analysis did not detect any cocaine . . . [or] controlled substances in either of those items." 3RP 47.

3. Bail jumping

The State presented the testimony of Janet Llpaitan, who works for the Department of Judicial Administration as a courtroom clerk supervisor at King County Superior Court. 3RP 58-59. Llpaitan testified about various certified court documents and recordings that established the trial and hearing dates in Le's case. Exs. 9-13; 3RP 60-69. This included an August 14, 2013 order that warned Le a warrant may be issued for his arrest if he failed to appear at court hearings. Ex. 10; 3RP 61. This testimony also included an October 24, 2013 order that rescheduled the omnibus hearing date to December 13, 2013. Ex. 11; 3RP 61-62. Llpaitan testified that on December 13, 2013, a motion, certification, and order for a bench warrant issued for Le's failure to appear at an omnibus hearing. Ex. 13; 3RP 67-68.

Le testified he lost his papers and could not remember the exact date of the court hearing. 3RP 90, 92. Le stated he would have gone to court had he known he was supposed to be there on December 13, 2013. 3RP 96.

Neither the State nor the defense adduced evidence that Le had been released from custody by a court order.

4. Jury instructions

The trial court gave the standard reasonable doubt instruction, WPIC 4.01,[2] which reads, in part, "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." CP 63; 3RP 106.

The trial court also defined bail jumping as "fail[ing] to appear as required after having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before a court." CP 71; 3RP 109. The to-convict instruction, however, omitted the "admitted to bail" definitional language, and instead recited the third element of bail jumping as requiring proof beyond a reasonable doubt "[t]hat the defendant had been released by court order with knowledge of the

[2] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008).

requirement of a subsequent personal appearance before that court." CP 72; 3RP 109.

5. Closing arguments

During defense closing, counsel point out that there was no evidence of a court order releasing Le. 3RP 122-24. Defense counsel stated, "And it's not just whether or not he had knowledge of a requirement of a subsequent personal appearance, but [he] has to be released by a court order with that knowledge. And none of [the documents admitted into evidence] do that." 3RP 124. On rebuttal, the State encouraged jurors to presume Le had been released by a court order: "unless he somehow dug himself out of custody . . . . [t]he only conclusion you can reach is, yes, he was released by court order." 3RP 132. But the State could not and did not point to any evidence to support its proposition that Le could not have been released but for a court order.

During her closing, defense counsel also attempted to challenge Officer Clark's references to persons in Le's position as "bad guys" and "criminals," asserting that it demonstrated law enforcement bias against homeless drug users. 3RP 128. She argued that such a bias was inappropriate and asked jurors not to adopt the bias and to be careful considering punishment may follow a conviction. 3RP 128.

On rebuttal, the State argued defense counsel was merely engaging in conspiracy theories. 3RP 130. Defense counsel objected that that was a mischaracterization of argument, but her objection was overruled. 3RP 130. The prosecutor argued defense counsel's assertion regarding Clark's bias was "wholly unreasonable and, if you want to follow Defense down Alice's rabbit whole through that line of argument . . . ." 3RP 131. Defense counsel objected for disparaging counsel, which the trial court again overruled. 3RP 131. The State then argued, "If you want to go down that route, well, that's your prerogative, but in no reasonable realm of thought is that going to be possible." 3RP 131.

6. Jury question, verdicts, sentence, and appeal

During deliberations, the jurors posed a question: "Per jury [to-convict bail jumping instruction] 12, What does 'release by court order' require [and] entail? What documents and procedures are necessary?" CP 75; 4RP 3. Defense counsel argued this question demonstrated the jury did not have enough information to conclude a court order had released Le. 4RP 3. The prosecutor and the trial court, however, agreed to instruct the jury, "You will not receive any further instruction on this issue." CP 76; 4RP 4.

The jury returned verdicts finding Le guilty of bail jumping and delivery of a material in lieu of a controlled substance. CP 77-78; 4RP 4-8.

The trial court sentenced Le to 60 months of incarceration for the delivery of a material in lieu of a controlled substance conviction. CP 99; 6RP 6. The trial court imposed a 51-month concurrent sentence for bail jumping. CP 99; 6RP 6. The trial court also imposed 12 months of community custody. CP 100; 6RP 10. Le timely appeals. CP 94-95.

D. ARGUMENT

1. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE OF BAIL JUMPING BECAUSE IT FAILED TO ADMIT A RELEASE ORDER INTO EVIDENCE

The State bears the burden of proving all elements of a charged offense beyond a reasonable doubt as a matter of due process. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A conviction must be reversed where, viewing the evidence in the light most favorable to the State, no rational trier of fact could find all elements of the charged crime beyond a reasonable doubt. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). This court should hold the State to its burden and hold that the State did not present sufficient evidence to sustain a bail jumping conviction because no evidence showed Le was released by a court order.

Jury instructions to which neither party excepts or objects become the law of the case and delineate the State's proof requirements. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (citing State v. Hanes,

74 Wn.2d 721, 725, 446 P.2d 344 (1968)). Neither the State nor Le excepted or objected to the definitional or to-convict instructions with regard to bail jumping. 3RP 99-101. These instructions became the law of this case.

The court instructed the jury generally, "A person commits the crime of Bail Jumping when he fails to appear as required after having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before a court." CP 71; 3RP 109. The to-convict instruction with regard to bail jumping required each of the following elements to be proved beyond a reasonable doubt:

> (1) That on or about December 13, 2013, the defendant failed to appear before a court;
>
> (2) That the defendant was charged with Violation of the Uniform Controlled Substances Act - Delivery of a Material in Lieu of a Controlled Substance;
>
> (3) That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court; and
>
> (4) That any of these acts occurred in the State of Washington.

CP 72 (emphasis added); 3RP 109 (emphasis added).

In light of these jury instructions, the State was required to prove Le had been released by a court order.[3] Accord State v. Malvern, 110 Wn. App.

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[3] The bail jumping statute, RCW 9A.76.170(1), provides alternate means for this element of the crime: "Any person having been released by court order or admitted to bail . . . ." (Emphasis added.) As the trial court's to-convict

811, 813, 43 P.3d 533 (2002) (reciting elements of bail jumping to include that the defendant "was released by court order"); State v. James, 104 Wn. App. 25, 36, 15 P.3d 1041 (2000) ("The corpus delicti [of bail jumping] includes: (1) being released from custody by a court order . . . ."); State v. Pope, 100 Wn. App. 624, 627, 999 P.2d 51 (2000) (reciting elements of bail jumping to include that the defendant "was released by court order"). Even when viewed in the light most favorable to the prosecution, the State failed to put forth evidence that Le had been released by a court order.

In its failed attempt to meet its burden, the State put on the testimony of Janet Llpaitan, who was employed by the King County Department of Judicial Administration as a courtroom clerk supervisor. 3RP 58-59. She testified regarding the contents of certified copies of various court documents that were admitted into evidence. 3RP 60-68; Exs. 10-13. None of these documents was a court order releasing Le.

Exhibit 10 was a Notice of Case Scheduling Hearing Date filed with the superior court clerk on August 14, 2013. Le signed this notice, which contained a boldface admonition that he "MUST BE PRESENT AT ALL HEARINGS OR A WARRANT MAY BE ISSUED FOR YOUR ARREST AND YOUR FAILURE TO APPEAR MAY RESULT IN ADDITIONAL

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instruction on bail jumping makes clear, however, the State was required to prove the specific element of being released by court order in this case. CP 72; 3RP 109.

CRIMINAL CHARGES AGAINST YOU." Ex. 10; 3RP 60-61. While this notice informed Le he was required to be present at all hearings subject to criminal penalty, this notice was not a court order that released Le.

Exhibit 11 was a certified copy of an Order Continuing Trial dated October 24, 2013. The order continued the trial date from November 12, 2013 to January 8, 2014, and set December 13, 2013 as the date of the omnibus hearing. Ex. 11; 3RP 62. Llpaitan described the purpose of an omnibus hearing as "just a check-in to make sure . . . all the witnesses have been contacted and everything is ready to go for trial." 3RP 62-63. Le did not sign this order but his lawyer did. Ex. 11; 3RP 63-64. This order reset the trial and omnibus hearing dates. It was not a court order that released Le.

Exhibit 12 was a certified copy of a clerk's minutes entry on October 24, 2013 that noted Le was "appearing in person and by counsel" at the hearing. 3RP 64-66. It also provided that an interpreter was present for Le. Ex. 12; 3RP 66. This minute entry confirmed Le was present and that interpreter services were provided at the hearing. Exhibit 12 could not be construed as a court order at all, let alone a court order that released Le.

Exhibit 13 was a certified copy of a motion, certification, and order for bench warrant issued December 13, 2013 because "on this date the defendant failed to appear for . . . Omnibus Hearing . . . ." 3RP 68. This bench warrant authorized Le's arrest for failing to appear at the December

13, 2013 omnibus hearing. It did not establish that Le had been released by a court order.

Exhibit 9 contained certified audio recordings of the October 24, 2013 and December 13, 2013 hearings. 3RP 68-69. The parties stipulated regarding the audio recording, "The parties stipulate that the October 24, 2014 omnibus hearing relates to defendant Than Le. The jury will only hear a portion of the hearing that relates to setting a new omnibus and trial dates. This is evidence is [sic] being offered for the charge of Bail Jumping." CP 56; 3RP 75, 78. Audio recordings of court hearings regarding the rescheduling of court dates were not court orders releasing Le nor did they establish that Le had been released by court order.

This was the sole extent of the evidence put forth by the State to prove the elements of bail jumping. Thus, the State's evidence showed only (1) a warning to Le that he needed to appear at all hearings, (2) a minute entry and court order that set forth new trial and omnibus hearing dates, (3) a bench warrant issued for Le's failure to appear at the omnibus hearing, and (4) audio recordings relating to setting new omnibus and trial dates. Even when viewed in the light most favorable to the State, no rational finder of fact could have found that this evidence established that Le had been released by court order.

Le also testified. He stated he had been released after the underlying incident and planned on moving out of Seattle because he did not want to continue using drugs. 3RP 89-91. Le said he had received papers with court dates on them, but lost them. 3RP 90, 92. The prosecutor also confirmed during cross examination that Le was given copies of the court documents and notice of his court dates. 3RP 92-93.

Le's testimony did not establish he had been released by a court order. While Le stated he had been released, he never said his release was pursuant to a court order. Le very well could have been released on bail, which is the alternative means of release under the bail jumping statute. RCW 9A.76.170(1) ("Any person having been released by court order or admitted to bail . . . ." (emphasis added)). Assuming that Le was released by court order would effectively write out the second manner of release listed in the statute. As RCW 9A.76.170(1) makes clear, not all releases occur pursuant to a court order. Le's testimony that he had been released does not provide evidence of a necessary court order.

Defense counsel pointed out this dearth of evidence to jurors during closing, arguing, "And it's not just whether or not he had knowledge of a requirement of a subsequent personal appearance, but [he] has to be released by court order with that knowledge. And none of these documents do that." 3RP 124.

In rebuttal, the State was unable to point to any court order that released Le and instead encouraged jurors to presume Le had been released by court order: "unless he somehow dug himself out of custody . . . . [t]he only conclusion you can reach is, yes, he was released by court order." 3RP 132. The State's plea to jurors to presume it had proved all the elements of bail jumping demonstrates the State did not actually prove all the elements of bail jumping. Moreover, contrary to its rebuttal argument, the State did not present any evidence to support its proposition that the only way Le could have been released was through a court order. As discussed, the State's proposition does not account for the possibility that Le was released on bail, the alternative means for release under RCW 9A.76.170. The State simply failed to provide evidence or reasonable inference to prove Le had been released by court order.

This lack of evidence troubled jurors, who submitted a question to the court the following day: "Per jury [to-convict bail jumping instruction] 12, What does 'release by court order' require [and] entail? What documents and procedures are necessary?" CP 75; 4RP 3. Defense counsel argued that this question showed the jury did not have enough information to conclude Le had been released by court order. 4RP 3. The prosecutor interrupted defense counsel and asserted no one should be commenting on the evidence while the jury was deliberating. 4RP 3-4. The trial court

agreed with the prosecutor and wrote back to the jury, "You will not receive any further instruction on this issue." CP 76; 4RP 4.

In returning a guilty verdict on bail jumping, the jury was left with no choice but to presume, as the State had asked, that a court order had released Le. But this presumption was not supported by the evidence. Outside of pure conjecture, there was not sufficient evidence to rationally conclude that Le had been released by a court order. Because the State failed to meet its burden of proof, this court must reverse the bail jumping conviction and remand for dismissal of the charge with prejudice. Hickman, 135 Wn.2d at 99.

2. THE POLICE OFFICER'S CHARACTERIZATION OF LE AS A "CRIMINAL" AND "BAD GUY" WAS AN OPINION ON GUILT THAT RENDERED LE'S TRIAL UNFAIR

The jury's fact-finding role is essential to the constitutional jury-trial right. U.S. CONST. amend. VI; CONST. art. I, §§ 21, 22; Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). Under the Washington Constitution, the right to a jury trial is "inviolate." CONST. art I, §§ 21, 22. Therefore, "[n]o witness, lay or expert, may testify to his [or her] opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 754 P.2d 12 (1987); accord State v. Quaale, ___ Wn.2d ___, 340 P.3d 213, 217 (2014).

Here, Seattle police officer Emily Clark testified regarding her training and experience regarding undercover operations:

> The classroom portion of it is mostly undercover safety that we talk about, because we are now playing a role of a criminal, so we have to talk about how criminals act, the way -- even down to the way they stand, the way they dress. So it's talking about how to change your mindset to, now, we are not portraying as police officers. We are portraying the bad guy and how to get what we need to catch the bad guy in this role.

2RP 7. Clark indicated she had been involved in more than 100 undercover operations, three-quarters of which were narcotics related. 2RP 9. Clark explained how to "play the role of a criminal" depending on the neighborhood: "If I am in the International District, where crack cocaine is prominent, the big transient area is an older crowd, like 40s, 50s, 60s. I will look transient. I will have dirty clothes, a dirty face, dirty fingernails." 2RP 9-10.

Clark immediately thereafter testified about conducting operations in the International District on April 13, 2012, the day Le was arrested. 2RP 10-11. She said she had dressed up to appear as a drug user, toting a wig, torn clothing, dirt on her face, and "black fingertips to appear as a crack user." 2RP 12. Clark also had "nicotine teeth stain you get in the costume store. You put it on your teeth and make your teeth brown and yellowy."

2RP 12. Clark then described the events leading to Le's arrest in detail. 2RP 12-23.

In determining whether this testimony amounted to an improper opinion on Le's guilt, the courts "consider the circumstances of the case, including the following factors: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." Quaale, 340 P.3d 213 at 217 (citing State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008)). Each of these factors indicates Clark's testimony was improper opinion on Le's guilt.

Clark informed the jury she had undergone significant training to look, stand, dress, and act like a "criminal" so that she could "portray[] the bad guy" in order "to catch the bad guy." 2RP 7. Clark then proceeded to describe exactly how she portrayed a "criminal" or "bad guy" to catch Le in this case. 2RP 12-23. Courts have repeatedly noted that opinions of guilt are particularly dangerous when they are backed by the prestige of law enforcement officers. Montgomery, 163 Wn.2d at 595; State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003) (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). Clark's testimony that she needed to appear as a criminal to catch the bad guy framed her opinion not as a personal belief, but as the reasonable judgment of an experienced law

enforcement officer, with the "aura of reliability" that entails. Montgomery, 163 Wn.2d at 595 (citing Demery, 144 Wn.2d at 765). Clark's testimony improperly expressed her opinion that Le was a bad guy, a criminal, and therefore guilty.

In addition, Clark's testimony explicitly stated that every subject of her undercover street-level narcotics operations had been a "criminal" "bad guy." Her testimony equated all drug users with "bad guys" that needed to be caught, i.e., imprisoned. Given that Le faced a drug charge stemming from actions that occurred on the street, Clark's testimony was an especially damaging remark on Le's guilt.

Le's defense was a general denial. Le stated he had been homeless and lived on the streets for the last 10 years. 3RP 85. He acknowledged that he was a drug user. 3RP 85. Thus, he testified he was merely trying to swindle Clark out of $30 in order to buy his own real drugs, not legitimately negotiate a drug sale with her. 3RP 85-86. Defense counsel argued Clark had negotiated the sale with another man, not Le, and that Le was just "trying to figure out how to obtain" Clark's money and that "that in and of itself is not a crime." 3RP 120. Clark was the first witness to testify and gave her opinion that Le was a drug-using "bad guy." Clark's opinion on Le's guilt pitted jurors against Le from the beginning of trial, polluting the lens through which they viewed all the other evidence, including Le's

explanations and arguments for his actions. In light of Le's defense and the other evidence, Clark's statement that Le was a "bad guy" at the beginning of trial amounted to an improper opinion on Le's guilt.

The opinion on Le's guilt was also exacerbated by the trial court's refusal to sustain defense counsel's objection to Clark's characterization of Le as a "bad guy." Defense counsel "object[ed] to the use of the term 'bad guy,'" and the trial court overruled the objection. 2RP 7. In overruling the defense's legitimate objection, the trial court at best failed to cure the prejudicial impact and at worst augmented the argument's prejudicial impact by lending its imprimatur to the remarks. State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984) (holding that overruling an improper statement "lent an aura of legitimacy to what was otherwise improper").

When a witness gives an opinion on a criminal defendant's guilt, it invades the province of the jury and deprives the defendant of his jury-trial right. Sofie, 112 Wn.2d at 656; Black, 109 Wn.2d at 348. This is a constitutional error that is presumed prejudicial, and the State bears the burden of demonstrating the improper opinion on guilt was harmless beyond a reasonable doubt. Quaale, 340 P.3d at 218; State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). In a case where the leading law enforcement witness told jurors that Le and everyone like Le was a "bad guy" and a "criminal," and, as discussed in the following section, the State

disparaged counsel for attempting to argue otherwise. Clark's impermissible opinion on Le's guilt cannot be dismissed as harmless. Based on Clark's improper opinion on Le's guilt, this court must reverse and remand for a new, fair trial.

3. THE PROSECUTOR'S DISPARAGEMENT OF LE'S COUNSEL DEPRIVED LE OF A FAIR TRIAL

"[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 (citing Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983) (per curiam)).

Our supreme court has found improper disparagement of defense counsel where the prosecutor characterized defense counsel's arguments as "sleight of hand" and "bogus." State v. Thorgerson, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011). Our supreme court also determined the prosecutor's argument was improper when he described defense counsel's argument as a "'classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing.'" State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008) (quoting verbatim report of proceedings). The prosecutor's

comments about defense counsel's closing were in the same vein as those disapproved in Thorgerson and Warren and accordingly require reversal.

During closing argument, defense counsel appropriately attempted to undermine Clark's reference to Le as a "bad guy" and "criminal," asserting that

> an officer who is, you know, talking about bad guys, and criminals, and obviously has a very strong bias against this specific type of person, a person who is homeless, who is on the street, who is a drug addict, and perceive them in that way, you certainly can't let her biases and beliefs impact you as jurors . . . .
>
> I should tell you that, that, you know, that's not appropriate to be biased against somebody because of their circumstances in life. But [it] does tell you that it is important that, when you are considering a case, that you can be careful and you should be careful of the fact that punishment may follow a conviction.

3RP 128. Defense counsel thus argued Clark's testimony demonstrated she was biased and simply asked jurors to reject her worldview that every poor, homeless, drug addict is a bad guy or a criminal.

On rebuttal, the State accused defense counsel of arguing "that this is either a conspiracy or a huge coincidental misunderstanding." 3RP 130. Defense counsel objected but her objection was overruled. 3RP 130. The prosecutor continued,

> basically, you'd have to believe that Officer Clark, because of some latent biases which didn't appear to come out when she was on the stand, was so jilted towards Mr. Le that she'd be setting him up for a crime like this, but . . . not just her

> . . . . all of [the officers] would have to be involved with this conspiracy for some reason against this Defendant.

3RP 130-31. Defense counsel objected again and the trial court overruled the objection again. 3RP 131. The prosecutor went on, "That is wholly unreasonable and, if you want to follow Defense down Alice's rabbit hole through that line of argument . . . ." 3RP 131. Defense counsel objected a third time for disparaging counsel, which the trial court again overruled. 3RP 131. The prosecutor then argued, "If you want to go down that route, well, that's your prerogative, but in no reasonable realm of thought is that going to be possible." 3RP 131.

The prosecutor's arguments that likened defense counsel's arguments to "Alice's rabbit hole" and outside the "reasonable realm of thought" were the equivalent of calling defense arguments "sleight of hand," "bogus," and "twisting" the facts. Cf. Thorgerson, 172 Wn.2d at 451-52; Warren, 165 Wn.2d at 29. The State's arguments expressly told jurors that the defense was using trickery, distraction, and confusion to avoid a conviction. These arguments attributed deception and unfair tactics to defense counsel and the defense's theory of the case. The prosecutor's choice to malign defense counsel severely damaged Le's presentation of his version of events and theory of the case. The prosecutor's disparagement constituted egregious misconduct.

Moreover, the trial court legitimized the prosecutor's disparagement of defense counsel by overruling defense counsel's multiple objections. Davenport, 100 Wn.2d at 764. The trial court's refusal to sustain defense counsel's objections all but endorsed the State's argument that the only way to acquit Le was to follow his lawyer down "Alice's rabbit hole" or to depart from the realm of reasonable thought.

Contrary to the prosecutor's characterization, defense counsel was not attempting to deceive jurors and her argument was both reasonable and thoughtful. She was attempting to remedy the sting of Clark's improper opinion that Le, a chronically homeless drug user, was a guilty "bad guy" and "criminal." Defense counsel merely asserted that Clark's remarks demonstrated the general law enforcement bias against poor, homeless, nonviolent drug users, urging jurors not to be complicit in that bias. And defense counsel is not alone in her bewilderment. As Chief Justice Madsen recently marveled with regard to the King County Prosecutor's dubious exercise of discretion that targets such individuals, "The use of considerable public resources to prosecute such a minor infraction, especially one that can easily be understood as a crime of poverty, is remarkable." State v. K.L.B., 180 Wn.2d 735, 745, 328 P.3d 886 (2014) (Madsen, C.J., concurring in dissent). While the State might be in denial about the social injustice of enforcing harsh drug policy against persons in Le's position, defense

counsel's arguments expressed hope that Seattle jurors were in better touch with reality. The prosecutor's disparagement deprived Le of this legitimate argument in his defense. No instruction could have cured the prosecutor's prejudicial disparagements. The prosecutor's denigration of Le and his lawyer requires reversal.

4. THE MANDATORY JURY INSTRUCTION, "A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS," IS UNCONSTITUTIONAL

Le's jury was instructed, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 63; 3RP 106; 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008) (WPIC). The Washington Supreme Court requires that trial courts provide this instruction in every criminal case, at least "until a better instruction is approved." State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). This instruction is constitutionally defective because it requires the jury to articulate a reason to establish a reasonable doubt. In light of this serious instructional error, this court must reverse.

WPIC 4.01 is invalid for two reasons. First, it tells jurors they must be able to articulate a reason for having a reasonable doubt. This engrafts an additional requirement on reasonable doubt. Jurors must have more than just a reasonable doubt; they must also have an articulable doubt. This makes it

more difficult for jurors to acquit and easier for the prosecution to obtain convictions. Second, telling jurors a reason must exist for reasonable doubt undermines the presumption of innocence and is effectively identical to the fill-in-the-blank arguments that Washington courts have invalidated in prosecutorial misconduct cases. If fill-in-the-blank arguments impermissibly shift the burden of proof, so does an instruction requiring exactly the same thing. Instructing jurors with WPIC 4.01 is constitutional error.

a. WPIC 4.01's language improperly adds an articulation requirement

Having a "reasonable doubt" is not, as a matter of plain English, the same as having a reason to doubt. But WPIC 4.01 requires both for a jury to return a not guilty verdict. A basic examination of the meaning of the words "reasonable" and "a reason" reveals this grave flaw in WPIC 4.01.

"Reasonable" is defined as "being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining within the bounds of reason . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment . . ." WEBSTER'S THIRD NEW INT'L DICTIONARY 1892 (1993). For a doubt to be reasonable under these definitions it must be rational, logically derived, and have no conflict with reason. Accord Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ("A 'reasonable doubt,' at a minimum, is

one based upon 'reason.'"); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (collecting cases defining reasonable doubt as one "'based on reason which arises from the evidence or lack of evidence'" (quoting United States v. Johnson, 343 F.2d 5, 6 n.1 (2d Cir. 1965))).

The placement of the article "a" before "reason" in WPIC 4.01 inappropriately alters and augments the definition of reasonable doubt. "[A] reason" in the context of WPIC 4.01, means "an expression or statement offered as an explanation of a belief or assertion or as a justification." WEBSTER'S, supra, at 1891. In contrast to definitions employing the term "reason" in a manner that refers to a doubt based on reason or logic, WPIC 4.01's use of the words "a reason" indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable, reasonable doubt.

Washington's reasonable doubt instruction is unconstitutional because its language requires more than just a reasonable doubt to acquit. Cf. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt . . . ."). Indeed, under the current instruction, jurors could have a reasonable

doubt but also have difficulty articulating or explaining why their doubt is reasonable. A case might present such voluminous and contradictory evidence that jurors having legitimate reasonable doubt would struggle putting it into words or pointing to a specific, discrete reason for it. Yet, despite reasonable doubt, acquittal would not be an option.

Scholarship on the reasonable doubt standard elucidates similar concerns with requiring jurors to articulate their doubt:

> An inherent difficulty with an articulability requirement of doubt is that it lends itself to reduction without end. If the juror is expected to explain the basis for a doubt, that explanation gives rise to its own need for justification. If a juror's doubt is merely, 'I didn't think the state's witness was credible,' the juror might be expected to then say why the witness was not credible. The requirement for reasons can all too easily become a requirement for reasons for reasons, ad infinitum.
>
> One can also see a potential for creating a barrier to acquit for less-educated or skillful jurors. A juror who lacks the rhetorical skill to communicate reasons for a doubt is then, as a matter of law, barred from acting on that doubt. This bar is more than a basis for other jurors to reject the first juror's doubt. It is a basis for them to attempt to convince that juror that the doubt is not a legal basis to vote for acquittal.
>
> A troubling conclusion that arises from the difficulties of the requirement of articulability is that it hinders the juror who has a doubt based on the belief that the totality of the evidence is insufficient. Such a doubt lacks the specificity implied in an obligation to 'give a reason,' an obligation that appears focused on the details of the arguments. Yet this is precisely the circumstance in which the rhetoric of the law, particularly the presumption of innocence and the state burden of proof, require acquittal.

Steve Sheppard, The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence, 78 NOTRE DAME L. REV. 1165, 1213-14 (2003) (footnotes omitted). In these various scenarios, despite having reasonable doubt, jurors could not vote to acquit in light of WPIC 4.01's direction to articulate a reasonable doubt. By requiring more than a reasonable doubt to acquit a criminal defendant, WPIC 4.01 violates the federal and state due process clauses. Winship, 297 U.S. at 364; U.S. CONST. amends. V, XIV; CONST. art. I, § 3.

b. WPIC 4.01's articulation requirement impermissibly undermines the presumption of innocence

"The presumption of innocence is the bedrock upon which the criminal justice system stands." Bennett, 161 Wn.2d at 315. It "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." Id. at 316. To avoid this, Washington courts have strenuously protected the presumption of innocence by rejecting an articulation requirement in different contexts. This court should safeguard the presumption of innocence in this case.

In the context of prosecutorial misconduct, courts have proscribed arguments that jurors must articulate a reason for having reasonable doubt. Fill-in-the-blank arguments are flatly barred "because they misstate the reasonable doubt standard and impermissibly undermine the presumption of

innocence." State v. Emery, 174 Wn.2d 741, 759, 278 P.3d 653 (2012). The Court of Appeals has repeatedly rejected such arguments as prosecutorial misconduct. See, e.g., State v. Walker, 164 Wn. App. 724, 731, 265 P.3d 191 (2011) (holding improper prosecutor's PowerPoint slide that read, "'If you were to find the defendant not guilty, you *have* to say: 'I had a reasonable doubt[.]' What was the reason for your doubt? 'My reason was ____.'"); State v. Johnson, 158 Wn. App. 677, 682, 684, 243 P.3d 936 (2010) (holding improper argument when prosecutor told jurors that they have to say, "'I doubt the defendant is guilty and my reason is I believed his testimony that . . . he didn't know that the cocaine was in there, and he didn't know what cocaine was'" and that "'[t]o be able to find reason to doubt, you have to fill in the blank, that's your job'" (quoting reports of proceedings)); State v. Venegas, 155 Wn. App. 507, 523-24 & n.16, 228 P.3d 813 (2010) (holding flagrant and ill intentioned the prosecutor's statement "'In order to find the defendant not guilty, you have to say to yourselves: "I doubt the defendant is guilty, and my reason is"—blank'" (quoting report of proceedings)); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009) (finding improper prosecutor's statement that "'in order to find the defendant not guilty, you have to say 'I don't' believe the defendant is guilty because,' and then you have to fill in the blank'" (quoting report of proceedings)).

Although it does not explicitly require jurors to fill in a blank, WPIC 4.01 implies that jurors need to do just that. Trial courts instruct jurors that a reason must exist for their reasonable doubt—this is, in substance, the same mental exercise as telling jurors they need to fill in a blank with an explanation or justification in order to acquit. If telling jurors they must articulate a reason for reasonable doubt is prosecutorial misconduct because it undermines the presumption of innocence, it makes no sense to allow the exact same undermining to occur through a jury instruction.

Outside the prosecutorial misconduct realm, Division Two recently acknowledged that an articulation requirement in a trial court's preliminary instruction on reasonable doubt would have been error had the issue been preserved. State v. Kalebaugh, 179 Wn. App. 414, 421-23, 318 P.3d 288, review granted, 180 Wn.2d 1013, 327 P.3d 54 (2014). The court determined Kalebaugh could not demonstrate actual prejudice given that the trial court instructed the jury with WPIC 4.01 at the end of trial. Id. at 422-23. The court therefore concluded the error was not manifest under RAP 2.5(a). Id. at 424.

In sidestepping the issue before it on procedural grounds, the Kalebaugh court pointed to WPIC 4.01's language with approval. 179 Wn. App. at 422-23. In considering a challenge to fill-in-the-blank arguments, the Emery court similarly approved of defining "reasonable doubt as a

'doubt for which a reason exists.'" 174 Wn.2d at 760. But neither Emery nor Kalebaugh gave any explanation or analysis regarding why an articulation requirement is unconstitutional in one context but not unconstitutional in all contexts.[4] Furthermore, neither court was considering a direct challenge to the WPIC 4.01 language, so their approval of WPIC 4.01's language does not control. See In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("[Courts] do not rely on cases that fail to specifically raise or decide an issue.").

Just like a preliminary instruction to jurors that they must give a reason to have a reasonable doubt and just like a fill-in-the-blank argument, WPIC 4.01 "improperly implies that the jury must be able to articulate its reasonable doubt . . . ." Emery, 174 Wn.2d at 760. By requiring more than just a reasonable doubt to acquit, WPIC 4.01 impermissibly undercuts the presumption of innocence. WPIC 4.01 is unconstitutional.

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[4] The Kalebaugh court stated it "simply [could not] draw clean parallels between cases involving a prosecutor's fill-in-the-blank argument during closing, and a trial court's improper preliminary instruction before the presentation of evidence." But drawing such "parallels" is a very simple task, as both errors undermine the presumption of innocence by misstating the reasonable doubt standard. As the dissenting judge correctly surmised, "if the requirement of articulability constituted error in the mouth of a deputy prosecutor, it would surely also do so in the mouth of the judge." Kalebaugh, 179 Wn. App. at 427 (Bjorgen, J., dissenting).

c. WPIC 4.01's articulation requirement requires reversal

An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the Sixth Amendment's jury-trial guarantee. Sullivan v. Louisiana, 508 U.S. 275, 279-80, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Indeed, where, as here, the "instructional error consists of a misdescription of the burden of proof, [it] vitiates *all* the jury's findings." Id. at 281. Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as 'structural error.'" Id. at 281-82.

As discussed, WPIC 4.01's language requires more than just a reasonable doubt to acquit criminal defendants; it requires a reasonable, articulable doubt. Its articulation requirement undermines the presumption of innocence. WPIC 4.01 misinstructs jurors on the meaning of reasonable doubt. Instructing jurors with WPIC 4.01 is structural error and requires reversal.

5. IF THE MULTIPLE ERRORS IN THIS CASE DID NOT INDIVIDUALLY DEPRIVE LE OF A FAIR TRIAL, THEIR CUMULATIVE EFFECT SURELY DID

Courts reverse a conviction for cumulative error "when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); see also State v. Coe, 101 Wn2.d 772, 789, 684 P.2d 668 (1984) ("While it is possible that some . . .

errors, standing alone, might not be of sufficient gravity to constitute grounds for a new trial, the combined effect of the accumulation of errors most certainly requires a new trial.").

Le's trial suffered from several errors, including Clark's giving an impermissible opinion of Le's guilt by calling him and people like him "criminals" and "bad guys," egregious prosecutorial misconduct that disparaged Le and his counsel, and an unconstitutional instruction on reasonable doubt. If this court determines that, individually, these errors do not require reversal of Le's conviction, it should conclude that, together, these errors deprived Le of a fair trial. These errors' cumulative effect requires reversal.

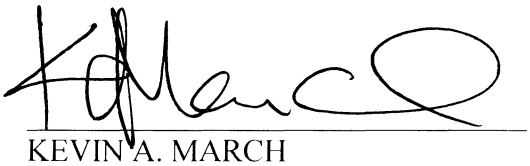
E. CONCLUSION

The State did not produce sufficient evidence to sustain a bail jumping conviction. The State's lead witness gave an improper opinion on Le's guilt and the prosecutor prejudicially disparaged defense counsel and her arguments. The reasonable doubt instruction was constitutionally defective. Accordingly, Le asks this court to reverse his bail jumping conviction and remand for dismissal of that charge with prejudice. Le also requests that this court reverse his drug conviction and remand for a new and fair trial.

DATED this 27th day of February, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 72166-6-I
	)	
THAN DINH LE.	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27TH DAY OF FEBRUARY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] THAN DINH LE
DOC NO. 868524
STAFFORD CREEK CORRECTIONS CERNTER
191 CONSTANTINE WAY
ABERDEEN, WA 9852

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF FEBRUARY 2015.

X Patrick Mayovsky