SUPREME COURT NO. 92697-2

NO. 72166-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THAN DINH LE,

Petitioner.

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

The Honorable Laura Inveen, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Le Dinh Than, the appellant below, asks this court to review the Court of Appeals decision referenced in Section B.

B. COURT OF APPEALS DECISION

Le requests review of the Court of Appeals decision in State v. Le, No. 72166-6-I (Wash. Ct. App. Nov. 16, 2015).

C. ISSUES PRESENTED FOR REVIEW

1. "[T]he evidence was insufficient to establish that Le had been released by court order" to sustain his bail jumping conviction. Le, slip op. at 4. The jury questioned the sufficiency of the evidence of release by court order, asking, "What does 'release by court order' require [and] entail? What documents and procedures are necessary?" CP 75; 4RP[1] 3. The trial court responded, "You will not receive any further instruction on this issue." CP 76; 4RP 4. WPIC 4.01[2] requires jurors to be able to articulate a reason for having a reasonable doubt: "A reasonable doubt is one for which a reason exists . . . ." CP 63 (emphasis added). Because jurors could not point to a reason that existed to doubt Le had been released by court order, WPIC 4.01 required them to convict Le of

[1] Consistent with his briefs in the Court of Appeals, Le cites the 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.

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

bail jumping despite insufficient evidence of an essential element of the crime. Do these facts compel the conclusion that WPIC 4.01 misdescribes the burden of proof, undermines the presumption of innocence, and shifts the burden of proof to the accused?

2. Is review appropriate under RAP 13.4(b)(1) and (3) because the Court of Appeals decision conflicts with decisions of this court and because this case involves a significant constitutional question?

D. STATEMENT OF THE CASE

The State charged Le with violating the Uniform Controlled Substances Act when he sold an undercover Seattle police officer crushed aspirin in lieu of controlled substance for $30 in April 2012. CP 1. The State later amended the information to include a count for bail jumping for Le's failure to appear at a December 2013 omnibus hearing. CP 45.

The State attempted to present evidence that Le was released by court order, putting on the testimony of King County Superior Court courtroom clerk supervisor, Janet Llpaitan. Llpaitan testified about various certified court documents and recordings that provided the trial and hearing dates in Le's case. Exs. 9-13; 3RP 60-69. However, the State presented no evidence that Le had been released from custody by a court order.

The trial court defined bail jumping in the jury instructions as "fail[ing] to appear as required after heaving been released by court order or

admitted to bail with knowledge of the requirement of a subsequent personal appearance before a court." CP 71 (Instruction 11) (emphasis added). The to-convict instruction omitted the "admitted to bail" definition 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 requirement of a subsequent personal appearance before that court." CP 72 (Instruction 12) (emphasis added).

Le's jury was also instructed with the standard reasonable doubt instruction, WPIC 4.01, which read, in part, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 63 (Instruction 3); 3RP 106.

During closing argument, defense counsel argued there was no evidence of any court order releasing Le. 3RP 122-24. She argued, "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 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 did not and could not point to any evidence to support its proposition that Le could not have been released but for a court order.

During deliberations, the jury submitted 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 showed the jury lacked enough evidence to conclude Le had been released by court order. 4RP 3. However, the prosecutor and the trial court 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.

Le appealed. CP 94-95. The Court of Appeals agreed with Le that the evidence at trial was insufficient to support the bail jumping conviction because "the State failed to prove an essential element of the crime, that Le was 'released by court order' . . . ." Le, slip op. at 3. Thus, the court reversed Le's bail jumping conviction and remanded for resentencing. Id. at 1, 5, 12.

The Court of Appeals affirmed Le's delivery of a material lieu of a controlled substance conviction. Id. at 6-12. In so affirming, the court did not address the substance of Le's challenge to WPIC 4.01 but instead briefly

recited this court's decisions in State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007), and State v. Kalebaugh, 183 Wn.2d 578, 355 P.3d 253 (2015).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THE FACTS OF THIS CASE DEMONSTRATE PRECISELY HOW WPIC 4.01 UNCONSTITUTIONALLY DISTORTS THE REASONABLE DOUBT STANDARD, UNDERMINES THE PRESUMPTION OF INNOCENCE, AND SHIFTS THE BURDEN OF PROOF TO THE ACCUSED

1. WPIC 4.01's articulation requirement misstates the reasonable doubt standard

Jury instructions must be "readily understood and not misleading to the ordinary mind." State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). "The rules of sentence structure and punctuation are the very means by which persons of common understanding are able to ascertain the meaning of written words." State v. Simon, 64 Wn. App. 948, 958, 831 P.2d 138 (1991), rev'd on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992).

The error in WPIC 4.01 is readily apparent to the ordinary mind. Have a "reasonable doubt" is not, as a matter of plain English, the same as having a reason to doubt. WPIC 4.01 erroneously requires both for a jury to acquit.

"Reasonable" is defined as "being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining in the bounds of reason . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment . . . ." WEBSTER'S

THIRD NEW INTERNATIONAL DICTIONARY 1892 (1993). Under these definitions, for a doubt to be reasonable it must be rational, logically derived, and not in conflict with reason. This definition best comports with United States Supreme Court precedent defining the reasonable doubt standard. E.g., 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 indefinite article "a" before "reason" in WPIC 4.01 inappropriately alters and augments the definition of reasonable doubt. "[A] reason," as employed in WPIC 4.01, means "an expression or statement offered as an explanation or a belief or assertion or as a justification." WEBSTER'S, supra, at 1891. WPIC 4.01's use of the words "a reason" indicates that reasonable doubt must be capable of explanation or justification. That is, WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable, justifiable reasonable doubt.

Jury instructions "'must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror.'" State v. Borsheim, 140 Wn. App. 357, 366-67, 165 P.3d 417 (2007)

(quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). Ambiguous instructions that permit an erroneous interpretation of the law are improper. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996), overruled in part on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). Even if it is possible for judges and lawyers to interpret the instruction to avoid constitutional infirmity, this is not the correct standard for measuring the adequacy of jury instructions. Judges and lawyers have arsenals of interpretative aids at their disposal whereas jurors do not. Id.

Recent prosecutorial misconduct cases exemplify how WPIC 4.01 fails to make the reasonable doubt standard manifestly apparent even to legally trained professionals. The appellate courts of this state have consistently condemned arguments that jurors must articulate a reason for having reasonable doubt. These fill-in-the-blank arguments "improperly impl[y] that the jury must be able to articulate its reasonable" and "subtly shift[] the burden to the defense." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); accord State v. Walker, 164 Wn. App. 724, 731, 265 P.3d 191 (2011); State v. Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010); State v. Venegas, 155 Wn. App. 507, 523-24 & n.16, 228 P.3d 813 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). These arguments are improper "because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence."

Emery, 174 Wn.2d at 759. Simply put, "a jury need do nothing to find a defendant not guilty." Id.

These prosecutorial misconduct cases are telling given that the improper burden shifting arguments are not merely the product of prosecutorial malfeasance but the consequence of WPIC 4.01's plain text. The offensive arguments did not materialize out of thin air but sprang directly from the language "[a] reasonable doubt is one for which a reason exists." In Anderson, the prosecutor recited WPIC 4.01 before arguing, "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." 153 Wn. App. at 424. In Johnson, likewise, the prosecutor told jurors, "What [WPIC 4.01] says is 'a doubt for which a reason exists.' In order to find the defendant not guilty, you have to say, 'I doubt the defendant is guilty and my reason is . . . .' To be able to find a reason to doubt, you have to fill in the blank; that's your job." 158 Wn. App. at 682.

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 continue allowing the same undermining to occur through a jury instruction. The prosecutorial misconduct cases make clear that WPIC 4.01 is the true culprit. Its doubt "for which a reason exists" language provides a natural and seemingly irresistible basis to argue that

jurors must give a reason why there is reasonable. Trained legal professionals mistakenly believe WPIC 4.01 means reasonable doubt does not exist unless jurors are able to provide a reason why it does exist. Average jurors certainly believe they must give a reason for having reasonable doubt.

The articulation of reasonable doubt required by WPIC 4.01 is extremely problematic in a case where the State has presented insufficient evidence, as in this case.

> 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 sufficient. 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 circumstances 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).

Jurors in Le's case doubted whether there was evidence Le had been released pursuant to a court order. They asked the trial court to elucidate the requirements of being released by a court order but the trial court refused. CP 75-76; 4RP 3-4. In rebuttal to the defense argument that the State failed to present evidence of a court order releasing Le, the prosecution argued that

"unless [Le] somehow dug himself out of custody . . . . [t]he only conclusion you can reach is, yes, he was released by court order." 3RP 132. The jury's question demonstrates that the jury was unsure it had sufficient evidence to convict Le of bail jumping given the absence of evidence Le was released by court order. But because jurors could not point to a reason to doubt Le was released by court order—which was in essence the State's argument—WPIC 4.01 (Instruction 3 at CP 63) required them to convict Le of bail jumping. This case presents unique facts that illustrate WPIC 4.01's constitutional infirmity. This court should accept review under RAP 13.4(b)(3) to evaluate WPIC 4.01's articulation requirement.

2. WPIC 4.01 rests on an outdated view of reasonable doubt that equated a doubt for which a reason exists with a doubt for which a reason can be given

The Court of Appeals refused to address Le's arguments by citing State v. Kalebaugh, 183 Wn.2d 578, 355 P.3d 253 (2015), and State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007). Le, slip op. at 10-11. But these cases did not address a direct challenge to WPIC 4.01 and therefore do not fairly resolve Le's dispute.

Bennett actually undermines WPIC 4.01 by requiring the instruction be given in every criminal case only "until a better instruction is approved." 161 Wn.2d at 318. The Bennett court clearly signaled that WPIC 4.01 has

room for improvement. This is undoubtedly true given WPIC 4.01's repugnant articulation requirement.

More recently in Kalebaugh, this court concluded that the trial court's erroneous instruction—"a doubt for which a reason can be given"—was harmless, accepting Kalebaugh's concession at oral argument "that the judge's remark 'could live quite comfortably' with final instructions given here," which included WPIC 4.01. 183 Wn.2d at 585. While Kalebaugh and Bennett might be read to tacitly approve WPIC 4.01, neither of the appellants in those cases argued the "one for which a reason exists" language in WPIC 4.01 misstated the reasonable doubt standard. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Because WPIC 4.01 was not challenged in Kalebaugh or Bennett, the analysis in each case flows from the unquestioned premise that WPIC 4.01 is correct. Because this court has suggested WPIC 4.01 can be improved and because no appellate court has recently addressed flaws in WPIC 4.01's language, this court should take this opportunity to closely examine WPIC 4.01 pursuant to RAP 13.4(b)(3).

Furthermore, this court's own precedent is in disarray. Kalebaugh's observation that it is error to require articulation of reasonable doubt

overlooks this court's precedent that approved WPIC 4.01's "for which a reason exists" by relying on cases approving of the "for which a reason can be given" language.

In State v. Harras, 25 Wash. 416, 421, 65 P. 774 (1901), this court found no error in the instruction, "It should be a doubt for which a good reason exists." This court maintained the "great weight of authority" supported this instruction, citing as authority the note to Burt v. State, 16 So. 342, 48 Am. St. Rep. 574 (Miss. 1894). This note, which is attached as Appendix B, cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.[3]

In Harras, this court viewed "a doubt for which a good reason exists" as equivalent to requiring that a reason must be given for the doubt. Harras directly conflicts with both Kalebaugh and Emery, which strongly reject any requirement that jurors must be able to give a reason for why reasonable doubt exists. Kalebaugh, 183 Wn.2d at 585 ("[T]he law does not require that a reason be given for a juror's doubt . . . ."); Emery, 174 Wn.2d at 760

[3] See, e.g., State v. Jefferson, 43 La. Ann. 995, 998-99, 10 So. 119 (La. 1891) ("A reasonable doubt . . . is not a mere possible doubt; it should be an actual or substantial doubt as a reasonable man would seriously entertain. It is a serious sensible doubt, such as you could give a good reason for"); Vann v. State, 9 S.E. 945, 947-48 (Ga. 1889) ("But the doubt must be a reasonable doubt, not a conjured-up doubt,—such a doubt as you might conjure up to acquit a friend, but one that you could give a reason for."); State v. Morey, 25 Or. 241, 256, 36 P. 573 (1894) ("A reasonable doubt is a doubt which has some reason for its basis. It does not mean a doubt from mere caprice, or groundless conjecture. A reasonable doubt is such a doubt as a juror can give a reason for.").

("Th[e] suggestion [that the jury must be able to articulate its reasonable doubt] is inappropriate because the State bears the burden of proving its case beyond a reasonable doubt, and the defendant bears no burden.").

This court's decision in State v. Harsted, 66 Wash. 158, 119 P. 24 (1911), elucidates further inconsistency in this court's decisional law regarding the reasonable doubt instruction. Harsted objected to the instruction, "The expression 'reasonable doubt' means in law just what the words imply—a doubt founded upon some good reason." Id. at 162. This court opined, "As a pure question of logic, there can be no difference between a doubt for which a reason can be given, and one for which a good reason can be given." Id. at 162-63. This court proceeded to cite out-of-state cases upholding instructions that defined reasonable doubt as a doubt for which a reason can be given. Id. at 164. One of the authorities this court relied on was Butler v. State, 102 Wis. 364, 78 N.W. 590, 591-92 (1899), which stated, "A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given." Though this court noted that some courts had disapproved of similar language, it was "impressed" with the Wisconsin view and felt "constrained" to uphold the instruction. 66 Wash. at 165.

Harsted and Harras provide the origins of WPIC 4.01's infirmity. In both cases this court equated a doubt "for which a reason exists" with a

doubt "for which a reason can be given." These cases reasoned that if a reason exists, it defies logic to suggest that the reason cannot also be given. Cf. Kalebaugh, 183 Wn.2d at 585. Harsted and Harras conflict with Kalebaugh and Emery. There is no real difference between the supposedly acceptable doubt "for which a reason exists" in WPIC 4.01 and the plainly erroneous doubt "for which a reason can be given." Kalebaugh, 183 Wn.2d at 585.

The articulation problem in WPIC 4.01 has continued unabated to the present day. There is an unbroken line from Harras to WPIC 4.01. WPIC 4.01's root is rotten. Emery and Kalebaugh condemned any suggestion that jurors must give a reason for having reasonable doubt. Yet Emery and Kalebaugh explicitly contradict Harras and Harsted. The law has evolved and what was acceptable 100 years ago is now forbidden. But WPIC 4.01 remains a relic of the misbegotten past, outpaced by this court's modern understanding of the reasonable doubt standard and swift eschewal of any articulation requirement.

It is time for a Washington court to seriously confront the problematic articulation language in WPIC 4.01. WPIC 4.01's articulation requirement required the jury in Le's case to convict him despite the insufficiency of the State's evidence. There is no meaningful difference between WPIC 4.01's doubt "for which a reason exists" and the erroneous

doubt "for which a reason can be given." Both require articulation. Articulation of reasonable doubt is repugnant to the presumption of innocence. Because this court's and the Court of Appeals' decisions demonstrate the case law is in disarray on the significant constitutional issue of properly defining reasonable doubt for Washington juries, Le's arguments merit review under RAP 13.4(b)(1) and (3).

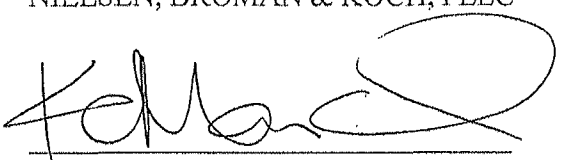
F. CONCLUSION

Because Le satisfies review criteria under RAP 13.4(b)(1) and (3), he asks that this court grant review.

DATED this 16th day of December, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. THAN DINH LE, Appellant.	No. 72166-6-I DIVISION ONE UNPUBLISHED OPINION FILED: November 16, 2015

TRICKEY, J. — Than Dinh Le challenges his jury convictions for delivery of a substance in lieu of a controlled substance and bail jumping. Because insufficient evidence supported the bail jumping conviction, we reverse that conviction and remand for resentencing. In all other respects, we affirm.

FACTS

At approximately 1:00 p.m. on April 13, 2012, Officer Emily Clark of the Seattle Police Department was working as an undercover narcotics buyer. Officer Clark approached a man and asked "if he had anything."[1] The man asked Clark how much she was looking for, and Clark said she "had 30," meaning 30 dollars.[2] The man said, "Hold on a minute" and began walking away, motioning for Clark to follow him.[3] The man introduced Clark to another man, later identified as Le. Le asked "how much [Clark] had," and when Clark repeated that she "had 30," Le told

[1] Report of Proceedings (RP) (May 5, 2014) at 13.
[2] RP (May 5, 2014) at 14.
[3] RP (May 5, 2014) at 15-16.

Clark to follow him.[4] Le made a brief phone call using a nearby pay phone and told Clark "his guy was coming."[5]

A few minutes later, a van pulled up. Le entered and exited the van, and asked Clark if she had the money. Le led Clark around the corner of a restaurant, out of public view, and showed her a folded piece of white paper containing two off-white rock-like substances that appeared to Clark to be crack cocaine. Le said, "I have the drugs here. Do you have the money?"[6] Le gave Clark the two substances and she gave him the money. Officers arrested Le and recovered the money Clark had given him. The Washington State Patrol Crime Laboratory analyzed the two substances and determined they contained only aspirin and caffeine.

On June 3, 2013, the State charged Le with one count of delivery of a substance in lieu of a controlled substance.[7] On August 14, while Le was in custody, the trial court entered a scheduling order notifying Le that he was required to be present for all hearings or a bench warrant would be issued for his arrest. Le was subsequently released from custody and failed to appear for his omnibus hearing on December 13. The State amended the information to add one count of bail jumping. A jury convicted Le as charged. Le appeals.

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[4] RP (May 5, 2014) at 17-18.
[5] RP (May 5, 2014) at 19-20.
[6] RP (May 6, 2014) at 87.
[7] The State also charged Le with one count of possession of cocaine, involving a separate incident, but ultimately elected not to proceed to trial on that charge.

ANALYSIS

Bail Jumping

Le contends insufficient evidence supports the conviction for bail jumping. Because the State failed to prove an essential element of the crime, that Le was "released by court order," we agree. RCW 9A.76.170(1).

A person is guilty of bail jumping if he or she fails to appear for a court appearance after "having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state." RCW 9A.76.170(1). Thus, the three elements the State is required to prove are as follows: (1) the defendant was held for, charged with, or convicted of a particular crime; (2) the defendant was released by court order or admitted to bail with the requirement of a subsequent personal appearance; and (3) the defendant knowingly failed to appear as required. State v. Williams, 162 Wn.2d 177, 183-84, 170 P.3d 30 (2007). Here, as to the second element, the to-convict instruction referred only to a release by court order, omitting any mention of an admission to bail.[8] Under the law of the case doctrine, the State was thus

[8] Instruction 12 read as follows:

> To convict the defendant of the crime of Bail Jumping, as charged in Count II, each of the following elements of the crime must 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.

required to prove that Le had been released by court order. See State v. Hickman, 135 Wn.2d 97, 99, 954 P.2d 900 (1998).

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201. We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Here, the evidence was insufficient to establish that Le had been released by court order. The State offered a certified copy of the August 14 order notifying Le that he was required to appear at all hearings. The order reflected that Le was in custody at the time. The State also offered a recording of the December 13 omnibus hearing in which Le failed to appear and a warrant was issued for his arrest. However, the State did not offer any court order entered between August 14 and December 13 releasing Le from custody.

Le testified that he was in jail at the time the August 14 order was entered. He testified that he was released from the jail sometime in November and was

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> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count II.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Count II.

Clerk's Papers (CP) at 72.

given a copy of the order with the omnibus hearing date but that he lost it and did not go to the hearing.

The State argues that a reasonable juror could have inferred from all of the evidence presented, including Le's testimony, that Le had been released by court order because "how else could Le have been released . . . unless authorized by the court?"[9] But RCW 9A.76.170(1) makes clear that not all releases occur pursuant to court order. There is no evidence in the record, direct or circumstantial, regarding the means by which Le was released from custody. While a jury could have reasonably inferred from Le's testimony that he was released by court order, it would have been equally reasonable to infer that Le was released through admission to bail. Because the State did not present evidence sufficient to establish that Le had been released by court order, we reverse his bail jumping conviction.

The State argues that even if the jury concluded that Le was released through admission to bail, this would still constitute release by a court order because "bail is set by the court."[10] However, this argument is only briefly mentioned in a footnote. Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); see also State v. Johnson, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993) (court generally declines to address the merits of an argument mentioned only in a footnote).

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[9] Br. of Resp't at 11.
[10] Br. of Resp't at 12 n.8.

Opinion Testimony

Le argues that statements made by Officer Clark during her testimony constituted an impermissible opinion on guilt that deprived him of a fair trial. Generally, no witness may offer an opinion regarding the defendant's guilt or veracity. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). "Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury." Kirkman, 159 Wn.2d at 927.

At trial, Officer Clark testified extensively regarding her experience as an undercover officer. She discussed a nationwide training program she attended regarding undercover operations:

> Four of the days are actual scenarios where we go and pretend that we're actually buying narcotics or acting like a prostitute with detectives, as they are the monitors. 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.[11]

Defense counsel said, "Your Honor, I'm going to object to the use of the term 'bad guy.'"[12] The trial court overruled the objection.

Le contends that Officer Clark's statements "improperly expressed her opinion that Le was a bad guy, a criminal, and therefore guilty."[13] But Officer Clark did not use the terms "criminal" and "bad guy" in reference to Le. Rather, Officer

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[11] RP (May 5, 2014) at 7 (emphasis added).
[12] RP (May 5, 2014) at 7.
[13] Br. of Appellant at 21.

Clark used the terms to explain that police officers mimic criminal behavior in order to conduct effective undercover operations.

Moreover, any error here would be harmless. A constitutional error is harmless beyond a reasonable doubt if the untainted evidence is so overwhelming that it necessarily supports a finding of guilt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Here, we are satisfied the jury would have found Le guilty of delivery of a substance in lieu of a controlled substance regardless of Officer Clark's comments. The evidence was uncontroverted that Le gave Clark what he represented to be drugs in exchange for money, and that the substances were not actually drugs. The challenged statements did not deprive Le of a fair trial.

Disparagement of Defense Counsel

Le contends that the prosecutor committed misconduct by disparaging the role of defense counsel in closing argument by comparing the defense theory to "Alice's rabbit hole" and describing it as "a conspiracy" and outside the "realm of reasonable thought."[14] To establish prosecutorial misconduct, the defendant "bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). If, as here, a defendant timely objects to the prosecutor's statements, the defendant must show that "'there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict'" in order to establish

[14] RP (May 6, 2014) at 130-31.

prejudice. State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (alteration in original) (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)).

A prosecutor has latitude in closing argument to draw and express reasonable inferences from the evidence. State v. Harvey, 34 Wn. App. 737, 739, 664 P.2d 1281 (1983). It is not misconduct for the prosecutor to argue that evidence does not support the defense theory or to fairly respond to defense counsel's argument. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). However, "[i]t is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity." State v. Thorgerson, 172 Wn.2d 438, 451, 258 P.3d 43 (2011). We review allegedly improper comments in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given. Russell, 125 Wn.2d at 85-86.

In closing argument, defense counsel argued that Officer Clark "put on a costume, put on a wig, painted her face, painted her fingernails, presented herself as a fellow drug user on this day, and tempted my client with $30."[15] Defense counsel also argued that Clark "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 "you certainly can't let her biases and beliefs impact you as jurors."[16] Defense counsel concluded, "I should tell you that, that, you know, that's

[15] RP (May 6, 2014) at 120.
[16] RP (May 6, 2014) at 128.

not appropriate to be biased against somebody because of their circumstances in life."[17]

> In rebuttal, the prosecutor stated:
>
> Defense is basically either claiming one of two things with respect to the drug charge, that this is either a conspiracy or a huge coincidental misunderstanding.
>
> . . . .
>
> With respect to the conspiracy, 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 . . . .
>
> . . . .
>
> That is wholly unreasonable and, if you want to follow Defense down Alice's rabbit hole through that line of argument . . . .[18]

Defense counsel objected, arguing the prosecutor's comments disparaged the role of defense counsel. The trial court overruled the objection. The prosecutor continued, "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."[19]

The State concedes that the prosecutor "could have expressed his rebuttal argument more artfully, or perhaps in more measured tones," but that the comments did not rise to the level of prosecutorial misconduct.[20] We agree in both respects. While the prosecutor's statements were unnecessarily pejorative, the purpose of the statements was to point out that the defense theory was not supported by the evidence. Moreover, as discussed above, given the

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[17] RP (May 6, 2014) at 128.
[18] RP (May 6, 2014) at 131.
[19] RP (May 6, 2014) at 131.
[20] Br. of Resp't at 22.

overwhelming evidence of guilt, Le fails to show that there was a substantial likelihood that the statements affected the jury's verdict.

The case Le relies on, State v. Thorgerson, 172 Wn.2d 438, 258 P.3d 43 (2011), is distinguishable. In Thorgerson, the Washington Supreme Court held that a prosecutor "impugned defense counsel's integrity" by "referring to his presentation of his case as 'bogus' and involving 'sleight of hand'" because these terms implied "wrongful deception or even dishonesty in the context of a court proceeding." 172 Wn.2d at 451-52. Here, in contrast, the prosecutor did not accuse defense counsel of deceiving the jury, but instead implied that the defense theory was unreasonable based on the evidence.

Reasonable Doubt Instruction

Le claims that that the instruction defining reasonable doubt as a doubt "for which a reason exists" was constitutionally deficient because it required the jury to articulate a reason for having a reasonable doubt.[21] Relying on State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012), Le also argues that the instruction resembles the improper "'fill in the blank'" arguments that may constitute prosecutorial misconduct.

At trial, the court instructed the jury on reasonable doubt using the Washington Pattern Jury Instruction: Criminal (WPIC) 4.01:

> 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 each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

[21] CP at 63.

> 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.[22]

A trial court is required to use WPIC 4.01 to instruct juries on the burden of proof and the definition of reasonable doubt. State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). Our Supreme Court recently reaffirmed that WPIC 4.01 is "the correct legal instruction on reasonable doubt" and rejected any suggestion that WPIC 4.01 requires a jury to articulate a reason for having a reasonable doubt or is akin to an improper "fill in the blank" argument. State v. Kalebaugh, 183 Wn.2d 578, 585-86, 355 P.3d 253 (2015).

Cumulative Error

Finally, Le contends that cumulative error prejudiced the outcome of the trial. The cumulative error doctrine applies when several errors occurred at the trial court that would not merit reversal standing alone, but in aggregate effectively denied the defendant a fair trial. State v. Hodges, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). Though we reverse Le's bail jumping conviction for insufficient evidence, Le fails to establish that his delivery conviction was tainted by any prejudicial error. As such, his claim of cumulative error fails.

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[22] CP at 63 (emphasis added).

We reverse Le's conviction for bail jumping and remand to the trial court for resentencing. In all other respects, we affirm.

Tickey, J.

WE CONCUR:

Cox, J.

APPENDIX B

convict, that the defendant, and no other person, committed the offense: *People* v. *Kerrick*, 52 Cal. 446. It is, therefore, error to instruct the jury, in effect, that they may find the defendant guilty, although they may not be "entirely satisfied" that he, and no other person, committed the alleged offense: *People* v. *Kerrick*, 52 Cal. 446; *People* v. *Carrillo*, 70 Cal. 643.

CIRCUMSTANTIAL EVIDENCE.—In a case where the evidence as to the defendant's guilt is purely circumstantial, the evidence must lead to the conclusion so clearly and strongly as to exclude every reasonable hypothesis consistent with innocence. In a case of that kind an instruction in these words is erroneous: "The defendant is to have the benefit of any doubt. If, however, all the facts established necessarily lead the mind to the conclusion that he is guilty, though there is a bare possibility that he may be innocent, you should find him guilty." It is not enough that the evidence necessarily leads the mind to a conclusion, for it must be such as to exclude a reasonable doubt. Men may feel that a conclusion is necessarily required, and yet not feel assured, beyond a reasonable doubt, that it is a correct conclusion: *Rhodes* v. *State*, 128 Ind. 189; 25 Am. St. Rep. 429. A charge that circumstantial evidence must produce "in" effect "a" reasonable and moral certainty of defendant's guilt is probably as clear, practical, and satisfactory to the ordinary juror as if the court had charged that such evidence must produce "the" effect "of" a reasonable and moral certainty. At any rate, such a charge is not error: *Loggins* v. *State*, 32 Tex. Cr. Rep. 364. In *State* v. *Shaeffer*, 89 Mo. 271, 282, the jury were directed as follows: "In applying the rule as to reasonable doubt you will be required to acquit if all the facts and circumstances proven can be reasonably reconciled with any theory other than that the defendant is guilty; or, to express the same idea in another form, if all the facts and circumstances proven before you can be as reasonably reconciled with the theory that the defendant is innocent as with the theory that he is guilty, you must adopt the theory most favorable to the defendant, and return a verdict finding him not guilty." This instruction was held to be erroneous, as it expresses the rule applicable in a civil case, and not in a criminal one. By such explanation the benefit of a reasonable doubt in criminal cases is no more than the advantage a defendant has in a civil case, with respect to the preponderance of evidence. The following is a full, clear, explicit, and accurate instruction in a capital case turning on circumstantial evidence: "In order to warrant you in convicting the defendant in this case, the circumstances proven must not only be consistent with his guilt, but they must be inconsistent with his innocence, and such as to exclude every reasonable hypothesis but that of his guilt, for, before you can infer his guilt from circumstantial evidence, the existence of circumstances tending to show his guilt must be incompatible and inconsistent with any other reasonable hypothesis than that of his guilt": *Lancaster* v. *State*, 91 Tenn. 267, 285.

REASON FOR DOUBT.—To define a reasonable doubt as one that "the jury are able to give a reason for," or to tell them that it is a doubt for which a good reason, arising from the evidence, or want of evidence, can be given, is a definition which many courts have approved: *Vann* v. *State*, 83 Ga. 44; *Hodge* v. *State*, 97 Ala. 37; 38 Am. St. Rep. 145; *United States* v. *Cassidy*, 67 Fed. Rep. 698; *State* v. *Jefferson*, 43 La. Ann. 995; *People* v. *Stubenvoll*, 62 Mich. 329, 332; *Welsh* v. *State*, 96 Ala. 93; *United States* v. *Butler*, 1 Hughes, 457; *United States* v. *Jones*, 31 Fed. Rep. 718; *People* v. *Guidici*, 100

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N. Y. 503; *Cohen* v. *State*, 50 Ala. 108. It has, therefore, been held proper to tell the jury that a reasonable doubt "is such a doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give good reason for": *State* v. *Jefferson*, 43 La. Ann. 995. So, the language, that it must be "not a conjured-up doubt—such a doubt as you might conjure up to acquit a friend—but one that you could give a reason for," while unusual, has been held not to be an incorrect presentation of the doctrine of reasonable doubt: *Vann* v. *State*, 83 Ga. 44, 52. And in *State* v. *Morey*, 25 Or. 241, it is held that an instruction that a reasonable doubt is such a doubt as a juror can give a reason for, is not reversible error, when given in connection with other instructions, by which the court seeks to so define the term as to enable the jury to distinguish a reasonable doubt from some vague and imaginary one. The definition, that a reasonable doubt means one for which a reason can be given, has been criticized as erroneous and misleading in some of the cases, because it puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt with the certainty required by law before there can be a conviction; and because a person often doubts about a thing for which he can give no reason, or about which he has an imperfect knowledge: *Siberry* v. *State*, 133 Ind. 677; *State* v. *Sauer*, 38 Minn. 438; *Ray* v. *State*, 50 Ala. 104; and the fault of this definition is not cured by prefacing the statement with the instruction that "by a reasonable doubt is meant not a captious or whimsical doubt": *Morgan* v. *State*, 48 Ohio St. 371. Spear, J., in the case last cited, very pertinently asks: "What kind of a reason is meant? Would a poor reason answer, or must the reason be a strong one? Who is to judge? The definition fails to enlighten, and further explanation would seem to be needed to relieve the test of indefiniteness. The expression is also calculated to mislead. To whom is the reason to be given? The juror himself? The charge does not say so, and jurors are not required to assign to others reasons in support of their verdict." To leave out the word "good" before "reason" affects the definition materially. Hence, to instruct a jury that a reasonable doubt is one for which a reason, derived from the testimony, or want of evidence, can be given, is bad: *Carr* v. *State*, 23 Neb. 749; *Cowan* v. *State*, 22 Neb. 519; as every reason, whether based on substantial grounds or not, does not constitute a reasonable doubt in law: *Ray* v. *State*, 50 Ala. 104, 108.

"HESITATE AND PAUSE"—"MATTERS OF HIGHEST IMPORTANCE," ETC. A reasonable doubt has been defined as one arising from a candid and impartial investigation of all the evidence, such as "in the graver transactions of life would cause a reasonable and prudent man to hesitate and pause before acting": *Gannon* v. *People*, 127 Ill. 507; 11 Am. St. Rep. 147; *Dunn* v. *People*, 109 Ill. 635; *Wacaser* v. *People*, 134 Ill. 438; 23 Am. St. Rep. 683; *Boulden* v. *State*, 102 Ala. 78; *Welsh* v. *State*, 96 Ala. 93; *State* v. *Gibbs*, 10 Mont. 213; *Miller* v. *People*, 39 Ill. 457; *Willis* v. *State*, 43 Neb. 102. And it has been held that it is correct to tell the jury that the "evidence is sufficient to remove reasonable doubt when it is sufficient to convince the judgment of ordinarily prudent men with such force that they would act upon that conviction, without hesitation, in their own most important affairs": *Farrell* v. *State*, 58 Ind. 293; *Arnold* v. *State*, 23 Ind. 170; *State* v. *Kearley*, 26 Kan. 77; or, where they would feel safe to act upon such conviction "in matters of the highest concern and importance" to their own dearest and most important interests, under circumstances requiring no

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. THAN DINH LE. Petitioner.	)))))))))	SUPREME COURT NO. _____ COA NO. 72166-6-I

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 16TH DAY OF DECEMBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** 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 16TH DAY OF DECEMBER 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

December 16, 2015 - 3:48 PM

Transmittal Letter

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- ○ Affidavit of Attorney Fees
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