72166-6

72166-6

NO. 72166-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

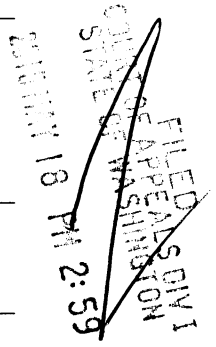
THAN DINH LE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE LAURA INVEEN

BRIEF OF RESPONDENT



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A. ISSUES PRESENTED

1. In order to sustain a conviction for Bail Jumping, the State must prove, among other things, that a defendant was released from custody by court order. The State adduced evidence that defendant Than Dinh Le was taken into custody after charges were filed, that he was informed that he had to attend all future court dates, that he was released pending trial, and that he then failed to appear at a hearing. Could a reasonable juror have inferred that Le's release was authorized by court order?

2. A witness may not give a personal opinion as to the guilt of a defendant. Seattle Police Officer Emily Clark testified that she was taught at undercover school how to act like a "criminal" or "bad guy." Did the trial court properly admit this testimony, when Officer Clark did not comment on Le's guilt? If the trial court did err, was any error harmless when the evidence of Le's guilt was overwhelming?

3. A prosecutor is given reasonable leeway in rebuttal closing argument, in responding to arguments made by defense counsel. Defense counsel below argued that there was no evidence of Le's guilt, despite his admissions on the stand that he sold fake drugs to an undercover police officer. Counsel then accused the police of being biased against homeless

people. In rebuttal, the prosecutor described counsel's argument as "wholly unreasonable," going "down Alice's rabbit hole," and being outside a "reasonable realm of thought." He then referred back to the evidence at trial. Was the prosecutor's argument proper? If not, has Le failed to demonstrate prejudice?

4. The Washington Supreme Court expressly has approved WPIC 4.01, which defines a reasonable doubt as "one for which a reason exists." Has Le failed to show that the Washington Supreme Court's approval of WPIC 4.01 is both incorrect and harmful?

5. The cumulative error doctrine applies only when several errors, though individually harmless, may combine to justify reversal. It does not apply when the asserted errors were few or had little or no effect on the outcome of the trial. In this case, there were no errors; if there were, they were few in number and did not affect the verdict. Has Le failed to show that the cumulative error doctrine applies in this case?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged defendant Than Dinh Le with Violation of the Uniform Controlled Substances Act ("VUCSA") – Delivery of a

Substance in Lieu of a Controlled Substance,[1] and with Bail Jumping.[2, 3] CP 44-45. The State alleged that on April 12, 2012, Le offered, arranged, or negotiated the sale or delivery of cocaine to another, and then delivered an uncontrolled substance in lieu of cocaine. CP 44. The State also alleged that on December 13, 2013, having been charged with the above crime, and having been released by court order with the knowledge of the requirement of a subsequent personal appearance before the King County Superior Court, Le failed to appear as required. CP 45.

A jury convicted Le of both counts. CP 77-78. At sentencing, because of his nine prior felony convictions, Le had an offender score of ten. CP 82, 87. His standard sentencing range on the VUCSA charge was therefore 60 to 120 months.[4] CP 82. On the bail jumping charge, his standard sentence range was 51 to 60 months. CP 82.

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[1] RCW 69.50.4012.

[2] RCW 9A.76.170(1).

[3] Le was also charged with, but not tried for, possessing cocaine. CP 44. That charge is not at issue in this appeal.

[4] Although Delivery of a Substance in Lieu of a Controlled Substance is a Class C felony with a maximum sentence of 60 months, Le's maximum sentence was doubled by statute because of his prior convictions for offenses relating to narcotic drugs. See RCW 9A.20.021(1)(c); RCW 69.50.4012(2); RCW 69.50.408; CP 82, 87.

The prosecutor asked the court to impose the lowest possible sentence authorized by law on each count. 6RP 4-5.[5] The State did not ask the court to impose any discretionary fines or fees. 6RP 5. Le expressly agreed with the State's sentencing recommendation and did not ask for an exceptional sentence. 6RP 5.

The court sentenced Le to the low end on each count, to run concurrently, and waived all non-mandatory fines and fees. CP 82-84; 6RP 6-7.

2. SUBSTANTIVE FACTS.

a. VUCSA Charge.

On April 12, 2012, Seattle Police Officer Emily Clark took part in an undercover "buy bust" operation around 12th Avenue South and South Jackson Street. 2RP 5, 10. Her role was to purchase narcotics in a street-level drug deal, by pretending to be a drug user. 2RP 12. She assumed a disguise by, for example, blackening her fingertips to mimic the appearance of a person who had used a pipe to smoke narcotics. 2RP 12.

Clark spotted a man and asked if he "had anything?" 2RP 13. The man asked how much she was looking for. 2RP 14. She told him that she had thirty dollars. 2RP 14.

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[5] The verbatim report of proceedings is cited as follows: 1RP – May 1, 2014; 2RP – May 5, 2014; 3RP – May 6, 2014; 4RP – May 7, 2014; 5RP – Jun. 6, 2014; and 6RP – Jul. 11, 2014.

The man took Clark across the street, where he introduced her to defendant Than Dinh Le. 2RP 15-17. Le asked Clark how much she had, and then asked her to follow him. 2RP 17-18.

Le led Clark down the street, where she saw him use a restaurant pay phone. 2RP 19. Le then told Clark that "his guy was coming" in a van. 2RP 19-20. After a couple of minutes, a van pulled up, and Le went into the van. 2RP 20.

Less than a minute later, Le exited the van and asked Clark if she had the money. 2RP 20-21. Clark told Le that she would not give him any money until he gave her the drugs. 2RP 20-21. Le led her around the corner of a restaurant, out of public view, and showed her a white folded piece of paper. 2RP 21. Inside were two off-white, rock-like substances about a quarter-inch in size, which appeared to be crack cocaine. 2RP 21-22. Le tipped the rocks into Clark's hand and she gave him thirty dollars in cash. 2RP 22.

Clark then gave a predetermined "good buy" signal. 2RP 22-23. A surveillance officer observed the signal and relayed to other officers that Clark had purchased narcotics. 2RP 47-48; 3RP 17. Officers then arrested Le, and recovered the money that Clark had given him, from his person. 3RP 47-50. They searched the ground in the immediate vicinity,

in case Le had sloughed any items, and found another piece of paper containing additional whitish rocks. 2RP 51.

The substance that Le sold to Clark was examined by the Washington State Patrol Crime Laboratory and found to contain only aspirin and caffeine. 3RP 34, 36. The substance found by officers within three feet of Le's arrest location also tested positive only for aspirin and caffeine. 3RP 37.

Le testified at trial and admitted that the man that Clark had first talked to was his "middleman." 3RP 85. The middleman had told him that Clark was a drug user and that she had thirty dollars. 3RP 85. Le pretended to make a phone call and then sold her two pills of cold medication that he had found. 3RP 86-87. He knew that the pills were not actual narcotics because he had tried to smoke them earlier and realized that they had no effect. 3RP 88.

b. Bail Jumping.

Following his arrest, Le was charged in King County Superior Court with VUCSA on June 3, 2013. 3RP 83-84.

On August 7, Le was transported to Seattle in custody after being arrested in Spokane for another offense. 3RP 89. On August 14, the superior court entered an order, setting a pre-trial hearing and warning Le that he must be present at all future hearings, or else risk a bench warrant

for his arrest. 3RP 60-61, 89; Exhibit 10 (notice of case scheduling hearing).

On October 24, the superior court entered another order, setting a hearing for December 13. 3RP 61-63; Exhibit 11 (order continuing trial); Exhibit 9 (audio recording of hearing). Le was present when the court issued this order, along with his attorney and a Vietnamese interpreter. 3RP 64-66; Exhibit 11; Exhibit 12 (clerk's minutes).

At some point in November, Le was released from custody pending trial and was placed on CCAP.[6] 3RP 90-92. Upon release, he was provided with a copy of a document resembling Exhibit 11—the order setting the upcoming December 13 hearing. 3RP 92.

Le then failed to appear at the December 13 hearing and the superior court issued a warrant for his arrest. 3RP 67-68; Exhibit 13 (order for bench warrant).

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[6] The Community Center for Alternative Programs (CCAP) is an alternative to incarceration that provides a weekly itinerary of structured programs, with the goal of assisting attendees to develop behavioral modification skills. It also provides referrals to community-based services. See Community Center for Alternative Programs (CCAP). King County Department of Adult & Juvenile Detention. Available online at: http://www.kingcounty.gov/courts/detention/community_corrections/programs.aspx (last accessed May 14, 2015).

C. ARGUMENT

1. SUFFICIENT EVIDENCE PROVED THAT LE HAD BEEN RELEASED BY COURT ORDER.

Le argues that the evidence was insufficient to prove that he failed to appear at a hearing after being released from custody by court order. But the evidence, viewed in the light most favorable to the State along with all reasonable inferences, was sufficient for a reasonable fact finder to find precisely that. Le's claims should be rejected.

a. Additional Facts.

The facts relating to the bail jumping charge are discussed in narrative format, above. The State presents them as a timeline here for ease of reference:

- **June 3, 2013**—Le is charged with VUCSA in King County Superior Court under Cause No. 13-1-01775-6 SEA. 3RP 83-84.

- **August 7, 2013**—Le is transported back to Seattle from Spokane, in custody, after being arrested for another offense. 3RP 89.

- **August 14, 2013**—the superior court enters an order under Cause No. 13-1-01775-6 SEA, which Le signs, that schedules a pre-trial hearing and warns Le that he must be present at all future court dates or that a bench warrant may issue for his arrest. 3RP 60-61, 92; Exhibit 10.

- **October 24, 2013**—the superior court enters another order, continuing trial and setting an omnibus hearing for December 13, 2013. 3RP 61-63; Exhibit 11. Le was present when the superior court entered this order, along with his defense attorney and an interpreter. 3RP 64-66; Exhibit 12; see also Exhibit 9.

- **November, 2013 (exact date unknown)**—Le is released from custody pending trial. 3RP 89-92. He is provided, upon release, with a copy of a document resembling Exhibit 11—the order setting the upcoming December 13 hearing. 3RP 92.

- **December 13, 2013**—Le fails to appear at the scheduled omnibus hearing and the superior court issues a bench warrant for his arrest. 3RP 67-68, 77; Exhibit 13.

The trial court instructed the jury that, in order to convict Le of the crime of Bail Jumping, it would have to find 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 (Instruction 12) (emphasis added); 3RP 109; see RCW 9A.76.170(1).

In closing argument, Le's attorney argued that the State had failed to adduce sufficient evidence to prove a part of the third element—that Le had been released by court order. 3RP 122-24. The prosecutor countered that the only reasonable conclusion was that Le's release had been authorized by the court. 3RP 132. ("Now, unless he somehow dug himself out of custody, again, it is entirely reasonable. And there's no

indication that would possibly be the case. The only conclusion you can reach is, yes, he was released by court order.").

During deliberations, the jury submitted a question to the trial court, seeking clarification of what it meant to be released by court order. CP 75; 4RP 3. Le's trial attorney began to argue that the State had failed to produce an order of release, and to request a response on that basis.[7] 4RP 3. But in order to avoid commenting on the evidence, the trial court simply instructed the jury that, "You will not receive any further instruction on this issue." CP 76; 4RP 3-4. The jury convicted Le of Bail Jumping. CP 78; 4RP 5.

b. Standard Of Review.

Evidence is sufficient to support a criminal conviction if, after viewing the evidence in the light most favorable to the State, a rational fact trier could have found 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, as well as all reasonable inferences from the evidence, which must be drawn in favor of the State and against the defendant. Id. An appellate court defers to the trier of fact on all "issues of conflicting testimony,

[7] Tellingly, however, Le did not move to dismiss the bail jumping charge for insufficient evidence, either at the close of the State's case or at the close of all of the evidence. See 3RP 80-84, 96.

credibility of witnesses, and the persuasiveness of the evidence." State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), abrogated in part on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

c. The Evidence Proved That Le Had Been Released By Court Order.

On appeal, Le makes the same argument that his trial attorney did below: that the State failed to prove that he had been released from custody by court order. This argument fails because a reasonable fact finder could have inferred from the evidence that a court had authorized Le's release from custody.

The timeline above establishes that Le was taken into custody after charges were filed, and that, after appearing several times before the superior court, he was released pending trial. As the prosecutor asked rhetorically during closing argument, how else could Le have been released under these conditions unless authorized by the court? Viewed in the light most favorable to the State, along with all reasonable inferences, it was reasonable for the jury to conclude that Le's release was pursuant to court order.

Le essentially argues that the evidence was insufficient to prove that his release was authorized by court order because the jury *also* could have concluded that he had been granted bail:

> Le's testimony did not establish [that] he had been released by a court order. While Le stated that 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 . . . .

Br. of App't at 16.

This argument fails. Just because the jury might also reasonably have concluded that Le was released pursuant to bail does not mean that the jury's conclusion—that he was released pursuant to court order—was unreasonable.[8] Nor does the jury's reasonable interpretation of the evidence somehow "write out" an element out of the statute. Because it was reasonable for the jury to conclude that Le was released by court order, his conviction should be affirmed.

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[8] The State does not concede that being released pursuant to bail would somehow be insufficient to prove that a defendant was released pursuant to court order. Indeed, bail is set by the court. There is no reason to conclude that the Bail Jumping statute provides mutually exclusive alternative means of committing the crime. Ultimately, however, this question is irrelevant; the sole issue is whether the evidence was sufficient for a reasonable juror to conclude that Le was released by court order.

2. THE TRIAL COURT PROPERLY ADMITTED OFFICER CLARK'S TESTIMONY ABOUT UNDERCOVER SCHOOL.

Le argues that Officer Clark's use of the terms "bad guy" and "criminal" in describing her undercover training constituted an impermissible opinion of Le's guilt. This claim should be rejected. Officer Clark's testimony was not a comment on Le's guilt. Even if it was, any error was harmless beyond a reasonable doubt.

a. Additional Facts.

Before recounting her interaction with Le, Officer Clark testified about the training that she received in order to work on undercover narcotics investigations:

Clark: . . . In March of 2010, I attended the Seattle Police Department—well, they host it. It's open to law enforcement across the country. It's a two-week-long undercover school.

Prosecutor: And at this school, what do they teach you?

Clark: It's 10 working days, two weeks, but 10 working days. 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 [sic] police officers. We are portraying the bad

guy and how to get what we need to catch the bad guy in this role.

Defense: Your Honor, I'm going to object to the use of the term, "bad guy."

The Court: Overruled.

2RP 7.

b. Clark's Testimony Was Not An Impermissible Opinion Of Guilt.

Le is correct that a witness may not express a personal belief as to the guilt of a defendant. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Impermissible opinion testimony may be reversible error because it violates the defendant's constitutional right to a fair jury trial, specifically, the independent determination of the facts by the jury. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

But Clark did not opine on Le's guilt. She testified that undercover school taught her how to act like a "criminal" and "bad guy." 2RP 7. She did not apply these terms to Le; she was talking about her training. Moreover, it is undeniably true, as the jury would have understood, that the purpose of undercover school is to teach police officers how to mimic criminal behavior. Clark's description of this

training simply was not an opinion of guilt. Le's claim should be rejected.[9]

c. Any Error In Clark's Testimony Was Harmless Beyond A Reasonable Doubt.

Even if Clark's testimony could be construed as an improper opinion of guilt, Le's convictions should be affirmed because any error was harmless beyond a reasonable doubt. See State v. Hayward, 152 Wn. App. 632, 651-52, 217 P.3d 354 (2009) (improper opinion testimony subject to constitutional harmless error test). 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).

The remaining evidence in this case was overwhelming. Le effectively admitted to the VUCSA charge when he testified that he negotiated with Clark for the sale of drugs, and that he sold her two pills that he knew to be cold medicine. 3RP 85-88. This was in addition to the

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[9] This Court may also reject Le's claim on the grounds that he failed to preserve this issue for review. "A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial." State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) (emphasis added). Thus, an appellate court generally will not consider an issue raised for the first time on appeal. RAP 2.5(a); Kirkman, 159 Wn.2d at 926. Here, Le objected to the use of the term "bad guy" but did not state any grounds. 2RP 7. Arguably, he has failed to preserve any claim that Officer Clark's testimony was impermissible opinion. See State v. Carlson, 61 Wn. App. 865, 869-70, 812 P.2d 536 (1991) (objection to testimony without stating grounds failed to preserve claim that testimony admitted in error).

testimony of the police officers who witnessed the transaction or took part in Le's arrest (even finding the same pre-recorded "buy money" on Le's person), and the forensic scientist who tested the substance. 3RP 17, 34, 36, 37, 51.

As for the Bail Jumping charge, the jury obviously recognized that the sole contested issue was whether Le's release had been authorized by court order. CP 75; 4RP 3. This procedural requirement had nothing whatsoever to do with Clark's testimony. Because any error in Clark's testimony was harmless beyond a reasonable doubt, Le's convictions should be affirmed.

3. THE PROSECUTOR PROPERLY RESPONDED TO DEFENSE COUNSEL'S ARGUMENT IN REBUTTAL CLOSING ARGUMENT.

Le argues that the prosecutor committed misconduct by disparaging defense counsel during rebuttal closing argument, and that the asserted misconduct was so prejudicial that reversal is required. This claim is without merit. The challenged statements were proper because they were made specifically in response to arguments by Le's trial attorney, and concerned whether those arguments were supported by the evidence. Even if the prosecutor's statements were improper, they were harmless.

a. Additional Facts.

In closing argument, despite Le's admissions on the stand, Le's attorney argued that there was "no testimony" that Le had negotiated any sort of drug transaction with Clark. 3RP 120-21; but see 3RP 87. She also argued that there was "no testimony" that Le had any knowledge of the type of substance that he gave to Clark—despite his testimony that he sold her cold medication, which he had tested first by trying to smoke. 3RP 121; but see 3RP 88.

Le's attorney then argued that Clark was "obviously" biased against homeless people and that Clark's alleged beliefs were "not appropriate":

> **Defense:** . . . So when you go through these jury instructions, and when you look at the evidence, and you look at the—especially the demeanor and attitude of the jurors [sic], 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 [sic] them in that way, you certainly can't let her biases and beliefs impact you as jurors and the jury instructions [sic].
>
> I should tell you that, that, you know, that's not appropriate to be biased against somebody because of their circumstances in life . . . .

3RP 128.

The prosecutor then responded to defense counsel's argument that there was no evidence of Le's guilt, and that Clark was simply biased against people like Le. He suggested that this argument could be reduced to two basic assertions: (1) that the police officers were somehow conspiring, because of their biases, against the homeless, (2) or that Clark, as a function of her biases, had somehow grossly misunderstood her interactions with Le:

Prosecutor: . . . [The] 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.

Defense: Objection, misstates Defense counsel's argument.

The Court: Overruled.

Prosecutor: 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, but not only just—not just her. She would also have to have Officer Witherbee, who found the buy money on Mr. Le, Officer Silva, who arrested him, Officer Blackburn, who took the drugs from Officer Clark, the drugs that she had been given by Mr. Le, and Officer Lilje, who observed pretty much all of the interaction—all of them would have to be involved with this conspiracy for some reason against the Defendant.

Defense: Objection, Your Honor.

The Court: Overruled.

Prosecutor: That is wholly unreasonable and, if you want to follow Defense down Alice's rabbit hole through that line of argument—

Defense: Objection, Your Honor—

The Court: Overruled.

Defense: —disparaging counsel.

The Court: Overruled.

3RP 130-31.

The prosecutor then referred back to the evidence at trial, explaining that counsel's argument was unreasonable in light of the fact that Le had testified that he negotiated a drug sale with Clark and that he had even tried smoking the cold medication first:

Prosecutor: 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. Additionally, the Defense is asserting, "Well, this is a coincidental misunderstanding, that, you know, Mr. Le wasn't trying to sell her any drugs, he was just trying to steal the [money] from her." And you know what? He testified to that end.

He also testified that, when it didn't work, when she wouldn't give him the money, he decided he would trick her by giving her the drugs that didn't work for him and trying to sell them to her. So apparently, though, that doesn't count as a transaction, the fact that not only did Officer Clark testify that they spoke about making this exchange, but Mr. Le admitted it himself.

> And so, again, to conclude otherwise would be patently unreasonable. And all of the evidence that's been presented establishes beyond a reasonable doubt that, yes, there was an exchange, a knowing exchange on behalf of Mr. Le for these drugs, for money in exchange for fake drugs . . . .

3RP 131-32.

b. Standard Of Review.

Appellate courts review a trial court's rulings on allegations of prosecutorial misconduct under an abuse of discretion standard. State v. Lindsay, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). The defendant must show that the comments were both improper and prejudicial. Id. at 430. In other words, the defendant bears the burden of showing that there is a substantial likelihood that any improper conduct affected the jury. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

"As an advocate, the prosecuting attorney is entitled to make a fair response to the arguments of defense counsel." State v. Brown, 132 Wn.2d 529, 566, 940 P.2d 546 (1997). A prosecutor can of course argue that the evidence does not support the defense theory. Lindsay, 180 Wn.2d at 431. Indeed, a prosecutor has wide latitude, in closing argument, to draw and express reasonable inferences from the evidence. State v. Gentry, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995). This is especially so in rebuttal closing argument, so long as the prosecutor's

argument is in response to arguments made by defense counsel, and the prosecutor's comments refer to the evidence. See State v. McKenzie, 157 Wn.2d 44, 52-57, 134 P.3d 221 (2006) (prosecutor's repeated use of term "guilty" during rebuttal argument not misconduct where prosecutor was responding to defense theory and referring to evidence).

It is improper, however, for a prosecutor to impugn defense counsel's integrity or to disparage defense counsel. Lindsay, 180 Wn.2d at 431-32. But such "[r]emarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

c. The Prosecutor's Argument Was Proper.

When defense counsel below claimed that there was no evidence of Le's guilt, and that Clark was biased against people like Le—and went so far as to inject her personal opinion that Clark's alleged beliefs were "not appropriate," 3RP 120-21, 128—the prosecutor properly responded to these arguments. The prosecutor explained that this argument was not supported by the evidence: first, because there was nothing in the record to establish that the police targeted Le because of bias; and second, because

there was in fact ample evidence of Le's guilt, including his own admissions. 3RP 130-32.

While the prosecutor could have expressed his rebuttal argument more artfully, or perhaps in more measured tones, the use of strong language to attack an argument does not equate to disparaging defense counsel. See Brown, 132 Wn.2d at 566 ("The use of the word 'ludicrous' [in rebuttal closing argument] was simply editorial comment by the prosecuting attorney which was a strong, but fair, response to the argument made by the defense."). Defense counsel's argument below was wholly unsupported and bafflingly at odds with Le's own testimony.[10] The prosecutor did not commit misconduct by responding forcefully to counsel's unsupported argument. Le's claim should be rejected.

Even if the prosecutor's comments were improper, Le's claim should still be rejected because Le has failed to demonstrate prejudice. As noted, the evidence of Le's guilt was overwhelming. Defense counsel's arguments were fatally undermined by the evidence, not by the prosecutor's comments. Because any improper comments simply were not prejudicial, Le's convictions should be affirmed.

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[10] Indeed, it was defense counsel below who made improper argument, as Le all but concedes on appeal. "While the State might be in denial about the social injustice of enforcing harsh drug policy against persons in Le's position," he writes, "defense counsel's arguments expressed hope that Seattle jurors were in better touch with reality." Br. of App't at 26-27. Such arguments simply urge jury nullification.

4. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE MEANING OF REASONABLE DOUBT.

Le asserts that the trial court instructed the jury on an incorrect definition of reasonable doubt. He claims that WPIC 4.01, the pattern instruction used in this case, misstates the burden of proof by defining a reasonable doubt as "one for which *a* reason exists." WPIC 4.01 (emphasis added); see CP 63 (Instruction 3) ("A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence."). This, he claims, improperly requires the jury to articulate a reason for its doubt.

Le's claim should be rejected. The Washington Supreme Court expressly has approved of WPIC 4.01 as an accurate statement of law that properly instructs the jury on the meaning of reasonable doubt.

a. Additional Facts.

The trial court instructed the jury using WPIC 4.01, which defines reasonable doubt as one for which a reason exists:

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 63 (Instruction 3); 3RP 106-07.

Le took exception to the "abiding belief" language contained in WPIC 4.01, but did not object to the definition of reasonable doubt as "one for which a reason exists."[11] 3RP 100.

b. The Trial Court Properly Instructed The Jury On The Meaning Of Reasonable Doubt.

"Generally, a criminal defendant may not raise an objection to a jury instruction for the first time on appeal unless it relates to a 'manifest error affecting a constitutional right.'" State v. O'Donnell, 142 Wn. App. 314, 321-22, 174 P.3d 1205 (2007) (quoting RAP 2.5(a)(3)). Le's claim fails because there was no error, let alone a manifest constitutional error. The Washington Supreme Court expressly has approved WPIC 4.01. Le has not shown that it is incorrect and harmful.

WPIC 4.01 expressly was approved by the Washington Supreme Court in State v. Bennett, 161 Wn.2d 303, 317-18, 165 P.3d 1241 (2007). There, the court noted that the instruction was adopted from well-established language in State v. Tanzymore, 54 Wn.2d 290, 340 P.2d 178 (1959), in which the court, nearly sixty years prior, observed that "'[t]his instruction has been accepted as a correct statement of the law for so many years, we find the assignment [of error criticizing the instruction] without

[11] The "abiding belief" language is contained in brackets in the pattern instruction and is optional. See WPIC 4.01 and cmt (3d Ed. 2014). Le's sole objection below was to the inclusion of this language. 3RP 100. He does not assign error to the "abiding belief" language on appeal, but only to the definition of reasonable doubt as "one for which a reason exists." Br. of App't at 2, 28-35.

merit.'" Bennett, 161 Wn.2d at 308 (quoting Tanzymore, 54 Wn.2d at 291 (alterations in original as quoted)). Indeed, the court in Bennett approved so strongly of WPIC 4.01 that it exercised its inherent supervisory authority to require trial courts in this state to use WPIC 4.01—and *only* WPIC 4.01—in defining reasonable doubt. 161 Wn.2d at 318.

Le has provided this Court with no basis upon which to depart from the holding of the Washington Supreme Court in Bennett. See State v. Watkins, 136 Wn. App. 240, 246, 148 P.3d 1112 (2006) (observing that the Court of Appeals will follow the precedent of the Washington Supreme Court). Even if this Court were inclined to entertain a challenge to controlling state supreme court precedent, Le bears the burden of making a "clear showing" that WPIC 4.01 is "incorrect and harmful." In re Stranger Creek & Tributaries in Stevens Cnty., 77 Wn.2d 649, 653, 466 P.2d 508 (1970). He has not done so.

Le relies on the "fill in the blank" line of cases typified by State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012), for the proposition that the inclusion of the indefinite article "a" before "reasonable doubt" incorrectly requires jurors to articulate a specific reason for their doubt. Br. of App't

at 30-31 (citing Emery, 174 Wn.2d at 759). But Le's argument actually fails under Emery. In that case, although holding that the prosecutor committed misconduct by urging the jury to articulate a reason for its doubt (i.e., to fill in the blank), the Washington Supreme Court observed that the prosecutor had "properly describ[ed] reasonable doubt as a 'doubt for which *a* reason exists[.]'" 174 Wn.2d at 760 (emphasis added). Emery prohibits only the *misuse* of this definition by prosecutors in closing argument; it starts with the premise that the definition itself is correct.[12]

Le's precise argument has also been raised and rejected before, in the Court of Appeals. In State v. Thompson, 13 Wn. App. 1, 533 P.2d 395 (1975), the defendant argued that the phrase "'a doubt for which a reason exists'. . . misleads the jury because it requires them to assign a reason for their doubt, in order to acquit[.]" Id. at 4-5. The court rejected this argument because "the particular phrase, when read in the context of the entire instruction does not direct the jury to assign *a reason* for their

[12] Le concedes that the Emery court observed that this definition of reasonable doubt is correct, but argues that the court did so without explanation or analysis. Br. of App't at 33-34. But it is unsurprising that the court felt little need to explain its observation, given that this definition has repeatedly been approved for decades. Regardless, the lack of explication in Emery does not mean that WPIC 4.01 is incorrect and harmful. Le has failed to meet his burden under In re Stranger Creek. 77 Wn.2d at 653.

doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary."[13] Id. at 5 (emphasis added).

Even if viewed separately from these controlling authorities, Le's argument is a hypertechnical exercise in semantics that must fail. "The test for determining if jury instructions are misleading is not a matter of semantics, but whether the jury was misled as to its function and responsibilities under the law." State v. Brown, 29 Wn. App. 11, 18, 627 P.2d 132 (1981); see also Wims v. Bi-State Dev. Agency, 484 S.W.2d 323, 325 (Mo. 1972) ("We have recently said that in determining the legal sufficiency of instructions . . . the court should not be hypertechnical in requiring grammatical perfection, the use of certain words or phrases, or any particular arrangement or form of language, but . . . should be concerned with the meaning of the instruction . . . to a jury of ordinarily intelligent laymen. And it has often been recognized that juries are composed of ordinarily intelligent persons who should be credited with having common sense and an average understanding of our language.") (internal quotation marks and citations omitted).

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[13] The Thompson court also observed that the phrase "ha[d] been declared satisfactory in this jurisdiction for over 70 years." 13 Wn. App. at 5 (citing State v. Harras, 25 Wash. 416, 65 P. 774 (1901)). The court made that observation in 1975, forty years ago. With Bennett and Emery, the phrase has now been approved for over 110 years.

Put another way, by the United States Supreme Court:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Boyde v. California, 494 U.S. 370, 380-81, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990).

Le's claim is unavailing because he assumes that jurors lack a commonsense understanding of the English language and that they would engage in hypertechnical hairsplitting. The trial court properly instructed the jury on the meaning of reasonable doubt.

5. THE CUMULATIVE ERROR DOCTRINE IS INAPPLICABLE.

Le claims that the doctrine of cumulative error requires reversal of his convictions. This doctrine applies "only when several trial errors occurred which, standing alone, may not be sufficient to justify a reversal, but when combined together, may deny a defendant a fair trial." State v. Hodges, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). Le's claim fails because there were no errors. Even if there were errors, his claim still fails because any errors were "few and ha[d] little or no effect on the outcome of the trial." State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). Le's convictions should be affirmed.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Le's convictions.

DATED this 18th day of May, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Kevin A March, the attorney for the appellant, at MarchK@nwattorney.net, containing a copy of the Brief of Respondent, in State v. Than Dinh Le, Cause No. 72166-6, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 18th day of May, 2015.

Name:
Done in Seattle, Washington