NO. 73026-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JASON BENSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LEROY MCCULLOUGH

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Constitutional Provisions

Washington State:

Statutes

Washington State:

Rules and Regulations

Washington State:

Other Authorities

A. ISSUES PRESENTED

1. When a deliberating jury communicates a question to the trial court, it is error to fail to notify the parties; but the error is harmless if the court's response to the jury was neutral, such as referring the jury to the original instructions. On the other hand, trial judges violate the state constitution by commenting on the evidence and ultimate factual issues, even implicitly. During deliberations in Benson's trial for assaulting and disarming a sheriff's deputy, the jury handed the bailiff a question asking the judge to tell them which physical act was the assault. The bailiff told the jury to refer to the original instructions, but the court did not notify the parties. Was the error harmless?

2. Improper opinion testimony on guilt is not manifest constitutional error unless the witness statement is explicit or almost explicit on an ultimate issue of fact and is actually prejudicial. In Benson's trial, two police witnesses inadvertently used the word "assault," in violation of a pretrial order, to describe Benson's actions. In each instance, the court instructed the jury to disregard the term "assault." Did the trial court exercise proper discretion in denying a mistrial?

3. It is misconduct for a prosecutor to state a clear, unmistakable and prejudicial personal opinion as to the guilt of the defendant. If the defendant does not object at the time, he must show that no instruction would have cured the prejudice. In Benson's trial for disarming a sheriff's deputy, the prosecutor asked a sheriff's sergeant about the importance of maintaining control of a weapon. When Benson objected to relevance, the prosecutor told the judge that "the State believes he pulled the Taser" from the victim deputy. Benson did not object to that comment. Has Benson failed to show that the prosecutor's restatement of the charge was improper? If not, was it curable with a simple jury instruction to disregard the comment?

4. It is misconduct for a prosecutor to state a clear, unmistakable and prejudicial personal opinion vouching for a witness's credibility; but it is not vouching to ask direct-examination questions that reasonably anticipate defense attacks on a witness's credibility. In Benson's trial for assaulting and disarming a deputy — where the defense was based on accusing the deputy and his partner of colluding in perjury — the prosecutor prefaced a question to the deputy about collusion by saying, "I'm embarrassed to ask this, but ...." Benson objected to the form of the question; the

prosecutor rephrased; and the deputy answered, without further objection, that he did not collude with his partner. Is Benson unable to show misconduct?

5. It is not misconduct for a prosecutor to use the phrase "we know" in closing argument when she is marshaling the evidence and the inferences from the evidence. The prosecutor in Benson's trial used the phrase "we know" on numerous occasions to summarize and draw conclusions from the evidence. Has Benson failed to show misconduct?

6. Several harmless errors sometimes can accumulate to require reversal, but Benson has the burden to show such harm. The only error in Benson's trial was the bailiff's harmless mishandling of the jury question. Has Benson failed to show cumulative error requiring reversal?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Jason Benson was charged by First Amended Information with Disarming a Law Enforcement Officer and Assault in the Third Degree, alleging that on November 1, 2012, in King County, Washington, he knowingly and without consent removed a firearm or weapon from Paul Mulligan, a law enforcement officer,

with intent to interfere with his duties; and intentionally assaulted Mulligan while Mulligan was performing his official duties. CP 25-26. In November 2014, a jury convicted Benson as charged. CP 52-53. The court sentenced Benson within the standard range to four months of work release and a month of community service. CP 82. Benson timely appealed. CP 88.

2. SUBSTANTIVE FACTS

On November 12, 2012, Jason Benson was staying with a family friend, Drew Galas, in Burien. 4RP 593[1]. That night, Benson was drinking with his adult son, J.T., when J.T. became ill. 4RP 594-96. Benson called 911. 4RP 598. King County Sheriff's Deputies Scott Fitchett and Paul Mulligan were dispatched to the residence along with aid personnel. 2RP 226-27. The deputies had to make sure the scene was safe before aid could go in. 2RP 226. When the deputies arrived, Galas came outside to meet them. 3RP 454; 4RP 598. Benson opened the front door and cursed. 3RP 455.

[1] The verbatim reports of proceedings are sequentially numbered but divided into multiple volumes, which will be referred to in this brief as 1RP (Vol. 1, November 10, 2014); 2RP (Vol. 2, November 12, 13, 17, 18, 2014); 3RP (Vol. 3, November 19, 2014); 4RP (Vol. 4, November 20, 2014); and 5RP (Vol. 5, November 24, 2014 and January 16, 2015).

The deputies followed Galas into the home. 3RP 456. It was very dark inside, except for a light in the kitchen. Id. The officers saw Benson's son lying on the floor. 2RP 231; 4RP 456. Benson immediately confronted the deputies and asked, "Who the fuck are you?" 2RP 232. The deputies tried to explain their role, but Benson said, "I don't need the fucking police; I need an ambulance." Id. Benson seemed quite intoxicated. 4RP 513, 548.

Benson then walked directly toward the deputies, and hit Deputy Mulligan with a forearm or shoulder as he went past. 2RP 234; 3RP 459. The force was enough to knock the 6-foot-2, 210-pound Mulligan off balance. 4RP 472. Mulligan thought it was an aggressive act, but chose to "show some restraint" because he wanted to help Benson's son. 3RP 460. Benson was still yelling profanely at the deputies. 2RP 236.

The deputies began commanding Benson to calm down and to put his hands behind his back, but Benson picked up a phone and called 911. 2RP 235-39. The call recorded many of the sounds of the rest of the incident. 2RP 273-83; 4RP 500-11. At some point during Benson's rant, the deputies drew their Tasers and told Benson he would be "tased" if he didn't calm down.

2RP 242. Benson replied by demanding that they tase him. 2RP 243.

On the phone with 911, Benson continued to curse at the officers; he threatened to take away a deputy's Taser; and he told the 911 operator he was "going to fucking whoop the shit out of them." 4RP 501, 504. Suddenly, Benson charged at Deputy Fitchett in a head-lowered "bull rush." 2RP 243; 4RP 477.

Fitchett kicked Benson. 2RP 244. Benson staggered backward momentarily, then continued his charge. 2RP 244-45. Fitchett shot his Taser at Benson. 2RP 245. Benson kneeled, snapped the Taser wires, and charged again. 2RP 245-46. Deputy Mulligan shot his Taser at Benson. 2RP 248. Benson again ripped away the wires and went at Mulligan. 2RP 249. Mulligan tried to shock Benson with the tip of his Taser, to no effect. 4RP 481. Benson forced Mulligan up against a wall and punched him. 2RP 249. Benson grabbed Mulligan's Taser and they struggled over it. 2RP 250; 4RP 482. Fitchett dropped his Taser and began punching Benson to get him off Mulligan. 2RP 251. Still, Benson wrenched Mulligan's Taser from his hand. 4RP 483.

As Mulligan and Fitchett continued to battle Benson, Mulligan picked up Fitchett's Taser and used it to drive Benson to

the ground. 2RP 255. Fitchett wrested Mulligan's Taser out of Benson's hand. 2RP 253. The deputies handcuffed Benson, but he continued to fight, kick and curse. 2RP 256; 4RP 486-91. He told the deputies, "Fuck you, I'm going to kill you." 4RP 489.

During the fracas, Deputy Mulligan had activated an emergency button on his radio, and several other deputies, sergeants and detectives rushed to the scene. 2RP 189, 191, 258. After Benson was placed in a patrol car, he continued to yell at deputies, and seemed confused as to which of the deputies he had been fighting with. 2RP 196-97; 4RP 569. He said he had taken it easy on the deputies, but next time he would "fuck them up." 2RP 198.

C. ARGUMENT

1. THE BAILIFF'S HANDLING OF THE JURY QUESTION WAS HARMLESS.

Benson contends first that he did not receive a fair trial because the parties were not informed that the trial court's bailiff had replied to a question from the jury, which sought specific factual guidance, by telling the jurors to refer to the original jury instructions. The error was absolutely harmless because the bailiff gave a neutral response with no additional instruction. Benson's suggested responses would have been manifestly unconstitutional.

a. Additional Relevant Facts.

During deliberations, a juror handed the bailiff a written question pertaining to the assault charge. 5RP 722. The bailiff later recalled that the question sought direction to the specific incident that the assault was based on, and would have called on the judge to respond to "details of the trial." 5RP 522, 525. One of the jurors also asked, as the bailiff later recalled, "Which one is it? Is it the – did he punch? Is it from the punch or is it from some shoulder move or something of that sort?" 5RP 725. The bailiff replied that the judge "cannot answer that question," and she said, "Please refer to your jury instructions." Still, the bailiff offered to deliver the written question to the judge anyway. 5RP 722. The juror said "we'll just move on," and took the note back. 5RP 723.

The note apparently was lost, but after the trial, Benson obtained declarations from five jurors. CP 63-72. Those jurors recounted that the jury wanted the court to state what part of the incident was the assault. See CP 63 ("what part of the incident was the assault); CP 65 ("what part of the incident was an assault"); CP 68 ("something to the effect of if we could take another action besides the shoulder bump as the assault"); CP 69 ("identifying what was the assault ... what should be considered as the

assault"); CP 71 ("if the shoulder bump was the only thing we were to consider as assault").

The bailiff informed the judge of the question before the verdict, but the court did not notify the parties. 5RP 728. Benson's lawyer learned of the question while talking to jurors after the verdict. 5RP 730.

Benson moved for a new trial. 5RP 729-33; CP 55-60. The court denied the motion. 5RP 746. While the court rule requiring party notification and input was violated in "spirit at a minimum," the court found, the error was harmless because even if the parties had been notified, "the appropriate response would have been 'Refer to your instructions.'" 5RP 742-45. The court also noted that both parties had been clear in closing arguments that the assault charge was based on the so-called shoulder check. 5RP 745. See also 5RP 677-78 (State described "shoulder checking" and said "that's an assault."); 5RP 704 (Defense: "The State says that Mr. Benson is guilty of felony assault for bumping in with his shoulder to Deputy Mulligan").

b. The Bailiff's Response And The Court's Failure To Notify Parties Was Harmless.

In a criminal proceeding, a new trial is necessary only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly. State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). The granting or denial of a new trial is a matter primarily within the discretion of the trial court, and the decision will not be disturbed unless there is a clear abuse of discretion. Id. An abuse of discretion occurs only "when no reasonable judge would have reached the same conclusion." Id.

Court rules require the trial court to notify the parties of a jury question, allow the parties to comment on a response, make the question part of the record, and respond in open court or in writing. CrR 6.15(f)(1). Any communication between the court and the jury in the absence of the defendant or defense counsel is error. State v. Jasper, 158 Wn. App. 518, 541, 245 P.3d 228 (2010), as amended on denial of reconsideration (Dec. 1, 2010), aff'd, 174 Wn.2d 96, 271 P.3d 876 (2012). The bailiff is the "alter-ego" of the judge and is bound by the same constraints. Bourgeois, 133 Wn.2d at 407. Nevertheless, the defendant must show prejudice,

and the State may demonstrate that the error was harmless. Jasper, 158 Wn. App. at 541.

The trial court has the discretion to decide whether to give further instructions to the jury after deliberations have begun. Id. at 542. The trial court has no duty to provide a jury with additional instructions after they have begun deliberating. State v. Campbell, 163 Wn. App. 394, 402, 260 P.3d 235 (2011), review granted, cause remanded on other grounds, 175 Wn.2d 1021, 288 P.3d 1111 (2012). Where the given instructions accurately state the law, the trial court need not further instruct the jury. Id. That has "long been the law" in Washington. Id. (citing Mott Iron Works v. Metro. Bank, 90 Wash. 655, 658-60, 156 P. 864 (1916)).

In cases of improper ex parte jury communication, the error is harmless if the trial court's response "is negative in nature and conveys no affirmative information." State v. Russell, 25 Wn. App. 933, 948, 611 P.2d 1320 (1980) (telling jury ex parte that an instruction "meant exactly what was written" was harmless). Referring the jury to previous instructions is neutral and harmless, even if it does not answer the jury's question. State v. Langdon, 42 Wn. App. 715, 717-18, 713 P.2d 120 (1986) (jury asked for help

defining a word in the instructions; bailiff referred it to the instructions).

Moreover, the Washington State Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. art. IV, § 16. This provision prohibits a judge from conveying to the jury his or her personal attitudes toward the merits of the case or instructing a jury that matters of fact have been established as a matter of law. State v. Besabe, 166 Wn. App. 872, 880, 271 P.3d 387 (2012). The court's personal feelings on an element of the offense need not be expressly conveyed; it is sufficient if they are merely implied. Id. Thus, "any remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment," and would be manifestly unconstitutional. Id. (citing State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006)).

Here, the trial court did not abuse its discretion in denying Benson a new trial because the bailiff's erroneous ex parte communication with the jury was harmless. The court was not obligated to give any further instruction. The bailiff's response to the jury conveyed no additional information, and was no different than other cases where this Court has found trial-court responses

to be neutral and harmless. See Besabe, 166 Wn. App. at 882-83 (court's response, "Please follow all of the instructions, including instruction 30," was harmless); State v. Allen, 50 Wn. App. 412, 420, 749 P.2d 702 (1988) (court's response, "Read your instructions and continue with your deliberations," was harmless).

Even assuming that the court had sought Benson's input on a response, Benson could not have required the court to give an answer. See Allen, 50 Wn. App. at 420. And the only proper responses were either no response at all or to refer the jury to the instructions. That is because the jury asked the court to tell them specifically what "was the assault." CP 63, 65, 68, 69, 71. There was no way for the judge to answer that question affirmatively without declaring that there *was* an assault — essentially declaring Benson guilty. Obviously, that would have been manifest constitutional error.[2]

Benson offers two responses the court should have given: (1) "To convict the defendant of Assault in the Third Degree you

[2] After all, Benson also is contending that when a sheriff's deputy and a sergeant merely uttered the word "assault" in their testimony, it "constituted impermissible comments on guilt that prejudiced Benson's right to an impartial jury verdict" to a constitutional degree. Brief of Appellant at 27. Though the State disagrees with Benson on that point, certainly Benson cannot argue that a trial judge explicitly specifying "what was the assault" would not have been a much greater error.

must agree the specific act of a shoulder bump was proved"; or (2) "For Count II, the State has elected to charge only the specific act of shoulder checking." Brief of Appellant (BOA) at 16-17. Had the judge given either of these instructions, Benson would now be demanding reversal for it — and he would be right.

First, by replying to a question, "What was the assault?" by discussing a "shoulder bump" or "shoulder checking," the judge would have been saying, "The shoulder bump was the assault." Second, even adopting the terms "shoulder bump" or "shoulder checking" would have characterized the evidence in favor of the State, and tacitly affirmed that such an act occurred.[3] See Besabe, 166 Wn. App. at 880 (court violates constitution by merely implying feelings on an element). It is reversible error to instruct the jury in a manner relieving the State of its burden to prove every element. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

[3] The terms "shoulder check" and "shoulder bump" were never used by the witnesses until the prosecutor characterized Benson's contact with Deputy Mulligan as such. See 2RP 234-35 (*Fitchett:* Benson "hit [Mulligan] with his forearm." ... *Prosecutor:* Do you know what Deputy Mulligan was doing at that point when Mr. Benson shoulder checked him?"); 3RP 459 (*Mulligan:* Benson "kind of threw his shoulder into me." ... *Prosecutor:* "Whether that individual went by and shoulder checked you ..."). In fact, Benson objected to the prosecutor's use of "shoulder check," pointing out that the witness did not use that term, and, "I'm not sure where that comes from." 3RP 460.

In this case, that includes whether, and how, physical contact occurred.

Moreover, Benson's proposed supplemental instructions would have been unconstitutionally erroneous because they would have disposed of most of the elements of third-degree assault. Benson's first proposal, especially, would have told the jury that all it needed to decide to "convict the defendant of Assault in the Third Degree" was that the "specific act of a shoulder bump was proved." BOA at 16-17. That ignores all the other elements of the crime, including that the contact was offensive, and that the deputy was performing his law-enforcement duties at the time. See RCW 9A.36.031; WPIC 35.23.02, 35.50. In short, nothing the trial court could have said — except nothing, or "refer to your instructions" — would have been neutral.

Still, Benson contends that the trial court had a duty to say *something*, because the jurors made it clear they were confused about the instructions. To make this assumption, this Court would have to delve into the five jurors' declarations about their individual thoughts and the deliberation process, but "individual or collective thought processes leading to a verdict 'inhere in the verdict' and cannot be used to impeach a jury verdict." State v. Ng, 110 Wn.2d

32, 43, 750 P.2d 632 (1988). That includes information that some jurors misunderstood or failed to follow the judge's instructions. See Ayers v. Johnson & Johnson Baby Products Co., 117 Wn.2d 747, 769, 818 P.2d 1337 (1991). This Court may consider only the question itself, which asked the court to tell them what the assault was — in other words, what verdict to reach.

To allege a duty to further instruct the jury, Benson has to look outside Washington to federal court. Even so, none of his cited cases help him. In Bollenbach v. United States, the problem with the federal criminal trial was not that the trial judge failed to elaborate for a confused jury — it was that the extra instruction he gave was "simply wrong." 326 U.S. 607, 613, 66 S. Ct. 402, 90 L. Ed. 350 (1946). In Davis v. Greer, the trial court fulfilled its duty to assist the jury on a legal question by "directing the jury to reread the instructions carefully." 675 F.2d 141, 145 (7th Cir. 1982). In United States v. Nunez, the jury sought clarification on a legal standard, not a fact question, and the appellate court was quick to note that "the court must be careful not to invade the jury's province as fact-finder." 889 F.2d 1564, 1569 (6th Cir. 1989).

Much more recently, the U.S. Supreme Court held that when a jury has a question but had been adequately instructed, the

Constitution does not require anything more than referring the jury back to the original instruction. Weeks v. Angelone, 528 U.S. 225, 234, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000). And in Waddington v. Sarausad, the high court reviewed a Washington state-court murder trial and held that referring the jury to instructions was not error even where the jury may have shown "substantial confusion about what the State was required to prove." 555 U.S. 179, 195, 129 S. Ct. 823, 172 L. Ed. 2d 532 (2009).

Even if Benson could portray the jury's question as indicative of confusion or of an inadequate instruction, any response beyond referring the panel to the previous instructions would have invaded the jury's fact-finding province and violated the state constitution. The bailiff's response in this case, though improper in its execution, was wholly harmless.

2. THE TRIAL COURT'S REMEDIES FOR INADVERTENT USES OF THE WORD "ASSAULT" WERE PROPER.

Benson contends next that he did not receive a fair trial because a sheriff's deputy and sergeant inadvertently used the verb "assault" during their testimony, which Benson portrays as improper opinions of guilt. His claims are baseless. In the first instance, the trial court instructed the jury to disregard the deputy's

entire answer, and acted well within its discretion in denying a mistrial because there was no likelihood that the word had any impact on the jury. In the second instance, the court sustained Benson's objection and instructed the jury to disregard the use of the word, and Benson sought no further relief. Benson cannot show abuse of discretion in the first instance, and he has waived any challenge to the second instance because he got all the relief he asked for. Benson cannot show manifest constitutional error because the uses of the word "assault" were not actually opinions of guilt, and thus were not improper.

a. Additional Relevant Facts.

Prior to trial, the court granted Benson's motion to preclude any State witness from describing Benson's conduct as an assault. 1RP 62-63.

When Deputy Fitchett testified about seeing Benson hitting Deputy Mulligan with his forearm, knocking him backward as Benson went for the phone, Fitchett said he was "in shock" and did not understand what had just happened. 2RP 234. Fitchett said he and Deputy Mulligan were "taken aback," and Fitchett asked Mulligan if he had "missed something." 2RP 235. The prosecutor asked Fitchett to clarify, and Fitchett replied, "I – again, I wasn't –

I was surprised. I was in – somewhat in shock that it – that we were there for an aid call and now he [Mulligan] had been assaulted." Id.

Benson immediately objected and moved "to strike." 2RP 236. The court responded, "The jury will disregard the witness's last answer." Id. The prosecutor then resumed her direct examination, asking Fitchett to explain what he did in response to being shocked. Id. Fitchett went on to describe his attempts to get Benson under control. Id.

At the next recess, Benson asked for a mistrial, claiming Fitchett's violation of the pretrial order "causes me great concerns." 2RP 260. Benson argued that the court's instruction to disregard would not be sufficient to cure the prejudice because there was "cumulative prejudice." 2RP 262. The court denied the motion, saying that Fitchett's use of the word was not flagrant or intentional, and, "I don't believe that there's a substantial likelihood that there's an impact on the jury in light of the information that preceded the motion that the jury already had." 2RP 262-63.

Later, Sheriff's Sergeant Rodney Chinnick testified that his ultimate conclusion from a use-of-force investigation was that "it was within department policy." 3RP 386. Benson did not object.

Id. During cross examination, Benson invited Chinnick to explain how his conclusions might have changed if the deputies were exaggerating Benson's aggression or gave inconsistent accounts, and Chinnick said that he considered the facts in the "light that is least beneficial" to the deputies and still concluded that they were "dealing with somebody who is combative." 3RP 417.

On redirect, the prosecutor asked Chinnick to further explain, and Chinnick said, "Because they were in one heck of a fight with somebody who may be trying to do them harm, and a Taser is a very minimum use of force to overcome that resistance and that assault." 3RP 431-32.

Benson objected and moved to "strike the issue of assault." 3RP 432. The court said, "The jury is instructed to disregard the use of the term assault." Id. Benson did not ask for any further instructions, and did not seek a mistrial; the prosecutor continued with questioning. Id.

b. The Trial Court Exercised Proper Discretion In Denying A Mistrial For Deputy Fitchett's Comment.

A trial court's denial of a motion for a mistrial is reviewed for abuse of discretion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). In evaluating this claim, the reviewing court considers

(1) the seriousness of the irregularity, (2) whether the irregularity involved cumulative evidence, and (3) whether the trial court instructed the jury to disregard the evidence. Id. Those factors are considered with deference to the trial court because the trial court is in the best position to discern prejudice. State v. Garcia, 177 Wn. App. 769, 777-78, 313 P.3d 422 (2013). A trial court should grant a mistrial only if there is such prejudice that nothing short of a mistrial will ensure the defendant a fair trial. Emery, 174 Wn.2d at 765. An abuse of discretion will be found for denial of a mistrial only when no reasonable judge would have reached the same conclusion. Id. In addition, "Washington courts have, for years, firmly presumed that jurors follow the court's instructions." Diaz v. State, 175 Wn.2d 457, 474, 285 P.3d 873 (2012).

Benson is complaining about violations of the trial court's pretrial order, which are trial irregularities that should be reviewed for abuse of discretion. As to the first irregularity — Fitchett's uttering the word "assaulted" — the trial court acted well within its discretion in denying Benson's motion for a mistrial. Applying the three-prong considerations articulated in Emery, *supra*:

- (1) Fitchett's use of the word "assaulted" was insignificant, given the entirety of the State's case. The State presented blow-by-blow accounts of the incident, along with a

soundtrack in the form of Benson's own 911 call. The jury had ample specific evidence to reach intelligent conclusions. As the trial judge said, it was unlikely that Fitchett's comment had any impact on the jury.

- (2) The stricken testimony was quite cumulative, because the jury heard Fitchett's previous testimony — that Benson had hit Mulligan; that this shocked Fitchett; and that the deputies were both taken aback. 2RP 234-35. Benson did not object to any of this. Id. And the jury further heard that Fitchett decided to get Benson under control because, "Mr. Benson had hit Deputy Mulligan; that he was screaming profanity; that the situation was not safe for aid crew to come in; and that there was a time-sensitive matter of someone allegedly overdosing on alcohol." 2RP 236-37. Benson did not object to any of this. Id.

- (3) Perhaps most important, the court instructed the jury to disregard Fitchett's entire answer that contained the word "assaulted," and the jury is presumed to follow the court's instructions. 2RP 236; Diaz, 175 Wn.2d at 474.

Benson cannot show that no reasonable trial court would deny a mistrial under these circumstances. There was no error.

c. Benson Has Waived Any Challenge To Sergeant Chinnick's Comment.

In order to preserve a trial irregularity issue for appeal, counsel must request some relief at the time the irregularity occurs. See State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (defense failure to object during prosecution closing argument or ask for curative instruction or immediate mistrial precluded

appellate review); State v. Lord, 161 Wn.2d 276, 291, 165 P.3d 1251 (2007); see also Karl B. Tegland, 14A Washington Practice: Civil Procedure § 30:41, at 281 (2d ed. 2009). A party may seek relief in the form of a curative instruction or immediate mistrial. See Swan, 114 Wn.2d at 661.

Where a party objects but does not seek relief, the issue is not preserved. Lord, 161 Wn.2d at 291. Where a party obtains all relief sought, the issue is similarly not preserved. See, e.g., Snyder v. Sotta, 3 Wn. App. 190, 194, 473 P.2d 213 (1970) ("[B]y refusing to make the motion for mistrial, solicited by the trial court, plaintiffs waived their right to subsequently claim a mistrial as to either occurrence of misconduct up to that time."); Casey v. Williams, 47 Wn.2d 255, 257, 287 P.2d 343 (1955) (holding that where counsel notified the judge that a juror had fallen asleep several times, but did not request a mistrial, "Directing the trial court's attention to the alleged misconduct, without asking for relief of any kind, does not ... preserve the error.").

Benson has waived any challenge to Sergeant Chinnick's inadvertent use of the word "assault" because the trial court gave Benson all the relief he sought. When Chinnick used the word "assault," Benson made a timely objection, which was sustained,

and the court admonished the jury to disregard the use of the term "assault." 3RP 432. Benson then asked for no further instruction, and did not request a mistrial. He cannot complain that he received an unfair trial when the trial court did everything Benson asked to cure the violation. Benson has waived this issue.

d. There Was No Manifest Constitutional Error Because There Were No Opinions Of Guilt And No Prejudice.

Generally, no witness may offer testimony in the form of an opinion regarding the defendant's guilt. State v. Rafay, 168 Wn. App. 734, 805, 285 P.3d 83 (2012). To determine whether a statement constitutes improper opinion testimony, a court considers the type of witness, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. Id. at 805-06. But the fact that an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt. State v. Saunders, 120 Wn. App. 800, 812, 86 P.3d 232 (2004).

Testimony that is based on a belief or idea rather than on direct knowledge of facts at issue is opinion testimony. Saunders, 120 Wn. App. at 811. Conversely, testimony that is based on

inferences from the evidence, does not comment directly on the defendant's guilt and is otherwise helpful to the jury, does not generally constitute an opinion on guilt. Rafay, 168 Wn. App. at 806.

Thus a witness, including a police officer, who has had some means of personal observation may relate the basis of his observation and then "state his opinion, conclusion, and impression formed from such facts and circumstances as came under his observation." Allen, 50 Wn. App. at 418, 749 P.2d 702 (1988) (officer could opine on defendant's sincerity based on factual observations). See also State v. Craven, 69 Wn. App. 581, 586, 849 P.2d 681 (1993) (testimony opining about defendant's behavior admissible if prefaced with personal observations of conduct).

Benson cannot show the trial court abused its discretion by denying a mistrial for Fitchett's comment, and he got all the relief he asked for after Chinnick's remark. So Benson must argue that the two uses of the verb "assault" added up to manifest constitutional error. But improper opinion testimony on guilt "is not automatically reviewable as a manifest constitutional error." State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007) ("[n]o case of this court has held that a manifest error ... *necessarily* exists" where witness

expresses opinion on ultimate issue of fact). Manifest error is very narrow, and requires "*an explicit or almost explicit witness statement on an ultimate issue of fact.*" Id. (emphasis added). It also requires actual prejudice. Id.

Here, there were no opinions on the ultimate factual issue — whether Benson was guilty of third-degree assault — let alone the explicit statement required for manifest error:

Deputy Fitchett testified that he felt shocked upon observing Benson assault Deputy Mulligan because the deputies were only there to help on an aid call. 2RP 235. This was a logical, reasonable inference — a statement of Fitchett's own state of mind from seeing Benson's behavior — and an explanation of what he did next. Fitchett was not asked whether, nor did he testify that, he personally believed Benson was guilty of the crime of third-degree assault. Benson cannot inflate Fitchett's single use of a verb into an opinion of guilt, let alone an explicit one.

Similarly, Benson cannot balloon Sergeant Chinnick's single use of the verb "assault" into an opinion of guilt on the ultimate factual issue. Chinnick was asked to state his conclusions of his use-of-force investigation, and Benson did not object to Chinnick stating that conclusion. Chinnick was never explicitly asked

whether he believed Benson was guilty of third-degree assault, or any of its elements. Chinnick's saying "assault," in common usage synonymous with "hit," or "attacked," was a permissible inference based on his personal review of the evidence and circumstances. It did not embrace the ultimate factual issue.

But even a constitutional error does not require reversal if, beyond a reasonable doubt, the untainted evidence is so overwhelming that a reasonable jury would have reached the same result in the absence of the error. Saunders, 120 Wn. App. at 813. Even if these two uses of the word "assault" rose to a constitutional violation, it was harmless amid the other evidence in this case. As previously stated, the jury had complete play-by-play accounts, supported by the 911 audio. Most important, the court instructed the jury to disregard both uses of the word "assault." It would be absurd to say that the jury not only ignored the court's instructions but was ultimately swayed by two minor, stricken remarks instead of all the other evidence.

The two cases that Benson highlights to assert reversible constitutional error both help prove that his case is far from it:

In State v. Montgomery, a case of possession of pseudoephedrine with intent to manufacture methamphetamine, it

was improper for two police officers and a forensic chemist to state express opinions — after being directly asked for them — that they believed the defendant had possessed the pseudoephedrine with intent to manufacture methamphetamine. 163 Wn.2d 577, 587-89, 183 P.3d 267 (2008). Yet even those opinions were not prejudicial, in large part because the jury had received relevant instructions. Id. at 595-96. In State v. Quaale, a DUI[4] case, a trooper was directly asked to state his opinion, based on an eye test, whether the defendant's "ability to operate a motor vehicle was impaired" — the paramount element of a DUI charge — and the trooper said he had "no doubt he was impaired." 182 Wn.2d 191, 195, 200, 340 P.3d 213 (2014). This was not harmless because the trooper's testimony about the eye test was basically the only evidence.[5] Id. at 202. But in Benson's case, the witnesses were not asked for their explicit opinions on the charged crime.

Two minor violations of the court's order — which were successfully objected to and stricken — do not add up to manifest constitutional error. This claim should be denied.

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[4] Driving Under The Influence.

[5] And unlike in Benson's case, the court overruled Quaale's objection to the question and thus did not instruct the jury about the testimony. 182 Wn.2d at 195.

3. BENSON FAILS TO SHOW PROSECUTORIAL MISCONDUCT.

Benson contends thirdly that he did not receive a fair trial because select phrases said by the prosecutor — in responding to a defense objection, in conducting direct examination, and in closing — amounted to prosecutorial misconduct. But Benson cannot meet his burden of showing the phrases were both improper and prejudicial, because they were neither.

a. Standard Of Review.

Defendants claiming prosecutorial misconduct must "show both that the prosecutor made improper statements and that those statements caused prejudice." State v. Lindsay, 180 Wn.2d 423, 440, 326 P.3d 125 (2014). In order to establish prejudice, a defendant must show a substantial likelihood that the improper conduct affected the jury's verdict. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Reviewing courts view a prosecutor's comments in the context of the total argument, the issues in the case, the evidence addressed, and the jury instructions. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert denied, 523 U.S. 1007 (1998). A prosecutor has wide latitude in drawing and

expressing reasonable inferences from the evidence. State v. Hoffman, 116 Wn.2d 51, 95, 804 P.2d 577 (1991).

A defendant has a duty to object to a prosecutor's allegedly improper argument. Emery, 174 Wn.2d at 761. If there is no contemporaneous objection, the defendant waives any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that no instruction could have cured the prejudice and the prejudice was substantially likely to affect the verdict. Id. at 760-61. If a curative instruction was possible with a timely objection, the "claim necessarily fails and [the] analysis need go no further." Id. at 764. Furthermore, "the jury is presumed to follow the instruction that counsel's arguments are not evidence." State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008).

b. The Prosecutor's Restatement Of The Charge Was Not Misconduct.

i. Additional relevant facts.

Before the trial started, the court instructed the jury:

> I've read to you in the beginning what the charges were. ... You are not to consider the filing of the information or its contents as proof of the matters charged. It is your duty as the jury to determine the facts of this case from the evidence produced in court.

2RP 161. And further:

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. They are not evidence, however, and you should disregard any remark, statements, or argument that's not supported by the evidence or by the law as the Court gives it to you ... Be aware that the lawyers may make objections to questions and to evidence. They have the right and the duty to make any objections which they think are appropriate. Such objections should not influence you and you should make no presumptions because a lawyer objects. The evidence that you are to consider consists of the testimony of the witnesses and the exhibits that will be admitted in evidence. It will be my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence which either is not admitted or which may be stricken by the Court.

2RP 164. See also WPIC 1.01.

During the State's case, the prosecutor asked Sheriff's Sergeant Chinnick to explain the policy about maintaining control of a weapon. 3RP 354. Benson objected to relevance. Id. The trial court asked the prosecutor to respond. Id. The prosecutor said:

> Your Honor, it goes to the actual – the implication of -- the impact of what happened when Mr. Benson gets a hold of the Taser. **Also the State believes he pulled the Taser from Deputy Mulligan**, also the State believes that the forthcoming testimony will indicate that that would be not a good thing to have happen and that it would not make any sense for Deputy Mulligan to lie about that because it was embarrassing.

3RP 354-55. The court replied:

> Well, it certainly doesn't -- the Court's not accepting it for any veracity on the part of any witness. But I think in light of the

> facts of the case, the allegation that one weapon was taken by the defendant, the Court will overrule the objection.

3RP 355. Benson was silent on the prosecutor's remark. Id. He did not object to the prosecutor's comment, did not ask that it be stricken, and did not ask for a curative instruction.

Before closing arguments, the jury was instructed:

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

5RP 660; CP 30.

ii. The prosecutor's statement of the charge was not a personal opinion of guilt.

It is improper for a prosecutor to express a personal opinion of guilt. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 706, 286 P.3d 673 (2012) (slideshow flashing "visual shouts" of "GUILTY! GUILTY! GUILTY!" was personal opinion of guilt, among other things). But to determine whether the prosecutor is expressing a personal opinion of the defendant's guilt, independent of the evidence, a reviewing court views the challenged comments in context. State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221

(2006). Prejudicial error does not occur until such time as it is *clear and unmistakable* that counsel is not arguing an inference from the evidence, but is expressing a personal opinion. Id. at 54.

The court in McKenzie highlighted State v. Case, where it was "clear and unmistakable" that the prosecutor was improperly expressing his personal opinion in closing argument because he said, "I mean, *that is my opinion* about what this evidence shows and how clearly this evidence indicates that this girl has been violated." McKenzie, 157 Wn.2d at 54 (citing Case, 49 Wn.2d 66, 68, 298 P.2d 500 (1956)) (emphasis in McKenzie). By contrast, the prosecutor in McKenzie used the word "guilty" in direct response to defense counsel's arguments and the context was not "clear and unmistakable opinion." 157 Wn.2d at 56. Even more relevant to Benson's case, the McKenzie court held that even the prosecutor's use of the word "rapist" to describe McKenzie was not improper because it was "a reasonable inference from the evidence and *was consistent with the charged crimes* of rape of a child in the second degree." Id. at 57 (emphasis added).

In Benson's case, the prosecutor's statement, "the State believes he pulled the Taser from Deputy Mulligan," came in response to a defense objection during direct examination, and

does not even come close to a clear and unmistakable personal opinion. The sentence was said in the third person. The prosecutor represented the State, and obviously the State believed that Benson disarmed Mulligan, or there would be no charge of disarming a law enforcement officer. The prosecutor was restating the charge, not saying that she personally believed Benson was guilty. There was no impropriety.

Even if there were, Benson did not object to the prosecutor's remark, so he must now show that the comment was so flagrant and ill-intentioned that no instruction could have cured the prejudice. See Emery, 174 Wn.2d at 761. The absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." Swan, 114 Wn.2d at 661. Here, the jury had been instructed at least twice that the lawyers' remarks are not evidence. Had Benson objected, the court could have simply repeated that instruction, or specifically told them to disregard the remark, and it would have cured any conceivable prejudice. There was no misconduct here.

c. The Prosecutor's Preface To A Question In Direct Examination Was Not Misconduct.

i. Additional relevant facts.

In closing, Benson reminded jurors of what he had told them in his opening remarks:

> When we started this case, I told you that this case was a case about two sheriff's deputies who confronted a man who was drunk, who was noncompliant, who was loud. A case about how those deputies became frustrated with that individual and tased him. And how, because of their fear of a use of force investigation, they constructed an allegation of assault and disarming to justify that tasing, that use of force.

5RP 683-84.[6]

Earlier, while questioning Deputy Mulligan, the prosecutor had said:

> I'm embarrassed to ask this but did you and Deputy Fitchett come up with a story about Mr. Benson's activities to cover up anything?

4RP 494. Benson objected "to the form of the question." Id. Before the court ruled on the objection, the prosecutor offered to rephrase the question. 4RP 495. The court said, "Go ahead." Id. The prosecutor then asked:

> Deputy Mulligan, did you and Deputy Fitchett ever have a conversation where you -- where you processed a story together to make sure they coincided?

[6] The opening statements were not transcribed in the verbatim reports of proceedings.

Id. Benson did not object further, nor did he seek a curative instruction.

ii. The phrase was neither improper nor prejudicial.

To engage in improper vouching, a prosecutor must clearly state a personal opinion about the truth of the witness's statements. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). As with stating personal opinions of guilt, prejudicial error will not be found unless it is "clear and unmistakable" that counsel is expressing a personal opinion. Id. Courts presume jurors follow judges' instructions. Diaz, 175 Wn.2d at 474. When the State reasonably anticipates an attack on its witness's credibility, it may address the issue on direct examination. Bourgeois, 133 Wn.2d at 402 (witness may testify about reluctance to testify).

Here, the phrase "I'm embarrassed to ask this but ..." was not a clear statement of personal opinion, so it was not improper. The prosecutor was merely expressing her awkwardness in asking the deputy whether he had conspired to commit perjury. And she was allowed to express that awkwardness and ask that question because Benson had already announced his defense that the

deputy and his partner were colluding in perjury. There was no impropriety.

Moreover, Benson asked for no curative instruction, and when the court permitted the prosecutor to rephrase the question, Benson did not object to the rephrased question. He cannot demonstrate prejudice. The phrase was not a "clear and unmistakable" opinion; the jury was repeatedly instructed to disregard lawyers' statements not supported by evidence; and had Benson asked, the judge could have further inoculated the jury by telling them to disregard the prosecutor's comment about being embarrassed. Benson cannot show that the jury was unable to follow the court's instructions and was swayed by the prosecutor's benign remark. His claim fails.

d. The Prosecutor's Use Of "We Know" In Closing Argument Was Not Misconduct.

i. Additional relevant facts.

Throughout her closing argument and rebuttal, the prosecutor used the phrase, "We know." Benson has identified eight instances that he claims were misconduct. BOA 37-40. To quote the prosecutor verbatim, along with context:[7]

[7] Statements in bold type are those singled out by Benson as misconduct.

- **(1) They also spent a lot of time talking about where Mr. Benson got that cut on the back of his head. We don't know where he got it** and it doesn't matter. The State does not need to prove how he got that cut on his head. There are multiple explanations for that. Perhaps he did fall down and hit his head on the glass? Perhaps it got cut when he was shoved into the screen door? Or perhaps it's when Deputy Fitchett and -- kneed him in the head and punched him in the head multiple times? Those are all very plausible explanations for how he got that injury. 5RP 674.

- **(2)** And Mr. Benson was very, very clear about what he wanted to do. He wanted to take that Taser. The beginning of the 911 call and about four or five seconds in he says, I'm going to take that Taser out of your hand. He charges at the officers. He tells them, I'm going to whoop your ass. And then he does. And he goes and he gets Deputy Mulligan's Taser. And so we know that he was trying to interfere with Deputy Mulligan. We know that very clearly. ... We know Deputy Mulligan was acting within the scope of his duties. And **we know that he knowingly removed it. We spent a lot of time talking to Deputy Fitchett and Deputy Mulligan and asking, how did he actually get that Taser?** Because they're not supposed to let go of those Tasers. And Deputy Fitchett said that they had both hands on it and that Mr. Benson wrenched it away. Deputy Mulligan indicated that Mr. Benson pulled it sparking and towards him and then ripped it out, that he never tried to push it away. 5RP 681.

- **(3)** But if somebody's acting with intent, they're also acting with knowledge. And we know that Mr. Benson was acting with both of those. **He knew that if he grabbed that Taser out of Deputy Mulligan's hand** he would get that, **he would remove it from him and he also was intending to do that. And so we know that did he that** [he did that]. 5RP 682.

- **(4)** I'll also notice he spent very, very, very little time talking about the disarming. He indicated that the reason that you should not believe that that disarming occurred is because

Deputy Mulligan, when he first described it, the first half of his description was that the defendant pushed the Taser back. Defense forgot to tell you was that then Mr. Benson pulled it out of his hand. ... You'll also notice that that's what Deputy Fitchett testified to. **He testified that that Taser was wrested out of Deputy Mulligan's hand. So, we know the disarming occurred.** 5RP 709.

- **(5)** We don't need to prove what exactly was on that 911 CD. We don't need to prove where specifically each deputy was standing. We don't need to prove what physical motion was used to take Deputy Mulligan's Taser. We don't need to know -- we don't need to prove to you what happened to Deputy Mulligan's Taser after the defendant armed himself with it, and we don't need to prove how many Tasings occurred or explain why there are as many Tasings. We just need to prove the things that are in the to convict. And for the Assault is that on the date the defendant assaulted Deputy Mulligan and Deputy Mulligan was a law enforcement officer. **On the disarming, that the defendant, with the attempt to interfere with the performance of Deputy Mulligan's duties he did that he took the weapon away. And we know that he did that.** 5RP 710.

- **(6)** All three individuals who are providing testimony indicate that Mr. Benson got back up after that Tasing. We know that he got back up and he charged at Deputies Fitchett and Mulligan. And **we know that Mr. Benson got that Taser. We know that he pushed it back and he pulled it away.** And, frankly, it doesn't matter how he took it. It doesn't matter how he feel[s]. [What] matters is that he assaulted Deputy Mulligan. 5RP 713-14.

- **(7), (8)** Defense wants you to concentrate on things that do not matter. You're going to have questions at the end of this case. You're going to wonder about things and that's okay. **What you're not going to wonder about, though, is whether or not Mr. Benson is guilty of Assaulting an Officer. We know that he assaulted Deputy Mulligan. You're also not going to have any questions about**

> **whether or not Mr. Benson took Deputy Mulligan's Taser. We know he did that.** And he knows he did that. Because, remember, he tells you. He tells us all he knows what he did. He says, I took it easy on them. Next time I'm not going to. I'm going to fuck them up. 5RP 714-15.

Benson did not object to any of the prosecutor's uses of "we know." 5RP 674-715.

ii. The prosecutor's remarks were not misconduct because she was permissibly marshaling the evidence.

Ten days after Benson filed his opening brief, this Court issued its opinion in State v. Robinson.[8] — P.3d —, 2015 WL 5098707, at *1 (Div. I, Aug. 31, 2015). This Court held that a prosecutor's use of the phrase "we know" in closing argument is not misconduct when used to "marshal the evidence." Id. at *8. Where the use of the phrase does not imply a special source of knowledge or "place the prestige of the government" behind the case, the prosecutor's remarks are not improper. Id. at *7-8.

In Robinson, Robinson complained of misconduct when the prosecutor said, "But what we do know from [the witness's] testimony – and [the witness] has no reason to lie about this." The court looked at the entire context of the prosecutor's argument, not just that single sentence, to find that the prosecutor was not

[8] Benson's brief was filed August 21, 2015.

impermissibly vouching but was marshaling the evidence from the trial. Id. at *7. In other words, when "we know" is essentially synonymous with "the evidence shows," there is no misconduct.

In Benson's case, it is clear that the prosecutor's use of the phrase, while perhaps inartful, was always synonymous with "the evidence shows." In no instance, when looking at the full context of the arguments, was she implying special knowledge, placing prestige upon herself or the witnesses, or trying to cozy up to the jury.

Benson has offered a series of extra-jurisdictional cases to support his contention that "we know" is impermissible, but this Court considered the same or similar cases in Robinson, concluded that there is no rule that "we know" is always misconduct, and distinguished marshaling the evidence from those cases. Id. at *8. See, e.g., United States v. Younger, 398 F.3d 1179, 1191 (9th Cir. 2005) (no misconduct where "prosecutors used the phrase 'we know' to marshal evidence actually admitted at trial and reasonable inferences from that evidence"). Perhaps because of Younger, Benson argued that the eight instances he identified went beyond the marshaling of evidence into impermissible territory. But contextual readings show that the prosecutor always used "we

know" to summarize or draw inferences from the evidence that had been presented at trial.

Benson might reply that his case is different from Robinson because Benson's prosecutor used the phrase with such frequency. But the fact that the prosecutor said "We know" so often actually demonstrates that she was using it almost automatically, without malice, as shorthand for "the evidence shows," not as an underhanded and calculated ploy to imply special knowledge or curry special favor.

Nonetheless, because Benson did not object at the time to any of the challenged statements, he must show that the comments were so flagrant and ill-intentioned that no instruction could have cured the prejudice. See Emery, 174 Wn.2d at 761. The prosecutor's innocuous and frequent use of the phrase proves there was no ill intention. And the court could have cured any potential prejudice by instructing the jurors to disregard her use of the phrase "we know," and by reminding them, as they were already instructed, that lawyers' remarks are not evidence and that it was their duty to determine the facts from the evidence produced in court.

There was no prosecutorial misconduct here.

4. THERE WAS NO CUMULATIVE ERROR.

Under the cumulative error doctrine, a defendant may be entitled to a new trial when accumulated harmless errors make a trial fundamentally unfair. Emery, 174 Wn.2d at 766. Benson bears the burden of proving an accumulation of error of sufficient magnitude to necessitate a retrial. In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835, clarified by 123 Wn. 2d 737, 870 P.2d 964 (1994). But here the sole error was the bailiff's harmless mishandling of the jury question, and one harmless error does not accumulate into reversible error. This claim also fails.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Benson's judgment and sentence.

DATED this 22nd day of October, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Dana Nelson, the attorney for the appellant, at Nelsond@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT in State v. Jason Maurice Benson, Cause No. 73026-6, 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 22 day of October, 2015.

Name:
Done in Seattle, Washington