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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 36804-1-III

STATE OF WASHINGTON, Respondent,

v.

CHERYL L. SUTTON, Petitioner.

PETITION FOR REVIEW

Andrea Burkhart, WSBA #38519
Two Arrows, PLLC
8220 W. Gage Blvd. #789
Kennewick, WA 99336
Tel: (509) 572-2409
Email: Andrea@2arrows.net
Attorney for Petitioner

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I. IDENTITY OF PETITIONER

Cheryl Sutton requests that this court accept review of the decision designated in Part II of this petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed on June 17, 2021, concluding that the trial court did not abuse its discretion in declining to directly answer a jury question about the essential elements of the charge when the parties did not dispute the correct answer and the court's only stated reason for not answering was that it did not want to and did not consider the instructions confusing. A copy of the Court of Appeals' published opinion is attached hereto.

III. ISSUES PRESENTED FOR REVIEW

"When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. U.S.*, 326 U.S 607, 612-13, 66 S. Ct. 402, 90 L. Ed. 350 (1946). Here, the trial court refused to directly answer the jury's request

to clarify a discrepancy between the "to convict" instruction and a definitional instruction, despite the parties' agreement as to the correct answer, for the stated reason that it did not want to and disagreed that the instructions were confusing. Considering the trial court's paramount duty to ensure the jury correctly understands the law, does a trial court abuse its discretion when it refuses, without justification, to directly answer a jury question?

IV. STATEMENT OF THE CASE

Cheryl Sutton was charged with leading Ken Stone, Alvaro Guajardo, and Colby Vodder in organized crime. CP 98. The State contended that Stone, Guajardo, and Vodder all worked for Sutton in a methamphetamine distribution business. *Opinion* at 3. However, the evidence tended to show that Vodder dealt in heroin rather than methamphetamine, and the defense argued that Vodder's drug operation was independent from Sutton's. IV RP 817-18. The State also presented evidence that other, uncharged individuals also worked for

Sutton, including another drug dealer named Christopher Schoonover and a friend of Sutton's named Nicole Price, who would sometimes drive Sutton to deliver drugs. II RP 415-16, 475, 477, 482.

The trial court gave two jury instructions concerning the charge. The first, instruction number 24, set forth the definition of the crime as follows:

> A person commits the crime of Leading Organized Crime when her or she intentionally organizes, manages, directs, supervises, or finances any three or more persons with the intent to engage in a pattern of criminal profiteering activity.

CP 169. The "to convict" instruction, number 25, stated:

> To convict the defendant of the crime of leading organized crime as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the period between June 1, 2015 and March 1, 2016, the defendant intentionally organized, managed, directed, supervised or financed three or more persons, Ken Stone, Alvaro Guajardo, and Colby Vodder;

(2) That the defendant acted with the intent to engage in a pattern of criminal profiteering activity, delivery of a controlled substance; and

(3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 170. Although the "to convict" instruction specifically named the individuals necessary to convict, in closing, the State contended that the jury could also find Price was one of Sutton's employees. IV RP 807.

After beginning deliberations, the jury inquired:

For instruction #25 must the defendant have organized (etc.) all three of the listed persons specifically, or just any 3 or more persons (as instruction #24 states)?

CP 189.

Both the State and the defense agreed that the correct answer was "yes," the jury must find Sutton organized the specifically named individuals in order to convict. IV RP 847-48. Defense counsel requested that the court answer the question directly or, alternatively, point the jury to instruction 25, the "to convict" instruction. *Id.* But the trial court expressed fear that to answer the jury's question directly would be "editorializing on the WPIC," which would be "dangerous territory." IV RP 850-51. The court further stated that it did not see an inconsistency between instructions 24 and 25. IV RP 851. The trial court ultimately concluded:

> I'm satisfied with asking them to please review the instructions as a whole. And I could write the answer's there in 24 and 25, but I don't want to do that. I mean, it's right there, and they're reading them. So I appreciate your input. I'm going to take the conservative route and ask them to 'please refer to your instructions or the instructions.'

IV RP 853-54.

The jury convicted Sutton and the Court of Appeals affirmed the conviction in a published opinion. CP 177; *Opinion*, at 1. The court of appeals reasoned that the jury is presumed to follow the instructions and because it did not ask any additional questions, the jury therefore understood the elements necessary to convict. *Opinion*, at 8-9. It relied upon *State v. Ng*, 110 Wn.2d 32, 750 P.2d 632 (1988) to conclude that the jury's question did not create an inference of jury confusion. *Opinion*, at 9-10. Nevertheless, it recognized that the trial court should have answered the jury's question to fulfill its judicial responsibility. *Opinion*, at 10. Despite this conclusion, it held that the trial court's decision not to answer the question was not an abuse of discretion. *Opinion* at 10. In reaching this conclusion, the Court of Appeals did not consider the trial court's reason for declining to answer as part of its analysis of whether the decision was an abuse of discretion.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be granted under RAP 13.4(b)(2), (3), and (4). The opinion conflicts with *State v. Backemeyer*, 5 Wn. App. 2d 841, 428 P.3d 366 (2018), *review denied*, 192 Wn.2d 1025 (2019), which presumes that trial courts must give appropriate clarifying instructions and recognizes that jury questions about the instructions evidence its confusion about the law, rendering the presumption that jurors follow the instructions inapplicable. Further, under the circumstances presented in this case, the trial court's failure to resolve the discrepancy in the instructions for the jury relieved the State of its burden of proving all of the essential elements of the charge. Thus, the scope of the trial court's duty to ensure the jury properly understands the State's burden of proof presents a significant question of constitutional magnitude. Finally, the case presents questions of significant public interest in the administration of justice, the nature of the trial court's

discretion in responding to jury questions, and the continuing viability of the reasoning set forth in *Ng* that improperly results in erasing jury confusion about the law and expanding the role of the jury from deliberating on questions of fact to resolving questions of law.

In *Backemeyer*, the Court of Appeals held that defense counsel's assistance was ineffective when he failed to request a clarifying instruction on the law, where the jury's questions indicated manifest confusion and the court saw "no reason why, if asked, the trial court would have refused" a direct answer to the jury's question. *Id.* at 849. But in this case, the Court of Appeals concluded the trial court's discretion extends to refusing a direct answer to a jury question without any reason. If a trial court need only refer the jury back to the instructions already given even when there is no disagreement about the correct answer and no reason not to give it, then failing to request a direct answer cannot be prejudicial. Review would reconcile this apparent conflict by establishing the nature of the

trial court's discretion in responding to jury questions, considering its duty to ensure the jury accurately understands the law.

Furthermore, to the extent *Ng* compels a different outcome, it is both wrongly decided and harmful. *See State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006) ("The doctrine of *stare decisis* requires a clear showing that an established rule is incorrect and harmful before it is abandoned.") (internal quotations omitted). In *Ng*, the Supreme Court held that failing to answer a jury question directly was not error because "the jury's question does not create an inference that the entire jury was confused, or that any confusion was not clarified before a final verdict was reached." 110 Wn.2d at 43. This incorrect and harmful conclusion resulted from an excessive expansion of the legal authority on which it was grounded, cannot be reconciled with the presumption that juries follow the court's instructions, and

further fails to ensure juror unanimity as to all of the essential elements of the crime charged.

With respect to its legal foundation, *Ng* relied upon *State v. Miller*, 40 Wn. App. 483, 698 P.2d 1123, *review denied*, 104 Wn.2d 1010 (1985), and *State v. Bockman*, 37 Wn. App 474, 682 P.2d 925, *review denied*, 102 Wn2d 1002 (1984). But neither case stands for the broad proposition that a single jury question can never demonstrate sufficient confusion to overcome the presumption that the jury will follow the court's instructions. In *Miller*, the jury inquired whether specific facts constituted robbery and the trial court's answer was not contained in the record. 40 Wn. App. at 486. Consequently, *Miller* concluded that any error was waived and its further discussion is *dicta*. *Id.* at 488. In *Bockman*, the jury asked the following question:

> If the defendants leave the scene of a second degree burglary, then an assault occurred by a third party, are those two then guilty by association of

> first degree burglary? Also clarification of the definition of immediate flight.

37 Wn. App. at 493. But Bockman did not challenge the trial court's answer to the jury's question; instead, he argued that the question showed the jury did not believe he was guilty of the crimes of which it convicted him. *Id.* at 493. In *that* context, the *Bockman* court concluded that the jury's decision is contained in the verdict and because the question is not a final determination, it did not undermine the verdict ultimately reached. *Id.* Thus, neither case stands for the broad propositions that jury questions do not evidence confusion that may undermine the justness of the verdict or overcome the presumption that the jury understands and follows the trial court's instructions.

Ng is wrongly decided because it failed to recognize that even if a jury question may not demonstrate that the entire jury is confused, a criminal defendant is entitled to a unanimous verdict by all members of the jury; consequently, confusion of

even a single juror is sufficient to call into question whether the verdict reflects the informed judgment of the entire jury as required for constitutional sufficiency. Furthermore, the presumption that jurors follow the instructions of the court is undermined when, as here, the jury plainly expresses its inability to reconcile separate instructions the provide potentially inconsistent directives. If the jury does not understand what the instructions require, how can the jury be presumed to follow them?

In addition to being wrong, *Ng* is harmful because it abdicates the trial court's responsibility to ensure the jury is educated in the law that it needs to resolve the case. The U.S. Supreme Court has stated:

> Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria.

Bollenbach, 326 U.S. at 612. *Ng*, as reflected in the present opinion, relinquishes this responsibility by failing to enforce it. Instead of simply taking the jury's stated confusion at face value, the Court of Appeals here creates an unworkable test where the reviewing court questions whether the jury's expression confusion is real or not. *Opinion*, at 8-9 (distinguishing *Backemeyer*). Consequently, the Court of Appeals first reaches the untenable conclusion that the jury understood the instructions because the "to convict" instruction was clear, without acknowledging that the jury did not understand whether it was to evaluate guilt by the standard set forth in the "to convict" instruction or the different standard set forth in the definitional instruction. *Opinion*, at 8-9. Then, the Court of Appeals presumed that the jury correctly followed the instructions even though the jury had expressed its inability to follow the instructions without clarification, which the trial court refused to give. *Opinion*, at 9. Thus this conclusion rests on the plainly wrong insistence that the jury understands the

instructions and therefore would not need to ask a question, even though it did.

The erasure of juror confusion is harmful to the trial outcome and to the public perception of the criminal justice process. Refusing to answer jury questions dismisses the legitimate confusion of laypersons who are not legally sophisticated and are told that each of the instructions is as important as the others, and so do not know how to resolve a discrepancy between the "to convict" instruction and the definitional instruction. *See* CP 146. Not only does this abandonment of the jury to figure out its own answers run the risk that the jury will figure it out incorrectly, thereby convicting an innocent, but the disrespect shown to the jury by dismissing its legitimate confusion is hardly likely to imbue them with faith in the jury trial as a guilt-adjudication mechanism.

Moreover, the *Ng* standard as applied here is harmful because it is unworkable. If the jury is presumed to understand the instructions even when it indicates it does not by submitting an inquiry, then there is no incentive for the trial court to educate the jury in favor of referring the jury back to the instructions it already questioned. The jury is intended to deliberate and decide questions of fact, not questions of law, but the *Ng* rule turns this structure on its head by presuming that the verdict evidences the resolution of the jury's legal confusion. While, in some cases, the jury *may* be able to resolve its confusion by simply re-reading the instructions more closely, in cases like the present where the answer is not plainly evident in the instructions themselves, there is an intolerable risk that the jury has guessed at the law and got it wrong. In the present case, the error strikes at the heart of the conviction because it cannot be ascertained whether the jury convicted Sutton on the evidence that she led the three individuals named

in the charge, or on the un-charged individuals presented in evidence and highlighted in closing by the State.

Finally, if – as here – the trial court need not even have an articulable reason for declining to answer the jury's question, then its decision is not discretionary but absolute. Under *Ng*, the decision not to answer a jury question is reviewed for abuse of discretion, which inquires whether the basis for the decision was unreasonable or untenable. 110 Wn.2d at 44. Thus, the inquiry in evaluating whether a direct answer may be declined should depend on the reasonableness the justification given for the refusal, rather than inherently contradictory reasoning that a jury's question does not evidence confusion.

Judges should be encouraged to take jurors seriously at face value to perform the judicial function effectively. It serves no purpose to criticize defense attorneys for failing to request direct answers to jury questions if the trial court has no responsibility or incentive to give them. Accordingly, review

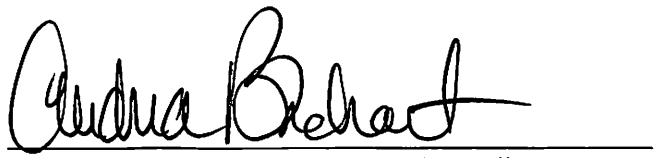
should be granted under RAP 13.4(b)(2) to resolve the conflict with *Backemeyer*, under RAP 13.4(b)(3) to evaluate whether the instructions together with the trial court's response adequately held the State to its burden of proving each essential element of the charge, and under RAP 13.4(b)(4) to provide needed encouragement to trial judges to respond directly to jury questions in the absence of an articulable reason not to and, as necessary, to overrule *Ng*'s harmful influence.

VI. CONCLUSION

For the foregoing reasons, the petition for review should be granted under RAP 13.4(b)(2), (3), and (4) and this Court should enter a ruling that Aleshkin's unlawful detention is a manifest error of constitutional magnitude warranting review and reversal under RAP 2.5(a)(3).

RESPECTFULLY SUBMITTED this 19 day of July, 2021.

TWO ARROWS, PLLC



ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Cheryl L. Sutton, #20155-085
FCI Waseca
Federal Correctional Institution
PO Box 1731
Waseca, MN 56093

And, pursuant to prior agreement of the parties, by e-mail through the Court of Appeals' electronic filing portal to the following:

Larry Steinmetz
Deputy Prosecuting Attorney
SCPAAppeals@spokanecounty.org

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

Signed this 19 day of July, 2021 in Kennewick, Washington.

Andrea Burkhart

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. CHERYL. L. SUTTON, Appellant, ALVARO GUAJARDO, Defendant, COLBY D. VODDER, Defendant.	)	No. 36804-1-III PUBLISHED OPINION

LAWRENCE-BERREY, J. — A jury convicted Cheryl Sutton of first degree felony murder and of leading organized crime. Her appeal relates only to the latter conviction.

The question we answer today is not new: Whether a trial court abuses its discretion when, during the jury's deliberation, the court declines to answer the jury's question about the law. The general answer is no, and we affirm the challenged conviction.

APPENDIX

Nevertheless, a trial court has a responsibility to ensure that the jury understands the law. We take this opportunity to strongly encourage our trial courts to fulfill this responsibility and directly answer a jury's question of law even if it believes its instructions are correct and complete.

FACTS

The narrow issue on appeal does not require us to recount the evidence linking Cheryl Sutton to her conviction of the first degree felony murder of Bret Snow. We limit our discussion of the facts accordingly.

Law enforcement executed a search warrant looking for evidence of drug trafficking at an address on North Starr Road in Newman Lake, Washington. At the property, they found Cheryl Sutton, Ken Stone, Alvaro Guajardo, and Colby Vodder. The ensuing investigation led to Sutton, Guajardo, and Vodder being arrested for the kidnapping and murder of Bret Snow. Sutton, Guajardo, and Vodder were charged together, but the prosecutions were later bifurcated.

The State charged Sutton with first degree felony murder predicated on kidnapping, first degree kidnapping, and leading organized crime. With respect to the charge of leading organized crime, the State alleged that Sutton

> did intentionally organize, manage, and direct three or more persons to wit: Ken Stone, Alvaro Guajardo, and Colby Vodder, with the intent to engage in a pattern of criminal profiteering activity, to-wit: Delivery of a Controlled Substance, as defined in RCW 69.50.

Clerk's Papers (CP) at 98.

At trial, the State's evidence showed that Sutton, Stone, and Guajardo lived at the Starr Road property and were involved in the distribution of methamphetamine to numerous people, including Snow. Vodder often was at the property and sold heroin. Sutton ran the drug operation and was the leader of the group. Stone and Guajardo acted as Sutton's enforcers and beat persons who stole from Sutton or did not pay. Nicole Price, Sutton's best friend, was Sutton's driver. She drove Sutton to places where Sutton sold drugs. Before resting, the State dismissed the kidnapping charge.

Sutton testified in her defense. She admitted she sold drugs, but denied she sold drugs or directed Stone, Guajardo, or Vodder.

The trial court instructed the jury on the law. Instruction 24 stated, "A person commits the crime of Leading Organized Crime when he or she intentionally organizes, manages, directs, supervises, or finances any three or more persons with the intent to engage in a pattern of criminal profiteering activity." CP at 169. Instruction 25 stated in relevant part:

> To convict the defendant of the crime of leading organized crime as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the period between June 1, 2015 and March 1, 2016, the defendant intentionally organized, managed, directed, supervised or financed three or more persons, Ken Stone, Alvaro Guajardo, and Colby Vodder;

CP at 170.

In its closing, the State argued the evidence proved that Sutton directed Stone, Guajardo, and Vodder. In addition, it noted the evidence showed that Sutton employed her driver, Price. Defense counsel emphasized Sutton's denial that she directed anyone and sought to distance herself from Vodder by arguing they had independent operations—Vodder sold heroin, while Sutton and the others sold methamphetamine.

During deliberations, the jury forwarded a written question to the judge. The judge asked counsel for suggestions on how it should respond to the jury's question: "For instruction #25, must the defendant have organized (etc.) all three of the listed persons specifically, or just any 3 or more persons (as instruction #24 states)?" Report of Proceedings (RP) at 189.

Both counsel agreed that the answer was yes.[1] The deputy prosecutor recommended that the court either answer the question yes or provide the standard response that directs the jury to refer back to its instructions. Defense counsel initially agreed, but then asked the court to answer the question yes or direct the jury to instruction 25, the to-convict instruction.

The court discussed what it considered an ambiguity in the jury's written question and did not want to presume it correctly understood the question. It explained that instructions 24 and 25 were clear. It decided that the best answer was to simply direct the jury to refer back to its instructions. Defense counsel then, somewhat unclearly, again requested the court to direct the jury to instruction 25, the to-convict instruction. The court opted to "take the conservative route" and direct the jury to refer to its instructions. RP at 854.

Soon after, the jury returned a verdict of guilty on both remaining counts. The court entered its judgment and sentence, and Sutton timely appealed.

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[1] The jury's question had two parts. A yes answer to both parts would make no sense. A fair construction of the parties' agreement is that the jury was required to focus only on the three persons listed in instruction 25.

ANALYSIS

Sutton argues the trial court abused its discretion by "declining the proposed defense instruction that accurately stated the law." Br. of Appellant at 1. She assigns error to the trial court "denying a supplemental defense instruction." Br. of Appellant at 2. But the colloquy and the record do not reflect any proposed defense instruction. We will construe Sutton's argument as assigning error to the trial court's decision not to direct the jury to instruction 25, the to-convict instruction.

Defendants are guaranteed a fair trial under the Sixth Amendment to the United States Constitution, which requires jury instructions that accurately inform the jury of the relevant law. *State v. Henderson*, 192 Wn.2d 508, 512, 430 P.3d 637 (2018). To ensure a jury is informed of the relevant law, CrR 6.15(f)(1) permits a trial court to provide the jury with supplemental written instructions on any point of law after deliberations begin.

This court reviews a trial court's decisions on whether to give a supplemental instruction for abuse of discretion. *State v. Sublett*, 176 Wn.2d 58, 82, 292 P.3d 715 (2012). "Abuse of discretion is found only when the decision is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Ugolini v. Ugolini*, 11 Wn. App. 2d 443, 446, 453 P.3d 1027 (2019) (internal quotation marks omitted) (quoting *State v. McCormick*, 166 Wn.2d 689, 706, 213 P.3d 32 (2009)).

A trial court should ensure that the jury understands the law. *State v. Backemeyer*, 5 Wn. App. 2d 841, 849, 428 P.3d 366 (2018) (citing *Bollenbach v. United States*, 326 U.S. 607, 612-13, 66 S. Ct. 402, 90 L. Ed. 350 (1946); *United States v. Hayes*, 794 F.2d 1348, 1352 (9th Cir. 1986)). When it is apparent the jury does not understand the law, the trial court may and should issue a supplemental written instruction. A failure to do so is inconsistent with its responsibility to ensure the jury understands the law and risks the jury rendering a verdict contrary to the evidence.

Sutton argues that the trial court should have given a supplemental instruction to clarify the law. In making this argument, she relies on *Backemeyer*. There, Backemeyer was in a bar rolling a marijuana joint and drinking a beer he had purchased elsewhere. *Id.* at 844. Nicholas Stafford, a bouncer at the bar who blended in with patrons, took Backemeyer's beer and told him to leave. *Id.* According to Backemeyer, Stafford did not identify himself as a bar employee. *Id.* at n.1. Backemeyer remained at the bar for several minutes. *Id.* Stafford confronted him and a scuffle ensued. *Id.* The much larger Stafford pushed Backemeyer to the floor and punched out some of his teeth. *Id.* Backemeyer drew a knife, badly cut Stafford's face, and then fled. *Id.* at 844-45.

The State charged Backemeyer with first degree assault with a deadly weapon. *Id.* at 845. The interplay between a self-defense instruction and a stand-your-ground

instruction made it unclear whether Backemeyer was entitled to use self-defense if he was a trespasser or if he was doing something illegal. *Id.* at 845-46.

During deliberations, the jury submitted a written question that reflected its confusion. Defense counsel expressed his concern that the jury was "'trying to get rid of self-defense'" if Backemeyer was a trespasser. *Id.* at 847. Nevertheless, he agreed with the State that the trial court should tell the jury to refer to its instructions. *Id.* A second question from the jury implied the jury would negate Backemeyer's claim of self-defense if it found that Backemeyer was rolling a marijuana joint or had brought a beer into the bar. *Id.* This second question made it clear the jury did not understand the law of self-defense. *Id.* Nevertheless, defense counsel agreed with the State that the trial court should tell the jury to refer to its instructions. *Id.*

We held that defense counsel performed deficiently and Backemeyer was prejudiced. We saw no reason why, if asked, the trial court would refuse to clarify the law, given the jury clearly misunderstood the law of self-defense. We noted if the trial court had refused, its refusal would have been contrary to its responsibility to ensure that the jury understood the law. *Id.* at 849-50.

Backemeyer is distinguishable from this case. There, it was clear that the jury misunderstood the law. Here, the to-convict instruction was clear. The jury's question

confirms it understood that to convict Sutton of leading organized crime, it needed to focus only on Stone, Guajardo, and Vodder.[2]

Unless shown otherwise, it is presumed a jury follows the court's instructions. *State v. Swan*, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990). While the jury did initially raise a question about the interplay between instructions 24 and 25, it did not ask any further questions after being told to review the instructions. This single question does not overcome the presumption the jury followed the court's instructions.

A case on point is *State v. Ng*, 110 Wn.2d 32, 750 P.2d 632 (1988). In *Ng*, the jury asked whether the term "duress" applied to all lesser charges. *Id.* at 36. *Ng* argued the trial court should have answered yes because it was an accurate statement of law. *Id.* at 42-43. Instead, the trial court referred the jury back to the instructions. *Id.* at 43. The *Ng* court concluded that the trial court had not abused its discretion. In so concluding, it noted "the jury's question does not create an inference that the entire jury was confused, or that any confusion was not clarified before a final verdict was reached." *Id.* at 43.

Similarly here, the jury's question did not create an inference that the entire jury was confused or that any confusion was not clarified before the jury reached its verdict.

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[2] Because the jury correctly understood the to-convict instruction, we need not address Sutton's related argument that a comma, rather than a colon, should have preceded the names of the three men in instruction 25.

The jury's question shows it understood that the to-convict instruction required it to find that Sutton organized, etc., the three persons named in the instruction—Stone, Guajardo, and Vodder.

At a minimum, the jury's question showed that some jurors wanted assurance they need not be concerned about the different wording in instruction 24. And because the trial court has a responsibility to ensure that the jury understands the law, it should have answered the jury's question. It could have answered: "To convict Sutton of leading organized crime, the State must prove the elements of that crime as set forth in Instruction 25 beyond a reasonable doubt." Nevertheless, the trial court's decision not to answer the jury's question was not an abuse of discretion.

Affirmed.

Lawrence-Berrey, J.

WE CONCUR:

Siddoway, A.C.J.

Fearing, J.

BURKHART & BURKHART, PLLC

July 19, 2021 - 7:40 AM

Transmittal Information

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