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SUPREME COURT NO. 96373-8

NO. 76369-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SONG WANG,

Petitioner.

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

The Honorable John Chun, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Song Wang, the appellant below, seeks review of the Court of Appeals decision in State v. Wang, ___ Wn. App. 2d ___, 424 P.3d 1251 (2018), which is appended to this petition and referenced accordingly.

B. ISSUES PRESENTED FOR REVIEW

1. Is the Court of Appeals bound to follow the opinions of the Washington Supreme Court regardless of subsequent history?

2. To establish robbery, the State is required to prove the use of force—in this case, homicide—was intended for the purpose of obtaining or retaining the decedent's property. The circumstances of the murder remain unknown. Moreover, mere financial difficulties, even serious ones, do not supply an inference of the intent to rob. Where no reasonable trier of fact could have found a robbery, must Wang's felony murder conviction be reserved and dismissed with prejudice?

3. Although the State was required to prove beyond a reasonable doubt that Wang used force for the purpose of obtaining or retaining the decedent's property, the jury was instructed that whenever a taking of property and a homicide are "part of the same transaction," a robbery has been committed. Even if the evidence were sufficient to sustain a felony murder conviction based on robbery, is reversal and remand for retrial required in light of the burden-relieving robbery instruction?

C. STATEMENT OF THE CASE[1]

The State charged Wang with first degree premeditated murder, first degree felony murder predicated on robbery, and first degree arson. CP 1-2. The charges arose from the death of Kittaporn Saosawatsri, a sex worker who lived and worked out of her downtown Bellevue apartment. On March 31, 2015, Bellevue firefighters received an automatic fire alarm notification in Saosawatsri's building and arrived quickly thereafter. 2RP[2] 495-97, 513. Sprinklers had been triggered in Saosawatsri's apartment; a smoldering pile of clothes was found in the closet. 2RP 500, 506-07. Saosawatsri was kneeling over the bed with multiple stab wounds. 2RP 508, 529-30.

Police noted jewelry, shoe boxes, and bags had been opened and strewn around the apartment. 2RP 530, 532, 683-84. Police found a wallet containing Saosawatsri's identification and credit cards, another bag containing her passport, additional credit, debit, or gift cards, and $1200 cash. 2RP 689-90. They also found a digital camera, two laptops, a Microsoft Surface, and iPhone, several purses, and several other boxes and shopping bags. 2RP 691-93, 909.

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[1] For a more thorough recitation of the facts, Wang respectfully refers the court to his opening brief. Br. of Appellant at 3-15.

[2] As with the briefing below, the reports of proceedings are referenced as follows: 1RP—consecutively paginated transcripts dated November 4 and December 15, 2016, and January 20, 2017; 2RP—consecutively paginated transcripts dated November 17, 29, 30 and December 1, 5, 6, 7, 8, 12, 13, 14, and 15, 2016; 3RP—November 28, 2016.

Saosawatsri had been stabbed at least 28 times. 2RP 1049. Though a medical examiner described the various wounds, he could not give their sequence other than indicating that Saosawatsri was still alive when she was stabbed through the heart, given the amount of blood present. 2RP 1031, 1034-39, 1041-45, 1046-48, 1070-71.

Video surveillance at the property showed someone consistent with Wang's appearance walking toward and entering through the main entrance and riding the elevator about an hour before Bellevue firefighters responded to the fire. 2RP 748, 998-99, 1091, 1094. Just before the fire alarm, footage also showed a man carrying an opaque yellow bag, which police believe was Wang carrying items from Saosawatsri's apartment. 2RP 999-1001.

Evidence showed contact between Saosawatsri's phone and another phone that had been used earlier in the day to contact about nine other sex work services through backpage.com. 2RP 1110-19. One contact indicated the caller requested a "two-girl special." 2RP 1160-61. Another indicated the caller asked for "bare" or the "girl friend experience." 2RP 1258-59.

Very little physical evidence was collected at the scene of the killing. No knife was found, no bloody clothing was found, and Wang's fingerprints were not located anywhere in the apartment. 2RP 882-83, 885. The only blood found in and around the apartment not associated with Saosawatsri was unidentified male blood in the nearest stairwell. 2RP 850, 910-11, 1440.

Saosawatsri and Wang were included as contributors to the mixture of DNA from a stain in the sink. 2RP 1140-41.

Managers of the Portland Buffalo Exchange and Crossroads Trading Company testified that Wang attempted to sell them a Louis Vuitton purse, Louis Vuitton wallet, and a watch the day after the killing. 2RP 1350, 1365-66.

The State also presented testimony that Wang was in very dire financial circumstances. See Br. of Appellant at 12-13.

Police located Wang in a northern California rest area. 2RP 1285. He was arrested and his clothes were taken for DNA testing; they showed no blood but a concentrated sample showed Saosawatsri's DNA typing profile. 2RP 1437, 1440, 1478-79. Wang was taken to a local jail where he spoke to his friend Steve Shafia. Wang, when asked what he did, stated, "something controlled me, just, just made me do it." Ex. 79. Shafia asked Wang directly if he had killed someone and Wang said "Yes." Ex. 79.

At trial, counsel objected to the robbery instruction, asserting "I think transaction is not defined. So I think it's not clear for the jury what that means. I think it's confusing.". 2RP 1651; CP 29. The court noted the instruction defining robbery was a pattern instruction and overruled the objection. 2RP 1652; CP 29.

The jury acquitted Wang of premeditated first degree murder but convicted of the lesser included offense of second degree intentional murder. CP 263-64. The jury also convicted Wang of first degree felony murder and first degree arson. CP 267-69. The trial court vacated the second degree intentional murder conviction on double jeopardy grounds. CP 314.

Wang appealed. CP 322. The Court of Appeals rejected Wang's claim that the State had failed to present evidence sufficient to establish a robbery was underway at the time of the killing as opposed to a mere theft after the killing. Appendix at 4-9. In doing so, the court disregarded the most analogous sufficiency case, State v. Allen, 159 Wn.2d 1, 147 P.3d 581 (2006), because "newly discovered evidence exonerated Allen" which called "into question the reliability of the circumstantial evidence in Allen. Appendix at 6. The Court of Appeals also determined that the robbery instruction was legally erroneous as Wang claimed but held Wang "fails to show a manifest constitutional error relieving the State of its burden of proof . . . ." The Court of Appeals did not address Wang's claims that the error had been preserved, his RAP 2.5(a)(3) analysis, his ineffective assistance of counsel claim, or his harmless error analysis.

D. ARGUMENT IN SUPPORT OF REVIEW

1. THE COURT OF APPEALS IS NOT EMPOWERED TO DISREGARD CASE LAW OF THIS COURT BASED ON SUBSEQUENT HISTORY

Opinions issued by the Washington Supreme Court are binding on the Court of Appeals until they are overruled. Crown Controls, Inc. v. Smiley, 110 Wn.2d 695, 700, 756 P.2d 717 (1988); State v. Lee, 147 Wn.n App. 912, 920-21 & n.2, 199 P.3d 445 (2008). The Court of Appeals errs when it disregards the precedent of the Washington Supreme Court. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

The Court of Appeals acknowledged that both "the State and Wang heavily rely on" State v. Allen, 159 Wn.2d 1, 147 P.3d 581 (2006). Indeed, as discussed in the next section, Allen is the most analogous case to Wang's and the barely sufficient circumstantial evidence that supported the jury's finding that Allen's killing furthered a robbery was lacking here. See Part D.2 infra. Yet the Court of Appeals disregarded Allen completely: "But after serving 16 years, newly discovered evidence exonerated Allen. The exoneration calls into question the reliability of the circumstantial evidence in Allen. We conclude any analysis of sufficiency of the evidence here based on comparison to the facts in Allen is unwarranted." Appendix at 6.

The Court of Appeals' decision to disregard a pertinent Washington Supreme Court decision based on subsequent history in the case in

inconsistent with both Washington Supreme Court and Court of Appeals precedent cited above that requires the Court of Appeals to acknowledge and apply the precedent of Washington's high court. RAP 13.4(b)(1)–(2). And the implications of the Court of Appeals decision are wide-ranging: under the Court of Appeals' reasoning, it seems that any Supreme Court case involving a conviction that is later overturned, whether based on new evidence, federal habeas review, or on some other ground may simply be disregarded. This is not tenable, undermines the constitutional structure of the courts, and calls into question litigants' ability to rely on Washington Supreme Court precedent. See generally CONST. art. IV, § 30 (establishing judicial power of Court of Appeals); RCW 2.06.030 (Court of Appeals subject to rules and review of Washington Supreme Court); see also Hutto v. Davis, 454 U.S. 370, 374, 102 S. Ct. 703, 70 L. Ed. 2d 556 (1982) (holding lower courts must follow higher court precedent "unless we wish anarchy to prevail within the federal judicial system"). Review of the Court of Appeals' bizarre decision to disregard this court's precedent based on subsequent history merits review under RAP 13.4(b)(3) and (4) as well.

2. THIS COURT'S DECISION IN ALLEN IS THE MOST ANALOGOUS AND THE CIRCUMSTANTIAL EVIDENCE THAT WAS BARELY SUFFICIENT THERE IS NONEXISTENT HERE

The State bears the due process burden of proving all elements of the charged offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A conviction must be dismissed when, viewing the evidence in the light most favorable to the State, no rational trier of fact could find all elements of the charged crime beyond a reasonable doubt. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). "[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." Id. at 16. "An inference should not arise where there exist other reasonable conclusions that would follow from the circumstances." State v. Jackson, 112 Wn.2d 867, 876, 774 P.2d 1211 (1989).

In disregarding Allen, the Court of Appeals' analysis on Wang's claim of insufficiency with respect to proof of robbery was lacking. Applying Allen to the facts of this case demonstrates that the evidence was insufficient to prove a robbery and therefore first degree felony murder.

Allen was a five-four decision in which the majority found the evidence sufficient to convict Allen of aggravated first degree murder with robbery as the aggravator. 159 Wn.2d at 11. Although the court was s split

on whether the evidence was sufficient, the court was unanimous with respect to the robbery statute's requirements, which were discussed in detail by Justice Alexander in dissent. Id. at 11-16 (Alexander, J., dissenting).

Washington long ago departed from a broader view that the use of any force prior to a theft necessarily demonstrates robbery. Id. at 12. In Washington, "the force must relate to the taking or retention of property, either as force used directly in the taking or retention or as force used to prevent or overcome resistance 'to the taking.'" Id. at 13 (quoting State v. Johnson, 155 Wn.2d 609, 611, 121 P.3d 91 (2005)). "'The mere taking of goods from an unconscious person, without force, or the intent to use force, is not robbery, unless such unconsciousness was produced expressly for the purpose of taking the property in charge of such person.'" State v. Larson, 60 Wn.2d 833, 835, 376 P.2d 537 (1962 (quoting 2 Francis Wharton, WHARTON'S CRIMINAL LAW § 1092, at 1390 (12th ed. 1932)).

> "Robbery may be punished more severely than larceny from the person. The principal policy served by this greater punishment is deterrence of the use of force (and the accompanying risk to human life) to obtain money or other property. This policy is not served where the intent to steal is not formed until after the assault. We conclude, therefore, that where the intent to steal is no more than an afterthought to a previous assault, there is no robbery."

Allen, 159 Wn.2d at 14 (Alexander, J., dissenting) (quoting Commonwealth v. Moran, 387 Mass. 644, 442 N.Ed.2d 399, 401 (1982)).

The majority in Allen agreed with Justice Alexander's legal summary of the requirements of proving robbery: "Merely demonstrating that the use of force preceded the theft does not amount to robbery." Allen, 159 Wn.2d at 10 n.4. The disagreement between the majority and the dissent in Allen was whether there was sufficient evidence to establish "that robbery was one of Allen's purposes for killing." Id.

As stated in the majority opinion, Allen confessed to police that he attacked and killed his mother in her home. Id. at 4. He stated the attack arose out of an argument about Allen not getting to work on time, potentially losing his job, and Allen and his children potentially becoming homeless, which caused Allen to "just bl[o]w up." Id. As the argument escalated, Allen strangled his mother with a cord and then struck her with a rifle, killing her. Id. at 4-5.

Allen had frequently experienced financial difficulties shortly before the killing and "went through his money quickly and was often broke a week before payday." Id. at 9. Allen's stepfather testified Allen had requested $400 from his mother to buy a car, which she refused. Id. Critically, "Allen, before the murder, had told a friend that his mother had a cashbox. Further, the cashbox was taken shortly after the murder and found near[]by." Id. at 9-10. Allen also told a cellmate "he took the cashbox after killing [his mother], that it had about $1,100 in it, and that he spent the money." Id. at 10. This

"considerable circumstantial evidence" supported the majority's holding that there was sufficient evidence that robbery motivated the murder. Id. at 9.

The four-justice dissent, by contrast, found this evidence merely established use of force and a subsequent theft, and therefore the State had failed to prove that the force was used for the purpose of theft. Id. at 11 (Alexander, J., dissenting).

The evidence in Wang's case falls far short of the evidence presented in Allen's. There was no evidence that Wang and Saosawatsri knew each other or that Wang had any knowledge about Saosawatsri's property. Unlike Allen, Wang did not mention Saosawatsri's property to anyone before the killing. Unlike Allen, no evidence supports an inference that Wang committed the killing to obtain property, much less just an expensive handbag and wallet along with a cheap watch, particularly when the potential property included laptops, a tablet PC, a digital camera, jewelry, several other purses, credit cards, and the contents of other shopping bags in the apartment. 2RP 689-93.

The Court of Appeals claims the evidence was sufficient because Wang had contacted other prostitutes on the day of the killing and a law enforcement witness "testified that escorts often had 'large sums of cash' and 'are less likely to report' a robbery." Appendix at 7 (quoting 2RP 1172-74). A police officer's knowledge of the sex work industry, however, does not establish Wang's. Wang's knowledge of the sex work industry, whatever that

is, was expressly excluded before trial, so the jury would have had to speculate to impute a police officer's knowledge of the industry to Wang. See 2RP 53-54.

This lack of connection between Wang and sex work industry is also what distinguishes State v. Yates, 161 Wn.2d 714, 168 P.3d 359 (2007), on which the Court of Appeals relied. Appendix at 6-7 (discussing evidence in Yates, 161 Wn2.d at 754, indicating sex workers were often robbed and hid cash in their shoes, bras, or underwear). Importantly, evidence was presented to the jury that Yates had on previously occasions lured prostitutes, negotiated sex acts with them, killed them by shooting them in the head, and then undressed them for the purpose of finding money. Yates, 161 Wn.2d at 752-53. No comparable evidence was presented to establish that Wang would target sex workers because of their cash business and reluctance to involve police. The Court of Appeals decision is just baseless speculation.

The evidence actually in the record regarding Wang's contacts with sex workers belies a robbery motive. In one contact, he requested a "two-girl" special. 2RP 1160-61. In another, he asked for the "girl friend experience." 2RP 1258-59. Wang thus appeared interested in engaging sex workers for their trade, not for some elaborate robbery plot. The Court of Appeals' statement that "Wang targeted a victim with property who was unlikely to call

the police" is conjecture, not a reasonable inference from the evidence. Appendix at 8.

The Court of Appeals also relied on the fact that medical evidence showed "a number of superficial stab wounds on her front and back, along with defense wounds on her arms. Saosawatsri had two fatal stab wounds to her chest." Appendix at 8. The court does not explain how this evidence supports the notion of robbery. The medical examiner clearly stated he could not provide any information on the order in which the knife wounds were inflicted. 2RP 1070-71. He could only say Saosawatsri was still alive when stabbed in the heart given the volume of blood present. 2RP 1070. To the extent the Court of Appeals relied on medical evidence to support its determination there was sufficient evidence, the Court of Appeals did not draw reasonable inferences based on the evidence presented at trial.

The Court of Appeals also seems to assert that evidence showing Wang attempted to sell some of Saosawatsri's property after the killing supports a robbery motive. Appendix at 8-9. The Allen court, however, was unanimous that "[m]erely demonstrating that he use of force preceded the theft does not amount to a robbery." Allen, 159 Wn.2d at 10 n.4; id. at 12 (Alexander, J., dissenting). As a matter of law, the fact that Wang took property does not establish he did so as part of a robbery.

The Court of Appeals also pointed out Wang's dire financial circumstances. Appendix at 8. But dire financial circumstances do not alone support an intent to rob. Poor finances might assist the State's proof when the financial condition is paired with circumstantial evidence to support a robbery motive, as in Allen. But, as discussed, the State has no circumstantial evidence to support anything beyond Wang's mere theft as an afterthought to the killing. Even when viewed in the light most favorable to the State, the evidence did not support robbery rather than mere theft.

By disregarding Allen, the Court of Appeals decision conflicts with that case on the constitutional issue of sufficiency. RAP 13.4(b)(1), (3).

The Court of Appeals decision also conflicts with State v. Irby, 187 Wn. App. 183, 201-02, 347 P.3d 1103 (2015), where the State argued there was sufficient evidence of the burglary aggravator for an aggravated murder conviction because Irby "[broke] into the upstairs bedroom and [stole] the guns." As the Court of Appeals explained,

> The problem with the State's argument is that no evidence establishes that the burglary of the upstairs bedroom preceded the murder. It is equally possible that Irby first encountered [the decedent] in the shop, killed him, and only then went upstairs to break into the bedroom and steal the guns.

Id. at 202. "Because it would require speculation to place the upstairs burglary before the murder in the chronology of events, we cannot sustain the jury's

finding that the murder was 'committed in the course of, in furtherance of, or in immediate flight from residential burglary." Id.

These principles apply just as well to the Court of Appeals decision. The State must present actual evidence beyond the fact that property was ultimately taken to establish that the taking was a robbery. The State did not do so. The Court of Appeals' contrary decision conflicts with Irby, warranting review. RAP 13.4(b)(2).

3. THE ROBBERY INSTRUCTION, WHICH THE COURT OF APPEALS ACKNOWLEDGED WAS ERRONEOUS, RELIEVED THE STATE OF ITS BURDEN OF PROVING A ROBBERY WAS UNDERWAY AT THE TIME OF THE KILLING

The jury instructions in this case relieved the State of its burden of proving a robbery was underway at the time of the killing. The instruction on robbery read, "The taking constitutes robbery, even if death precedes the taking, whenever the taking and a homicide are part of the same transaction." CP 291; 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (WPIC) 37.50, at 723 (4th ed. 2016). This directed jurors that robbery was committed whenever force was used and property was taken, regardless of timing. As discussed, timing matters because "[m]erely demonstrating that the use of force preceded the theft does not amount to robbery." Allen, 159 Wn.2d at 10 n.4 (quoting id. at 12 (Alexander, J., dissenting); see also Larson, 60 Wn.2d at 835 (stealing from unconscious

person not robbery unless unconsciousness produced expressly for purpose of stealing). The instruction relieved the State of its burden to show that deprivation of property was the purpose of the killing and therefore requires reversal of Wang's first degree murder conviction.

After discussing the case law to arrive at the conclusion that WPIC 37.50 is "potentially confusing" and legally incorrect, Appendix at 10-13, the Court of Appeals claimed, "Wang fails to show a manifest constitutional error relieving the State of its burden of proof when the evidence supports a reasonable inference that Wang had the intent to take property at the time he began to use force," Appendix at 13.

The court's analytical approach is unclear. The decision does not specify that Wang has not preserved the error for appellate review, despite "manifest constitutional errors" typically being discussed in the context of issue preservation. RAP 2.5(a)(3). Indeed, the decision does not address Wang's claims that (1) the issue was preserved by defense counsel's objection to WPIC 37.50's "same transaction" language as "confusing," 2RP 1651, or (2) to the extent the issue was not preserved, it is a result of ineffective assistance of counsel. Br. of Appellant at 31-34; Reply Br. at 9-14. Instead, the Court of Appeals appears to opine that Wang cannot show any prejudice because the evidence was sufficient, which is not the proper harmlessness analysis. The Court of Appeals' confusion or conflation of various analytical

approaches to addressing constitutional issues alone calls out for RAP 13.4(b)(3) review.

To the extent the Court of Appeals means that the error is harmless, it is incorrect. Where a jury instruction misstates an element the State must prove, it will be deemed harmless only if the reviewing court can conclude, beyond a reasonable doubt, that the element is supported by uncontroverted evidence. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1995)). The Court of Appeals did not apply this analysis but instead seemed to assert sufficiency of the evidence negated instructional prejudice, creating a conflict with Brown. RAP 13.4(b)(1).

The State presented no evidence establishing the precise circumstances of Saosawatsri's death or any taking that occurred after her death. However, under the erroneous robbery instruction, the prosecution could simply dispense with the need for such evidence because the instruction rendered the timing of intent to take property irrelevant. The State argued precisely this in closing, noting the "[c]loset was tossed," the countertop was covered with "all those bags that had been opened," and "[e]verything about this scene said that somebody had been in there to rob Ms. Saosawatsri." 2RP 1679. In other words, jurors could simply presume that a robbery occurred because items in the apartment had been rummaged. Indeed, WPIC 37.50

required only proof that the homicide and the taking of property occurred in the same transaction. The instruction relieved the State of its burden to prove intent to commit theft at the time of the force. Relieving the State of this burden is not harmless where uncontroverted evidence failed to show how and when the taking of property occurred.

The Court of Appeals also relied on the portion of the robbery instruction that reads, "The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance of the taking," asserting, "This accurate limiting statement alleviates any concerns that the instruction broadens the definition of robbery." Appendix at 13. This conflicts with the rule that jury instructions must be manifestly clear and not misleading. State v. Bennett, 151 Wn.2d 303, 307, 165 P.3d 1241 (2007). Any reasonable juror would interpret WPIC 37.50 to mean that force must be used to obtain or retain property and then, as a matter of law, that this standard is met whenever a taking and a homicide are part of the same transaction, regardless of timing.[3] The Court of Appeals decision, to the extent it holds that the error in using WPIC 37.50 was harmless, merits RAP 13.4(b)(1) and (3) review.

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[3] There is no other plausible interpretation. As the comment to WPIC 37.50 makes clear, "the State need not prove that the homicide was committed in order to take the person's property; a robbery is committed even if the intent to steal was not formed until shortly after the person was dead." WPIC 37.50 cmt., at 724; see also Appendix at 12-13 (acknowledging the drafters' comment is mistaken).

To the extent that the Court of Appeals decision means that Wang failed to adequately preserve the error, the Court of Appeals' decision conflicts with State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988), and State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). Instructions that direct a particular verdict qualify as manifest constitutional errors which may be reviewed under RAP 2.5(a)(3) regardless of objection. Scott, 110 Wn.2d at 688-89 & n.5. Where instructions relieve the State of a burden of proof, they qualify as RAP 2.5(a)(3) manifest constitutional errors. O'Hara, 167 Wn.2d at 108. WPIC 37.50 directed that a robbery occurred if the jury determined the killing and taking of property occurred in the same transaction, irrespective of timing. Because it relieved the State of its temporal burden of proof, WPIC 37.50 was manifest constitutional error. To the extent the Court of Appeals held otherwise, RAP 13.4(b)(1) and (3) review is warranted.

Wang did object to the last sentence of WPIC 37.50 because it was confusing: "transaction is not defined. So it's not clear for the jury what that means. I think it's confusing." 2RP 1651. To the extent this objection was inadequate to preserve the issue for review, it is a result of ineffective assistance of counsel.[4] This court held defense counsel rendered deficient performance when he proposed a pattern instruction where available case law

[4] The Court of Appeals did not address Wang's ineffective assistance of counsel claim at all yet noted that the WPIC 37.50 did not constitute "manifest constitutional error."

established the pattern instruction was incorrect. State v. Kyllo, 166 Wn.2d 856, 865-69, 215 P.3d 177 (2009). By objecting, Wang's counsel clearly sensed the instruction defining robbery was problematic. Had counsel consulted State v. Hacheney, 160 Wn.2d 503, 506, 158 P.3d 1152 (2007); Allen, Irby, or Larson, counsel would have discovered more precisely why WPIC 37.50 is legally incorrect. To the extent his objection did not preserve the error, counsel rendered ineffective assistance. The Court of Appeals' failure even to address this claim should be considered a conflict with controlling constitutional precedent. RAP 13.4(b)(1), (3).

WPIC 37.50 plainly contains an incorrect statement of the law that warrants the corrective review of this court. RAP 13.4(b)(4).

E. CONCLUSION

Because he satisfies all RAP 13.4(b) review criteria, Wang asks that this petition for review be granted.

DATED this 26th day of September, 2018.

Respectfully submitted,

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APPENDIX

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2018 AUG 27 AM 10: 47

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

STATE OF WASHINGTON, Respondent,	)	No. 76369-5-I
v.	)	
SONG WANG, Appellant.	)	PUBLISHED OPINION
	)	FILED: August 27, 2018

VERELLEN, J. — Song Wang appeals his conviction of first degree felony murder for the death of Kittaporn Saosawatsri. Wang argues the State presented insufficient evidence that he caused the death of Saosawatsri in the course of or in furtherance of the crime of second degree robbery. The State presented evidence that Wang was in financial despair, he was targeting prostitutes, and he used force in stabbing Saosawatsri. When viewed in a light most favorable to the State and considered together with the State's evidence that Wang took Saosawatsri's property and attempted to sell an expensive handbag the day after the murder, a rational jury could find him guilty beyond a reasonable doubt of causing Saosawatsri's death in the course of or in furtherance of a robbery.

Wang challenges jury instruction 17, defining second degree robbery. We agree with the State's concession that jury instruction 17 is potentially confusing without a definition or clarification of "same transaction." But Wang fails to show a

manifest constitutional error relieving the State of its burden of proof when the evidence supports a reasonable inference that Wang had the intent to take property at the time he began to use force.

Wang also challenges the court's exclusion of evidence that the police failed to investigate other potential suspects. But Wang failed to make a sufficient offer of proof to obtain appellate review of this issue.

During trial, the lead detective testified, "I believe that Mr. Wang was responsible for the murder of Ms. Saosawatsri."[1] Because the testimony was offered in the context of the detective explaining the course of the investigation, the detective did not give an improper opinion as to Wang's guilt.

During closing argument the prosecutor argued, "I urge you to use your common sense. Look at the evidence. Weigh the testimony and render your decision. I'm confident you will do the right thing."[2] Wang did not object. Because the comment was limited to a single instance and was tempered by the immediately preceding statement instructing the jury to look at the evidence and weigh the testimony, Wang fails to show the prosecutor's comment was so flagrant and ill intentioned that a curative instruction could not have cured any prejudice.

Wang fails to establish he is entitled to a new trial based on cumulative error.

Therefore, we affirm.

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[1] Report of Proceedings (RP) (Dec. 8, 2016) at 1211.

[2] RP (Dec. 14, 2016) at 1732-33.

FACTS

Around 9:00 p.m. on March 31, 2015, when responding to a fire alarm, Bellevue firefighters found the body of Saosawatsri in her apartment. They also found a pile of smoldering clothes in Saosawatsri's closet. Saosawatsri was found kneeling over her bed with multiple superficial stab wounds on her front and back, along with defensive wounds on her arms. The medical examiner determined Saosawatsri died from two stab wounds to her chest. The police found jewelry, shoes, and handbags strewn around the kitchen and outside the closet.

Video surveillance in Saosawatsri's building showed a white Cadillac Escalade entering the building garage at 7:35 p.m. on March 31, 2015. The video showed a male, later identified as Wang, walking up the garage ramp. At the same time, Saosawatsri buzzed someone into the building. Video surveillance showed Wang entering the building and getting off the elevator on Saosawatsri's floor. Shortly before 9:00 p.m., video surveillance showed Wang exiting the garage with a large bag.

During the investigation, the police learned Saosawatsri was engaged in prostitution. Police connected Wang to a phone used to contact Saosawatsri the day of the murder.

The State charged Wang with first degree premeditated murder, first degree felony murder, and first degree arson.

Following the trial, the jury convicted Wang of first degree felony murder, first degree arson, and the lesser included offense of second degree intentional

murder under the first degree premeditated murder charge. During sentencing, the court vacated the second degree murder conviction to avoid double jeopardy.

Wang appeals.

ANALYSIS

I. Sufficiency of the Evidence

Wang contends there was insufficient evidence he caused Saosawatsri's death in the course of or in furtherance of a robbery to sustain a conviction for first degree felony murder.

"'The sufficiency of the evidence is a question of constitutional law that we review de novo.'"[3] To determine whether there is sufficient evidence to sustain a conviction, we review the evidence in the light most favorable to the State and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[4] "'A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.'"[5]

A person is guilty of murder in the first degree when:

> He or she commits or attempts to commit the crime of either (1) robbery in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first or second degree, or (5) kidnapping in the first or second degree, and in the course of or in furtherance of such crime or in immediate

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[3] State v. Hummel, 196 Wn. App. 329, 352, 383 P.3d 592 (2016) (quoting State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016)).

[4] State v. Elmi, 166 Wn.2d 209, 214, 207 P.3d 439 (2009).

[5] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (quoting State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)).

> flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants.[6]

Here, the State alleges Wang caused Saosawatsri's death in the course of or in furtherance of second degree robbery.

A person commits robbery when:

> [H]e or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.[7]

"Intent to deprive the victim of the property is a necessary element of the offense of robbery."[8]

"To establish that a killing occurred in the course of, in furtherance of, or in immediate flight from a felony, there must be an 'intimate connection' between the killing and the felony."[9] Specifically, the State must prove "that the death was a probable consequence of the felony and must specifically prove that the felony began before the killing."[10]

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[6] RCW 9A.32.030(1)(c).

[7] RCW 9A.56.190.

[8] State v. Quillin, 49 Wn. App. 155, 164-65 741 P.2d 589 (1987).

[9] State v. Brown, 132 Wn.2d 529, 607-08, 940 P.2d 546 (1997).

[10] State v. Irby, 187 Wn. App. 183, 201, 347 P.3d 1103 (2015).

Wang argues the State presented insufficient evidence that the use of force related to his taking of Saosawatsri's property. He contends it is just as likely "that the taking of property was an afterthought to the killing."[11]

To support their respective arguments, the State and Wang heavily rely on State v. Allen.[12] Donovan Allen was convicted of aggravated first degree murder for the death of his mother. Our Supreme Court concluded the "considerable circumstantial evidence" was sufficient to establish Allen committed the murder in furtherance of a robbery and affirmed his conviction.[13] But after serving 16 years, newly discovered evidence exonerated Allen.[14] The exoneration calls into question the reliability of the circumstantial evidence in Allen. We conclude any analysis of sufficiency of the evidence here based on comparison to the facts in Allen is unwarranted.

In State v. Yates,[15] Robert Yates was convicted of two counts of aggravated first degree murder.[16] Our Supreme Court considered whether there was sufficient

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[11] Appellant's Br. at 20.

[12] 159 Wn.2d 1, 147 P.3d 581 (2006).

[13] Id. at 9.

[14] See State v. Donovan Allen, 00-1-00235-9, Cowlitz County Superior Court, Order Vacating Conviction and Dismissing Case without Prejudice, December 1, 2015; Amended Order of Dismissal with Prejudice, July 11, 2016.

[15] 161 Wn.2d 714, 168 P.3d 359 (2007).

[16] See Irby, 187 Wn. App. at 204 ("There is no distinction between the analysis of the sufficiency of the evidence to support felony murder as charged and the similar aggravating circumstance. Both require that the killing occurred in the course of, in furtherance of, or in immediate flight from a felony.").

evidence that Yates committed the murders "'in furtherance of . . . [r]obbery.'"[17] In Yates, both victims were prostitutes and "[t]he State presented evidence that women engaged in prostitution typically require payment prior to the negotiated sexual act and that, because they are often robbed, they commonly hide their money in their shoes, brassieres, or underwear."[18] Both victims were found with their clothing disturbed and no cash on or near their bodies. The State also provided evidence that Yates had financial difficulties. The court concluded, "Viewed in the light most favorable to the State, the State's circumstantial evidence could have persuaded a rational trier of fact that Yates [committed the murders] in furtherance of robbery."[19]

Similarly, when the evidence in this case is viewed in a light most favorable to the State, there is a reasonable inference that Wang killed Saosawatsri with the intent to take her property.

The State presented evidence that Wang used a phone application to make calls via the Internet rather than a regular cellular service provider. Wang created the account he used to communicate with Saosawatsri on the day of the murder, March 31, 2015. On the same day, Wang contacted numerous medium-priced prostitutes. One of the State's law enforcement witnesses testified that escorts often have "large sums of cash" and "are less likely to report" a robbery.[20] This

[17] Yates, 161 Wn.2d at 754 (quoting RCW 10.94.020(11)(a)).

[18] Id. 754.

[19] Id. at 754-55.

[20] RP (Dec. 7, 2016) at 1172-74.

evidence supports a reasonable inference that Wang targeted a victim with property who was unlikely to call the police.

The State presented evidence of Wang's financial despair. On March 23, 2015, Wang's business partner texted Wang about people who were trying to locate Wang to collect debts. Wang responded, "Tell me a way to make fast money."[21] Wang's business partner also previously loaned Wang money to assist with his financial difficulties.

On March 21, 2015, Wang stole his ex-girlfriend's white Cadillac Escalade.[22] Wang's ex-girlfriend had previously helped Wang pay off a $17,000 business loan. The relationship ended after she discovered Wang's significant gambling debt. And Wang defrauded at least two other people.

The State also presented evidence concerning Wang's use of force and taking of Saosawatsri's property. The medical examiner testified that Saosawatsri had a number of superficial stab wounds on her front and back, along with defensive wounds on her arms. Saosawatsri had two fatal stab wounds to her chest. The police found jewelry, shoes, and handbags strewn around the kitchen and outside the closet. And Wang was seen on video surveillance leaving Saosawatsri's apartment with a full bag.

On April 1, 2015, the day after the murder, Wang contacted two Portland consignment stores and attempted to sell an expensive woman's handbag. At the

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[21] RP (Dec. 13, 2016) at 1576.

[22] A white Cadillac Escalade was seen at Saosawatsri's apartment on the day of the murder.

first store, Wang turned down an offer of $405 for the bag "because it wasn't enough for the item."[23] At the second store, the manager refused to buy the handbag from Wang because she suspected it was stolen. Wang returned to the first store but refused to sell when he learned he would receive a check rather than cash.

When the evidence is viewed in a light most favorable to the State, there is a reasonable inference that Wang intended to take Saosawatsri's property at the time he walked into her apartment and before he began to use force culminating in her death. The State did not merely show Wang had financial difficulties. Rather, the State presented evidence of Wang's accelerating financial difficulties in the days leading up to the murder, his desperation to resolve these problems, and his targeting of prostitutes who were likely to have cash and were unlikely to call the police. Accordingly, we conclude the State presented sufficient evidence to support Wang's first degree felony murder conviction.

II. Jury Instruction

Wang argues jury instruction 17, defining robbery, "relieved the State of its burden to prove all elements of the offense beyond a reasonable doubt and thereby violated [his] due process rights."[24]

We review errors of law in jury instructions under the de novo standard.[25] "Jury instructions are proper when they permit the parties to argue their theories of

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[23] RP (Dec. 8, 2016) at 1354-55.

[24] Appellant's Br. at 25.

[25] State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).

the case, do not mislead the jury, and properly inform the jury on the applicable law."[26]

Here, jury instruction 17 provided:

> A person commits the crime of robbery in the second degree when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another who has an ownership, or possessory interest in that property, against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which case the degree of force is immaterial. *The taking constitutes robbery, even if death precedes the taking, whenever the taking and a homicide are part of the same transaction.*[27]

Wang specifically challenges the final sentence of jury instruction 17. Instruction 17 mirrors WPIC 37.50.[28] Under WPIC 37.50, the final sentence is optional.

In general, as recognized in State v. Irby, "[c]hronology is important in proving that a murder was committed in the course of a felony."[29] "The State must present evidence that the death was a probable consequence of the felony and must specifically prove that the felony began before the killing."[30] The final sentence of WPIC 37.50 appears to be in tension with this principle.

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[26] Id.

[27] Clerk's Papers (CP) at 291 (emphasis added).

[28] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (WPIC) 37.50, at 723 (4th ed. 2016).

[29] 187 Wn. App. 183, 201, 347 P.3d 1103 (2015).

[30] Id.

In Irby, the jury convicted the defendant of aggravated murder. This court decided there was insufficient evidence that the murder was committed in the course of or in furtherance of burglary. This court cited to State v. Hacheney when addressing the importance of chronology.[31] In Hacheney, the jury convicted the defendant of aggravated murder. Our Supreme Court considered whether there was sufficient evidence that the defendant committed the murder in the course of or in furtherance of arson. The court acknowledged, "for a killing to have occurred 'in the course of' arson, logic dictates that the arson must have begun before the killing."[32] But our Supreme Court also acknowledged the same logic does not necessarily apply to robbery:

> This is not say that a robber, for example, who kills his victim before committing the taking can necessarily avoid conviction for aggravated first degree murder. A killing to facilitate a robbery would clearly be "in the furtherance of" the robbery. RCW 10.95.020(11). And where the killing itself is the force used to obtain or retain the property, then the death can be said to be the probable consequence of the felony.[33]

Moreover, the final sentence of WPIC 37.50 was meant to address the situation where death precedes the taking and not the situation where death precedes the formation of the intent to rob. The comment to WPIC 37.50 cites State v. Craig[34] and State v. Coe[35] when addressing the use of force before

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[31] 160 Wn.2d 503, 158 P.3d 1152 (2007).

[32] Id. at 518.

[33] Id. n.6.

[34] 82 Wn.2d 777, 514 P.2d 151 (1973).

[35] 34 Wn.2d 336, 208 P.2d 863 (1949).

property is taken.[36]

In Coe, our Supreme Court addressed Coe's contention "that one cannot be guilty of robbery if the victim is a deceased person."[37]

> As an abstract principle of law this is true, as essential elements of the crime of robbery would necessarily be lacking. However, that principle can not apply here, because the robbery and the homicide were all a part of the same transaction and the fact that death may have momentarily preceded the actual taking of the property from the person does not affect the guilt of the appellant in the commission of the crime charged.[38]

Under Coe, the fact that the victim is dead at the time of the taking does not automatically preclude a conviction for felony murder based on robbery.

In Craig, Craig was convicted of robbery and first degree felony murder. Craig argued the taking of the victim's property "could not be robbery because, the driver being dead at that point, it was not accomplished by force or by putting the deceased in fear."[39] The court stated:

> The burden was on the state to show the killing by the defendant and that it was done in connection with the robbery, as a part of the same transaction. It was not incumbent upon it to prove the state of mind of the defendant at the time of the killing.[40]

The comment to WPIC 37.50 mistakenly relies on this rationale from Craig for the incorrect proposition that "the State need not prove that the homicide was committed in order to take the person's property; a robbery is committed even if

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[36] 11 WASHINGTON PRACTICE, *supra*, cmt. at 724.

[37] Coe, 34 Wn.2d at 341.

[38] Id.

[39] Craig, 82 Wn.2d at 779.

[40] Id. at 782.

the intent to steal was not formed until shortly after the person was dead."[41] But Craig does generally support the optional "same transaction" language in WPIC 37.50.

At oral argument, the State conceded WPIC 37.50 is potentially confusing without a definition or clarification of "same transaction." We agree. But the use of the optional language did not relieve the State of its burden to prove all the elements of robbery beyond a reasonable doubt. In jury instruction 17, as in the pattern instruction, the sentence immediately preceding the final sentence correctly identified that "[t]he force or fear must be used to obtain or retain possession of the property."[42] This accurate limiting statement alleviates any concerns that the instruction broadens the definition of robbery.

Wang fails to show a manifest constitutional error relieving the State of its burden of proof when the evidence supports a reasonable inference that Wang had the intent to take property at the time he began to use force. The mere possibility that a person might commit a homicide and after the fact form the intent to take property does not render WPIC 37.50 manifestly unconstitutional on these facts.

III. Exclusion of Evidence

Wang contends the trial court violated his right to present a defense when it excluded evidence of law enforcement's failure to investigate other suspects.

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[41] 11 WASHINGTON PRACTICE, *supra*, cmt. at 724.

[42] CP at 291.

"In order to obtain appellate review of trial court action excluding evidence, there must be an offer of proof."[43] "An offer of proof must be sufficiently definite and comprehensive fairly to advise the trial court whether or not the proposed evidence is admissible."[44]

Here, "Wang wished to present evidence that Saosawatsri had made enemies by assisting law enforcement in investigating and prosecuting six participants in a prostitution ring in 2012."[45] Wang proffered a federal indictment filed against the six participants and a defense interview with Bellevue Detective Tor Kraft concerning Saosawatsri's involvement in the 2012 investigation. In the defense interview, Detective Kraft indicated that Saosawatsri was cooperative in the 2012 investigation.

Defense counsel asked Detective Kraft if he investigated any of the participants from the prostitution ring as possible suspects in Saosawatsri's murder. He replied,

> In the information I was provided when this initially occurred there was nothing that led me down that path. I wasn't able to find any connection. Of course that doesn't mean that that couldn't be a possibility. . . . [b]ut there was [an] overwhelming amount of information pointing to this one particular individual, the defendant.[46]

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[43] Sutton v. Matthews, 41 Wn.2d 64, 67, 247 P.2d 556 (1952).

[44] Id.

[45] Appellant's Br. at 34.

[46] Pretrial Exhibit 17 at 19.

Detective Kraft also testified that any follow up was left to the lead detective, Detective Ellen Inman. And Wang failed to provide any evidence concerning what Detective Inman did or did not investigate in terms of potential other suspects.

Wang's proffer is insufficient to establish that the police failed to investigate the six participants. We conclude Wang failed to make a sufficient offer of proof to obtain appellate review of this issue.

IV. Improper Opinion

Wang argues Detective Inman gave an improper opinion as to Wang's guilt. "No witness, lay or expert, may testify to his opinion as to the guilt of the defendant, whether by direct statement or inference."[47]

> In determining whether such statements are impermissible opinion testimony, the court will consider the circumstances of the case, including the following factors: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.[48]

Testimony from police officers carries an "'aura of reliability.'"[49]

As a threshold matter, we do not accept any suggestion by the State that once the defense contends the police unfairly narrowed the investigation to Wang, the State was free to elicit opinion testimony concerning Wang's guilt. Here, during direct examination, Detective Inman twice testified, "I believe that Mr. Wang

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[47] State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

[48] State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (internal quotation marks omitted) (quoting State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)).

[49] Id. at 595 (quoting Demery, 144 Wn.2d at 765).

was responsible for the murder of Ms. Saosawatsri."[50] In isolation, this answer, framed in the present tense, appears to be an opinion of guilt, but this testimony was offered in the context of Detective Inman explaining the course of the investigation. Specifically, Detective Inman was explaining the importance of phone records in identifying Wang as the suspect.

Wang cites State v. Montgomery.[51] There, the State charged Montgomery with possession of pseudoephedrine with intent to manufacture methamphetamine. At trial, one detective testified, "I felt very strongly that they were, in fact, buying ingredients to manufacture methamphetamine based on what they had purchased, the manner in which they had done it, going from different stores, going to different checkout lanes. I'd seen those actions several times before."[52] This testimony was offered in response to a question from the State about whether the detective had formed any conclusions based on his observation of Montgomery and a codefendant buying pseudoephedrine.

Another detective, who also witnessed the purchase, testified that the items purchased by Montgomery "were purchased for manufacturing."[53] This testimony was offered in response to a question from the State about why the detectives had not stopped Montgomery earlier. Initially, the detective responded, "It's always our hope that if the person buying these chemicals, that are for what we believe to be

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[50] RP (Dec. 8, 2016) at 1211.

[51] 163 Wn.2d 577, 183 P.3d 267 (2008).

[52] Id. at 587-88.

[53] Id. at 588.

methamphetamine production, that we can take them back to the actual lab location."[54]

Our Supreme Court found the opinion testimony from the detectives was improper. The court determined neither the State nor the detectives "made any effort to avoid expressing their opinions that Mr. Montgomery possessed pseudoephedrine with the intent to manufacture methamphetamine."[55]

Here, unlike the witnesses in Montgomery, Detective Inman's testimony was offered to explain the progression of the investigation and how the police arrived at Wang as the lead suspect. We conclude Detective Inman did not offer an improper opinion as to Wang's guilt.

V. Prosecutorial Misconduct

Wang contends a new trial is required because the State committed prosecutorial misconduct during closing argument.

"Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard."[56]

To prevail on a claim of prosecutorial misconduct, the defendant bears the burden of establishing that the conduct was both improper and prejudicial.[57] To establish prejudice, the defendant must show "a substantial likelihood that the

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[54] Id.

[55] Id. at 592 n.6.

[56] State v. Brett, 126 Wn.2d 136, 174-75, 892 P.2d 29 (1995).

[57] State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)).

misconduct affected the jury verdict."[58] We evaluate the prosecutor's challenged statements "within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions."[59]

Here, the prosecutor argued in rebuttal, "I urge you to use your common sense. Look at the evidence. Weigh the testimony and render your decision. *I'm confident you will do the right thing.*"[60] Wang did not object to the comment during trial. The "'failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.'"[61]

Even assuming the prosecutor's comment was improper, Wang fails to establish prejudice. The potentially improper comment was limited to a single instance and the comment was tempered by the immediately preceding comments instructing the jury to look at the evidence and weigh the testimony.[62]

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[58] In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012).

[59] State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

[60] RP (Dec. 14, 2016) at 1732-33 (emphasis added).

[61] Thorgerson, 172 Wn.2d at 443 (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)).

[62] See State v. Coleman, 74 Wn. App. 835, 839 & 841, 876 P.2d 458 (1994) (This court found the prosecutor's comment "telling the jury it would violate its oath if it disagreed with the State's theory of the evidence" was improper. But this court concluded the single comment was not prejudicial because it was "tempered by her immediately preceding comments that 'we cannot second guess you, and we will not second guess you.").

We conclude the prosecutor's comment was not so flagrant and ill intentioned that a curative instruction could not have cured any prejudice.

VI. Cumulative Error

Finally, Wang argues cumulative error resulted in an unfair trial and requires reversal and remand. "The cumulative error doctrine applies where a combination of trial errors denies the accused a fair trial even where any one of the errors, taken individually, may not justify reversal."[63]

For lack of a combination of trial errors, we conclude Wang is not entitled to a new trial based on cumulative error.

Therefore, we affirm.

WE CONCUR:

Mann, A.C.J.

Becker, J.

[63] In re Detention of Coe, 175 Wn.2d 482, 515, 286 P.3d 29 (2012).

NIELSEN, BROMAN & KOCH P.L.L.C.

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