Supreme Court No. 96701-6
(COA No. 35000-2-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DELBERT BENSON,

Petitioner.

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

PETITION FOR REVIEW

NANCY P. COLLINS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER

Delbert Benson, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Benson seeks review of the decision by the Court of Appeals dated October 30, 2018, for which reconsideration was denied on December 6, 201. Copies are attached as Appendix A and B.

C. ISSUES PRESENTED FOR REVIEW

1. During the pendency of this appeal, the law changed governing a court's authority to impose certain legal financial obligations. This Court ruled that these changes apply to cases pending on direct review. Mr. Benson apprised the Court of Appeals of this change in the law but the Court of Appeals declined to accept Mr. Benson's request to consider this belatedly raised issue. Because the law has changed, should this Court order Mr. Benson's case remanded for reconsideration of legal financial obligations that the trial court only imposed because it believed they were mandatory?

2. The prosecution has a heightened evidentiary burden in any perjury case, requiring it to produce direct testimony from a witness with personal knowledge of the false testimony as well as independent corroborative evidence. The State did not offer direct testimony proving Mr. Benson made material false statements under oath and the to-convict instruction omitted this essential element. Does the absence of critical proof from the case and the "yardstick" jury instruction raise an issue for which review should be granted?

3. The to-convict instruction must limit the jury to consider the acts charged in the information. Here, the information expressly charged Mr. Benson with making a specific false statement about buying drugs from John Gant but the to-convict instruction allowed the jury to convict him of perjury based on any false statement he made. By failing to limit the jury's verdict to the specific charged acts contained in the information, did the court's instruction permit the jury to convict Mr. Benson based on uncharged acts and is this error particularly harmful where the prosecution diluted its burden of proof in its closing argument, over objection?

D. STATEMENT OF THE CASE

In October 2012, a detective visited Delbert Benson in jail and offered to release him and help get his pending charges dropped if Mr. Benson purchased drugs for the police. RP 136-37.[1] Mr. Benson agreed. RP 138-39. Immediately after his release from jail, Mr. Benson resumed using methamphetamine "every day" without stopping to sleep. RP 344-45.

On October 30, 2012, Mr. Benson met Detective Gary Bolster at the police station. RP 148. The detective hid an audio recorder in Mr. Benson's coat and gave him money to buy drugs. RP 148, 153, 348. Detective Bolster expected Mr. Benson would buy methamphetamine from Wade Armour and instructed him to conduct the exchange quickly. RP 142; Ex. 3, RP 2.[2]

Detective Bolster and Officer Steve Harris separately followed

[1] The verbatim report of proceedings (RP) are contained in three consecutively paginated volumes.

[2] Exhibit 3 is an audio-recording that was played for the jury and transcribed only for purposes of appeal. Citations are to the transcript prepared for appeal. The transcript may not reflect what the jurors heard or discerned.

Mr. Benson at a distance, driving separate cars. RP 150, 151, 296. Mr. Benson met Mr. Armour but did not buy drugs. RP 148-49. The two men drove to John Gant's house. RP 149-51. They went inside a building, in an old and dark warehouse area for about 30 or 40 minutes. RP 150. The officers could hear only parts of the conversation over Mr. Benson's recording device. RP 151. They could not see what inside the building and "didn't see any drug transaction." RP 251.

Mr. Benson finally left Mr. Gant's home with several other people who he dropped off at various places and then he returned to the police station. RP 151. Mr. Benson told Detective Bolster that he gave John Gant $150. Ex. 5, at 1. He gave Detective Bolster a container holding what the detective presumed to be methamphetamine. RP 157.

Although Mr. Benson's contract with the police required him to make several drug purchases, Mr. Benson refused to take part in any more efforts to buy drugs. RP 164, 189-90, 261.

The prosecution charged John Gant with one count of delivery of methamphetamine to Mr. Benson. RP 176. Mr. Gant had a jury trial. RP 262. The State called Mr. Benson as a witness. RP 178. Mr. Benson testified he was addicted to methamphetamine, and he told the detective he gave money to Mr. Gant but in fact, he kept the money and the

methamphetamine he gave to the detective was his own. RP 180-86, 191, 193-94. He said it was in a toolbox in his truck. RP 186, 340. The jury acquitted Mr. Gant of selling drugs to Mr. Benson. RP 302.

Two years after Mr. Gant's acquittal, the State charged Mr. Benson with first degree perjury, claiming he falsely testified on June 26, 2013, "that he did not purchase any drugs from John Gant on October 30, 2012." CP 4; CP 162 (second amended information).

The jury convicted Mr. Benson of first degree perjury. CP 189. He challenged the lack of direct evidence positively proving perjury and the inadequacy of the essential elements jury instruction. But the Court of Appeals summarily denied relief. App. A. He also belatedly raised the impropriety of LFOs based on a change in the law that occurred after the briefing was filed, but the Court of Appeals refused to grant relief, without explanation. App. B.

The facts are further explained in Appellant's Opening Brief, in the relevant factual and argument sections, and are incorporated herein.

E. ARGUMENT

1. The Court of Appeals decision disregards the essential elements of first degree perjury.

a. Perjury has unique, heightened elements of proof.

In all criminal cases, the burden of proving the essential elements of a crime unequivocally rests upon the prosecution. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970); U.S. Const. amend. 14; Const. art. I, § 3.

In a perjury prosecution, the State must meet a more stringent evidentiary burden, "higher than in other criminal cases." *State v. Singh*, 167 Wn. App. 971, 976, 275 P.3d 1156 (2012); *State v. Wallis*, 50 Wn.2d 350, 354-55, 311 P.2d 659 (1957) (heightened burden of proof stems from common law). The unique requirements of proof for perjury exist because the criminal justice system strongly prefers "encouraging witnesses to testify freely without fear of reprisals." *Nessman v. Sumpter*, 27 Wn. App. 18, 23-24, 615 P.2d 522 (1980).

The statutory elements of perjury in the first degree are that a witness knowingly makes a materially false statement in an official proceeding, under oath. RCW 9A.72.020. Unique to a perjury prosecution, for the State to convict a person of perjury,

> (t)here must be the direct testimony of at least one credible witness, and that testimony to be sufficient must be positive and directly contradictory of the defendant's oath; in addition to such testimony, there must be either another such witness or corroborating circumstances established by independent evidence, and of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence. Otherwise the defendant must be acquitted.

Nessman, 27 Wn. App. at 23, quoting *State v. Rutledge*, 37 Wash. 523, 528, 79 P. 1123 (1905).

The "direct testimony" rule requires the State present a witness who is "in a position to know of his own experience that the facts sworn to be true by the defendant are false." *Id.* The defendant's own contradictory statements, "sworn or unsworn, are not direct evidence of the falsity of the testimony which the law requires." *Id.*, quoting *State v. Wallis*, 50 Wn.2d 350, 354-55, 311 P.2d 659 (1957).

In addition to direct testimony, the corroborating evidence "must be clear and positive and so strong that, with the evidence of the witness who testifies directly to be the falsity of the defendant's testimony, it will convince the jury beyond a reasonable doubt." *State v. Arquette*, 178 Wn. App. 273, 285, 314 P.3d 426 (2013), quoting

Rutledge, 37 Wash. at 527. Corroborative evidence must also be independent of the direct witness's testimony and "inconsistent with the innocence of the defendant." *Id.*

To prove a person answered falsely, the "burden is on the questioner" to ask precise questions. *State v. Stump*, 73 Wn. App. 625, 629, 870 P.2d 333 (1994). The "questions and answers" underlying the perjury allegation "must demonstrate both that the defendant was fully aware of the actual meaning behind the examiner's questions and that the defendant knew his answers were not the truth." *Id.* at 628. If a question was ambiguous, it does not satisfy the necessity of making a knowingly false statement. *Id.*

Giving an "evasive answer," even with the intent to mislead, cannot constitute perjury if it is technically true. *State v. Olson*, 92 Wn.2d 134, 138, 594 P.2d 1337 (1979).

b. The prosecution did not present direct witness testimony positively demonstrating Mr. Benson lied while testifying.

The prosecution contended Mr. Benson committed perjury when he testified at John Gant's trial that the methamphetamine he gave to the police was his and was not given to him by Mr. Gant in exchange for money. CP 7-8 (Bill of Particulars); CP 122 (amended information).

To prove Mr. Benson's 2013 testimony was knowingly false, the prosecution was required to present: (1) "the testimony of at least one credible witness which is positive and directly contradictory" to the sworn testimony of Mr. Benson; and (2) "another such direct witness or independent evidence of corroborating circumstances of such a character as to clearly" overcome the presumption of innocence. *Olson*, 92 Wn.2d at 136.

Yet the State did not present any witnesses with personal knowledge that Mr. Benson had in fact purchased methamphetamine from Mr. Gant. It did not offer testimony from people who were with Mr. Benson at the time of the alleged drug sale, even though several other people were present when Mr. Benson was interacting with Mr. Gant. The prosecution could have called Wade Armour or John Gant as witnesses, and admitted it knew how to reach both men, but did not offer their testimony. CP 125; RP 14. At least one woman was also present, and her voice can be heard on the recording, but she did not testify. *See, e.g.*, Ex. 3, RP 18-20.

Without any testimony from a person who saw an alleged drug purchase, the prosecution offered testimony from two police officers who did not see any drug sale. Detective Bolster and Officer Harris

were trailing Mr. Benson from a distance. RP 232-33, 251, 297. The sale allegedly occurred inside a building, where Mr. Benson was for 30 or 40 minutes, and the transmission that Detective Bolster was listening to went "in and out" due to static. RP 150-51.

Detective Bolster "presumed" Mr. Benson bought a controlled substance but the detective was parked on the other side of the building. RP 157, 237. He did not see any drug transaction. RP 251. Similarly, Officer Harris "pretty much didn't see anything." RP 297. It was dark out and the officer parked his own car on a neighboring street so he could "pick up" Mr. Benson "as he left." RP 298.

The police officers did not witness a drug sale occur and therefore could not satisfy the requirements of direct testimony from a witness based on "his or her own experience." *Nessman*, 27 Wn. App. at 24. Without direct testimony from a witness who knows what occurred from his own experience, the prosecution relied on an ambiguous audiotape generated by the wire Mr. Benson wore. This recording contains wide-ranging, disjointed, off-color and unconnected streams of conversation throughout. Ex. 3. The word methamphetamine is never spoken. *Id.* No one talks directly about buying drugs. Instead,

the prosecution asked the jurors to infer a drug purchase occurred by isolating stray comments while ignoring their context. RP 381.

Remarks could be about drugs but the context remains murky and it is never clear that a purchase actually occurred with money and drugs changing hands. The recording alone does not provide direct evidence that Mr. Benson bought methamphetamine from Mr. Gant and it does not satisfy the strict requirement of direct testimony for proving perjury. *See Singh*, 167 Wn. App. at 976.

Because perjury cannot be based on a defendant giving inconsistent statements about an event, Mr. Benson's statements to the detective could not be the direct testimony necessary to prove perjury. *Arquette*, 178 Wn. App. at 285. In addition, Mr. Benson was charged with lying about whether he bought "drugs" from Mr. Gant, yet in the post-incident interview he only told the detective directly that he gave money to Mr. Gant, not that he bought drugs from him. Ex. 5, p. 1-3.

The prosecution did not offer "positive" or clear and "direct" testimony from a witness with firsthand knowledge demonstrating that Mr. Benson in fact bought methamphetamine from Mr. Gant on October 30, 2012, as charged. CP 122.

Perjury's strict requirements of proof demand at least one direct witness as well as independent corroboration. *Arquette*, 178 Wn. App. at 285. The recording cannot substitute for the mandatory direct witness because it does not contain clear, positive evidence unambiguously showing that Mr. Benson lied. *See Singh*, 167 Wn. App. at 977. The prosecution did not meet the necessary legal threshold to prove perjury.

c. The to-convict instruction omitted the essential elements that the State must prove for a perjury conviction.

In order to ensure the jury instructions make the controlling legal standards manifestly apparent to the average juror, a to-convict instruction sets forth the essential elements that the jury must find in order to vote in favor of a conviction. *State v. Johnson*, 180 Wn.2d 295, 306, 325 P.3d 135 (2014); *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953); U.S. Const. amend. 14; Const. art. I, §§ 21, 22.

The to-convict instruction "must contain all of the elements of the crime because it serves as a yardstick by which the jury measures the evidence to determine guilt or innocence." *Johnson*, 180 Wn.2d at 306, quoting *State v. Sibert,* 168 Wn.2d 306, 311, 230 P.3d 142 (2010), *State v. Smith,* 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (jury has the "right" to rely on the "to convict" instruction as "complete statement of

the law" and a violation is a "constitutional defect" requiring automatic reversal). A "reviewing court may not rely on other instructions to supply the element missing from the 'to convict' instruction." *State v. Nelson*, 191 Wn.2d 61, 74, 419 P.3d 410 (2018) (internal citation omitted).

The essential elements of perjury include the requirements that the prosecution produce direct testimony of at least one witness with personal knowledge and independent corroborative evidence showing the falsity of the accused person's testimony. But the to-convict instruction only informed the jurors of the statutory elements of first degree perjury, not the additional elements mandating a heightened standard of proof for a perjury conviction. CP 177 (Instruction 11).

It did not mention the need for direct testimony or corroborative evidence. In fact, another instruction told the jurors that "[t]he law does not distinguish between direct and circumstantial evidence in terms of their weight and value in finding the facts in this case." CP 171 (Instruction 5). This instruction undercuts the heightened proof and requirement of direct testimony unique to a perjury conviction.

Because the to-convict instruction directed the jurors that they only needed to find the bare the statutory elements of perjury to convict

Mr. Benson, and the remaining instructions confuse or undermine the common law requirements of direct testimony by a witness with firsthand knowledge, the omission from the to-convict instruction misled the jury about the proof necessary to convict Mr. Benson. CP 177.

d. The to-convict instruction permitted the jury to convict Mr. Benson based on uncharged acts.

When the Information presents one specific act as the basis of the charged crime, it is error for a trial court to instruct the jury it may convict the defendant based on other conduct. *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942); A person "cannot be tried for an uncharged offense." *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988).

The Amended Information alleged Mr. Benson committed perjury in the first degree when he, "on June 26, 2013, during an official proceeding, made a materially false statement, to wit: that he did not purchase any drugs from John Gant on October 30, 2012, which he knew to be false under an oath required or authorized by law." CP 122.

But the to-convict instruction did not require the jury to rest its verdict only on the particular statement about purchasing drugs from John Gant. The to-convict instruction only asked whether "on or about the 26th day of June, 2013, the defendant *made a false statement.*" CP 177 (emphasis added). This instruction let the jury consider any false statement Mr. Benson made on June 26, 2013, without limitation to the specific statement charged. *See, e.g.*, *State v. Sutherby*, 165 Wn.2d 870, 880, 204 P.3d 916 (2009) (construing "a" and "any" as having "broad and inclusive connotations").

As Mr. Benson detailed in his own testimony, he made many statements when testifying on June 26, 2013, several of which contradicted the detective's description of events. The court's instructions did not plainly direct the jurors to consider only whether the specific statement charged in the information was a material false statement given under oath in an official proceeding. Mr. Benson gave many statements on June 26, 2013, a number of which were different from the detective's testimony about the incident. Because Mr. Benson was only charged with making a specific false statement on June 26, 2013, but the court's instruction did not limit the jury to that particular

statement, the instructions permitted the jury to convict him based on an uncharged act.

This error was exacerbated by the prosecution's dilution of its burden of proof in its closing argument. It is misconduct for a prosecutor to make arguments that misstate or shift the State's burden to prove the accused person guilty beyond a reasonable doubt. *State v. Lindsay,* 180 Wn.2d 423, 434, 326 P.3d 125 (2014); *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935).

Here, the prosecutor compared its case to a boat, and trivialized the defendant's complaints about the prosecution's insufficient evidence. It argued,

> If this were a trial about whether or not a boat existed, was made, and the plaintiff was alleging this is a boat, this would be a case where the defense is telling you, well, we're not sure because we don't know if it has one mast or two masts, maybe even three masts, when all you have to decide is, is it a boat, and will it float?

RP 413. The defense promptly objected, saying "I think counsel if trivializing the term –." But the court interjected, "Overrule." The court told the jury that the lawyers' remarks are not evidence or law, but the prosecution could, "[g]o ahead. This is argument." *Id.*

The prosecution's comparison of this case to "a boat" where the jury only needed to decide "will it float," fundamentally misrepresented and trivialized the prosecution's burden of proof, particularly in a case where it had a uniquely high burden of proving the elements of perjury based on direct and corroborative proof. In a case where the to-convict instruction made no reference to the heightened evidentiary burden imposed to convict Mr. Benson of perjury and also made no reference to the specific act of perjury alleged in the amended information, the prosecution's efforts to dilute its burden of proof in its argument further impacted the jury's deliberations and the fairness of the trial. These objected to remarks were delivered just before the jury started its deliberations and received the court's imprimatur by overruling the defense objection.

e. This Court should grant review.

This Court should grant review because the Court of Appeals opinion conflicts with cases from this Court and other Court of Appeals decisions explaining the essential elements of perjury, and raises essential constitutional issues. RAP 13.4(b)(1), (2), (3). Furthermore, substantial public interest favors review because the pattern jury

instructions do not fully take into account the unique essential elements and proof requirements for perjury. RAP 13.4(b)(4).

2. The change in the law prohibiting the imposition of discretionary LFOs and rendering this new law applicable for people whose cases are on direct appeal merits granting Mr. Benson relief from LFOs the court imposed.

This Court recently ruled that new changes to the laws governing the imposition of legal financial obligations (LFOs) apply to cases pending on direct review. *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). This ruling was issued on September 20, 2018, and was final upon a mandate entered on October 23, 2018.

Mr. Benson filed his opening brief in December 2017 and his reply brief May 2018, before the law changed governing LFOs. The trial court imposed discretionary costs including the $200 criminal filing fee, $23.30 witness costs, $250 jury demand fee, and $100 DNA collection fee. CP 195. The court did not enter any finding that Mr. Benson possessed the ability to pay. CP 195. In fact, the court imposed them only after determining the LFOs were mandatory. 3RP 68. It conducted no inquiry into Mr. Benson's ability to pay. *Id.*

The recent statutory amendments make it categorically impermissible to impose any discretionary costs on indigent defendants.

Ramirez, 191 Wn.2d at 739; LAWS OF 2018, ch. 269, § 6(3). This change in the law "applies on appeal to invalidate" discretionary LFOs imposed upon an indigent person. *Ramirez*, 191 Wn.2d at 746.

Now, the previously mandatory $200 filing fee cannot be imposed on indigent defendants. *Id.*; LAWS OF 2018, ch. 269, § 17(2)(h). It is also improper to impose the $100 DNA collection fee if the defendant's DNA has been collected as a result of a prior conviction. LAWS OF 2018, ch. 269, § 18. Mr. Benson had several prior convictions that would have necessarily triggered his DNA collection. CP 194. The law also changed to amend *former* RCW 10.46.190 (2005) so that no jury fee can be ordered against a person who is indigent at the time of sentencing LAWS OF 2018, ch. 269, § 9.

Mr. Benson apprised the Court of Appeals of this change in the law in a motion for reconsideration, because law changed after the Court of Appeals set the case for consideration without oral argument. The Court of Appeals denied the request without explanation or comment.

Based on this recent change in the law, Mr. Benson asks this Court to consider this issue and order the trial court to strike the now-discretionary LFOs. This is Mr. Benson's only opportunity to raise this

issue in the course of his constitutionally protected right to direct appeal. Mr. Benson's present indigent status is documented in the declaration filed for purposes of pursuing this appeal. This financial statement is "reliable" evidence of his on-going poverty. *See Ramirez*, 191 Wn.2d at 744. He has "no financial resources whatsoever." CP 207. He has been incarcerated since 2016 and is serving a 72-month sentence. CP 197, 207. The trial court imposed $573.50 in LFOs because it believed they were mandatory costs. 3RP 68. The law has materially and significantly changed during the direct appeal. This Court grant review and strike the non-mandatory LFOs imposed upon an indigent person, as mandated by the change in the law.

F. CONCLUSION

Based on the foregoing, Petitioner Delbert Benson respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 2nd day of January 2019.

Respectfully submitted,

NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Petitioner

APPENDIX A

FILED
OCTOBER 30, 2018
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. DELBERT HAROLD BENSON, Appellant.	)	No. 35000-2-III UNPUBLISHED OPINION

PENNELL, J. — Delbert Benson appeals his perjury conviction. We affirm.

FACTS

Delbert Benson agreed to work as a confidential informant and facilitate a controlled drug buy on October 30, 2012. Prior to the controlled buy, Mr. Benson met with two police officers. The officers searched Mr. Benson's person and pickup truck and provided him $200 in buy funds. Mr. Benson was also outfitted with an audio transmitting and recording device. The device enabled the officers to listen to Mr. Benson's conversations in real time and also to record the conversations for future use.

After being wired and prepped for the controlled buy, officers followed Mr. Benson to the residence of John Gant. Mr. Benson went inside the residence and met with Mr. Gant for approximately 40 minutes. During the meeting, officers could hear

Mr. Benson negotiating a purchase for $150. The conversation included drug terminology such as a "ball," an "eight ball" and a "teen." Clerk's Papers (CP) at 36, 38. After finishing his meeting with Mr. Gant, the police followed Mr. Benson back to the police station.

Once at the station, officers performed additional searches of Mr. Benson and his pickup. They recovered $50 in buy funds and a plastic container containing methamphetamine. During a recorded debriefing, Mr. Benson said that he had gone to Mr. Gant's house and given him $150. Mr. Benson was asked if Mr. Gant had methamphetamine.[1] He responded, "yes." CP at 59. Mr. Benson explained Mr. Gant weighed the methamphetamine and took the $150 in exchange for the drug.

As a result of Mr. Benson's controlled buy, the State charged Mr. Gant with controlled substance violations. Mr. Benson was called to testify at trial. During his testimony, Mr. Benson denied Mr. Gant had ever supplied him with methamphetamine. Mr. Benson claimed that the methamphetamine turned over to police belonged to him and had come from a tool box located in the bed of his pickup. Mr. Benson also testified that he had kept the $150 that he was supposed to have given to Mr. Gant. According to

[1] The officers referred to methamphetamine as "it" during the recorded debriefing. CP at 59. The context of the interview makes clear that the "it" being referenced is the methamphetamine turned over by Mr. Benson to the officers.

Mr. Benson, he instead placed the $150 in his wallet. Mr. Gant was acquitted of the controlled substance charge.

Two years after Mr. Gant's acquittal, the State charged Mr. Benson with first degree perjury. The information alleged Mr. Benson gave materially false testimony when he stated he did not purchase any drugs from John Gant on October 30, 2012. The exact statements that formed the basis of the charge were identified in a bill of particulars.[2]

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[2] The statements identified in the bill of particulars were as follows:

> Q.: Are you going to tell the jury who you got the Meth from?
> A.: It was mine.
> Q.: It was yours?
> A.: The only reason I took the money from [the police] was to get the money.
> Q.: Ok. So where did you have it?
> A.: In my tool box in my pickup.
> . . . .
> Q.: Did Mr. Gant give you any Methamphetamine while you were in the apartment?
> A.: No. I, I –
> Q.: Did he give you any Methamphetamine at any time?
> A.: No.
> . . . .
> Q.: You made a comment about Mr. Gant "not being the guy." What do you mean by that?
> A.: When we were at the house, Mr. Gant never gave me anything. That's all I meant by that. Mr. Gant never gave me any drugs at all, ever.

CP at 7-8.

Mr. Benson's case proceeded to trial. The State presented testimony from the two officers who had handled Mr. Benson's cooperation. The officers described their surveillance activities and interactions with Mr. Benson. According to the officers' testimony, they would have searched any tool box located in Mr. Benson's truck as well as Mr. Benson's wallet. Yet during the pre-buy search, the officers did not discover any methamphetamine. Nor did the officers ever see Mr. Benson retrieve anything from the bed of his pickup during the course of their surveillance. During the post-buy search, Mr. Benson was not discovered to have $150 on his person. In addition to the officers' testimony, the State introduced the entire wire recording of Mr. Benson's undercover activity, along with Mr. Benson's post-buy recorded statement to police. The entire statement was played for the jury, as were portions of the undercover recording.

At several points during the trial, the prosecutor explained that Mr. Benson had perjured himself by claiming that the drugs turned over to police were his.[3] Defense counsel reiterated this clarification and pointed out the various false statements attributed to Mr. Benson that were *not* the subject of the perjury charge.

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[3] During opening statements, the prosecutor stated, "And when you have heard everything and [are] deliberating about this case you are left with two choices: Did [Mr. Benson] lie on the stand regarding whose drugs this was, or was it really his?" 1 Report of Proceedings (RP) (Oct. 31, 2016) at 117. During closing argument, the prosecutor stated Mr. Benson was "contesting the perjury charge saying that the dope was his." 3 RP (Nov. 2, 2016) at 379.

The prosecutor concluded his rebuttal argument with the following statement, to which the defense objected:

> [PROSECUTOR]: You know, one might, you know, people like analogies. It's always kind of difficult to come up with one that makes sense. If this were a trial about whether or not a boat existed, was made, and the plaintiff was alleging this is a boat, this would be a case where the defense is telling you, well, we're not sure because we don't know if it has one mast or two masts, maybe even three masts, when all you have to decide is, is it a boat, and will it float? And the State submits to you that you know, after you have, now that you have heard everything—
>
> [DEFENSE COUNSEL]: Your Honor, I apologize. I have to object. I think counsel is trivializing the term—
>
> THE COURT: Overrule. Again, ladies and gentleman what the lawyers say isn't evidence. It's not the law. You will get the evidence from what you heard and get the law from my instructions.
>
> Go ahead. This is argument.
>
> [PROSECUTOR]: After you have seen, gone through the evidence, the transcript, the wires, that you are left with no reasonable doubt but that Mr. Benson committed the crime of Perjury back in June 2013. Thank you.

3 Report of Proceedings (Nov. 2, 2016) at 413-14.

The jury was given a standard pattern instruction that direct and circumstantial evidence carry equal weight and value (instruction 5).[4] The jury was also given an instruction specific to the heightened evidentiary requirements for perjury (instruction 7). *See, e.g.*, *State v. Singh*, 167 Wn. App. 971, 976, 275 P.3d 1156 (2012) (explaining the requirement). Instruction 7 provided:

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[4] CP at 171; 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 5.01, at 181 (4th ed. 2016).

> To convict the defendant of the crime of Perjury in the First Degree, there must be either positive testimony of at least two credible witnesses that directly contradicts the defendant's statement made under oath or there must be one such direct witness along with independent direct or circumstantial evidence of supporting circumstances that clearly overcomes the oath of the defendant and the legal presumption of defendant's innocence.

CP at 173. The to-convict instruction (instruction 11) listed the elements of first degreeperjury but did not contain any reference to the heightened evidentiary requirement described in instruction 7. Mr. Benson was found guilty of first degree perjury. He appeals.

ANALYSIS

Sufficiency of the evidence

In a sufficiency challenge, our inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences are drawn in the State's favor, and the evidence is interpreted most strongly against the defendant. *Id.* This court does not reweigh the evidence and substitute its judgment for that of the trier of fact. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

A person is guilty of first degree perjury if, in any official proceeding, he or she makes a materially false statement, which he or she knows to be false, under an oath required or authorized by law. RCW 9A.72.020(1). The evidentiary requirements for a perjury conviction are more stringent than all other crimes, except treason. *State v. Arquette*, 178 Wn. App. 273, 282, 314 P.3d 426 (2013). Sufficient evidence for a perjury conviction requires

> "the direct testimony of at least one credible witness, and that testimony to be sufficient must be positive and directly contradictory of the defendant's oath; in addition to such testimony, there must be either another such witness or corroborating circumstances established by independent evidence, and of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence. Otherwise the defendant must be acquitted."

State v. Rutledge, 37 Wash. 523, 528, 79 P. 1123 (1905) (quoting *People v. Rodley*, 131 Cal. 240, 261, 63 P. 351 (1900)). This direct testimony must come "from someone in a position to know of his or her own experience that the facts sworn to by defendant are false." *Nessman v. Sumpter*, 27 Wn. App. 18, 24, 615 P.2d 522 (1980).

Mr. Benson claims the State's evidence was insufficient to meet the heightened evidentiary requirements for perjury. We disagree. The State presented testimony from law enforcement officers that Mr. Benson did not have any methamphetamine on his person or in his vehicle prior to the meeting with Mr. Gant. This directly contradicted

Mr. Benson's testimony that the methamphetamine had come from a tool box located on his truck bed. The officers' testimony regarding the origins of the methamphetamine was corroborated by the audio recording of Mr. Benson's interactions with Mr. Gant, during which the men discussed drug terminology and a $150 purchase. It was also corroborated by the statements made by Mr. Benson during his recorded debriefing. The State's corroborating evidence was inconsistent with Mr. Benson's claim of innocence. There was, therefore, sufficient evidence to justify the jury's guilty verdict.

To-convict jury instruction

Mr. Benson claims that the court's to-convict instruction was flawed in two ways: (1) the instruction did not inform the jury of the heightened evidentiary requirements applicable to perjury, and (2) the instruction did not specify which false statement formed the basis of the State's charge. We reject both challenges.

Essential elements

Jury instructions are reviewed de novo. *State v. Johnson*, 180 Wn.2d 295, 300, 325 P.3d 135 (2014); *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Taken together, the instructions must inform the jury that the State bears the burden of proving every essential element beyond a reasonable doubt. *Johnson*, 180 Wn.2d at 306; *Pirtle*, 127 Wn.2d at 656. Because the to-convict instruction is the "'yardstick by which the jury

measures the evidence,'" it must contain all of the essential elements of the charged crime. *Johnson*, 180 Wn.2d at 306 (quoting *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010)). Other instructions cannot be used to supplement a defective to-convict instruction. *Id.*

Mr. Benson criticizes the court's to-convict instruction because it did not recite the heightened evidentiary requirements applicable to perjury. This argument fails because a crime's evidentiary standard is different from its elements. Elements are "'[t]he constituent parts of a crime—[usually] consisting of the actus reus, mens rea, and causation.'" *State v. Peterson*, 168 Wn.2d 763, 772, 230 P.3d 588 (2010) (alteration in original) (quoting *State v. Fisher*, 165 Wn.2d 727, 754, 202 P.3d 937 (2009)). An evidentiary standard merely governs how the elements of a crime must be proved. It was unnecessary for the trial court's to-convict instruction to provide an explanation of evidentiary standards. Instead, it was sufficient for the standards to be set forth in a separate instruction, as was done here. Mr. Benson's challenge therefore fails.

Specification of the charged offense

The court's to-convict instruction alleged "[t]hat on or about the 26th day of June, 2013, the defendant made a false statement." CP at 177. For the first time on appeal, Mr. Benson raises the concern that the jury may have convicted him for making a false

statement different from the statements identified in the State's charging document and bill of particulars.

We find no reversible error. Any vagueness in the court's instruction was sufficiently addressed by the clarification presented by both counsel for the State and defense counsel. *See State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (no multiple acts problem when the State tells "the jury which act to rely on in its deliberations"). Further instruction from the court was therefore unnecessary.

Prosecutorial misconduct

Allegations of prosecutorial misconduct are reviewed for an abuse of discretion. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). A defendant bears the burden of showing that the prosecutor's comments are both improper and prejudicial. *Id.* Allegedly improper arguments by the prosecutor must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

Mr. Benson claims the prosecutor's boat analogy misstated the burden of proof and denigrated the defense. We disagree. Viewed in context, the prosecutor's analogy simply pointed out that the jury should focus on the false statement that formed the basis of the crime charged (the boat), not details regarding other false statements or wrongdoing (the

various masts of the boat). While the prosecutor's analogy may not have been perfect, it did not undermine the fairness of Mr. Benson's trial. The trial court appropriately overruled Mr. Benson's objection to the prosecutor's argument.

CONCLUSION

The judgment of conviction is affirmed.[5]

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Korsmo, J.

[5] Because we find no error, we need not address Mr. Benson's argument that his conviction should be reversed on the basis of cumulative error.

APPENDIX B

FILED
DECEMBER 6, 2018
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,	)	
	)	No. 35000-2-III
Respondent,	)	
	)	ORDER DENYING MOTION
v.	)	FOR RECONSIDERATION
	)	
DELBERT HAROLD BENSON,	)	
	)	
Appellant.	)	

THE COURT has considered appellant Delbert Benson's motion for reconsideration of our October 30, 2018, opinion, and the record and file herein.

IT IS ORDERED that the appellant's motion for reconsideration is denied without prejudice to move for relief in the trial court pursuant to CrR 7.8(b).

PANEL: Judges Pennell, Korsmo, Lawrence-Berrey

FOR THE COURT:

Lawrence-Berrey, C.J.

ROBERT LAWRENCE-BERREY
Chief Judge

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DELBERT BENSON, Appellant.	)))))))))	COA NO. 35000-2-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF JANUARY, 2019, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] TERESA CHEN [tchen@co.franklin.wa.us] ATTORNEY AT LAW PO BOX 5889 PASCO, WA 99302-5801	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
[X] DELBERT BENSON 336803 AIRWAY HEIGHTS CORRECTIONS CENTER PO BOX 2049 AIRWAY HEIGHTS, WA 99001	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 2ND DAY OF JANUARY, 2019.

X_____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

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