No. 97521-3
COA No. 51276-9-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT LEATHERMAN,

Petitioner.

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

The Honorable Carol Murphy, Judge
Cause No. 15-1-00544-1

ANSWER TO PETITION FOR REVIEW

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2. Whether Leatherman has demonstrated that review of the decision of the Court of Appeals to decline review of Leatherman's challenge to the bail jumping instruction is appropriate under RAP 13.4(b)(3) and/or (4), the alleged error did not affect a manifest constitutional right and the instruction given included the element of a required subsequent appearance.

B. STATEMENT OF THE CASE.

1. Procedural Facts.

On April 21, 2015, Robert Leatherman was charged with one count of Animal Cruelty in the First Degree. CP 3. On November 4, 2015, an order was filed withdrawing Jenna Henderson as Leatherman's counsel and directing the Office of Assigned Counsel to appoint substitute counsel. CP 7. On March 8, 2017, a First Amended Information was filed by the State charging Leatherman

with an additional count of Bail Jumping for failing to appear before the court as required on June 4, 2015. CP 12.

Trial began with jury selection on October 16, 2017. CP 15. At the conclusion of the trial on October 19, 2017, the jury found Leatherman guilty on all charges. CP 48, 49, 23. The State requested he be remanded into custody until sentencing which was scheduled for November 8, 2017, that request was denied. CP 23. Sentencing was held on November 9, 2017. CP 53. Leatherman was sentenced to six months on count one, Animal Cruelty in the First Degree, and three months on count two, Bail Jumping, to be served concurrently. CP 56. He was also prohibited from owning or possessing animals - or residing with anyone who owns or possess animals - for a period of five years. CP 58. A Notice of appeal was filed on December 7, 2017. CP 64. An Agreed Order for Amendment of Judgment and Sentence was entered on December 21, 2017, allowing Leatherman to wait until January 2, 2018, to begin serving his sentence. CP 79.

Division II of the Court of Appeals affirmed Leatherman's conviction. The Court noted that the prosecutor had not improperly shifted the burden of proof. Unpublished Opinion, No. 51276-9-II, at 14-15. The Court of Appeals agreed that the prosecutor's statement

comparing the care of Wolfy to that of a human child was improper, the Court found that the statement was not flagrant or ill intentioned, noting that the "statements were not so inflammatory that an instruction would have been ineffective." *Id.* at 15-16.

2. Substantive Facts.

In October of 2014, Shawna Estrada was driving through Bucoda and noticed a dog named Wolfy struggling to walk down the road. RP[1] 53-55. She attempted to locate his owner, but was unable to do so. RP 55. She then went to city hall in an attempt to secure assistance for Wolfy. RP 56. She approached a man in city hall, who introduced himself as the mayor and unable to offer assistance. RP 56-57. At this point she approached Wolfy and noticed he was missing skin around his hindquarters and had maggot infested wounds. RP 57. She was unable at this time to continue searching for care for Wolfy because she had a child in her vehicle and did not know his temperament. RP 57. Ms. Estrada posted pictures of Wolfy on social media, because she was looking for somebody who might know the owner and was frustrated that she couldn't find help for him. RP 58-59.

[1] For the purposes of this brief the verbatim report of proceedings of the Jury Trial from October 16, 17, 18, and 19, 2017 shall be referred as RP.

On October 14, 2014, Thurston County Sheriff's Deputy Jay Swanson contacted Robert Leatherman in regard to a reported dog shooting. RP 140. Leatherman indicated that a dog that he owned, Wolfy, had begun seizing and Leatherman decided to end his life. RP 142. An associate of Leatherman's took Wolfy into a secluded area and shot him in the head. RP 146, 109. Leatherman gave Deputy Swanson a false name when asked who had shot Wolfy. RP 145. Leatherman later identified the shooter as Jeffrey Gavin. RP 150. Deputy Swanson retrieved Wolfy's remains which had been put into a sleeping bag and left where he was killed. RP 146-147. While collecting Wolfy's remains, Deputy Swanson located a .22 caliber shell casing. RP 147.

A necropsy was then performed on Wolfy by a veterinarian, Dr. Victoria Smith. RP 80. Dr. Smith had performed over 100 necropsies at this time. RP 80. She testified to the findings from the exam and explained the photographs that had been taken. RP 77-131. She discovered hemorrhaging in his mouth that indicated Wolfy's death by gunshot was not instantaneous. RP 109. Additionally, the necropsy revealed Wolfy was suffering from extreme periodontal disease, hair entrapped in his teeth, severe ear infections, intense dermatitis, and untreated arthritis all of which

caused him extreme pain for at least six months prior to his death. RP 109. He also had old untreated gunshot wounds. RP 121.

Wolfy's periodontal disease was stage four, it would have taken years to develop and he suffered from multiple fractured teeth as well. RP 88, 93. Dr. Smith testified that consuming hard food would have been very difficult for him due to the extreme pain. RP 91. Hair was also found wrapped around Wolfy's teeth which exacerbated his suffering when he attempted to eat. RP 88-89. Dr. Smith testified that the hair wrapped around his teeth was evidence of chronic chewing of the skin which indicates the animal was in pain from another untreated condition RP 90. She indicated that Wolfy attempting to eat with the embedded hair in his gum line would be similar to a human attempting to eat with barbwire in their mouth. RP 88-89.

There was no evidence that any of his conditions had ever been treated. RP 108. Dr. Smith further indicated that all of Wolfy's conditions were in fact treatable. RP 92, 102, 107-108, 112-113. She also testified that periodontal disease is often identified by lay pet owners. RP 126. Wolfy also had wounds that were infested with maggots. RP 98. She testified that maggot infestation was unlikely to occur post death. RP 99.

She was unable to determine if Wolfy actually suffered from seizures because his brain was not intact due to the gunshot. RP 108-109. She did, however, indicate that end stage starvation can cause seizures. RP 110-111. Furthermore, Dr. Smith testified that in the 24-48 hours preceding his death, Wolfy had consumed no dog food, RP 103, 105, and that the only items in his digestive tracks were rocks, hair, and corn. RP 103. She further testified that dogs do not typically eat rocks unless they are starving, RP 104, and that Wolfy most likely scavenged for the corn because it is not a normal diet for a dog. RP 105.

Additionally, evidence showed that Wolfy had been losing weight for such a long period of time that there was little pericardial fat around his heart. RP 106. Dr. Smith testified that Wolfy had undergone extreme loss of muscle, subcutaneous fat, and internal fat. RP 83. She indicated this all would have taken a long time to occur. RP 90-92, 106.

The defense offered testimony at trial from associates of Leatherman that in their personal opinion Wolfy was well cared for. RP 226, 232, 253, 264. The testimony was that individuals saw food in a bowl left out for Wolfy. RP 254, 267. Further testimony showed that the food was hard kibble. RP 258. No testimony was

offered at trial that the witnesses had seen Wolfy actually *consume* the food. *See* RP *generally*. For the year proceeding Wolfy's death Leatherman did not live with him and he spent the majority of his time wandering around town alone. RP 271.

Thurston County Senior Deputy Prosecuting Attorney Mark Thompson testified that a bench warrant was issued for Leatherman after a polling of the courtroom by Judge Dixon on June 4, 2015, revealed he failed to appear for a required hearing on that date. RP 207-209. The jury was given instructions after the conclusion of the evidentiary portion of the trial. The court's to convict instruction on bail jumping stated the elements as follows:

> (1) That on or about June 4, 2015, the defendant failed to appear before a court;
>
> (2) That the defendant was charged with Animal Cruelty in the First Degree;
>
> (3) That the defendant had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court; and
>
> (4) That any of these acts occurred in the State of Washington.

CP 45.

After, the instructions were read to the jury, counsel offered their closing arguments. The State attempted to explain the concept of reasonable doubt to the jury during closing.

> When you go back and deliberate, you will be given the definition of the term "reasonable doubt." And what a reasonable doubt means, it's a very circuitous definition, "it's one for which a reason exists and may arise from the evidence or lack of evidence. It is such as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence." What does that mean? In a nutshell, it means when you go back and you deliberate and you say, "well, I have a doubt in this case." Before you say "not guilty," you have to ask yourself, is the doubt that you have a reasonable one? If the answer is, "no", it's not reasonable, then that's not reasonable doubt.

RP 326-327.

During defense's closing argument counsel opined that Leatherman's love for Wolfy should impact the jury's decision. "[B]ut it is relevant as to maybe the state of mind. Would that state of mind of somebody who felt that strongly about a dog engage in the type of criminal negligence as alluded to by the state?" RP 331. In rebuttal argument the State replied.

> You can say all day long, I love my kid ... [B]ut the fact you don't do anything else for your kid, don't brush your kid's teeth, don't take your kid to the doctor to make sure your kid is healthy, don't solve the problems that's causing your kid to starve, that still makes you a neglectful parent, and this is the

> same situation ... No one is saying that Mr. Leatherman doesn't love his dog. There has been no testimony to that ... You can love a dog ... but he was still neglectful, for whatever reason.

RP at 354-355.

Leatherman was subsequently found guilty by the jury on all charges. RP 371.

C. ARGUMENT.

A petition for review will be accepted by this Court only if the petitioner demonstrates that review is appropriate under the criteria set forth in RAP 13.4(b). Leatherman agues two of those, RAP 13.4(b)(3) and 13.4(b)(4), which provide:

> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). The decision of the Court of Appeals in this case was based on existing precedent, and Leatherman fails to demonstrate that review by this Court is appropriate.

1. The Court of Appeals applied well settled case law in deciding the allegations of prosecutorial misconduct.

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v.

Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)); State v. Emery, 174 Wn. 2d 741, 278 P.3d 653 (2012). A reviewing court examines allegedly improper arguments in the context of the total argument, the issues in the case, the instructions given the jury, and the evidence addressed in the argument. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). To establish prejudice, the appellant must show that the improper comments had a substantial likelihood of affecting the verdict. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

A defendant's failure to object to improper arguments constitutes a waiver unless the statements are "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Dhaliwal, 150 Wn.2d at 578. The absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

For claims of improper burden shifting, that were not raised at trial, the defendant bears the burden of proving that the conduct

was both improper and that it was prejudicial. Emery, 174 Wn.2d at 757-760. There, this Court held that the "constitutional harmless error standard" does not apply to claims of prosecutorial misconduct through improper burden shifting and the traditional test for misconduct applies. *Id.* In that case, during closing arguments the prosecutor told the jury that in order to find the defendant not guilty the jury must "fill in the blank" of what the reasonable doubt is they are basing their acquittal on. *Id.* at 759. The Court held that the argument properly described reasonable doubt as a "doubt for which a reason exists" but was improper because the defendant bears no burden. *Id.* at 759-760. However, this Court held the defendants did not meet their burden of proving flagrant and ill-intentioned misconduct. *Id.* at 763-764.

> If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Under this heightened standard, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." Thorgerson, 172 Wn.2d at 455.

Id. at 760-761.

In Emery, this Court held that the prosecutor's improper burden shifting argument was not flagrant or ill-intentioned because they were not the kind of comments held in earlier precedent to have an "inflammatory effect." *Id.* at 762-763. The Court of Appeals correctly applied that precedent, distinguishing the comments of the prosecutor in this case from those in Emery. Unpublished Opinion, at 15.

The decision was correct and based on precedent settled by this Court. The statement of the prosecutor did not amount to the level of burden shifting seen in Emery, the prosecutor did not say that the jury had to fill in the blank with an articulable reasonable doubt; instead she reiterated that if the jury found a doubt as to Leatherman's guilt, it had to be reasonable to be a reasonable doubt. The statement did not shift the burden of proof. Review is unnecessary.

With regard to the claim of prosecutorial misconduct involving comparing Wolfy to a human child, the Court of Appeals correctly found that the statement was not so flagrant or ill-intentioned that it could not have been cured with a proper instruction. A prosecutor has wide latitude to argue reasonable inferences from the evidence and is entitled to fairly respond to

defense counsel's argument and criticisms of the State's case. State v.Thorgerson, 172 Wn.2d 438, 448, 449-50, 258 P.3d 43 (2011). Even if a rebuttal argument is found improper, a prosecutor's remarks are not grounds for reversal when invited or provoked by defense counsel unless they were not a pertinent reply or were so prejudicial that a curative instruction would be ineffective. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

After defense counsel argued that Leatherman's affection for Wolfy made it unlikely that Leatherman would commit the offense, the prosecutor made comments about what a reasonable person would do if they had children and argued that saying that you love a child does not mean you are not neglectful if you let them starve. RP 329, 345-346, 354. The Court of Appeals found the prosecutor's comparison between the care a reasonable person would give a child and the care Leatherman gave Wolfy was improper. Unpublished Opinion, at 16. However, "Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request." Russell, 125 Wn.2d at 85.

The state was simply showing that emotional affection does not constitute a lack of neglect and that you can love an entity and

still neglect them. The prosecutor further clarified the argument by stating

> No one is saying that Mr. Leatherman doesn't love his dog. There has been no testimony to that ... You can love a dog ... but he was still neglectful, for whatever reason.

RP at 354-355. This statement was invited by counsel's assertion that someone who loves an entity cannot commit criminal negligence against them. The prosecutor's argument was clearly not flagrant or ill-intentioned and the trial court could have cured any prejudice by directing the jury to disregard the prosecutor's statement had Leatherman objected. The Court of Appeals correctly held that Leatherman waived his prosecutorial misconduct claim when he did not object to the prosecutor's argument at trial. Unpublished Opinion at 15.

The decision of the Court of Appeals properly applied the precedent set by this Court and Leatherman has not demonstrated that review is appropriate under RAP 13.4(b).

2. The decision of the Court of Appeals to decline review of Leatherman's challenge to the bail jumping instruction was correct given that the alleged error did not affect a manifest constitutional right and the instruction given included the element of a required subsequent appearance.

The trial court's to convict instruction on bail jumping stated the elements as follows:

> (1) That on or about June 4, 2015, the defendant failed to appear before a court;
>
> (2) That the defendant was charged with Animal Cruelty in the First Degree;
>
> (3) That the defendant had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court; and
>
> (4) That any of these acts occurred in the State of Washington.

CP 45.

Leatherman contended that improperly relieved the State of its burden to prove every element of the offense of bail jumping beyond a reasonable doubt. Petition for Review at 14. However, the appellate court held that the defendant's challenge did not involve a manifest constitutional error under RAP 2.5(a)(3), and declined to review the jury instruction. Unpublished Opinion, at 17. The Court based its decision on a similar case, State v. Hart, 195 Wn. App. 449, 381 P.3d 142 (2016), *review denied,* 187 Wn.2d 1011. There, the Court held that the to-convict instruction did include the element of a required subsequent appearance. *Id.* at 456. The court stated:

> [T]he trial court's bail jumping to-convict instruction, which mirrors the to-convict instruction in 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 120.41 at 517 (3d ed. 2008), required the State to prove beyond a reasonable doubt that Hart "had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court." CP at 58 (emphasis added). Accordingly, the trial court's to-convict instruction included the element of a required subsequent appearance and, thus, we reject Hart's challenge to the instruction.

Id.

Here, the relevant portion of the instruction is identical to the one at issue in Hart. CP 45. Hence the court's previous conclusion in Hart applies and the appellate court correctly found that the instruction on Bail Jumping properly instructed the jury on the elements necessary to convict.

Leatherman contends, however, that Hart was incorrectly decided because it "conflates two elements of bail jumping." Petition for Review at 18. However, Leatherman's argument that knowledge of a required hearing is inherently different than the accused failing to appear in court "as required" is unpersuasive. The language included in the instruction "with knowledge of the requirement of a subsequent personal appearance" inherently includes the element of a "required subsequent appearance." Hart

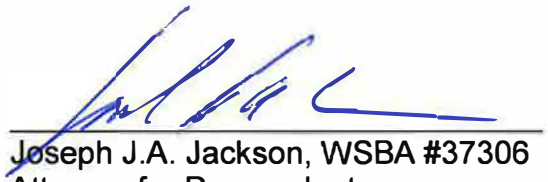
at 456. Proving the former necessarily proves the latter. Thus, the jury was instructed as to all of the necessary elements of the crime of bail jumping.

There was no constitutional error and the structure of the jury instruction caused no practical and identifiable adverse consequence in the trial. Therefore, there is no reason that this Court should accept review. The issue raised by Leatherman does not raise a significant question of constitutional law or involve issues of substantial public interests that warrants review under RAP 13.4(b)(3) or (4).

D. CONCLUSION.

Leatherman has failed to demonstrate that review of the decision of the Court of Appeals is necessary pursuant to RAP 13.4(b). As such, the State respectfully requests that this Court deny review.

Respectfully submitted this 4th day of September, 2019.



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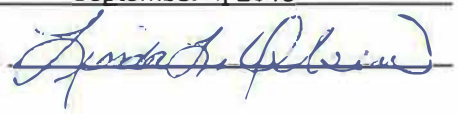
DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Supreme Court using the Court Portal utilized by the Washington State Supreme Court for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: September 4, 2019

Signature: 

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