NO. 998515
COA NO. 526034-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ERIC NEWMAN,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

RYAN JURVAKAINEN
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. IDENTITY OF RESPONDENT

The State of Washington, by and through the Cowlitz County Prosecuting Attorney's Office, respectfully requests this Court deny review of the May 4, 2021, unpublished opinion of the Court of Appeals in *State v. Newman*, COA No. 52603-4-II consolidated with COA No. 53963-2-II. This decision upheld Newman's convictions for one count of possession of methamphetamine with intent to deliver, one count of unlawful possession of a firearm, and one count of possession of a stolen firearm, and held that his arguments regarding pretrial release were moot.

II. ANSWERS TO ISSUES PRESENTED FOR REVIEW

1. This Court should deny review of the issue of bail and pretrial release as it is moot and has been addressed by cases that came after the trial court's decision in this case.

2. The Court of Appeals properly held that, though the prosecutor's statement was improper, a new trial was not warranted.

III. STATEMENT OF THE CASE

On January 21, 2018, Ryan Lorenzo lent his truck to his father-in-law. RP 187. At some point overnight between January 21 and January 22, somebody broke into the truck while it was parked at Lorenzo's father-in-law's house and stole various items out of it. RP 188. One of the items taken was Lorenzo's Ruger 1911 .45-caliber semiautomatic firearm. *Id.* This firearm has wooden handgrips that have been custom engraved. RP

205, 188. Only approximately 36 firearms were engraved in this way because they were ordered by Lorenzo's Army platoon to memorialize their tour in Afghanistan. RP 188–89.

On February 9, 2018, officers with the Longview Police Department Street Crimes Unit served a search warrant at Eric Newman's residence, locate d at 1940 33rd Avenue, Apartment number 10, in Longview, Washington. RP 197. The search warrant allowed officers to search Newman and his apartment for illegal drugs. *Id.* Once officers gained entry into the apartment, they observed Newman standing in the space between the living room and kitchen and detained him. RP 200.

Detective Mortensen searched a room that he believed was Newman's. He based this belief on the presence of medical supplies and medical discharge papers with Newman's name on them in the room, knowing Newman had recently suffered a severe leg injury. RP 204, 275. Detective Mortensen found a small safe on the left side of the bed that he handed to Detective Sanders to open. RP 205.

Detective Sanders was initially unable to find a key to the safe so he dropped it on the sidewalk to open it. RP 218. The key was later found on the floor between the living room and the kitchen, right where Newman was standing when officers initially opened the apartment door. RP 225, 270. Once Detective Sanders opened the safe, he found Lorenzo's

firearm, a scale with drug residue, various pills, plastic with 5.9 grams of methamphetamine, a coffee grinder with heroin residue, and lactose, which is a cutting agent. RP 219–20, 255, 257.

Newman had previously been convicted of a felony that qualifies as a serious offense, so is not allowed to own or possess firearms. RP 248.

The State charged Newman with possession of methamphetamine with intent to deliver with a firearm enhancement, possession of heroin, unlawful possession of a firearm, and possession of a stolen firearm. At his first appearance, the State requested bail in the amount of $50,000 based on the facts alleged in the probable cause statement and on Newman's criminal history. Newman's history includes one conviction for assault in the second degree with a deadly weapon, three assault in the third degree convictions, two felony no-contact order violation convictions, a residential burglary conviction, and a conviction for witness tampering. RP 4. In total, Newman had 14 prior felony convictions, seven prior misdemeanor convictions, and six prior bench warrants. *Id.* The attorney that represented Newman at the first appearance requested that Newman be released on his personal recognizance because he had a medical appointed the following Monday. *Id.* The court set bail at $35,000.

At Newman's omnibus hearing, his attorney again requested a medical PR release so Newman could attend medical appointments and tend to his wounds. RP 7–11. Newman's attorney also noted that Clark County had a hold on Newman at the time, based on pending charges in that court. RP 10. The court declined to change the bail based on the nature of the charges and Newman's criminal history. RP 12. At some point between that hearing on April 17, 2018, and August 20, 2018, Newman was able to post bail and be released from jail. RP 26, RP 52.

Newman was found guilty of all charges except the firearm enhancement on August 31, 2018. RP 390, CP 75. The Court of Appeals reversed Newman's conviction for possession of a controlled substance based on *State v. Blake* but upheld the remaining convictions and held that his arguments regarding pretrial release were moot.

IV. ARGUMENT

RAP 13.4(b) states that a petition for review will only be accepted by the Supreme Court if one of four conditions are met: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; (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. Neither in the petition for review nor in the decision from the Court of Appeals are there any issues that would fall under one of the four conditions as outlined by RAP 13.4(b). The Court of Appeals decision in this case is not in conflict with any decisions of either the Washington Supreme Court or another division of the Court of Appeals. The holding also does not raise a significant question of law, and while pretrial bail issues may be of public interest, that issue is moot and has been settled by recent case law.

A. Newman's petition should be denied as the issue of his pretrial release or bail is moot and does not present a continuing and substantial public interest.

An issue on appeal is moot if the reviewing court can no longer provide the party effective relief. *State v. Harris*, 148 Wn. App. 22, 26, 197 P.3d 1206 (2006), *citing State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004). An issue that is moot will not be considered unless "it involves matters of continuing and substantial public interest." *In re Eaton*, 110 Wn.2d 892, 895, 757 P.3d 961 (1988). In *Harris*, the court found Harris's appellate claim regarding the calculation of his offender score moot because Harris had served all of his incarceration time and was not sentenced to serve community custody. *Harris*, 148 Wn. App. at 26.

Harris would have had cause for relief if he had been sentenced to community custody that would have ended earlier if he had been sentenced under the appropriate offender score. *Id.* at 27. There was no relief that could be offered to Harris because he had already served all of his time. *Id.* at 26–27.

Here, Newman acknowledges that the issue of the trial court's imposition of pretrial release conditions is moot but petitions the court to address it regardless. While courts have addressed moot issues when they constitute a matter of continuing and substantial public interest, that is not shown here. *See State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012). Newman complains the superior court in this case refused to apply CrR 3.2. Petition for Review 6. However, the trial court did consider the relevant facts listed in CrR 3.2(c) and (e). The trial court considered Newman's criminal record, the nature of the charge, Newman's past record of threats to victims or interference with witnesses, as well as Newman's past record of deadly weapons. RP 3–5. While the trial court did not explicitly state the reasons for the bail amount he set, the inference is that he based his decision on the information provided by the State and defense counsel, which covered the relevant portions of CrR 3.2. Therefore, this Court should deny Newman's petition, as it is moot and the trial court conducted the relevant inquiries.

Additionally, recent cases on this issue obviate the need for additional guidance from this Court. Newman cites a number of cases in his petition that all came after the trial court set bail in his case. For example, *State v. Huckins* was decided on September 25, 2018, while the trial court set bail in Newman's case on March 9, 2018. The other cases cited by Newman were decided in 2019 and 2020. This issue has been clearly addressed by the courts after bail was set in Newman's case. There is no need for further guidance on this issue and there is no evidence that this issue will recur in the future. Therefore, the issue is moot and does not require further review. The State respectfully asks this Court to deny the petition for review.

B. Newman's petition should be denied as the issues of prosecutorial misconduct and ineffective assistance of counsel do not raise a significant question of law and are not of public interest.

With all claims of misconduct, "the defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial." *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997), citing *State v. Luvene*, 132 Wn.2d 668, 701, 903 P.2d 960 (1995). When determining whether conduct was improper, the court reviews the effect of allegedly improper comments not in isolation, but in the context of the total argument and the issues in the case. *State v. Brown*, 132 Wn.2d 529,

561, 940 P.2d 546 (1997). Even if it is shown that the conduct was improper, misconduct does not require reversal unless there is a substantial likelihood the misconduct affected the verdict. *State v. Wilson*, 20 Wn. App. 592, 595, 581 P.2d 592 (1978).

When a defendant fails to object to allegedly improper comments at trial, the error is considered waived 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." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), quoting *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. York*, 50 Wn. App. 446, 458-59, 749 P.2d 683 (1987). If a defendant – who did not object at trial – can establish that misconduct occurred, then he must also 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." *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). Under this heightened standard, a reviewing court is to focus less on whether the prosecutor's conduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured. *Id.* at 762; *Russell*, 125 Wn.2d at 85 ("Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request."). The absence of an objection at the

time of the argument "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).

Here, the Court of Appeals correctly held that the improper statement could easily have been ameliorated by a curative instruction referring jurors to the instructions that tell them the prosecutor's statements are not evidence, that they are to disregard anything the lawyers say that is not supported by the evidence, that circumstantial evidence carries the same weight as direct evidence, and that the evidence they are to consider is the testimony and exhibits only. The prosecutor's statement in the case as bar was not so egregious that a curative instruction would have been ineffective. Jurors are presumed to follow instructions. Therefore, an instruction from the court would have cured any potential prejudice.

Newman also fails to show that the prosecutor's argument affected the jury's verdict. As discussed above, there was other evidence to support the inference that Newman knew the gun was stolen, including the unique nature of the firearm itself, its missing magazine, and how close in time the gun was found in Newman's possession after it was stolen. The

jury could infer from this information that the knowledge element had been met.

Finally, Newman fails to show that trial counsel was ineffective. To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). When the claim of ineffective assistance of counsel is based on a failure to object, the defendant must show that an objection to the evidence would likely have been sustained and that the result of the trial would have been different had the evidence not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998), citing *State v. Hendrickson*, 129 Wn.2d 61, 80, 917 P.2d 563 (1996). As discussed above, an objection to the prosecutor's argument would not have been sustained, since the argument did not misstate the law or the burden of proof. Therefore, Newman's trial counsel was not ineffective.

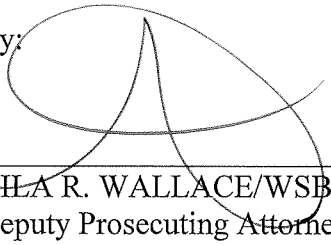
The trial court properly held that the improper statement did not require reversal. Because this is not an issue of public interest and does not raise a significant question of law, this Court should deny the petition for review.

V. CONCLUSION

For the reasons stated above, the State respectfully requests this Court deny Newman's petition for review.

Respectfully submitted this 2nd day of July, 2021.

RYAN JURVAKAINEN
Prosecuting Attorney

By: 

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CERTIFICATE OF SERVICE

I, Julie Dalton, do hereby certify that RESPONSE TO PETITION FOR REVIEW was filed electronically via the Washington State Appellate Courts' Portal and which will automatically cause such filing to be served on the opposing counsel listed below:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on July 2, 2021.

Julie Dalton

Julie Dalton, Legal Specialist

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

July 02, 2021 - 11:09 AM

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