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~~COURT OF APPEALS
STATE OF WASHINGTON
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NO. 64863-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RAUL ILERNA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. To possess cocaine with intent to deliver, a defendant must either have actual or constructive possession. Here, Ilerna was seen making hand-to-hand transactions while standing at the head of a line of approximately 10 people, walked away and ran when officers approached him, ducked into a nearby bar, and reached into his pocket as he moved quickly toward an area of the bar before returning to the main entrance. A pill bottle was recovered in the area where Ilerna was contacted by the officer who followed him into the bar, and that bottle contained cocaine. Is there substantial evidence in the record to support Ilerna's conviction?

2. Failure to object at trial to an alleged improper argument constitutes a waiver of Ilerna's prosecutorial misconduct claim unless the comments were so flagrant and ill-intentioned that the resulting prejudice could not have been obviated by a curative instruction. In initial closing argument, the prosecutor referred to Ilerna as a "smart criminal." During rebuttal, the prosecutor told the jury that they can presume things by their reasonable and rational

inferences, that the law doesn't tell them that they can make presumptions in favor of one party and not in favor of another, and that it tells them to be reasonable and rational, to use their common sense. This comment was made after the jury had heard several references to the presumption of innocence: in the court's initial instructions, and from both counsel during their arguments. The court interrupted the prosecutor's remarks and told the jury that the presumption of innocence does not mean that it accorded the State the same presumption in any way, either in evaluating the evidence or anything else.

Also in rebuttal, the prosecutor referred to Ilerna as a "smart criminal," and defense counsel objected. The judge stated that the jury understood that it was not evidence, that the jury was the ultimate finder of fact. The prosecutor, near the end of rebuttal, asked the jury not to reward the defendant for being smart and stated that defense was doing his job by arguing to the jury about what reasonable doubt is. Ilerna only objected to one of these comments, the use of the term "smart criminal." Has Ilerna failed to establish that 1) the prosecutor misstated the law, and 2) the prosecutor's argument was improper and so flagrant and

ill-intentioned that any resulting prejudice could not have been cured?

B. STATEMENT OF FACTS

1. PROCEDURAL FACTS

Raul Ilerna¹ was charged with one count of Violation of the Uniform Controlled Substances Act: Possession with Intent to Deliver Cocaine after police saw him engage in a suspected drug deal and then run into a bar when the police attempted to contact him. Shortly after he was arrested, a pill bottle with cocaine inside was found in the area that Ilerna had specifically run to. CP 1-4. Ilerna was convicted by a jury as charged. CP 76. The court sentenced Ilerna to 60 months of confinement, followed by 12 months of community custody. CP 77-81.

2. SUBSTANTIVE FACTS

On July 14, 2009, Seattle Police Department Officers Terry Bailey and Andrew Zwaschka were on bicycle patrol. At about 11:00 p.m., they were riding in the International District near the

¹ The defendant is identified as "Ilerna" in the trial court proceedings, but is referred to as Ilerna in Appellant's brief. For sake of clarity, the State will refer to the defendant as Ilerna.

intersection of South King Street and Maynard Avenue South when Officer Zwaschka noticed a line of people at the corner of the intersection. 12/29/09 RP 57-58.² At the head of that line stood a person later identified as Ilerna; Officer Zwaschka described the scene as a "line of people facing northbound that are lined up like he's--like he's a merchant and people are waiting in line to buy something." 12/29/09 RP 58. Officer Bailey saw Ilerna with approximately 10 transient looking homeless people trailing behind him, trying to flag him down, calling his name. 12/30/09 RP 12. Officer Zwaschka watched as the person at the front of the line made some type of hand transaction with Ilerna. 12/29/09 RP 59. Believing that a narcotics transaction was occurring, Officer Zwaschka told his partner they should watch that corner. 12/29/09 RP 59. Officer Zwaschka continued to observe as the person who made the transaction walked away and the next person stepped up. 12/29/09 RP 59.

After Officer Zwaschka watched Ilerna make this hand-to-hand transaction, Officers Zwaschka and Bailey approached Ilerna,

² The verbatim report of proceedings consists of four volumes of transcripts from December 29, 2009, through January 29, 2010. The State has adopted the system used by the Appellant as noted on page three of the Appellant's opening brief.

who looked at them, put his hands in his pockets, did a 180 degree turn, and started walking away from the line of people that had formed in front of him. 12/29/09 RP 59-60. The group of people around Ilerna followed him across the street. 12/29/09 RP 63-64. Ilerna then walked underneath some scaffolding that had been erected across the sidewalk. 12/29/09 RP 61. When Officer Zwaschka told the defendant to stop, Ilerna raised his hands in the air, flailed them around, and yelled something. 12/29/09 RP 62. Ilerna took off running and ran inside the Fortune Sports Bar, with Officer Bailey and then Officer Zwaschka going in after him. 12/29/09 RP 64-65. The Fortune Sports Bar is approximately 200 feet from where Ilerna crossed the street. 12/29/09 RP 65. The International District and the location of the Fortune Sports Bar are both high drug areas. 12/29/09 RP 72-73; 12/30/09 RP 54-55.

The front door of the Fortune Sports Bar leads directly to the main bar, and to the left is another door to another bar. 12/30/09 RP 14. Officer Bailey saw the defendant enter through the front door, either running or moving very quickly, and make his way to the second bar on the left. 12/30/09 RP 14. When Officer Bailey chased Ilerna into the Fortune Sports Bar, there were other people in the main bar itself, but there "wasn't really anybody" in the

second bar. 12/30/09 RP 54. As the defendant made his way to the doorway of the other bar, he shoved his hand in his pocket like he was reaching for something. 12/30/09 RP 14. The defendant went to a corner in the second bar, paused for a second, and started to walk back out toward Officer Bailey. 12/30/09 RP 15. Ilerna was detained and escorted out of the bar. 12/30/09 RP 15. Within a couple of minutes, Officer Bailey re-entered the bar in the area where he had arrested Ilerna and found a prescription bottle with a significant amount of crack cocaine inside. 12/30/09 RP 16-17. The bottle was recovered from the area where Ilerna had been dealt with. 12/30/09 RP 48. At the time he was arrested, Ilerna had \$885.37 on him, found in a number of different places on his person. 12/29/09 RP 67.

At trial, Officer Zwaschka testified that based on his training and experience, it is common for a person who sells drugs to place the money that they receive in different pockets. 12/29/09 RP 67. Ilerna stipulated that the substance inside the pill bottle was cocaine. 12/30/09 RP 95.

During the State's case, the jury was shown two clips of video footage that had been filmed inside the Fortune Sports Bar the night that the defendant was arrested. 12/30/09 RP 47-48; EX

4-5. The first clip depicted the defendant entering the bar and then pausing before walking back out toward the main door, followed by Officer Bailey re-entering the bar, walking back near the area where he had contacted the defendant, and then bending down and picking up the container (the pill bottle containing the crack cocaine). 12/30/09 RP 47; EX 4. The second clip showed the defendant running through the front door, reaching in his pocket, and going into the second bar. 12/30/09 RP 48; EX 5.

Kyle La, the manager of the Fortune Sports Bar, testified that he had seen the defendant in the bar before the incident in question, and had specifically seen him about 30 minutes before he was arrested in the bar. 12/30/09 RP 77-78. The defendant had come in, had a drink, and then left. 12/30/09 RP 78. La testified that when Ilerna entered the bar for the second time that night, he was running and he slammed the door open with a loud bang that the whole bar could hear. 12/30/09 RP 80-81.

La testified that officers followed within 10-15 seconds after Ilerna came running in. 12/30/09 RP 81. La testified that it was not very busy in the second bar that evening. 12/30/09 RP 80. La testified that he vacuums the floor from top to bottom when he begins work at 4 p.m. daily, and he had never seen the pill bottle

before he saw an officer recover it from under the table. 12/30/09
RP 79-80.

Ilerna did not present any evidence. 12/30/09 RP 95.

C. ARGUMENT

1. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT ILERNA'S CONVICTION FOR POSSESSION OF COCAINE WITH INTENT TO DELIVER.

Ilerna asserts that the State did not prove that Ilerna constructively possessed the cocaine found in the pill bottle because there was no evidence that the cocaine belonged to him or that it was under his control. This argument should be rejected because there was sufficient evidence from which a rational jury could find that Ilerna had constructively possessed the cocaine when he was seen engaging in suspected drug transactions, ran when approached by officers, moved quickly into a bar and went immediately to a certain area of that bar, with the bottle containing cocaine found shortly after in the area where Ilerna had been.

The State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction

if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

"A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that reasonably can be drawn therefrom." Id. at 201. Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 719. The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

A person is guilty of possession with intent to deliver a controlled substance if he possesses a controlled substance with the intent to deliver a controlled substance. RCW 69.50.401(1), (2)(a). Cocaine is a controlled substance. RCW 69.50.206(4). Possession means having a substance in one's custody or control; it may be either actual or constructive. State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). Though neither "actual" nor

"constructive" possession is defined in the act, both are defined by case law. Actual possession means that "the goods are in the personal custody of the person charged with possession; whereas constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods." State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

Exclusive control is not required to establish constructive possession, but mere proximity to a controlled substance is insufficient to establish dominion and control. State v. Bradford, 60 Wn. App. 857, 862, 808 P.2d 174 (1991). The totality of the circumstances must be considered in establishing constructive possession. State v. Collins, 76 Wn. App. 496, 501, 886 P.2d 243 (1995).

Ileria relies on State v. Callahan, 77 Wn.2d 27, State v. Spruell, 57 Wn. App. 383, 788 P.2d 21 (1990), and State v. Cote, 123 Wn. App. 546, 549, 96 P.3d 410 (2004), in support of his argument that the State's evidence was insufficient to show he had constructive possession of the cocaine. In Callahan, the defendant was one of many guests on a houseboat, was one of two people seen in close proximity to the drugs, and admitted handling the

drugs that day. 77 Wn.2d at 28. Another guest on the houseboat claimed ownership of the drugs, and that claim was unchallenged. Id. at 31. The court found that the defendant's status as a guest on the houseboat, ownership of property on the houseboat, knowledge of the drugs and proximity to them to be insufficient to consider him a constructive possessor of the drugs. Id. at 31. The court noted that: "evidence pointing to any dominion or control the defendant might have had over the drugs was purely circumstantial and it is not within the rule of reasonable hypothesis to hold that possession by the defendant may be established by circumstantial evidence when undisputed direct proof places exclusive possession in some other person." Id. at 32.

Likewise in Spruell (consolidated case with Luther Mathis Hill), a search warrant was executed on the home of one of the three codefendants. 57 Wn. App. at 384. When officers entered, they found Hill in the kitchen near a table with the following on it: a small scale, baking soda, alcohol, several vials, white powder residue, a razor blade, one codefendant's driver's license, and a set of car keys. Id. at 384. Another person was seated at that table; Hill was not seen actually seated at the table. Id. at 384. A plate with white powder residue had Hill's fingerprint on it, and the white

powder from the kitchen tested positive for cocaine. Id. at 384.

Finding that Hill did not have actual possession of the cocaine, the court addressed the issue of constructive possession. Id. at 386.

The court held that Callahan stood for the proposition that where the evidence is insufficient to establish dominion and control of the premises, mere proximity to the drugs and evidence of momentary handling is not enough to support a finding of constructive possession. Id. at 388.

In Cote, the defendant had been a passenger in a stolen vehicle. Inside the vehicle, evidence of manufacturing methamphetamine was found, and one of the jars had the defendant's fingerprints on it. 123 Wn. App. 546 at 548. The defendant was not near or in the vehicle at the time he was arrested. Id. at 550. The court found that the evidence at trial established, as in Callahan, only that the defendant had proximity to the drugs and had momentarily handled them. Id. at 550. In so holding, the court noted that there was no evidence establishing that the Mason jars were found in the passenger area of the vehicle, where the defendant had been riding. Id. at 550. The evidence at trial indicated that the jars had been found in the "back of the stolen pickup." Id. at 550.

State v. Porter, 58 Wn. App. 57, 791 P.2d 905 (1990), a case subsequent to Callahan and Spruell, is instructive. In Porter, officers served a search warrant on a residence where the defendant happened to be present. Id. at 58. Officers testified that the defendant pointed a gun at them before dropping it and fleeing into another part of the residence, where he was arrested. Id. at 59. At the time he was arrested, the defendant was carrying \$693 in cash. Id. at 59. Police also recovered a pill bottle containing cocaine, on the kitchen floor near where the defendant had been sitting. Id. at 59. The pill bottle was found within a few feet of where the defendant had dropped the gun. Id. at 59.

In determining that sufficient evidence was presented at trial for the jury to infer that the defendant had constructive possession of the cocaine found on the kitchen floor of the residence, the Porter court distinguished the facts from those in Spruell. Id. at 61. The court noted that there was substantial evidence suggesting that the defendant was not merely an innocent visitor caught up in a situation as the officers forced entry to the residence. Id. at 61. Specifically, the court noted that the defendant had a large sum of cash on him when he was arrested. Id. at 61. The court also noted that another person was in the kitchen with the defendant when

officers entered, but the defendant's pointing the firearm at them and fleeing the room suggested an effort by him to avoid capture and prosecution. Id. at 62. The court found these factors sufficient to support an inference that the defendant was aware of the illegal nature of the drugs found near him and was exercising dominion and control over the drugs shortly before his arrest. Id. at 62.

Ilerna's reliance on Callahan, Spruell, and Cote is misplaced. In Callahan, a person other than the defendant testified, with corroborating witnesses, that the drugs belonged to him and he had exclusive control over them. 77 Wn.2d at 31. In Spruell, more than one person was near the drugs when police entered the residence and no evidence was presented at trial that the defendant lived in the residence or had any ties to it beyond his presence at the time the warrant was served. 57 Wn. App. 383 at 388. In Cote, the defendant was a passenger in a vehicle that contained evidence of manufacturing methamphetamine, and his fingerprints were found on this evidence. 123 Wn. App. 546 at 550. Cote was not near the vehicle when he was arrested, and there was no other evidence presented linking him to the manufacturing or distribution of methamphetamine. 123 Wn. App. 546 at 550.

The instant case is closer to Porter than to Callahan, Spruell, and Cote. There was no "undisputed direct proof of exclusive possession in some other person," as found in Callahan. 77 Wn.2d at 31-32. There was no other person in the same vicinity as the drugs, and thus, with the same proximity as the defendant, as in Spruell and Cote. 57 Wn. App 383 at 388, and 123 Wn. App. 546 at 548, respectively. Ilerna had been in the Fortune Sports Bar before, and was not a simple bystander in the bar when officers came in, as the defendants in Callahan, Spruell, and Cote all could have claimed.

On the contrary, the evidence established that Officer Bailey followed Ilerna into the Fortune Sports Bar after Ilerna was observed completing at least one suspected hand-to-hand narcotics transaction with another person in a high-drug area. The evidence showed that when confronted by them, Ilerna yelled and waved his hands, then ran first behind the scaffolding on the sidewalk, then into the Fortune Sports Bar. Ilerna did not just run down the street; he went into a bar he had been in before, in fact, on that very night. Once inside the main bar, he moved quickly to a specific second bar area, and reached into his waistband as he did so. After he paused in the area of the bar he had gone into, Ilerna

turned and walked back out toward the main entrance, where Officer Bailey contacted him. The evidence also included videos of the evening in question that corroborated Officer Bailey's testimony about Ilerna's behavior once in the bar. When he was arrested, Ilerna had \$885.37 on his person, stuffed into various pockets. Officer Bailey went back into the bar within minutes and found the pill bottle containing a significant amount of cocaine in the area where Ilerna had been contacted.

These facts are clearly distinguishable from Cote, Callahan, and Spruell, where the defendants were found only to be in mere proximity to the drugs, and no behavior was observed by officers prior to arrest.

Because the evidence established that Ilerna engaged in a hand-to-hand transaction, fled when officers approached, reached into his waistband as he ran into the Fortune Sports Bar, and transitioned from running to walking as he returned to the main bar area, a rational trier of fact could, and did, find that Ilerna had exercised dominion and control over the cocaine that was found in the second bar area he had specifically gone to.

2. THE PROSECUTOR DID NOT COMMIT
MISCONDUCT IN CLOSING ARGUMENT

a. Relevant Facts

Prior to closing arguments, the court read aloud the full set of jury instructions. 12/30/09 RP 97-107. The first instruction was Washington Pattern Jury Instruction-Criminal 1.02, which states in part: "The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law...[T]he lawyers' statements are not evidence." CP 53.

The prosecutor then gave her initial closing argument, and spent the bulk of the argument summarizing the evidence that established the elements of the possession with intent to deliver cocaine charge. 12/30/09 RP 107-14. The prosecutor referred to Ilerna as a "very smart criminal" in her initial closing. Ilerna did not object. 12/30/09 RP 107.

Defense counsel then argued that the State's case was based on assumptions, speculation and innuendo, and made several references to the presumption of innocence, concluding that with the lack of evidence in the State's case, it could not breach that presumption of innocence. 12/30/09 RP 115-28.

On rebuttal, the prosecutor responded to defense's claims with the following:

Well, why are we here? We're here based on the biggest presumption of them all. We're here because the Defendant is presumed innocent until the State has met its burden of proof of proving beyond a reasonable doubt that the elements of a crime have been committed. So the law tells you, yes, you can presume things by your reasonable and rational inferences. Because the law tells you to make a presumption. The law doesn't tell you that you can make presumptions in favor of one party and not in favor of another. It tells you to be reasonable and it tells you to be rational.

12/30/09 RP 129.

The court then interrupted the prosecutor's initial closing argument to admonish the jury with the following:

The presumption of innocence does not mean that you accord the State that same presumption in any way, either in evaluating the evidence or anything else. The presumption of innocence is not an evidentiary rule. Do not be confounded by that.

12/30/09 RP 130 (emphasis added)

Also in rebuttal, the prosecutor responded to defense counsel's argument that the officers never saw the drugs by repeating that Ilerna is a "smart criminal." 12/30/09 RP 131. Ilerna objected to that use of the term "criminal." 12/30/09 RP 131. The court overruled Ilerna's objection and admonished the jury, "Jury

understands it's not evidence. You're the ultimate finders of fact..."
12/30/09 RP 132.

The prosecutor began to wrap up her rebuttal with a response to Ilerna's claim that there were holes in the State's case by saying "There isn't a hole in the State's case. The Defense is doing his job. He's arguing to you about what reasonable doubt is."
12/30/09 RP 133.

At the end of her rebuttal, after refuting defense counsel's claims of holes in the State's case, the prosecutor asked the jury to not reward Ilerna for being smart. 12/30/09 RP 134.

b. The Prosecutor Did Not Commit Misconduct By Using The Term "Smart Criminal" In Rebuttal.

To establish prosecutorial misconduct, the defendant must show that the conduct complained of was both improper and prejudicial. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Prejudice is established only if the defendant demonstrates a substantial likelihood that the misconduct affected the jury's verdict. Id. The impropriety and prejudicial impact of a prosecutor's remarks "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 to the jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). A prosecutor is given wide latitude in closing argument to draw and express reasonable inferences from the evidence. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

The prosecutor used the term "smart criminal" in the context of her rebuttal argument; she was responding to defense counsel's assertions that there were holes in the State's case, and specifically, that the officers had not seen drugs. 12/30/09 RP 131. The prosecutor was drawing and expressing a reasonable inference from the evidence at trial that Ilerna did not have any drugs on his person when he was finally arrested, which is proper in closing argument. The court noted this in overruling Ilerna's objection, but also admonished the jury, reminding all that what the prosecutor was saying was not evidence. Any possible prejudice was cured by the court's admonition. Therefore, even if that remark were improper, Ilerna has not demonstrated a substantial likelihood that it affected the jury's verdict.

- c. Ilerna's Failure To Object To The Remaining Allegedly Improper Comments During Closing Argument Constitutes A Waiver Of His Claims Because The Comments Were Not Flagrant Or Ill-intentioned.

Ilerna did not object at the time to any of these four remarks he now alleges were improper. Because the prosecutor's comments were not flagrant and ill-intentioned, this argument should be rejected.

Failure to object to an improper argument constitutes a waiver of the claimed error unless the improper argument was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995); Hoffman, 116 Wn.2d at 93. 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), cert. denied, 498 U.S. 1046 (1991). "[C]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for a new trial or on appeal." Id. (internal quotations omitted).

- i. The prosecutor did not commit misconduct during initial closing argument by referring to Ilerna as a smart criminal, or in rebuttal for asking the jury not to reward him for being smart.

As noted above, the impropriety and prejudicial impact of a prosecutor's remarks 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 to the jury. 132 Wn.2d 529 at 561. In initial closing argument, the prosecutor was summarizing the evidence presented, which included Ilerna's behavior on the night in question. In doing so, as is permissible and proper in closing argument, she drew a reasonable inference from the evidence in this case: Ilerna's choice to flee when contacted by police, his destination while fleeing, and the fact that no drugs were found on him, despite what Officers Bailey and Zwaschka had witnessed him doing. The jury was reminded more than once that what the lawyers said, and specifically, what the prosecutor said in closing argument, was not evidence. When viewed in the context of all necessary factors, it is clear these two statements were not misconduct. Even if the remarks were improper, Ilerna has not demonstrated a substantial likelihood that they affected the jury's

verdict. Also, by not objecting to the remarks at the time they were made, Ilerna waived any objection unless the remarks are shown to be flagrant or ill-intentioned. Ilerna has not made that showing.

- ii. The prosecutor did not commit misconduct in rebuttal by misstating the law as to the presumption of innocence.

Viewed in isolation, the prosecutor's remark that the law does not tell the jury they could make presumptions in favor of one party and not another may have been an unfortunate word choice. However, when viewed in context, the prosecutor appears to have been referring to "rational inferences" when she said "presumption." Ilerna argues here on appeal that this comment is similar to those in State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008), but Warren is distinguishable because the curative instruction the trial court gave here did not include a reading of the jury instruction on reasonable doubt, as did that in Warren.

Defense's reliance on Warren is misplaced, as the prosecutor's comments in that case that were found to be "remarkable misstatement[s] of the law" are easily distinguishable from the prosecutor's comments in the case at bar. In Warren, the

prosecutor argued in closing that "...for them to ask you to infer everything to the benefit of the defendant is not reasonable," "Reasonable doubt does not mean give the defendant the benefit of the doubt," and "it doesn't mean, as the defense wants you to believe, that you give the defendant the benefit of the doubt." 165 Wn.2d at 24. After the comments cited above had been made, and defense had objected twice during the prosecutor's rebuttal, that trial court gave a lengthy curative instruction, reminding the jury that the definition of reasonable doubt was in the jury instructions. 165 Wn.2d at 25.

In the case at bar, at the beginning of her rebuttal, and immediately before making the remark that Ilerna now objects to, the prosecutor herself emphasized the importance of the presumption of innocence and correctly stated the burden of proof upon the State. 12/30/09 RP 129. The "presumptions" comment and the court's curative instruction came after the jury had, between the jury instructions and the closing arguments of both defense and the State, heard no fewer than seven references to the presumption of innocence. Defense made several references to it, comparing it to a strong fortress and a strong wall, and telling the jury that the State's evidence would have to pile high enough to

breach or overcome it. 12/30/09 RP 116, 118, 124, and 128.

Defense even illustrated the practical effect of the presumption of innocence, telling the jury that the defendant was innocent through the entire case, was innocent at that moment, would remain innocent when the jury walked into the jury room, and was innocent unless and until the jury found him to be guilty. 12/30/09 RP 128.

The "presumptions" comment is simply not similar to those in Warren, and the court's curative instruction clarified any confusion. Viewed in the proper context, the standard as noted above, this comment was not improper, and if improper, did not prejudice Ilerna, as he has not demonstrated a substantial likelihood that the comment affected the jury's verdict. Again, as no objection was raised at trial, Ilerna is required to show that the comment was flagrant and ill-intentioned (see analysis above), which he has not done.

- iii. The prosecutor did not commit misconduct by denigrating the defense.

Ilerna asserts that the prosecutor denigrated the defense with this statement in rebuttal: "The defense is doing his job. He's arguing to you about what reasonable doubt is." 12/30/09 RP 133.

Ilerna's assertion that this statement denigrated the defense does not appear to have any support in the record, and his reliance upon State v. Gonzalez, 111 Wn. App. 276, 45 P.3d 205 (2002) is misplaced. The comments in Gonzalez portrayed the defense as only having an obligation to his client, while the prosecutor seeks only justice. 111 Wn. App. at 283-84. In the case at bar, the prosecutor did not denigrate the role of defense counsel with the statement regarding reasonable doubt and the defense attorney's actions. Nothing in this comment could be read to be disparaging of the role of defense counsel; in defense's closing argument in a criminal case, it is rare to *not* hear the argument that reasonable doubt exists.

The record also does not support Ilerna's assertion that the prosecutor's reference in rebuttal to defense counsel doing his job closing was analogous to comments made in State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996). In Fleming, the court found two instances of prosecutorial misconduct. In one, the prosecutor in closing told the jury that to find the defendants not guilty, they would have to find that the victim was lying or mistaken, which misstated the law and misrepresented both the role of the jury and the burden of proof. 83 Wn. App. at 213. The prosecutor's closing

also included several references to the defendants' failure to explain certain events on the night in question, improperly shifting the burden to the defense to disprove the State's case. Id. at 214.

Viewed in the proper context (see analysis above), the comment was not improper, and Ilerna has demonstrated no prejudice. Finally, as no objection was raised at trial, Ilerna is required to show that the comment was flagrant and ill-intentioned (see analysis above), which he has not done.

The prosecutor in the case at bar did not misrepresent the role of the jury, nor did she improperly shift the burden of proof to the defense. As noted above, the prosecutor in the case at bar correctly stated the burden of proof and its relation to the presumption of innocence at the beginning of her rebuttal. 12/30/09 RP 129. In her closing, the prosecutor reviewed the elements of the crime charged, she summarized the evidence that had been presented, and she drew reasonable inferences from that evidence. All are permissible and proper examples of closing argument.

D. CONCLUSION

For the above reasons, the State respectfully requests that this court affirm Ilerna's drug conviction.

DATED this 9 day of September, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

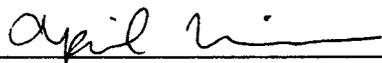
By: 

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jan Trasen, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. RAUL ILERNA, Cause No. 64863-2-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name April Nieman
Done in Seattle, Washington

9/10/10

Date