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No. 51276-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

Robert Leatherman,
Appellant.

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

The Honorable Carol A. Murphy
Cause No. 15-1-00544-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Leatherman received effective assistance of counsel when his attorney made the strategic decision to not request a lesser included instruction and to not object to the admission of certain evidence which was relevant and prevented juror confusion?
2. Whether the State properly explained reasonable doubt and made proper analogies responding to defense arguments during closing?
3. Whether the trial court adequately instructed the jury regarding the elements of Bail Jumping?

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. This appeal follows.

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. RP¹ 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.

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 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.

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.

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 they 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 him 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 preceding 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.

1. LEATHERMAN DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an

appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70.

A. COUNSEL'S DECISION TO NOT REQUEST A LESSER INCLUDED INSTRUCTION WAS TACTICALLY MADE AND A REQUEST FOR A LESSER INCLUDED INSTRUCTION WOULD NOT HAVE BEEN GRANTED UNDER THE FACTS OF THIS CASE.

Lesser-included instructions are given when (1) each element of the lesser offense is a necessary element of the crime charged, and (2) the evidence supports an inference that only the lesser included crime was committed. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Here, the elements of the lesser offense are not all necessary elements of the crime charged. Leatherman was charged with Animal Cruelty in the First Degree.

A person is guilty of animal cruelty in the first degree when, except as authorized by law, he or she, with criminal negligence, starves, dehydrates, or suffocates an animal and as a result causes: (a) Substantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering; or (b) death.

RCW 16.52.205(2). The crime he claims the jury should have also received instruction on is Animal Cruelty in the Second Degree.

An owner of an animal is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the owner knowingly, recklessly, or with criminal negligence:
(a) Fails to provide the animal with necessary shelter, rest, sanitation, space, or medical attention and the animal suffers unnecessary or unjustifiable physical pain as a result of the failure.

RCW 16.52.207(2)(a).

The element of “fails to provide the animal with...medical attention” is not included in Animal Cruelty in the First Degree. An individual can provide their pet with all required medical care and still starve, dehydrate, or suffocate them. That element of Animal Cruelty in the Second Degree is not encompassed by the Animal Cruelty in the First Degree statute and as such Leatherman was not entitled to a lesser-included instruction.

Additionally, the decision to exclude lesser-included offenses is a decision that should be made after consultation with the defendant, but in the end it is a decision to be made by counsel. State v. Grier, 171 Wn.2d 17, 31-32, 246 P.3d 1260 (2011). Where trial counsel’s decision can be described as legitimate trial tactics or strategy, and it was reasonable, it cannot be deficient performance. Id. At 33-34. There, the court held that the defense’s “all or nothing” tactic was legitimate. Id. at 20.

“*Strickland* begins with a ‘strong presumption that counsel’s performance was reasonable.’ *Kyllo*, 166 Wn.2d at 862. To rebut this presumption, the defendant bears the burden of establishing the absence of any ‘conceivable legitimate tactic explaining counsel’s performance.’ *Reichenbach*, 153 Wn.2d at 130 (emphasis added). Although risky, an all or nothing approach was at least conceivably a legitimate strategy to secure an acquittal.” Id. at 42.

The Supreme Court followed Grier when it decided State v. Breitung, 173 Wn.2d 393, 267 P.3d 1012 (2011). In that case, the Court found that seeking a lesser-included instruction would have weakened the defendant's claim of innocence, therefore it was reasonable strategy not to pursue the instruction. Id. at 398-400. "Where a lesser-included offense instruction would weaken the defendant's claim of innocence, the failure to request a lesser-included offense instruction is a reasonable strategy." State v. Hassan, 151 Wn.App. 209, 220; 211 P.3d 441 (2009).

Here, like Hassan, a request for lesser-included instruction would have weakened the defense's claim of innocence. If the jury had been given a lesser-included instruction acquittal would have been practically impossible, this is because there were potential defenses to the allegation of starvation, which counsel passionately pursued, while there were very little -if any- potential arguments that Leatherman did not negligently fail to seek medical care for Wolfy. "[B]ecause the only chance for an acquittal was to not request a lesser-included instruction, we conclude that the decision to pursue an all-or-nothing strategy was not objectively unreasonable." Id. at 221.

Leatherman relies upon State v. Smith, 154 Wn. App. 272, 223 P.3d 1262 (2009) to establish that not requesting a lesser-included instruction in this case constituted ineffective assistance of counsel. However, his reliance on that case is misplaced. The Court there did not hold that all defendants charged with Animal Cruelty in the First Degree are entitled to a lesser-included instruction of Animal Cruelty in the Second Degree Id. at 278. Instead, the Court simply held that under the specific facts of that case the factual prong was satisfied. Id. They never addressed the legal prong of the test because the State never argued that it had not been satisfied. Id.

Here, the State contests the idea that each element of Animal Cruelty in the Second Degree is a necessary element of Animal Cruelty in the First Degree. The State alleged that Leatherman, “with criminal negligence, did starve an animal.” CP 24. With that allegation, legal prong of the Workman test is satisfied with regard to animal cruelty in the second degree because failing to get medical care is not a necessary element of the offense that was charged. Smith is not controlling because the Court did not address that prong of the test.

Furthermore, the factual prong has also not been met in this case. The facts are easily distinguishable from Smith. There was evidence that it may have been an undiagnosed parasite that caused the llama's health problems, that the defendant fed the llama special food in an effort to help him gain weight, and that the defendant sought advice on how to help the llama gain weight. Id. None of those facts are present in this case.

A parasite cannot be detected without medical diagnostics, however Dr. Smith testified that periodontal disease is often noticed by pet owners due to the smell it produces, the animal's inability to eat, and other characteristics visible when the pet attempts to eat or bark. RP 126, 128-129. A pet owner failing to notice a parasite infection which is not visible to the unaided eye is inherently different than a pet owner failing to notice their dog slowly starving to death over a substantial period of time due to an inability to eat, RP 88, 90-92, 106.

In Smith the defendant did everything short of taking the llama to the veterinarian in an attempt to slow or reverse the weight loss, which supported giving a lesser-included instruction on Second Degree Animal Cruelty. Smith 154 Wn. App at 278. Here,

there was no evidence indicating that Leatherman had made any attempts to help Wolfy gain weight.

While the defense did present testimony from others familiar with Wolfy that they did not notice anything wrong, the jury's verdict clearly shows that they believed Dr. Smith's testimony was more credible. Credibility determinations are for the trier of fact to determine and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Leatherman claims that testimony at trial showed Wolfy was given "adequate" food. Brief of Appellant at 14. However, that is not what the defense's witnesses testified. The testimony was that there were bowls with food left out for Wolfy. RP 257, 267. Further testimony showed that the food was hard kibble. RP 258. The mere presence of hard kibble, which is what the witnesses testified to, does not mean that Wolfy was actually able to consume the food. Evidence showed consuming hard food would have been very difficult for him due to the extreme pain from the state of his mouth. RP 91.

While the food may have been available it surely was not adequate because Dr. Smith testified that in the 24-48 hours preceding his death Wolfy had consumed no dog food, RP 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. Furthermore, Dr. Smith testified that Wolfy had undergone extreme loss of muscle, subcutaneous fat, and internal fat. RP 83. While the food *may* have been offered to Wolfy it was clearly *not* adequate in either quantity or quality since he had been without adequate nutrition for such a long period of time.

The jury found the testimony of Dr. Smith that Wolfy had been slowly starving credible regardless of the testimony of Leatherman's friends and acquaintance. The jury's credibility determination should not be disturbed on review. While the facts present in Smith supported a lesser-included instruction because the defendant had done everything short of taking the animal to the veterinarian, those same facts are not present in this case. Ultimately, counsel made a strategic decision to pursue acquittal on the charge of Animal Cruelty in the First Degree instead of requesting a lesser-included instruction of Second Degree Animal

Cruelty because that was the only chance for outright acquittal. Legally, as charged in this case, a request for a lesser-included instruction would likely have been denied under the Workman test. Leatherman's counsel was not ineffective.

B. COUNSEL'S FAILURE TO OBJECT TO THE ADMISSION OF EVIDENCE REGARDING WOLFY'S OTHER MEDICAL ISSUES DID NOT DEPRIVE LEATHERMAN OF EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE EVIDENCE WAS PART OF THE RES GESTAE, THE OBJECTION WAS NOT LIKELY TO SUCCEED, AND DECISIONS ON WHETHER TO OBJECT ARE STRATEGIC DECISIONS.

Washington courts have long recognized what is sometimes called the res gestae or same transaction analysis. State v. Thompson, 47 Wn. App. 1, 11, 733 P.2d 584, *review denied*, 108 Wn.2d 1014 (1987). This often allows in evidence of other crimes "[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place." State v. Tharp, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), *affirmed*, 96 Wn.2d 591, 637 P.2d 961 (1981), quoting E. Cleary, *McCormick's Evidence* § 190, at 448 (2d ed. 1972).

The jury was entitled to know the whole story. The defendant may not insulate himself by committing a string of connected offenses and thereafter force the prosecution to present a truncated or fragmentary version of the transaction by arguing that evidence of other crimes is inadmissible because it only tends to

show the defendant's bad character. "[A] party cannot, by multiplying his crimes, diminish the volume of competent testimony against him."

Tharp, 27 Wn. App. at 205, quoting State v. King, 111 Kan. 140, 145, 206 P. 883, 885 (1922).

While many courts have framed *res gestae* evidence in terms of an exception to ER 404(b), the Court of Appeals has found that it "more appropriately falls within ER 401's definition of 'relevant' evidence, which is generally admissible under ER 402." State v. Grier, 168 Wn. App. 635, 644, 646, 278 P.3d 225 (2012). It is not really the kind of prior misconduct contemplated by ER 404(b), but rather relevant evidence that provides the context of the charged crime. It completes the story. Id. at 647.

The testimony regarding the extent of Wolfy's condition was necessary to complete the story of the incident. The jury saw pictures of Wolfy's remains and without Dr. Smith explaining the full findings of the necropsy the pictures could have caused confusion. The jury needed to see the pictures to substantiate Dr. Smith's testimony that Wolfy was emaciated. If she had not explained the full extent of his condition, as seen in the photographs, the jury could have been confused about what they were seeing and that could have led them to draw improper conclusions which could

have greatly prejudiced Leatherman. The jury could have assumed the maggot infested wounds, RP 98-99, 118, were new or deliberate injuries, instead of chronic sores most likely caused by dermatitis. RP 98-99, 118. They could have assumed the gunshot wounds to the back of his body were recent, instead of old occurrences. RP 121. Dr. Smith had to explain the full findings of the necropsy to prevent the jury from being confused. The negligence that lead to the numerous other ailments Wolfy suffered happened at the same time and in the same place as the negligence that lead to his starvation, this evidence is clearly part of the res gestae and is admissible.

Furthermore, the evidence of Wolfy's full condition directly related to the allegation of starvation. This is because hair was found wrapped around his 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 most likely due to either an orthopedic or skin condition. RP 90. The evidence of the chronic untreated dermatitis, arthritis, and ear infections substantiated Dr. Smith's statement that Wolfy was in severe pain that lead him to chew on himself so frequently that hair wrapped

around his teeth leading to extreme pain when he attempted to eat. This evidence directly relates to proving negligence leading to the starvation of Wolfy, which is an element the State was required to prove.

Where a defendant claims ineffective assistance of counsel based upon trial counsel's failure to object they must show the objection was likely to succeed. State v. Gerdts, 136 Wn. App. 720, 727, 150 P.3d 627 (2007); State v. Valdez, No. 48740-3-II, 2017 Wash. App. LEXIS 1529, 37 (Ct. App. June 27, 2017)². In Gerdts, this Court held that a defendant's failure to show that the objection was likely to succeed disposed of his ineffective assistance of counsel claim. Gerdts, 136 Wn. App. at 727. In Valdez, this Court reaffirmed that principle and disposed of a claim of ineffective assistance of counsel due to failure to object to an alleged ER 404(b) violation because the appellant's brief failed to argue that the objection would have likely succeeded. Valdez, No. 48740-3-II, 2017 Wash. App. LEXIS 1529 at 38-39.

Here, like Valdez, the appellant's brief includes no argument that any objection to the testimony regarding the extent of Wolfy's maladies was likely to have succeeded. Instead, the brief simply

² Unpublished decision cited for persuasive value in accordance with GR 14.1.

states that the evidence was inadmissible, without any reference to the res gestae doctrine or why it would not apply, and that the outcome would have been different if the evidence had not been admitted. Appellant's Brief at 18. Analogous to Valdez, this omission is fatal to his claim. Valdez at 39. Leatherman simply claims that the evidence was inadmissible, without any substantive argument as to why and then claims the evidence was material in the verdict. That is not the correct standard for reviewing an ineffective assistance of counsel claim predicated upon a failure to object. See Gerdts, 136 Wn. App. 720; In re Pers. Restraint of Davis, 152 Wn. 2d 647, 101 P.3d 1 (2004).

The proper test is whether the objection if offered was likely to succeed, the appellant's brief does not even reference this and as such the claim fails. However, even if the brief had argued that the objection would have likely been sustained the claim would still fail because the record clearly indicated this was relevant evidence. The evidence was necessary to prevent juror confusion, to establish the neglect that caused his chronic chewing which exasperated his extreme oral pain that likely caused the starvation, and complete the story of the incident. Any objection would have likely been overruled.

The decision of whether or not to object to testimony is a “classic example of trial tactics.” State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). The decision to not object to evidence may be a deliberate attempt to prevent highlighting or emphasizing the evidence and the defendant bears the burden of proving it was not. In re Pers. Restraint of Davis, 152 Wn. 2d 647, 714, 101 P.3d 1 (2004). In Davis, counsel did not object to testimony that was arguably improper victim impact evidence. The Washington Supreme Court held that the decision not to object could be characterized as legitimate strategy to prevent emphasizing the testimony and because the petitioner failed to rebut the presumption of it being a tactical decision it was not grounds for reversal. Davis 152 Wn. 2d at 714.

Here, Leatherman has failed to rebut the presumption of effective performance. If counsel had objected it would have drawn more attention to the evidence. Also, as discussed above, without the explanation of the photographs the jury could have drawn incorrect conclusions regarding Wolfy’s condition which could have been more prejudicial to Leatherman. Because legitimate tactics and considerations do support counsel’s decision to not object to

the evidence, Leatherman was not deprived of effective assistance of counsel.

2. THE STATE DID NOT COMMIT MISCONDUCT IN ITS CLOSING ARGUMENT.

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).

During closing argument, the prosecutor has wide latitude to argue reasonable inferences from the evidence. State v. Thorgerson, 172 Wn.2d 438, 453, 258 P.3d 43 (2011). A reviewing court first determines whether the challenged comments were in fact improper. If so, then the court considers whether there was a “substantial likelihood” that the jury was affected by the comments. P.2d 699 (1984). A conviction will be reversed only if improper argument prejudiced the defendant. There is no prejudice unless the outcome of the trial is affected. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

A. THE STATE’S EXPLANATION OF REASONABLE DOUBT
IN THE CONTEXT OF THE ENTIRE ARGUMENT DID NOT
SHIFT THE BURDEN OF PROOF.

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, the Washington Supreme 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. There, 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, they 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.

The Emery 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 cited several cases which dealt with this issue:

“[S]ee, e.g., *State v. Belgarde*, 110 Wn.2d 504, 506-07, 755 P.2d 174 (1988) (prosecutor stated the American Indian group with which defendant was affiliated was “a deadly group of madmen” and “butchers,” and told them to remember “Wounded Knee, South Dakota” (quoting VRP)); *Reed*, 102 Wn.2d at 143-44 (prosecutor repeatedly called the defendant a liar, stated the defense had no case, said the defendant was a “murder two,” and implied the defense witnesses should not be believed because they were from out of town and drove fancy cars (quoting RP at 979-88)). The prosecutor’s comments here, while clearly improper, “simply do not rise to such level.” *State v. Elmore*, 139 Wn.2d 250, 292, 985 P.2d 289 (1999).”

Id. at 762-763.

The court held the arguments were simply the kind that could have potentially confused the jury about the burden of proof, but were not per se incurable just because they touched upon constitutional rights. Id. at 763. Because of the fact they could have been cured with a proper instruction their claim failed and the analysis was concluded. Id. at 764.

Here, Leatherman alleges that the prosecutor’s comments during closing argument explaining what constitutes reasonable doubt were improper. The prosecutor stated:

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.

The statement did not amount to the level of burden shifting seen in Emery, the prosecutor did not say that the jury had to do something before they found the defendant not guilty, instead she stated you simply have to ask yourself something- if your doubt is a reasonable one. All the prosecutor was doing was giving the jury a guide to help them understand a difficult concept. The statement did not shift the burden of proof. However, even if the court finds that the argument was improper it was clearly not fragrant nor ill-intentioned, which is the burden Leatherman must prove to warrant reversal. The statement made here was proper and far less inflammatory than the prosecutor’s argument in Emery. If that conduct, which clearly rises to a higher level of burden shifting than

the conduct here, did not meet the burden necessary for reversal it is clear the conduct here does not.

B. THE STATE'S ANALOGY DURING REBUTTAL WAS NOT AN APPEAL TO THE JUROR'S EMOTIONS.

Rebuttal argument is treated slightly differently than the initial closing argument. Even if 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) "Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request." Id., at 85.

"As a general rule, remarks of the prosecutor, including such as would otherwise be improper, are not grounds for reversal where they are invited, provoked, or occasioned by defense counsel and where [the comments] are in reply to or retaliation for [defense counsel's] acts and statements, unless such remarks go beyond a pertinent reply and bring before the jury extraneous matters not in the record, or are so prejudicial that an instruction would not cure them."

State v. La Porte, 58 Wn.2d 816, 822, 365 P.2d 24 (1961).

Here, Leatherman assigns error to the following statement of the prosecutor made during rebuttal argument:

"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."

RP 354. However, Leatherman fails to recognize that this was a direct reply to counsel's argument that Leatherman loved his dog and therefore did not neglect him.

During closing argument, defense counsel argued

"[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 engaged in the type of criminal negligence as alluded to by the state?"

RP 331. 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 and as such was a proper reply to be made in rebuttal.

Furthermore, Leatherman contends that applying the same standard of reasonable care for a child to a dog is inherently an incorrect application of the law, but this is without any statutory or judicial support. The reasonable person standard is an objective one “within the ken” of the average fact finder. State v. Marshall, 39 Wn. App. 180, 692 P.2d 855 (1984); State v. Askham, 120 Wn. App. 872, 883, 86 P.3d 1224 (2004); State v. Marquart, No. 30824-3-III, 2014 Wash. App. LEXIS 729, 14 (Ct. App. Mar. 27, 2014)³. In Marshall the Court held that a juvenile conviction for manslaughter was not void due to the lack of expert testimony regarding the reasonable person standard as it relates to juveniles because “[t]he standard of conduct of a reasonable 15-year-old is an objective standard, within the ken of the average fact finder, as is the standard of conduct of a reasonable adult.” Marshall 39 Wn. App. 184. In Marquart the Court applied the doctrine from Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999) to find that “[i]n negligence cases, the behavior of a “reasonable person” is peculiarly an issue of fact usually reserved for a jury to decide.” Marquart at 15.

³ Unpublished decision cited only for persuasive authority,

The decision of what a reasonable person would do when faced with the situation Leatherman was in is a determination to be made by the jury. Dr. Smith explained the proper standard of care during her testimony. RP 126-127. Here, the jury agreed with her standard and clearly felt that Leatherman's negligence was a gross departure from the standard of care, evidenced by their guilty verdict. The state's analogy did not equate the standard of care for a child to that of a dog, it was simply a rebuttal of the defense's proposition that you cannot neglect an entity you love.

Leatherman alleges that this analogy was an appeal to the passions and emotions of the jury. In doing so Leatherman relies upon In re Pers. Restraint of Glasmann, 175 Wn. 2d 696, 286 P.3d 673 (2012). There, the prosecutor intentionally presented the jury with altered copies of the defendant's booking photograph, added captions with inflammatory statements such as " GUILTY, GUILTY, GUILTY" that rose to the level of asking the jury to consider evidence not admitted at trial, and expressed his personal opinion of the defendant's guilt. Id. The Court reaffirmed the principle that absent objection at trial claims of prosecutorial misconduct are waived unless the defendant establishes that the misconduct was flagrant and ill-intentioned. Id. at 704. The Court found that the

egregious conduct of the prosecutor in that case did rise to the requisite level necessary for reversal, stating:

“Prejudicial imagery may become all the more problematic when displayed in the closing arguments of a trial, when the jury members may be particularly aware of, and susceptible to the arguments being presented. Given the *multiple ways* in which the prosecutor attempted to improperly sway the jury and the *powerful visual medium he employed*, no instruction could erase the cumulative effect of the misconduct in this case. The prosecutor essentially produced a media event with the deliberate goal of influencing the jury to return guilty verdicts on the counts against Glassmann.”

Id. at 707-708 (emphasis added).

The alleged improper argument of the prosecutor in this case rises nowhere near the level of the misconduct in Glassman. There, the deciding factor was the prosecutor’s improper use of imagery that “contaminated the entire proceedings.” Id. at 712. Here, there was no imagery used by the prosecution in their closing argument, there was no altering of evidence, there was no proclamation that the defendant was “GUILTY, GUILTY, GUILTY!” It was clear under those facts that the argument was an improper appeal to the jury’s emotions and passions, but none of the factors leading the Court to that conclusion are present in this case.

Leatherman has not argued that the alleged misconduct impacted the jury decision beyond a bare assertion that “[t]here is a substantial likelihood that the prosecutor’s misconduct affected the verdict in Mr. Leatherman’s case,” Appellant’s Brief at 21, with a citation to Glassman at 704. But nowhere on page 704 of Glassman does it say that conduct of the kind in dispute here is substantially likely to impact the jury’s verdict. Glassman at 704. Instead, the Court stated “[t]o show prejudice requires that the defendant show a substantial likelihood that the misconduct affected the jury verdict” Id. The Court was not saying that all alleged misconduct is substantially likely to impact a jury’s verdict but instead was simply restating the defendant’s burden to prove prejudice.

Here, it is clear that Leatherman has failed to meet his burden of showing prejudice by the alleged misconduct. Leatherman has offered no argument as to why the alleged misconduct prejudiced him besides a bare assertion with a citation that is inapplicable. In contrast to Glassman, there was no use of inflammatory captions, no altering of evidence, and no assertion by the state that Leatherman was “GUILTY, GUILTY, GUILTY!” Instead, the state simply used an analogy to rebut the defenses

arguments and when taken in the context of the entire rebuttal argument the statement was not improper nor flagrant and ill-intentioned.

3. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING THE ELEMENTS NECESSARY TO CONVICT FOR THE CHARGE OF BAIL JUMPING.

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.

Leatherman contends that this instruction permitted conviction even if the element of him failing to appear "as required" was not found beyond a reasonable doubt. However, this Court recently held that identical jury instructions on charges of Bail Jumping were adequate. State v. Hart, 195 Wn. App. 449, 381 P.3d 142 (2016), *review denied*, 187 Wn.2d 1011. There, this 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. “[T]he defendant had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court...” CP 45. While in Hart, the relevant portion read “[T]he defendant had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court...” Hart 195 Wn. App at 454. Hence, this Court's previous conclusion in Hart applies.

Leatherman contends that this decision was incorrectly decided and inherently harmful. However, the Washington Supreme Court's denial of discretionary review suggests otherwise.

Leatherman contends that knowledge of a required hearing is inherently different than the accused failing to appear in court "as required." However, this argument is not persuasive. The language directly included in the instruction "with knowledge of the requirement of a subsequent personal appearance" inherently includes the element of a "required subsequent appearance." Id. at 456. Hence, this Court should follow precedent and hold that this instruction was adequate.

Even if this Court were to change its mind regarding the validity of the instruction reversal is still not warranted because the error would have been harmless. An error is harmless "unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986) (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)). In Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827(1999), the Supreme Court addressed the issue of when a constitutional error is subject to a harmless error analysis. There, a defective jury instruction had

omitted an element of the charged offense that the State had the burden to prove. The Court found that such an error was not structural and that a constitutional harmless error analysis was appropriate. Id.

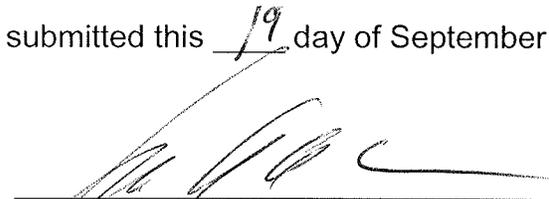
Here, a harmless error analysis is also appropriate so the dispositive issue is whether the instruction- if it is deficient- impacted the jury's verdict. This is highly unlikely given that the element alleged to have been omitted, missing a required hearing, is encompassed in other elements of the to-convict instruction. Additionally, evidence presented at trial overwhelmingly showed that Leatherman had in fact missed a required court appearance. Because the instruction, if found erroneous, likely had little impact on the verdict it would be a harmless error not mandating reversal.

D. CONCLUSION.

Leatherman's counsel made a strategic decision to pursue outright acquittal and did not object to the admission of specific evidence because it was relevant and necessary to prevent prejudice against his client. These were reasonable decisions for him to make and as such his representation was not ineffective. The prosecution did not commit misconduct in its closing argument by shifting the burden of proof and no prejudice resulted from the

prosecutor's statement. The State's rebuttal argument was invited by the argument of defense and did not rise to the inflammatory level necessary for reversal. Even if this Court were to find that the any of the prosecutor's comments were improper, the statements were clearly not flagrant and ill-intentioned. The State respectfully requests that this Court affirm Leatherman's convictions.

Respectfully submitted this 19 day of September, 2018.



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CERTIFICATE OF SERVICE

I certify that I served a copy of Brief of Respondent on the date below as follows:

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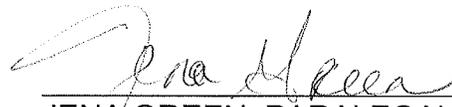
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 19th day of September, 2018, at Olympia, Washington.



JENA GREEN, PARALEGAL

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