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NO. 53202-6

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL RONALD WILKINS,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann Van Dorninck

No. 17-1-02843-8

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Defendant Wilkins challenges the sufficiency of the evidence for the deadly weapon enhancement, where the penetrating stab wound to the victim's kidney put him at risk of death. The Defendant's claim that the enhancement is only permitted in "actually lethal situations" is unsupported in the law. RCW 9.94A.825 ("a deadly weapon is an implement ... which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death").

The trial court did not abuse its discretion in denying a mistrial for alleged prosecutorial error and in accepting the jury's verdict. The prosecutor does not commit prejudicial error by inquiring in voir dire if jurors require physical evidence over oral testimony and by providing an abbreviated recitation of the elements in opening statement. *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008); *State v. Brown*, 132 Wn.2d 529, 562-63, 940 P.2d 546 (1997). The court does not influence a verdict by permitting the jury, which has announced it has reached a verdict, a few minutes to correct an oversight to reduce its verdict to a writing in the proper form provided. *State v. Ford*, 171 Wn.2d 185, 250 P.3d 97 (2011).

II. RESTATEMENT OF THE ISSUES

- A. Where the Defendant stabbed the victim in the kidney and shattered his rib, leaving the victim at risk of organ failure and death, is there sufficient evidence that the Defendant used the knife in a manner which may easily and readily produce death?
- B. Did the court suggest a verdict by permitting the jury a few minutes to amend an oversight by filling out the special verdict form after it announced it had reached a verdict?
- C. The prosecutor inquired in voir dire about jurors' preferences for exhibits over testimony, but communicated no evidence not admitted at trial. The prosecutor discussed elements in opening statement during which the court advised that the court alone would provide the jury with the law. On this showing, has the Defendant established the prosecutor's questions and remarks were improper, prejudicial, and requiring of reversal?
- D. Where the Defendant failed to preserve error and where the error is harmless, should this Court decline to review form language in the judgment which correctly advises that interest will accrue on 96 percent of the Defendant's LFOs and which will not result in interest accruing on the remaining four percent?

III. STATEMENT OF THE CASE

During the early hours of July 8, 2017, Deonta Wilkerson and his friend Rakim Robinson were leaving Club Silverstone in Tacoma after a night out dancing with other army friends celebrating Pride for Tacoma. 6RP 813, 815-16, 819-22, 887-89, 891, 895. In backing out of his parking spot, Wilkerson hit bumpers with a pickup truck that was backing out from the opposite side of the street. 5RP 667-68; 6RP 822, 897-98, 900-01. As Wilkerson exited to check for damage and exchange information,

Defendant Michael Ronald Wilkins got out of his pickup and immediately punched Wilkerson in the jaw. 6RP 822, 828, 900-01.

Wilkerson told the Defendant that he was calling the police to deal with the minor accident. 6RP 902. The Defendant became concerned that he would be arrested, because he was driving drunk. 6RP 905.

“We’re all drunk. We’re both going to jail. Just give me a couple hundred dollars, it’s going to go away.”

5RP 671; 6RP 905. When Wilkerson refused, insisting he would wait for the police, the Defendant taunted Wilkerson and Robinson with racial slurs. 5RP 666, 668, 671; 6RP 829, 833-35, 906. The Defendant and his friends began fighting Wilkerson and Robinson. 5RP 672-74; 6RP 826-27, 830-32, 879, 905. When Wilkerson and Robinson retreated to their car, the Defendant and his friends jumped on the car, “trying to destroy the car to get inside” and demanding money. 6RP 836-37, 880, 908-10.

Wilkerson called the police again. *Id.* He could not escape the dangerous scene, because the Defendant pulled his large truck into the middle of the narrow road, blocking his egress. 6RP 836-37, 909. Wilkerson and Robinson exited the car a second time, and the Defendant’s two friends went after 5’2” Robinson as Wilkerson screamed in exasperation for the police. 6RP 830, 838-39, 842, 911-12.

The Defendant removed a knife¹ from a leather sheath on his belt and approached Wilkerson with hands close to his side. 5RP 596-97, 607-08, 614-15, 674; 6RP 912-13. Fearful of what was in the Defendant's hands, Wilkerson knocked him to the ground only to discover that he had been stabbed in the back and was trailing blood. 5RP 674; 6RP 840, 913-14. Throwing up blood, Wilkerson knew he had internal bleeding and worried he was "bleeding out." 6RP 917-18. He lay down. 6RP 917-18. Wilkerson asked someone on the street to remove his shirt and put pressure on the wound. 6RP 840, 914, 918. "You need to help me right now so I don't die on this sidewalk." 6RP 918. Then he took his phone from his pocket and took a picture of the Defendant's license plate. 6RP 839, 919. The phone was covered in blood. 6RP 919.

The Defendant and his friends made no move to help. 6RP 919. The Defendant's wife, who had been observing the fight, yelled to her group to go. 5RP 675. She got into the driver's seat and took off as the others chased after, jumping into the bed of the truck. 5RP 674-76; 6RP 840, 915, 919-20.

Ruston Police Officer Grubb testified he observed Wilkerson lying on the ground with large lacerations on his back and side. 4RP 464. He was

¹ Witness Robert Williams had informed police that the Defendant's knife had a blade that was 5-6 inches long. CP 4; 5RP 694. However, at trial, he did not have an independent recollection of the blade length. 5RP 694.

“in obvious pain. There was a decent amount of blood ... soaking the shirt that was being used to apply pressure to his wound.” 4RP 471. Wilkerson’s clothes were cut off on the sidewalk. 6RP 922-23. And he was taken to Saint Joseph’s Medical Center, where he was classified critical upon arrival. 6RP 782-83, 799.

Wilkerson’s twelfth rib was shattered, his lip had to be “glued back together,” and he had been cut twice – a slash to his left side and a puncture to his kidney. 6RP 789, 795, 800, 923-25. The penetrating wound was 5.5 inch wide and approximately three inches deep, close to the diaphragm and lungs. 6RP 797-98, 801, 923. The location of the kidney wound threatened damage to veins, arteries, and the collecting system. 6RP 789-93, 802-03, 811. Wilkerson’s damaged hilum put him at risk of infection due to leakage of urine into the body. 6RP 793-94. Dr. Long Tran testified that “if you have a penetrating injury and it does penetrate a solid organ, the risk of death is always in our thoughts.” 6RP 803.

However, surgery posed its own risk. RP 798 (“If you do go in there, there’s a high risk that he could lose the whole kidney.”). Wilkerson was kept on a secure hospital floor with five cameras in his room. 6RP 928. After four days, Wilkerson had stabilized sufficiently for the doctors to decide against surgery. 6RP 928. The doctors proposed serial abdominal

exams and blood level tests with urologists and radiologists in hopes that the body can repair itself without surgery. 6RP 798-99.

In this case, fortunately, there has been no further complication thus far. 6RP 799. But doctors continue to monitor Wilkerson's kidney function to this day. 6RP 928-29.

The Defendant was charged with assault in the first degree, assault in the second degree, and felony harassment² – each with deadly weapon enhancements. CP 1-3.

During jury selection, defense counsel repeatedly objected as the prosecutor inquired into whether jurors could make a fair determination knowing that not all possible evidence might be admitted at trial. 3RP 268, 323-30. After numerous interruptions, the judge excused the jury to explain that she was sustaining the objections insofar as the questions may be interpreted as legal instruction on the reasonable doubt standard, i.e. a right reserved to the court, or insofar as the jurors might speculate about their verdicts. 3RP 330-31.

When defense counsel made a motion for mistrial. 3RP 331. The prosecutor explained that her questions were designed to insure that jurors

² The police report indicated the Defendant had made a threat to kill. CP 4. However, this evidence did not come out at trial, and the court dismissed the felony harassment charge for insufficient evidence of a threat. 7RP 1089-90.

“can work within the confines of what they will be instructed.” 3RP 332.

The defense motion was denied. 3RP 331.

The defense again repeatedly interrupted the prosecutor’s opening statement, complaining that any discussion of the elements was argument. 4RP 429-30. The prosecutor explained that it was important in a multi-week trial to apprise the jury in advance, not just about the anticipated evidence, but about “what they are going to be asked to evaluate those facts against.” 4RP 434. The court advised: “You absolutely have a right to talk about it’s Assault in the First Degree, this is generally what it means, but you’re going through each of the elements, which is inappropriate.” 4RP 435. The court advised that it would “give the law at the end.” 4RP 435.

After the presentation of evidence, the court instructed the jury that it was their duty:

... to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

....

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

CP 36.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 37.

When the jury advised it had a verdict, the court noted aloud which forms had been filled out and which had been left blank. 8RP 1220-21. Upon hearing that the special verdict form was among the forms left blank, the presiding juror indicated that this was an oversight.

THE COURT: Verdict Forms C and D are blank and the Special Verdict Form is blank.

PRESIDING JUROR: Did we forget that?

THE COURT: Yes.

I'm just going to send you right back in with all the instructions. *If you can't agree, there's an option for that, too.*

I'm going to excuse you to fill out the Special Verdict Form.

8RP 1221 (emphasis added). The jury stepped out, without objection from either party. 8RP 1221. When the jury returned, it acquitted the Defendant of first degree assault and convicted him of second degree assault with a deadly weapon enhancement. CP 67; 8RP 1221-22. The court confirmed by a raise of hands that the verdicts reflected the personal votes each of the

twelve jurors. 8RP 1222. The Defendant made no request for further examination of the jury verdicts.

Only after the verdict was returned and the jury had exited a final time, did the Defendant object.³ Defense counsel then argued that the court should not have permitted the jury to render a verdict on the enhancement, arguing that the apparent omission had actually been “the verdict of the jury, and that is it.” 8RP 1223. The court disagreed:

THE COURT: Just to clarify, the Special Verdict Form indicates, “The answer section above has been intentionally left blank,” and that wasn’t signed either. And it’s clear to me, given that it was Verdict Form A, B and then C and D, which were blank -- the Special Verdict Form was after that and it was also blank -- that it was oversight on their part. And, for the record, they were out maybe two minutes to fill in the form and come back. The record is made. I’m just completing the record.

Whatever motion you have, I’m denying that at this point.

8RP 1223.

The trial court sentenced the Defendant Wilkins to 14 months for the assault in the second degree and 12 months for the deadly weapon enhancement, for a total of 26 months confinement. CP 80; 9RP 1246. The trial court imposed the \$500 crime victim assessment and \$12,056 in restitution. CP 78, 111. Wilkins timely appealed. CP 88.

³ The Defendant’s claim (Brief of Appellant at 17) that he “promptly objected” is not the record.

IV. ARGUMENT

- A. **There is sufficient evidence that the Defendant wielded the knife in a manner which easily and readily could have produced death, where he penetrated the victim's kidney and shattered his rib, leaving the victim at risk of organ failure and death.**

The Defendant claims there is insufficient evidence supporting the deadly weapon enhancement. Brief of Appellant (BOA) at 7. Specifically, he claims that he did not use the knife in a manner likely to result in death. This contradicts his concession below:

[A]ny time a person gets stabbed, it is life-threatening. *We are not disputing that fact.* What we have disputed at this trial, and what we have always disputed and what Mr. Wilkins still continues to dispute, is the fact that he was the person who wielded the knife and that he is the person who actually stabbed Mr. Wilkerson.

9RP 1243 (emphasis added). *See also* 8RP 1152.

“A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonable can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* A reviewing court defers the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). After viewing the evidence in the light most favorable to the State, interpreting all inferences in favor of the state and most strongly against the

defendant, the Court must determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Salinas*, 119 Wn.2d at 201.

“[A] deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death.” RCW 9.94A.825. *See also* CP 47. The Defendant notes that this definition is distinguished from that at RCW 9A.04.110(4)(b), which defines a deadly weapon as one readily capable of causing death “or substantial bodily harm.” BOA at 10 (quoting *State v. Cook*, 69 Wn. App. 412, 418, 848 P.2d 1325 (1993)). *See also State v. Zumwalt*, 79 Wn. App. 124, 130, 901 P.2d 319 (1995). *See also* CP 43, 45 (defining assault in the first degree).

Dr. Long Tran, the surgeon who treated the victim in this case, testified that the victim arrived at the hospital with a stab wound to the back, which raised concerns of injury to “a multitude of potential organs, solid organs, vascular organs, intestines.” 6RP 787-88. The stabbing penetrated the victim’s right kidney and fractured a rib. 6RP 789, 800. Dr. Tran testified that “if you have a penetrating injury and it does penetrate a solid organ, the risk of death is *always* in our thoughts.” 6RP 803 (emphasis added).

The Defendant argues that the evidence is insufficient, because Wilkerson survived his injuries. He argues that the knife could only have been used in a manner capable of producing death if he had succeeded in severing Wilkerson's blood vessels or destroyed his kidneys. BOA at 12. "Mr. Wilkerson did not suffer an injury that was actually likely to result in death." *Id.* His argument is premised on rewriting the statutory definition. A deadly weapon is one which "has the capacity" to inflict death and which, from the manner in which it is used, "is likely to produce or may easily and readily produce death." RCW 9.94A.825. A deadly weapon is not defined as one that *actually* or *always* results in death. What matters is the manner in which it is used. *Cf. State v. Peterson*, 138 Wn. App. 477, 482-83, 157 P.3d 446 (2007) (a knife used only to cut wires and to pry a stereo from an unoccupied car in a deserted parking lot is not a deadly weapon); *Zumwalt*, 79 Wn. App. at 126 (a knife only used to stab someone in the hand is not used in a deadly manner).

The character of an implement as a deadly weapon is determined by ***its capacity*** to inflict death or injury, and its use as a deadly weapon by the surrounding circumstances, such as the ***intent*** and ***present ability*** of the user, ***the degree of force***, ***the part of the body*** to which it was applied and ***the physical injuries inflicted***.

State v. Thompson, 88 Wn.2d 546, 548-49, 564 P.2d 323 (1977) (emphasis added). The success of the attack is irrelevant under the statutory definition. A death is not required.

The Defendant argues, without any citation to authority, that the legislature could not have intended the enhancement to be used when victims survive. BOA at 13. The enhancement should be reserved for “actually lethal situations.” *Id.* This argument is unpersuasive. If this were the case, then the law would limit the enhancement to those offenses resulting in death. This is not the law.

Although the victim in this case was lucky enough to survive the injuries inflicted by Wilkins, Dr. Tran’s testimony shows that the victim suffered exactly the type of injury that is *likely to or may easily and readily* produce death – a penetrating injury to a solid organ, namely, the right kidney. 6RP 803. When someone suffers such an injury, the risk of death is “always” a concern to doctors. *Id.* Viewing the evidence in the light most favorable to the State, the evidence shows the weapon Wilkins stabbed the victim with had the capacity to cause death and from the manner in which it is used, was likely to produce or may have easily and readily produced death. Accordingly, sufficient evidence supports the conviction for the deadly weapon enhancement.

B. The court did not suggest a verdict by permitting the jury, after it announced it had reached a verdict, to amend an oversight and properly record that verdict in writing.

The Defendant argues that, in permitting the jury to complete a form that the presiding juror indicated had been left blank inadvertently, the trial court had “suggest[ed] the need for agreement,” contrary to CrR 6.15(f)(2). BOA at 15.

To prevail on a claim of improper judicial interference with the verdict, a defendant “must establish a reasonably substantial possibility that the verdict was improperly influenced by the trial court’s intervention.” *State v. Watkins*, 99 Wash.2d 166, 178, 660 P.2d 1117 (1983). This requires an affirmative showing and may not be based on mere speculation. We consider the totality of circumstances regarding the trial court’s intervention into the jury’s deliberations. *Watkins*, 99 Wash.2d at 177–78, 660 P.2d 1117; *State v. Boogaard*, 90 Wash.2d 733, 739–40, 585 P.2d 789 (1978). Before we can do so, ***the defendant must first establish that the jury was still within its deliberative process.***

State v. Ford, 171 Wn.2d 185, 188–89, 250 P.3d 97, 99 (2011) (emphasis added) (lead opinion in plurality decision). The defendant must show “the jury was undecided when sent back to the jury room.” *Ford*, 171 Wn.2d at 191-92. Once the jury announces it has ended deliberations and reached a verdict, CrR 6.15(f) “has no application.” *Id.* at 190-91.

Judicial coercion must include an instance of actual conduct by the trial judge during jury deliberations that could influence the jury’s decision. To make such a claim, a defendant must first make a threshold showing that the jury was still within its deliberative process. Second, though related, the defendant must affirmatively show that the jury

was at that point still undecided. Third, the defendant must show judicial action designed to force or compel a decision, and fourth, the impropriety of that conduct. Finally, if raised for the first time on appeal, a defendant must show that such interference rises to the level of manifest error, such that it actually prejudiced the constitutional right to a fair trial.

Ford, 171 Wn.2d at 193.

In *Ford*, the jury informed the court it had reached a unanimous verdict, but it had left a form “completely blank.” *Ford*, 171 Wn.2d at 186-87. The judge instructed the jury to return to the jury room and complete the blank form. *Id.* *Ford*, 171 Wn.2d at 187. Within less than five minutes, the jury returned with the form filled out, convicting the defendant of second degree rape. *Id.* A poll confirmed the verdict. *Id.* The court held that there was no threshold showing on these facts that the court improperly influenced the jury’s verdict. *Id.* at 189.

Nothing in the record before us suggests that the jury was deadlocked or experiencing any difficulty in reaching a decision. What we have is the opposite. The jurors twice indicated their unanimity. The jurors were polled. Each juror affirmed agreement with the verdict. There is no room for judicial coercion or influence because, as the record shows, the jurors had reached their verdict. And as far as the end result of completing the verdict form, they could just as conceivably have returned a “not guilty” verdict.

Ford, 171 Wn.2d at 189.

This is distinguishable from a deadlocked jury being interrupted in its deliberations and coerced through individual voir dire to reach a verdict

in half an hour's time. *Id.* at 189-90 (discussing *State v. Boogaard*, 90 Wn.2d 733, 585 P.2d 789 (1978)).

The facts in our case are similar to those in *Ford*. The jury announced it had reached a verdict. 8RP 1220. At that point, CrR 6.15(f), had no application. There was no verdict to coerce.

The presiding juror indicated that the blank form was an oversight. 8RP 1223 ("Did we forget that?"). The court instructed the jury that the form could be completed in any manner, including by indicating that they could not come to an agreement. *Id.* ("If you can't agree, there's an option for that, too."). The jury stepped out "maybe two minutes to fill in the form and come back."⁴ 8RP 1223. A passage of mere minutes suggests, consistent with the jury's announcing a verdict, that there were no further deliberations. *Ford*, 171 Wn.2d at 191. And then they were polled three times as to each of the three completed verdict forms, indicating the verdicts represented their personal votes. 8RP 1222. There is no suggestion on this record that the jurors were deadlocked, but only that they had overlooked memorializing their verdict in the form.

⁴ The court's recitation of the record is consistent with the clerk's minutes, which indicates that between 1:28 and 1:34, the jury was seated, the verdict read, a conversation ensued, the jury was excused, it recessed, and then it indicated it was ready to return with the completed form. CP 127. *But see* Brief of Appellant at 18 (arguing that the judge's estimation of "two minutes to fill in the form and come back" diverges from the clerk's minutes which indicate that a greater number of activities occurred in greater span of time).

The Defendant relies on *State v. Guzman Nunez*, 174 Wn.2d 707, 712, 285 P.3d 21 (2012), mischaracterizing the discussion therein.

Guzman Nunez did not address any claim of judicial pressure on a jury to reach a verdict. It held that a jury must be unanimous in deciding aggravating circumstances. In so doing it overruled *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003) and *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), which would have permitted a non-unanimous special finding. *Guzman Nunez* noted that this matter had been decided in *State v. Brett*, 126 Wn.2d 136, 892 P.2d 29 (1995), which had required jury unanimity to reject an aggravating factor for aggravated first degree murder.

In *Brett*, the jury was instructed:

“If, after fully and fairly considering all of the evidence or lack of evidence you are not able to reach a unanimous decision as to any element of any one of the aggravating circumstances, *do not fill in the blank for that alternative.*”

Guzman Nunez, 174 Wn.2d at 714 (quoting *Brett*, 126 Wn.2d at 173). *Brett* had argued that this instruction jeopardized the requirement for jury unanimity. *Brett*, 126 Wn.2d at 172. The court had disagreed, because the instruction told the jury not to fill in the blank if it could not agree. *Id.* at 173. The *Guzman Nunez* opinion does not discuss improper judicial influence on a jury’s verdict.

The Defendant notes that within *Guzman Nunez*, there is a paragraph approving yet again the *Brett* instruction. BOA at 16. However, it is apparent that the court did not require this language, but only endorsed it insofar as it required jury unanimity for sentencing factors.

We are not called upon in these cases to develop a rule that would better serve both the purposes of jury unanimity and the policies of judicial economy and finality. We do note, however, that the instruction given in *Brett*, requiring a jury to leave a special verdict form blank if it could not agree, is a more accurate statement of the State's burden and ***better serves the purposes of jury unanimity***. See 126 Wash.2d at 173, 892 P.2d 29. For these reasons, we endorse the *Brett* instruction going forward.

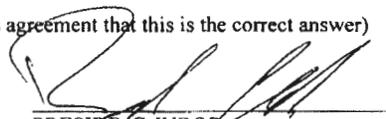
Guzman Nunez, 174 Wn.2d at 718-19 (emphasis added).

Here in our own case, the form provided a failsafe to determine whether the jury had considered the form at all. The presiding juror was to sign and date to indicate that the jury intended a non-answer.

QUESTIONS: Was the defendant Michael Wilkins armed with a deadly weapon at the time of the commission of the crime?

ANSWER: YES (Write "yes" if unanimous agreement that this is the correct answer)

2-28-2019
DATE


PRESIDING JUROR

The answer section above has been intentionally left blank.

DATE

PRESIDING JUROR

CP 67. Notably, the line specifying "The answer section above has been intentionally left blank," which would indicate that the jury could not reach

a unanimous decision, was not signed or dated. 8RP 1221. The jury had not intended a non-answer. *Id.* It had reached a decision but failed to properly record it.

On this record, it is apparent that the trial court did not suggest or coerce a verdict on the weapon enhancement. The court simply permitted the jury to communicate its verdict in written form. Rather than instructing the jury that it had to make a definitive decision of “yes” or “no,” the trial court instructed the jury that if it could not reach a unanimous decision, “there’s an option for that, too.” 8RP 1221. All twelve jurors confirmed that the verdict reflected their personal vote. 8RP 1222.

C. The prosecutor’s statements were neither improper nor prejudicial where her inquiries in voir dire communicated no evidence not admitted at trial, where her abbreviated discussion of the legal elements in opening statement was consistent with the instructions the court would give, and where the court repeatedly advised the jury that only the court could provide the law.

The Defendant renews his claim that the prosecutor’s voir dire and opening statement⁵ were improper. BOA at 19. To prevail on a claim of prosecutorial error, a defendant bears the burden of showing that, in the context of the record and all of the circumstances of the trial, the prosecutor’s conduct was both improper and prejudicial. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012); *State v. Magers*, 164 Wn.2d 174,

⁵ The relevant pages of the transcript have been appended.

191, 189 P.3d 126, 135 (2008). To establish prejudice, the defendant must show a substantial likelihood that the error affected the jury verdict. *Glasmann*, 175 Wn.2d at 704; *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). The reviewing court will review the challenged statements in the context of the entire case. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747, 785-86 (1994). The trial court's denial of a motion for mistrial for alleged prosecutorial error lies within the sound discretion of the trial court, and it will not be disturbed absent an abuse of discretion. *Id.*

The Defendant claims that it was improper for the prosecutor to tell jurors that police officers write reports. BOA at 22. Because this is common knowledge, the comment was not improper.

At several points in the trial, the police officers and eyewitnesses in this case testified *from the police reports* such that the jury actually received the facts contained in the reports that were alluded to during voir dire. 4RP 467, 469, 532, 715, 739, 760. Accordingly, even if the State's comments during voir dire were improper, they were not prejudicial in the context of the whole record, because the comments did not inform the jury of any evidence that was not presented at trial.

The Defendant claims that it was improper for the prosecutor to tell the jury what the evidence would not be. BOA at 23 (citing 3RP 268 (prosecutor stating the court would not provide the jurors with a transcript

of the testimony they had heard)). Because this was accurate, it was not improper. The prosecutor may inform the jury in advance of testimony what the State's evidence is expected to show. *Magers*, 164 Wn.2d at 191.

The prosecutor asked jurors about their ability to make a fair determination of guilt based on oral testimony and in the absence of written materials, such as full police reports or transcripts. RP 268, 323, 325-27, 329-30. This line of questioning did not suggest that such evidence, if it existed, would be inculpatory versus exculpatory. It did not suggest any specific evidence at all. Therefore, the prosecutor did not suggest that evidence not presented at trial provided additional grounds for finding a defendant guilty. *Russell*, 125 Wn.2d at 87. The prosecutor's questions were not improper. *See also State v. Brown*, 132 Wn.2d 529, 562-63, 940 P.2d 546 (1997) (holding prosecutor's statement in an aggravated murder trial that the jury would come to know the deceased victim only through the testimony of witnesses was proper).

Even if the prosecutor's comments improperly referred to facts not in the record, defense counsel's objections and the trial court's prompt response and eventual written jury instructions cured any resulting prejudice. *Russell*, 125 Wn.2d at 88 (a new trial is unwarranted where defense objected to improper comments and the court promptly provided a curative instruction). The trial court stated various times, following defense

objections, that it would instruct the jurors on the law and what evidence would be admitted. RP 268, 323, 330-31. It instructed the jury that the lawyer's remarks are not evidence; only the witness testimony and exhibits were evidence. CP 36. A reviewing court will presume jurors followed the trial court's instructions. *Russell*, 125 Wn.2d at 85-85. On this record, it cannot be said that the prosecutor's comments during voir dire prejudiced the outcome of the trial.

The Defendant Wilkins also argues the State's short, interrupted discussion of the elements in opening statement constitutes error. BOA at 27-28. This is not the law. The Washington Supreme Court has held that an abbreviated rendition of the elements of the alleged offenses during an opening statement "do[es] not strike us as improper or prejudicial." *Magers*, 164 Wn.2d at 191. Here the prosecutor "laid out the undisputed elements of the charged offenses," because, "there's no way to prepare a jury for what may be a multi-week trial without telling them and giving them an idea of what they are going to be asked to evaluate those facts against." 4RP 434.

Even had the prosecutor misstated or been unclear in the law, because she was interrupted by objections and because the court provided the jury with a full, written instruction of the law, her aborted attempt could not have been prejudicial. In sustaining a defense objection to the

comments, the trial court stated, “That’s sounding more like closing. If you want to briefly talk about what the State needs to prove, that’s okay.” 4RP 430. As the trial court pointed out, the State would indisputably be able to discuss the elements of the charges during closing argument. And the trial court repeatedly advised that it would be instructing the jury on the law (including the elements) at the end of the case. 4RP 431, 435-36, 438. Before deliberations, the court fully instructed the jurors of the law, advising them to disregard any remark not supported by the law, which “is contained in my instructions to you.” CP 37.

This Court should find the Defendant has not met his burden of demonstrating either impropriety or prejudice.

D. This Court should decline to consider Wilkins’ unpreserved challenge to harmless language in the judgment.

For the first time on appeal, the Defendant challenges form language which correctly advises that RCW 10.82.090 governs interest in LFOs. BOA at 32. He did not preserve objection to the form language at sentencing, and thus his claim is waived on appeal. 9RP 1243-47. The failure to object must be determinative of this claim.

It is well settled that an “appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a); *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). “As a general matter, an argument neither pleaded nor argued to the trial court cannot be raised

for the first time on appeal.” *Washington Fed. Sav. v. Klein*, 177 Wn. App. 22, 29, 311 P.3d 53, 56 (2013). And in particular, unpreserved challenges to LFOs do not meet any RAP 2.5(a) exception. *State v. Duncan*, 185 Wn.2d 430, 437, 374 P.3d 83, 87 (2016); *Blazina*, 182 Wn.2d at 832.

The purpose underlying issue preservation rules is to encourage the efficient use of judicial resources by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *State v. Hamilton*, 179 Wn. App. 870, 878, 320 P.3d 142, 148 (2014) (citing *State v. Robinson*, 171 Wn.2d 292, 304–05, 253 P.3d 84 (2011)). If the Defendant had made timely objections, these small complaints could have been addressed and resolved at that time without any additional expense.

The decision not to address LFO issues at a sentencing hearing is “unsurprising” and often made “consciously and prudently.” *State v. Duncan*, 180 Wn. App. 245, 250-51, 327 P.3d 699, 701 (2014), *aff’d and remanded*, 185 Wn.2d 430, 374 P.3d 83 (2016). In this case, it is unsurprising that there was no objection. The largest part of the Defendant’s LFOs (96 percent) is restitution. CP 78 (\$500 crime victim assessment),

111 (\$12,056 in restitution). “Restitution shall bear interest from the date of judgment until payment at the rate applicable to civil judgments.” RCW 10.82.090(1). Restitution will be collected and distributed before any other LFO. RCW 9.94A.760(2).

Insofar as the Defendant’s complaint regards interest on the crime victim assessment, as a matter of law and fact, no interest will accrue. The form language cites the proper statute which dictates that interest cannot accrue on the \$500 victim assessment imposed. RCW 10.82.090(2). While the Pierce County judgment form has been amended since Mr. Wilkins’ sentencing to more properly reflect the amendments to the law, software changes affecting clerks’ offices across the state mean that there is no risk that any offender will accrue interest on non-restitution LFOs regardless of any form language.

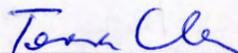
Accordingly, the Court should decline to review the challenge to harmless form language under RAP 2.5(a)(3).

V. CONCLUSION

For the reasons stated above, the State respectfully requests that this Court affirm Defendant Wilkins' convictions and sentence.

RESPECTFULLY SUBMITTED this 22nd day of January, 2020.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



Teresa Chen WSB# 31762
Deputy Prosecuting Attorney

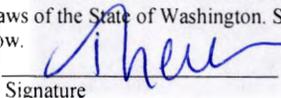


BRENNA L. QUINLAN
Rule 9

Certificate of Service:

The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

1-22-20
Date


Signature

PIERCE COUNTY PROSECUTING ATTORNEY

January 22, 2020 - 3:49 PM

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Superior Court Case Number: 17-1-02843-8

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