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Court of Appeals
Division III
State of Washington

NO. 33097-4-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

RUDOLFO HILL SAMANIEGO, Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

- A. Was the trial court correct in admitting Samaniego's statements at trial?
- B. Was there sufficient evidence to support Samaniego's conviction for maintaining a drug dwelling?
- C. Did the trial court properly excluded irrelevant evidence offered by the defense to impeach Officer Berry?
- D. Has Samaniego failed to show that the prosecutor's conduct was improper and that his right to a fair trial was prejudiced?
- E. Was Samaniego provided a fair trial under the cumulative error doctrine?
- F. Should the court remand for resentencing on the school zone enhancements?

II. STATEMENT OF THE CASE

Rudolfo Hill Samaniego was charged with one count of possession of methamphetamine with intent to deliver. CP 4. The charges were later amended to include counts two and three, delivery of methamphetamine and maintaining a drug dwelling. CP 6. In addition, school zone enhancements were alleged as to all three counts. CP 5-6. After the State's case-in-chief, however, the State agreed to drop the enhancement relating to count three. RP 1044.

The charges stemmed from the following facts:

Samaniego was residing in a room at the Travel Inn motel. RP 889. Police officers conducted surveillance from outside his room and observed that vehicles and individuals on foot would come and go from the room and that visitors would only stay for about five to ten minutes in the room. RP 890. The traffic pattern was consistent with street-level drug dealing. RP 890. On November 14, 2013, Samaniego left his motel room. RP 893. Detective Gusby saw him outside doing something inside of his vehicle. RP 955-7. Samaniego walked back into his room and then drove out of the parking lot. RP 957. The detective saw him park in the parking lot of Burger Ranch. RP 959. Another vehicle pulled up beside Samaniego's vehicle. RP 959. A female exited her vehicle, opened Samaniego's passenger door, and handed him something. RP 959. Samaniego then handed her an item. RP 959. Afterwards, she entered her car and drove away. RP 959-60. Based on the detective's training and experience, he believed that he witnessed a drug transaction. RP 959.

Subsequently, detectives executed a search warrant of Samaniego's motel room. RP 893-4. Inside the room, they encountered a female and child. RP 895. Officers saw a two-foot layer of smoke near the ceiling that was consistent with methamphetamine smoke. RP 894. There was a functioning digital scale on a table. RP 896-7. Officers also found cellophane baggies that were consistent with packaging material for small

amounts of narcotics. RP 897. A detective testified that it was common to find new unused baggies close to individuals engaged in street-level narcotics trafficking. RP 898. On a table, detectives also discovered a baby wipes container, which held a baggie of methamphetamine inside. RP 905, 963.

In addition, detectives found a gray bag in between a mattress and box spring. RP 898. Inside the bag, detectives found another functioning digital scale, packing material, a cut red straw used to scoop up methamphetamine, a pill bottle, and a Ziploc baggie containing methamphetamine. RP 900-3, 964. A hollowed-out container disguised as a motorcycle battery was found as well. RP 905. In the bathroom, a detective found a glass pipe with burnt residue. RP 906, 964. The pipe was consistent with a pipe used for smoking methamphetamine. RP 906, 964.

Samaniego was arrested that same day. On his person, Officer Berry found U.S. currency and four bindles of methamphetamine. RP 908, 984. Samaniego was interviewed and admitted that he lived at the motel with his girlfriend and baby. RP 913, 966. He admitted that the gray bag was his and that some of the methamphetamine in it was for personal use and that some was for resale. RP 913. He said the methamphetamine found on his person was for resale and that he sold

methamphetamine to make money. RP 914, 966. He admitted that clients would come to the residence to purchase drugs and that they would sometimes smoke in the motel room. RP 914, 966. He further admitted to conducting a drug transaction with a female shortly before being taken into custody. RP 915, 966. He also admitted that all the methamphetamine located in the hotel room was his. RP 934, 967.

Prior to trial, the defense filed a motion to suppress under Criminal Rule 3.5. CP 7-10. The defense argued that Samaniego's statements were involuntary and coerced by threats and promises of law enforcement. CP 10. Specifically, the defense claimed that Detective Tucker told Samaniego that if he did not admit to the drugs that he would be forced to arrest Samaniego's girlfriend and turn their son over to CPS. CP 8. A CrR 3.5 hearing was held. Detectives Tucker and Gusby testified for the State. RP 22-67. The defendant testified and called no other witnesses. RP 72-86. The court ruled that no threats or promises were made. RP 1235, CP 123. The defense motion to suppress statements was denied. RP 96, CP 123. Findings of fact and conclusions of law were subsequently filed. CP 118-123. Samaniego did not assign error to any of the findings of fact.

The case went to trial and Samaniego was found guilty of all counts. CP 92-7. The jury found that counts one and two took place

within a school zone. CP 93-4. At the sentencing hearing, Samaniego was sentenced to 40 months in prison on counts one and two and 24 months on count three. CP 100. The court ordered that the confinement times run concurrently, for a base sentence of 40 months in prison. CP 100. The court also added 24 months on each school zone enhancement and ordered that they run consecutively. CP 100.

This appeal followed.

III. ARGUMENT

A. The trial court correctly decided the admissibility of Samaniego's statements at trial.

A defendant may waive rights conveyed in Miranda warnings provided the waiver is made voluntarily, knowingly, and intelligently. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966). A court must examine the totality of the circumstances to determine whether the relinquishment of the right was voluntary and whether the waiver was made with "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986). The State must establish the voluntariness of the statement by a preponderance of the evidence. State v. Earls, 116 Wn.2d 364, 379, 805 P.2d 211 (1991). The issue of voluntariness must be

determined by examining the totality of the circumstances. Arizona v. Fulminante, 499 U.S. 279, 285-6, 111 S. Ct. 1246 (1990).

The standard of review is whether there is substantial evidence from which the trial court could have found the confession voluntary under the totality of the circumstances. State v. Broadaway, 133 Wn.2d 118, 133, 942 P.2d 363 (1997). Importantly, after the clerk's papers were supplemented with the 3.5 findings of fact and conclusions of law, Samaniego did not assign error to any findings of fact. Findings of fact entered after a CrR 3.5 hearing are verities on appeal if unchallenged. Id. at 131.

In the case at hand, Detective Tucker, along with Detective Gusby, questioned Samaniego after his arrest. Detective Tucker testified that he did not make any threats or promises to the defendant and did not use deception during the interview. RP 35, 45, 53. Detective Tucker told Samaniego that his girlfriend was under arrest and in custody on reckless endangerment and possession with intent to deliver charges. RP 46. He also told Samaniego that his child was with CPS. RP 45-6. The detective testified that after Samaniego provided a statement, he told the defendant what would happen to his girlfriend. RP 37. Detective Tucker stated that the girlfriend was released, but not as a result of any threats or promises to

the defendant. RP 37. The detective also testified that no threats or promises were made regarding Samaniego's child. RP 38.

Detective Gusby also testified at the 3.5 hearing. He sat in on the interview of the defendant. He testified that no threats or promises were made to Samaniego by himself or Detective Tucker. RP 56. Detective Gusby reiterated that the girlfriend's release was not conditioned on anything said during the interview. RP 57. The detective stated that after Miranda rights were read and signed, Samaniego expressed concern over his girlfriend and child. RP 58. He was told that his girlfriend was in custody and later informed when she was released. RP 60, 61.

According to the defendant, an agreement was made with Detective Tucker before Miranda warnings were read. RP 76. Samaniego testified that prior to Miranda being read, he inquired about his child and girlfriend. RP 74. He said that he was told that his girlfriend was arrested and that his child was being taken away from him. RP 74. He claimed that he told the detectives that he would give them the information they wanted if they let his girlfriend and child go. RP 76. He said that he told Detective Tucker that he would not sign until he saw his girlfriend go. RP 76. Samaniego said he then told the detective that everything they found was his. RP 77. On cross-examination, Samaneigo said that he was not

confused by the rights form and understood his rights. RP 82. He also said that he told the detective the truth about the drugs. RP 84.

The trial court believed the detectives and found that they did not promise or threaten Samaniego with anything in order to secure his cooperation with the interview, and did not release Samaniego's girlfriend as a condition of any bargain with Samaniego. CP 123. The court further found that there was no deal or bargain regarding Samaniego's girlfriend or child and that Samaniego voluntarily waived his rights before making incriminating statements. CP 123. As such, the trial court denied the defense motion to suppress. CP 123.

On appeal, Samaniego argues that there was an implicit or explicit promise. However, the trial court did not believe Samaniego when he testified that there was a promise. The trial court believed the officers. The record contains substantial evidence from the detectives that supports the trial court's determination of voluntariness. Although Samaniego's testimony at the CrR 3.5 hearing disputes this evidence, their testimony constitutes substantial evidence supporting the trial court's findings, particularly given the deference accorded the trier of fact on questions of credibility. See Broadaway, 133 Wn.2d at 134. Furthermore, as explained in Broadaway, even if a promise had been made, the defendant was not compelled to go forward with his confession after his girlfriend was

released and any promise did not induce the confession. Id. As such, the trial court correctly decided the admissibility of Samaniego's statements at trial.

B. There was sufficient evidence to support Samaniego's conviction for maintaining a drug dwelling.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the prosecution, the evidence 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). In applying this test, the court accepts the prosecution's evidence as true and accepts all inferences that can be reasonably drawn in support of the State's position. Id.

Circumstantial evidence may be used to prove any element of a crime. State v. Garcia, 20 Wn. App. 401, 405, 579 P.2d 1034 (1978). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)). The jury, alone, has

had the opportunity to view the witnesses' demeanor and to judge their veracity.

The relevant statute here provides in part: "It is unlawful for any person . . . knowingly to keep or maintain any . . . dwelling . . . which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for keeping or selling them in violation of this chapter." RCW 69.50.402(a)(6). The jury was instructed on the three elements of this crime in Jury Instruction Number 24:

(1) That on or about or during or between November 1, 2013 and November 13, 2013, the defendant knowingly kept or maintained a building, dwelling, or other structure; (2) That the building, dwelling, or other structure was: (a) resorted to by persons who use controlled substances for the purpose of using controlled substances; or (b) used for keeping, or selling controlled substances; and (3) That this act occurred in the State of Washington.

CP 85.

Here, there was no dispute that the act occurred in the State of Washington. The issue involves the first two elements of the crime. Samaniego claims that there was no time frame given for when other people were using drugs in the motel room, that no one saw anyone purchase or use drugs in the motel room, and that the drug deal took place

outside the room. Brief at 20-23. He also claims that the primary and substantial purpose of the motel room was as a place for Samaniego to live. Brief at 23.

Based on the record below, the evidence is sufficient to establish all of the essential elements of the crime of maintaining a drug dwelling. First of all, the State did establish the date element, “on or about or during or between November 1, 2013 and November 13, 2013.” “[W]here time is not a material element of the charged crime, the language ‘on or about’ [in the information] is sufficient to admit proof of the act at any time within the statute of limitations, so long as there is no defense of alibi.” State v. Hayes, 81 Wn. App. 425, 432, 914 P.2d 788 (1996); State v. Oberg, 187 Wash. 429, 432, 60 P.2d 66 (1936). In this case, there was no alibi defense raised.

Detective Tucker testified that Samaniego was residing at the Travel Inn motel towards the end of September or the beginning of October. RP 889. Detective Tucker began surveillance of that location and noticed a pattern of vehicles and foot traffic that would be at the unit for five or ten minutes and then depart. RP 889-90. Officer Berry testified that he arrested Samaniego on November 14, 2013. RP 981, 984. Samaniego admitted that clients would come to his motel room to purchase drugs. RP 915. The reasonable inference from this admission is

that he was using the room to sell meth since at least the end of September or beginning of October, when detectives started surveillance up until the day of his arrest. This is sufficient evidence to find that he was maintaining a drug dwelling “on or about or during or between November 1, 2013 and November 13, 2013.”

The defense also claims that there was no evidence of drug deals within the motel room. However, Samaniego admitted that his clients would come to the residence to purchase drugs and that they would sometimes smoke in the motel room. RP 914, 966. His statements were corroborated by detectives’ observations before and during November 14, 2013, and also by the methamphetamine and drug-related items found in his room. As such, there was sufficient evidence that the motel room was resorted to by persons who use methamphetamine for the purpose of using that drug and used for keeping or selling methamphetamine.

Samaniego also claims that the primary and substantial purpose of the motel room was as a place for Samaniego to live and that there was insufficient evidence that the substantial purpose of the dwelling was for drug activity. Brief at 23. In support of his argument, he cites State v. Ceglowski, 103 Wn. App. 346, 12 P.3d 160 (2000). In Ceglowski, the court held that “the totality of the evidence must demonstrate more than a *single isolated incident* of illegal drug activity in order to prove that the

defendant “maintains” the premises for keeping or selling a controlled substance in violation of the drug house statute.” 103 Wn. App. 350 (emphasis added). However, the court noted that the rule does not mean that a small quantity of drugs or evidence found on only “a single occasion cannot be sufficient to show a crime of a continuing nature.” Id. at 353. The evidence could be sufficient if the totality of the evidence proves that the defendant “maintained” the premises for selling or keeping controlled substances. Id.

Here, there was overwhelming evidence of more than a single isolated drug deal. Detectives conducted surveillance of the hotel room for a period of time. They made observations consistent with the defendant’s admission that he sold methamphetamine to make money and that clients would come to the residence to purchase drugs and that they would sometimes smoke in the motel room. As such, this was much more than a single isolated incident. The testimony depicts a course of continuing conduct or behavior over a period of time at the motel room. As such, a rational trier of fact could find that Samaniego maintained the motel room for keeping or selling drugs.

C. The trial court properly excluded irrelevant evidence offered by the defense to impeach Officer Berry.

Samaniego argues that his right to compulsory process was violated when the trial court refused to allow him to impeach a police officer, Officer Berry, with a report written about the Sunnyside Police Department.

The right to compulsory process is guaranteed by the Washington State Constitution and the United States Constitution. Article 1, § 22 (amendment 10), of the Washington State Constitution, states:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf

And the United States Constitution guarantees this identical right through the Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The right to compulsory process, however, is distinct from the the right to cross-examine witnesses.

And as explained by our State Supreme Court, the right to cross-examine is not absolute:

...[T]he right to cross-examine adverse witnesses is not absolute. Chambers, 410 U.S. at 295. Courts may, within their sound discretion, deny cross-examination if the evidence sought is vague, argumentative, or speculative. State v. Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965). Since cross-examination is at the heart of the confrontation clause, it follows that the confrontation right is also not absolute. The confrontation right and associated cross-examination are limited by general considerations of relevance. See ER 401, ER 403; Hudlow, 99 Wn.2d at 15.

State v. Darden, 145 Wn.2d 612, 620-21, 41 P.3d 1189 (2002).

Here, Samaniego's attorney found a peer report online and on cross-examination, wanted to impeach Officer Berry with part of the report. The State objected on hearsay grounds and the report being prejudicial. RP 949. The court found that there was no foundation for the

report and that the report could not be directly linked to Officer Berry. RP 949, 951.

The report was part of a LEMAP¹ review of the Sunnyside Police Department by an outside organization, WASPC.² RP 946. It was printed off of the City of Sunnyside website. RP 946. The report was sought by the Sunnyside Police Department's interim chief in an effort to review and improve the agency.³ The goal of the report was to help the Sunnyside Police Department identify areas in need of strengthening and highlight positive and innovative programs and practices.

The report mentioned many areas, including officers not documenting data. In that regard, the report stated the following:

Multiple people who were interviewed indicated that patrol seemed to lack the effort to more than just make arrests, properly documenting data, and protecting evidence to achieve successful prosecution. And potential incarceration was not perceived to be a priority for many officers. Some officers interviewed obviously recognized the quality of their reports

¹ LEMAP is the Loaned Executive Management Assistance Program. LEMAP provides management consulting and technical assistance to law enforcement entities. LEMAP reviews provide agencies a review of their organizational structure. <http://www.waspc.org/loaned-executive-management-assistance-program--lemap->.

² WASPC is the Washington Association of Sheriffs and Police Chiefs.

³ As appellant has pointed out, the report is on the Sunnyside Police Department's website at <http://www.ci.sunnyside.wa.us/documentcenter/view/707>. The report was generated after the date of this incident.

mattered, but thought organizational attitude one of indifference and did not represent the long-term good of the community.

RP 947. This is the part that the defense wanted to raise on cross-examination of Officer Berry. RP 946-51.

However, the report is not impeachment evidence and the defense has failed to show how it is relevant impeachment evidence under the law. Tegland's Handbook on Evidence sets forth five methods for impeaching the credibility of a witness:

1. The witness may be shown to be biased.
2. The witness may be challenged on the basis of mental or sensory deficiencies,
3. Evidence may be introduced to contradict facts to which the witness has testified,
- 4 The character of the witness may be attacked by evidence of poor reputation, specific instances of misconduct, or prior convictions; and
5. The witness may be shown to have made a prior inconsistent statement.

5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence at 312-3 (2009).

In this case, the officer admitted on the stand that he did not write a report in this case. RP 988. The LEMAP report would not have contradicted his testimony. The defense questioned Officer Berry about not writing a report and he readily admitted it. RP 988. He explained that

he did not write a report because his involvement in the case was minimal.
RP 988.

As such, none of impeachment methods apply to the section of the report that the defense wanted to use to impeach Officer Berry. It does not show he is biased. It does not contradict a fact to which he has testified. It does not demonstrate a specific instance of misconduct. It does not show a prior inconsistent statement made by Officer Berry.

Individuals and groups can and do make statements that are critical of police departments around the country. It does not mean that the statement is then impeachment evidence when a member of the police department testifies. Evidence Rule 607 states that “the credibility of a witness may be attacked by any party...” The critical problem with the hearsay in the report is that it does not speak to Officer Berry’s credibility in any way.

Even if the person being attacked is one who can be impeached, the particular evidence being offered must still be (1) relevant to impeach, and (2) either nonhearsay or within a hearsay exemption or exception. State v. Allen, 98 Wn. App. 452, 466, 989 P.2d 1222 (1999). A prior statement is relevant to impeach, as already seen, if (1) it tends to cast doubt on the credibility of the person being attacked, and (2) the credibility of the person being attacked is a fact of consequence to the

action. Id. To be nonhearsay when offered to impeach, a prior statement must cast doubt on credibility *without regard to the truth of the matters asserted in it.* Id. Generally then, it must have been made by the same person whose trial testimony is being attacked. Id.

Here, the evidence is not relevant to impeach and it is hearsay that does not fall within any exceptions. The statement about the data cannot be described as “nonhearsay” in that the statement must be true. In sum, the defense has failed at trial and on appeal to demonstrate how this part of the report is impeachment evidence of Officer Berry’s testimony. The trial court correctly refused to allow the report to be used to impeach Officer Berry.

D. Samaniego has failed to show that the prosecutor’s conduct was improper and that his right to a fair trial was prejudiced.

In order to establish that he is entitled to a new trial due to prosecutorial misconduct, Samaniego must show that the prosecutor’s conduct was improper and prejudiced his right to a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Prejudice is established where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996)). But a defendant

who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so “flagrant and ill intentioned” that it caused enduring and resulting prejudice that a curative instruction could not have remedied. Boehning, 127 Wn. App. at 518 (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995)).

1. Cross-Examination of Mr. King

Samaniego claims that the prosecutor suggested that the defense counsel was appointed. However, his claim is entirely without merit. The prosecutor was trying to establish that the hired defense investigator, Mr. King, always worked for the defense and got paid by the defense. Here is the relevant portion of the cross-examination:

PROSECUTOR: And Mr. Therrien-Power touched on the fact that you are compensated for your work.

MR. KING: Yes.

PROSECUTOR: Who pays your bill?

DEFENSE: Objection; relevance.

THE COURT: Sustained.

PROSECUTOR: Mr. King, when was the last time you worked as a prosecution investigator?

MR. KING: I’ve never worked for the prosecution.

RP 1054-5. The prosecutor in no way suggested that the defense attorney was appointed. The questioning was not even about the defense attorney.

It was about the defense investigator. The prosecutor followed up by asking who Mr. King works for. The only thing that a juror could infer from this line of questioning is that Mr. King gets paid by the defense. There was no inquiry that would suggest or imply that public funds were being used to pay for his services. Furthermore, there is no substantial likelihood that the prosecutor's question, "Who pays your bill?" affected the jury's verdict. As such, Samaniego has not shown that his right to a fair trial was prejudiced.

2. Closing Argument

A prosecutor's closing argument is reviewed in the context of the total argument, the issues in the case, the evidence, and the jury instructions. Id. at 519. "A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury." Id.

Samaniego first claims that the prosecutor disparaged him by "implying defense counsel would not be honest in his closing arguments." Brief at 33. However, this is the actual statement that the prosecutor ended with after finishing his closing argument: "Now, this is Mr. Therrien-Power's turn to tell you why I'm wrong in all the important ways, but I'll be back with you in a couple minutes." Importantly, there was no objection to this statement.

And where the defense fails to timely object to an allegedly improper remark, the error is deemed waived unless the remark is “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). In fact, 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. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (citations omitted). A defendant cannot remain silent, speculate on a favorable verdict, and when it is adverse, use the alleged misconduct to obtain a new trial on appeal. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

As applied here, the remark was not improper and cannot be said to be so flagrant and ill-intentioned that nothing could have cured the prejudice caused. The statement was relatively benign and did not attack or disparage defense counsel. It amounted to a statement that the defense attorney would simply have a different argument than the prosecutor. Had the defense objected, the objection likely would have been overruled.

Samaniego also claims that the prosecutor disparaged defense counsel when he stated that, “Exaggeration and misconstrual of the testimony does not create reasonable doubt.” Brief at 33. This was in

response to the defense's closing argument where the defense claimed that from the detective's surveillance location, he would not be able to actually see people coming and going from the motel room "unless he was off by a matter of a city block." RP 1121. The context is as follows:

PROSECUTOR: Ladies and gentlemen look at the length of this block. That is a block. All right? If you want to get maybe hyper-technical you can see a couple small roads up here. Maybe one of those is a smaller city block. Exaggeration and misconstrual of the testimony does not—
Defense: Objection –
PROSECTUOR: --create reasonable doubt.
COURT: I'm going to overrule the objection, but I want to move on.

RP 1129.

Here, the prosecutor was responding to the defense argument that the officer could not have done surveillance from his particular location. "[T]he prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." Russell, 125 Wn.2d at 87 (citing United States v. Hiatt, 581 F.2d 1199, 1204 (5th Cir. 1978)). Furthermore, the argument was a reasonable one in response to the defense attorney's closing argument that the detective was not able to actually conduct surveillance but rather, was only able to see the front of the Travel Inn.

Nonetheless, Samaniego has not demonstrated any prejudice resulting from the argument. Samaniego admitted to conducting drug

sales from the motel room, which was consistent with the detective's observations during surveillance.

Next, Samaniego claims that the prosecutor trivialized the burden of proof. Arguments by the prosecution that shift or misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt constitute misconduct. State v. Gregory, 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006). However, in this case, the prosecutor did not misstate the burden of proof. He correctly stated that the burden was not proof beyond a possible doubt, but proof beyond a reasonable doubt. His description of what could possibly happen was sustained and there was no further argument distinguishing between reasonable and possible doubts. The prosecutor then went on to define the burden per the words used in the pattern jury instruction. The entire argument went as follows:

PROSECUTOR: Moving forward,
Instruction 3. Some people get hung up on
this. This is what is a reasonable doubt. It's
pretty clear in here "reasonable" means
reasonable, not a possible doubt. All right.

DEFENSE: Objection; trivializing the
burden of proof.

THE COURT: Overruled.

PROSECUTOR: The difference between
reasonable and possible is what you perceive
it to be. I would say that it is a possibility
that a meteor could come out of the blue and
wipe us all out right here as we sit.

DEFENSE: Objection; trivializing the
burden of proof.

THE COURT: Yeah. I'm going to sustain that, and also reference to "I".

PROSECUTOR: I didn't catch that I said "I." And I'm going to address that with you guys. If ever the pronoun "I" comes out of my mouth, I mean the State, not my personal opinion. We all talk and use the word "I," it will probably slip out one more time. Not how the State means it, okay? As the instruction says, "If you have an abiding belief in the truth of the charge, if the doubts that you have are not reasonable," then you can put in guilty, you can convict. All right.

RP 1102-3. From this record, it is clear that the prosecutor did not minimize or trivialize the gravity of the reasonable doubt standard and the jury's role. Furthermore, the prosecutor did not misstate the burden of proof. It was an accurate statement of the law.

In addition, the jury was correctly instructed on the burden of proof in this case in instruction number three:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 64. Jurors can be presumed to have followed the court's instructions. State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). Importantly, the jury was also instructed that:

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 61. These instructions can be presumed to have cured any prejudice arising from the prosecutor's argument in the same way that a curative instruction would have. Importantly, Samaniego never requested a curative instruction and was satisfied when the court sustained his objection and the prosecutor moved on.

Samaniego argues that the prosecutor asked the jury to determine which witnesses were liars and suggested that they had to find that the officers lied prior to acquitting Samaniego. Brief at 35-6. Here is what the prosecutor actually argued:

PROSECUTOR: When officers observed the defendant leave the hotel room, where does he go? He goes, on our map here, a very short distance to -- a very short distance from the hotel room, on to the street, around a building, and -- actually, around two buildings and into a parking lot. Not exactly the most damning evidence by itself. But what happened in the parking lot? No one goes into the restaurant. A woman gets out of her car, gets into his car. They exchange

something and then both of them drive off. Also at the end of the day, not the end of the world. Even Officer Gusby says it could have been baseball tickets, but it looked suspicious. What ties it together is the defendant doesn't make it very far. He makes it around that left turn towards the bottom of the map where it's marked "D" before he's pulled over. And what do they find? Currency and drugs. Now we're starting to see what may -- what may have changed hands there. What seals it is his later statement: "Oh. Yeah. Yeah. I sold her drugs, and it was a foolish thing to do because she owed me money from the last time last time. I did it." **Ladies and gentlemen, if you're going to lie to the cops, that's probably not –**
DEFENSE ATTORNEY: Objection.
PROSECUTOR: -- **one you're going to tell.**
THE COURT: Sustained as to characterization.
PROSECUTOR: If you're going to make a statement to the cops, why would you make that one? If you're going to make a statement, why not, "I went to that parking lot and purchased drugs from that person." "I went to the parking lot and we exchanged baseball tickets." Why would anyone say, "I went to that parking lot and I sold methamphetamine to that person?"

RP 1107-8 (emphasis added).

The prosecutor was only asking that the jury believe Samaniego when he said that he went into the parking lot and sold methamphetamine to someone. His argument was that if Samaniego was going to lie to the cops, he would not lie about that. The prosecutor never asked the jurors to

decide which witnesses were liars. He asked them to believe Samaniego's statement. The prosecutor also never suggested that they had to find that the officers lied in order to acquit Samaniego. The defense claim in this regard is entirely meritless and the prosecutor did not commit misconduct by asking the jury to believe Samaniego when he said he sold methamphetamine to a person in the parking lot. Assuming, for sake of argument, that there was any misconduct, Samaniego also cannot demonstrate any prejudice.

3. Rebuttal Argument

First, Samaniego takes issues with the part of the prosecutor's rebuttal argument, in which he stated, "...let's have a little instructional session on twisting facts and taking things out of context." RP 1242. The defense objected and the objection was sustained. Importantly, the defense did not seek any curative instruction. And reversal is not required if an error could have been obviated by a curative instruction which the defense did not request. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Here, the defense was satisfied at trial with the sustained objection and did nothing further. Furthermore, the statement did not specifically point to the defense attorney doing anything improper. The prosecutor was attacking the defense argument. And the jury was properly

instructed that the lawyers' remarks are not evidence and that they are to disregard any argument that is not supported by the evidence. CP 61.

Secondly, Samaniego claims that the prosecutor described the defense attorney's argument as an "interesting argument from a rhetorical perspective." However, the prosecutor never referenced the defense closing. He simply stated that "There's an interesting argument here..." Even so, calling the defense argument interesting is within the realm of proper prosecutorial argument. Nothing about the statement disparages defense counsel. Here is the relevant portion of the rebuttal argument and the context for the statement:

The date on Count 3. There's an interesting argument here from a rhetorical perspective. Counsel implied, "You know, it's a hotel. People and come and go from hotels. That's what they're there for." Not what the evidence was. Was there increased foot traffic and vehicle traffic at Mr. Samaniego's room? The fact that people come and go from a hotel doesn't mean they come and go from your room of that hotel. That room is your house. As for the dates, the statement has been Mr. Samaniego had been selling methamphetamine and people have been coming over to that room to buy methamphetamine and to smoke out since he moved in. Yes, the dates are before the date of the search warrant. We have not heard anything about Mr. Samaniego suddenly coming into a bunch of methamphetamine. You are allowed to infer that if he had methamphetamine on November 14th that

he was selling. Maybe he had some of that methamphetamine on November 13th when he admits that people were coming over. He didn't admit specifically to the 13th, but the point is prior to the 14th when people are doing this he has methamphetamine. You can infer it from the fact that he's got it now.

RP 1128-9. Clearly, the prosecutor was simply explaining his theory of the case for the date element in count three. Samaniego has not shown any prosecutorial misconduct in this regard. Furthermore, assuming, for sake of argument, that there was any misconduct, he has not shown any prejudice as he has not demonstrated a substantial likelihood that the prosecutor's rebuttal argument affected the jury's verdict.

E. Samaniego was provided a fair trial under the cumulative error doctrine.

Under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair. In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). The defendant has not had a fair trial when, considering the trial's scope, the errors' combined effect materially affected its outcome. See State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1994). However, the cumulative error doctrine does not warrant reversal when a trial has few errors with little or no impact on the outcome. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

Samaniego argues that reversal is warranted by the cumulative effect the errors he alleges. But considering the full scope of the trial, for sake of argument, if there were any errors, they did not materially affect the outcome. Russell, 125 Wn.2d at 94. Because Samaniego had a fair trial, the cumulative error doctrine does not warrant reversal of his convictions. State v. Greigg, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

F. The court should remand for resentencing on the school zone enhancements.

Given State v. Conover, 183 Wn.2d 706, 355 P.3d 1093 (2015), the trial court should remand for resentencing on the school enhancements. In that case, the Supreme Court held that the language in the drug zone enhancement does not require trial courts to run the enhancements consecutively across counts. 183 Wn.2d at 718. As such, the case should be remanded for the trial court to determine if the enhancements should run concurrently or consecutively.

IV. CONCLUSION

In sum, for the foregoing reasons, the State asks that the court affirm Samaniego's convictions and remand for resentencing on the school zone enhancements.

Respectfully submitted this 17th day of June, 2016,

s/Tamara A. Hanlon
TAMARA A. HANLON, WSBA 28345
Senior Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on June 17, 2016, by agreement of the parties, I emailed a copy of BRIEF OF RESPONDENT to Travis Stearns at wapofficemail@washapp.org.

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

DATED this 17th day of June, 2016 at Yakima, Washington.

____s/Tamara A. Hanlon_____
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