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No. 35000-2-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DELBERT BENSON,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

Frustrated that Delbert Benson led the police to believe he purchased drugs from John Gant but, when called to testify at Mr. Gant's trial, said he had not bought drugs from Mr. Gant, the prosecution charged Mr. Benson with perjury in the first degree. Unlike other criminal offenses, perjury has a heightened evidentiary burden that requires the State to produce testimony from at least one direct witness who has firsthand knowledge the accused person's testimony was false, as well as independent and positive corroborating evidence.

At Mr. Benson's perjury trial, the prosecution did not present any direct testimony from a witness with personal knowledge that Mr. Benson lied or clear corroborating testimony. Moreover, the "to convict" instruction omitted any reference to the essential elements of proving perjury based on direct testimony and corroborative evidence. The "to-convict" instruction also allowed the jury to convict Mr. Benson of false statements that were not charged in the information. The prosecution's failure to meet its burden of proof and the court's instructional errors require reversal.

B. ASSIGNMENTS OF ERROR.

1. The prosecution failed to prove all essential elements of first degree perjury as required by common law and the due process clauses of the state and federal constitutions.

2. Instruction 11, the court's to-convict instruction, did not contain all essential elements to prove first degree perjury which denied Mr. Benson his right to a fair trial by jury. CP 177.

3. The court's to-convict instruction permitted the jury to rest its verdict on acts that were not charged in the information. CP 177.

4. The prosecution committed misconduct by trivializing its burden of proof in closing argument.

5. Cumulative error denied Mr. Benson a fair jury trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The prosecution has a heightened evidentiary burden in any perjury case, requiring it to produce direct testimony from a witness with personal knowledge of the false testimony as well as independent corroborative evidence. The State did not offer direct testimony proving Mr. Benson made material false statements under oath. Did the State fail to meet its burden of proving all essential elements of perjury?

2. The to-convict instruction is a yardstick for the jury that must contain all essential elements necessary for a conviction. The to-convict instruction for perjury made no reference to the requirements of direct testimony and independent corroboration that are necessary for a perjury conviction. Did the to-convict instruction omit essential elements that are required for the jury to convict Mr. Benson?

3. The to-convict instruction must limit the jury to consider the acts charged in the information. Here, the information expressly charged Mr. Benson with making a specific false statement about buying drugs from John Gant but the to-convict instruction allowed the jury to convict him of perjury based on any false statement he made. By failing to limit the jury's verdict to the specific charged acts contained in the information, did the court's instruction permit the jury to convict Mr. Benson based on uncharged acts?

4. The prosecution deprives an accused person of a fair trial when it encourages the jury to dilute its burden of proof or denigrates the defense. Over defense objection, the prosecution trivialized its burden of proof and denigrated the defense by saying it only needed to show there was "a boat" and "will it float," rather than prove how many masts the boat has, as it claimed the defense was contending. By

overruling the defense objection, did the court encourage the jury to minimize the State's burden of proof?

D. STATEMENT OF THE CASE.

In October 2012, a detective visited Delbert Benson in jail and offered to release him and help get his pending charges dropped if Mr. Benson purchased drugs for the police. RP 136-37.¹ Mr. Benson agreed. RP 138-39. Immediately after his release from jail, Mr. Benson resumed using methamphetamine "every day" without stopping to sleep. RP 344-45.

On October 30, 2012, Mr. Benson met Detective Gary Bolster at the police station. RP 148. The detective hid an audio recorder in Mr. Benson's coat and gave him money to buy drugs. RP 148, 153, 348. Detective Bolster expected Mr. Benson would buy methamphetamine from Wade Armour and instructed him to conduct the exchange quickly. RP 142; Ex. 3, RP 2.²

Detective Bolster and Officer Steve Harris separately followed

¹ The verbatim report of proceedings (RP) are contained in three consecutively paginated volumes.

² Exhibit 3 is an audio-recording that was played for the jury and transcribed only for purposes of appeal. Citations are to the transcript prepared for appeal.

Mr. Benson at a distance, driving separate cars. RP 150, 151, 296. Mr. Benson met Mr. Armour but no exchange occurred. RP 148-49. He got into Mr. Benson's car and they drove to John Gant's house. RP 149-51. They went inside an old and dark warehouse area for about 30 or 40 minutes. RP 150. The officers could hear some of the conversation over Mr. Benson's recording device but the reception cut in and out. RP 151. They could not see what was going on inside the building and "didn't see any drug transaction." RP 251.

After some time, Mr. Benson left Mr. Gant's home with several other people who he dropped off at various places and then he returned to the police station. RP 151. Mr. Benson told Detective Bolster that he gave John Gant \$150. Ex. 5, at 1. He gave Detective Bolster a container holding what the detective presumed to be methamphetamine. RP 157.

Although Mr. Benson's contract with the police required him to make several drug purchases, Mr. Benson refused to take part in any more purchases. RP 164, 189-90, 261.

The prosecution charged John Gant with one count of delivery of methamphetamine to Mr. Benson. RP 176. Mr. Gant never admitted he sold drugs to Mr. Benson and had a jury trial. RP 262. The State called Mr. Benson as a witness. RP 178. Mr. Benson testified that he

was addicted to methamphetamine, and he told the detective he gave money to Mr. Gant but in fact, he kept the money and the methamphetamine he gave to the detective was his own. RP 180-86, 191, 193-94. He said it was stored inside a toolbox in his truck. RP 186, 340. The jury acquitted Mr. Gant of selling drugs to Mr. Benson. RP 302.

Two years after Mr. Gant's acquittal, the State charged Mr. Benson with first degree perjury, claiming he falsely testified on June 26, 2013, "that he did not purchase any drugs from John Gant on October 30, 2012." CP 4; CP 162 (second amended information).

The prosecution added a count of possession of a controlled substance, claiming that if Mr. Benson gave the police his own methamphetamine, he could be convicted of unlawful possession. CP 162; RP 50-53, 378-79. The jury convicted Mr. Benson of first degree perjury and acquitted him of possession of a controlled substance. CP 189.

The court imposed a standard range sentence of 72 months in prison. CP 197.

E. ARGUMENT.

1. The prosecution failed to prove the essential elements of first degree perjury.

a. Perjury has unique, heightened elements of proof.

In all criminal cases, the burden of proving the essential elements of a crime unequivocally rests upon the prosecution. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970); U.S. Const. amend. 14; Const. art. I, § 3. Proof beyond a reasonable doubt of all essential elements is an “indispensable” threshold of evidence the State must establish for a conviction. *Winship*, 397 U.S. at 364.

In a perjury prosecution, the State must meet a more stringent evidentiary burden, “higher than in other criminal cases.” *State v. Singh*, 167 Wn. App. 971, 976, 275 P.3d 1156 (2012); *State v. Wallis*, 50 Wn.2d 350, 354-55, 311 P.2d 659 (1957) (discussing common law origins of heightened burden of proof). The unique requirements of proof for perjury exist because the criminal justice system strongly prefers “encouraging witnesses to testify freely without fear of reprisals.” *Nessman v. Sumpter*, 27 Wn. App. 18, 23-24, 615 P.2d 522 (1980).

The statutory elements of perjury in the first degree are that a witness knowingly makes a materially false statement in an official proceeding, under oath. RCW 9A.72.020. Unique to a perjury prosecution, for the State to convict a person of perjury,

(t)here must be the direct testimony of at least one credible witness, and that testimony to be sufficient must be positive and directly contradictory of the defendant's oath; in addition to such testimony, there must be either another such witness or corroborating circumstances established by independent evidence, and of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence. Otherwise the defendant must be acquitted.

Nessman, 27 Wn. App. at 23, quoting *State v. Rutledge*, 37 Wash. 523, 528, 79 P. 1123 (1905).

The "direct testimony" rule requires the State present a witness who is "in a position to know of his own experience that the facts sworn to be true by the defendant are false." *Id.* The defendant's own contradictory statements, "sworn or unsworn, are not direct evidence of the falsity of the testimony which the law requires." *Id.*, quoting *State v. Wallis*, 50 Wn.2d 350, 354-55, 311 P.2d 659 (1957).

In addition to direct testimony, the corroborating evidence "must be clear and positive and so strong that, with the evidence of the witness who testifies directly to be the falsity of the defendant's

testimony, it will convince the jury beyond a reasonable doubt.” *State v. Arquette*, 178 Wn. App. 273, 285, 314 P.3d 426 (2013), quoting *Rutledge*, 37 Wash. at 527. Corroborative evidence must also be independent of the direct witness’s testimony and “inconsistent with the innocence of the defendant.” *Id.*

To prove a person answered falsely, the “burden is on the questioner” to ask precise questions. *State v. Stump*, 73 Wn. App. 625, 629, 870 P.2d 333 (1994). The “questions and answers” underlying the perjury allegation “must demonstrate both that the defendant was fully aware of the actual meaning behind the examiner’s questions and that the defendant knew his answers were not the truth.” *Id.* at 628. If a question was ambiguous, it does not satisfy the necessity of making a knowingly false statement. *Id.*

In addition, giving an “evasive answer,” even with the intent to mislead, cannot constitute perjury if it is technically true. *State v. Olson*, 92 Wn.2d 134, 138, 594 P.2d 1337 (1979).

To assess the sufficiency of evidence, “it must be kept in mind that the requirements of proof” in a perjury case “are the strictest known to the law, outside of treason charges.” *Id.* at 136.

b. The prosecution did not present direct witness testimony positively demonstrating Mr. Benson lied while testifying.

The prosecution contended Mr. Benson committed perjury when he testified at John Gant's trial that the methamphetamine he gave to the police was his and was not given to him by Mr. Gant in exchange for money. CP 7-8 (Bill of Particulars); CP 122 (amended information). In order to prove Mr. Benson's 2013 testimony was knowingly false, the prosecution was required to present: (1) "the testimony of at least one credible witness which is positive and directly contradictory" to the sworn testimony of Mr. Benson; and (2) "another such direct witness or independent evidence of corroborating circumstances of such a character as to clearly" overcome the presumption of innocence. *Olson*, 92 Wn.2d at 136.

The State did not present any direct witnesses who testified from their personal knowledge that Mr. Benson had in fact purchased methamphetamine from Mr. Gant. It did not call any of the people who were with Mr. Benson at the time of the alleged drug sale and could have seen it, even though several other people were there when Mr. Benson was interacting with Mr. Gant. For example, the prosecution could have called Wade Armour or John Gant as witnesses. It told the

court it knew how to reach both men but did not offer their testimony. CP 125; RP 14. At least one woman was also present, and her voice can be heard on the recording, but she did not testify. *See, e.g.*, Ex. 3, RP 18-20.

Instead of offering testimony from a person with firsthand observations of the alleged drug purchase, the prosecution offered testimony from two police officers without firsthand knowledge. Detective Bolster and Officer Harris were trailing Mr. Benson from a distance. RP 232-33, 251, 297. They had searched Mr. Benson and his truck beforehand, but the search was not very thorough, according to Mr. Benson. RP 248. Mr. Benson was inside a building for 30 or 40 minutes, and the transmission that Detective Bolster could hear went “in and out” due to static. RP 150-51.

Detective Bolster “presumed” Mr. Benson bought a controlled substance but the detective was parked on the other side of the building and could not see Mr. Benson or his car. RP 157, 237. He did not see any drug transaction. RP 251. Similarly, once Mr. Benson parked outside of Mr. Gant’s home, Officer Harris “pretty much didn’t see anything.” RP 297. It was dark out and the officer parked his own car

on a neighboring street so he could “pick up” Mr. Benson “as he left.”
RP 298.

The police officers did not witness a drug sale occur and therefore could not satisfy the requirements of direct testimony from a witness based on “his or her own experience.” *Nessman*, 27 Wn. App. at 24.

Without direct testimony from at least one witness who knows what occurred from his own experience, the prosecution relied on an ambiguous audiotape generated by the wire Mr. Benson wore. This recording contains wide-ranging, disjointed, off-color and unconnected streams of conversation throughout. Ex. 3. The word methamphetamine is never spoken. *Id.* No one talks directly about buying drugs. Instead, the prosecution asked the jurors to infer a drug purchase occurred by isolating stray comments while ignoring their context. RP 381.

The prosecution insisted to the jury that a drug exchange must have happened in the tape recording when there was mention of a rain bonnet, because the methamphetamine Mr. Benson later gave to the detective was in a rain bonnet container. RP 157, 381, 411. But the context where rain bonnet is mentioned happens when talking about a drain, as demonstrated by the surrounding remarks:

MALE SPEAKER 1: Yeah. (** 00:55:33) that, dude.
MR. BENSON: What comes in that? We're all (** 00:55:36) here.
MALE SPEAKER 1: I got -- a rain bonnet came in.
MR. BENSON: A rain bonnet?
MALE SPEAKER 1: Yeah, for now.
MR. ARMOUR: How much did you pay for the drain?
MR. BENSON: 800 bucks.
MR. ARMOUR: Huh?
MR. BENSON: Like, \$800 to the place that went out of business downtown.
MR. ARMOUR: Holkeler's (phonetic)?
MR. BENSON: Holkeler's, yeah, fucking charged me -- it was on clearance for 700 bucks. Hold on. Hey, I might have been -- it's very possible -- hold on. Let me call her. There we go. How much for -- all I -- there we go. There she is.
FEMALE SPEAKER 1: Okay. (** 00:56:54). It's like (** 00:56:58) probably, and then you adding (** 00:57:02).
MR. BENSON: Really? I mean, I'm still waiting.
MALE SPEAKER 1: I mean, I'm getting them tomorrow because he's right here.
MR. BENSON: I thought you were going to flip the power off. That'll work. I can get you some money from Tracy tomorrow. I should have kept my Toyota new.

Ex. 3, VRP 36.

The conversation throughout the recording is similarly nonlinear and at times nonsensical. Some remarks could be about drugs but the context remains murky and it is never clear that a purchase actually occurred with money and drugs changing hands.

For example, there is some conversation about something “to smoke” and needing to “re-up,” but Mr. Benson says, “keep your shit”

without agreeing to buy something before the conversation turns to talk about a dog:

MALE SPEAKER 1: It's either a dog or it's (** 00:52:12) out there. Fuck, if I give you this, I have nothing to smoke.

MR. BENSON: Is he -- that's on you, dude. However fast you can do it, (** 00:52:23).

MALE SPEAKER 1: Okay. I need 200 bucks to re-up, so it's like --

MR. BENSON: Yikes.

MALE SPEAKER 1: (** 00:52:31) about that.

MR. BENSON: 20, 40.

MALE SPEAKER 1: Wade wouldn't let me do three like that, either. And I'm like, dude, if you were me --

MR. BENSON: Well, no. I'm just --

MR. ARMOUR: (** 00:52:46) --

MR. BENSON: -- (** 00:52:46).

MALE SPEAKER 1: Wait a second. Let's try some right now. And we'll see what you think about it --

MR. BENSON: Okay.

MALE SPEAKER 1: -- see what you want (** 00:5:).

MR. BENSON: Well, keep your shit and we'll fucking wait for (** 00:53:08).

FEMALE SPEAKER 1: Hey, Doug (phonetic), isn't your dog at (** 00:53:10)?

MALE SPEAKER 1: Yeah. He got in there.

Ex. 3, VRP 33.

The male asks “how much” and if he wants “a bottle,” but Mr. Benson responds by saying he wants to “put 50 bucks on the pick-up,” without answering what he needs:

MALE SPEAKER 1: How much do you need? Do you just want a bottle or how much do you need?

MR. BENSON: Dude, I would love to put 50 bucks on the pick-up. And then I was trying to get --

MALE SPEAKER 1: Well, I can give you one and a half for 150.

MR. BENSON: One seven three for hooking me up.

MALE SPEAKER 1: Dude --

MR. BENSON: You need a --

MALE SPEAKER 1: Okay. We'll do the one --

MR. BENSON: I'll give you a T for 120.

MALE SPEAKER 1: That's backwards.

Ex. 3, VRP 34-35.

Although there is conversation about selling something, it never clearly occurs and it is never clearly about methamphetamine:

MR. ARMOUR: How much cash you got?

MALE SPEAKER 1: I got zero. I (** 00:54:18) no money (** 00:54:20) drugs and I know he only deals with (** 00:54:23). I could sell that to him just to (** 00:54:26).

MR. BENSON: You said one five for one?

MALE SPEAKER 1: No, one five for one five.

MR. BENSON: All right.

MALE SPEAKER 1: I mean, I don't like charging you, man, but --

MR. BENSON: No, no. Just, I mean, that's fine. I don't really (** 00:54:41) and I actually get back to (** 00:54:43). I spent fucking all day getting the Toyota -- fucking bastard. And I had one guy. He wouldn't let me leave with \$20. He would not let me. He was bound and determined to fucking go ride with me. Yeah. (** 00:55:02) bucks. So it's ring -- did you ever see the ring (** 00:55:19)?

Ex. 3, VRP 35.

Throughout the recording, Mr. Benson jumps in and out of topics of conversations. He repeatedly talks about trying to sell an amp

or about getting his Toyota. No clear exchange occurs of money for methamphetamine from Mr. Gant.

The recording alone does not provide direct evidence that Mr. Benson bought methamphetamine from Mr. Gant and it does not satisfy the strict requirement of direct testimony for proving perjury. *See Singh*, 167 Wn. App. at 976.

Mr. Benson later spoke to Detective Bolster in another recorded conversation. He told the detective that, “I went to uh, John Gant’s house, and I gave him \$150.” Ex. 5, p. 1. When asked what he did, Mr. Benson said, “I paid him cash, he asked me if I wanted to try it, I said no, uh well they smoked, and I talked to the girl for a good little time. Uh back and forth, back and forth, I was trying to figure out a hustle, for money, stolen shit, what not, what not.” Ex. 5, p. 3. In this recorded interview, Mr. Benson never directly said he purchased methamphetamine from Mr. Gant. The detective only asked about “it” without specifying what “it” was. Ex. 5, p. 2 (asking inter alia, “he had it there?”; “how did he get it?”; “did he weigh it?”).

Because perjury cannot be based on a defendant giving inconsistent statements about an event, Mr. Benson’s statements to the detective could not be the direct testimony necessary to prove perjury.

Arquette, 178 Wn. App. at 285. In addition, Mr. Benson was charged with lying about whether he bought “drugs” from Mr. Gant, yet in the post-incident interview he only told the detective directly that he gave money to Mr. Gant, not that he bought drugs from him. Ex. 5, p. 1-3.

Both the audiotape of the incident and the post-incident interview could serve as some corroborative evidence of what Mr. Benson did when he met with Mr. Gant, but they are not “positive” or clear and “direct” testimony from a witness with firsthand knowledge demonstrating that Mr. Benson in fact bought methamphetamine from Mr. Gant on October 30, 2012, as charged. CP 122.

Perjury’s strict requirements of proof demand at least one direct witness as well as independent corroboration. *Arquette*, 178 Wn. App. at 285. The recording cannot substitute for the mandatory direct witness because it does not contain clear, positive evidence unambiguously showing that Mr. Benson lied. *See Singh*, 167 Wn. App. at 977. The recording is far too murky and requires speculation and guesswork. The prosecution did not meet the necessary legal threshold to prove perjury.

- c. Insufficient evidence of the essential elements of perjury requires reversal.*

Absent proof of every essential element required to support a perjury conviction, the conviction must be reversed and the charge dismissed. *Arquette*, 178 Wn. App. at 289. The prosecution’s failure to present sufficient direct and corroborative evidence establishing the falsity of the testimony Mr. Benson gave in 2013 regarding buying methamphetamine from John Gant requires reversal. *Id.*

2. The court’s “to-convict” instruction omitted essential elements of the State’s burden of proving first degree perjury and permitted a verdict for uncharged acts.

- a. The yardstick “to-convict” instruction must contain all elements essential to the State’s burden of proving a charged offense.*

In order to ensure the jury instructions make the controlling legal standards manifestly apparent to the average juror, a to-convict instruction sets forth the essential elements that the jury must find in order to vote in favor of a conviction. *State v. Johnson*, 180 Wn.2d 295, 306, 325 P.3d 135 (2014); *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953); U.S. Const. amend. 14; Const. art. I, §§ 21, 22.

The to-convict instruction “must contain all of the elements of the crime because it serves as a yardstick by which the jury measures

the evidence to determine guilt or innocence.” *Johnson*, 180 Wn.2d at 306, quoting *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010), *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (jury has the “right” to rely on the “to convict” instruction as “complete statement of the law” and a violation is a “constitutional defect” requiring automatic reversal).

A to-convict instruction must stand on its own; courts do not “look to other jury instructions to supplement a defective ‘to convict’ instruction.” *Id.*; *Smith*, 131 Wn.2d at 262-63 (“We have held on numerous occasions that jurors are not required to supply an omitted element by referring to other jury instructions.”). Even when another instruction contains the missing elements from the to-convict instruction, the other instruction “will not cure the error caused by the element’s absence from the to-convict instruction.” *State v. Todd*, Wn. App. , 403 P.3d 867, 870 (2017), quoting *State v. Richie*, 191 Wn. App. 916, 927, 365 P.3d 770 (2015).

The essential elements that must be included in the to-convict instruction are both statutory and nonstatutory requirements of a conviction. *Richie*, 191 Wn. App. at 927. For example, the to-convict instruction for robbery must include the common law elements of intent

to commit theft and the victim's possessory authority. *Id.* The to-convict instruction must include a "judicial engrafted causation requirement" explaining a link between drinking alcohol and causing a person's death when common law required this causal connection. *State v. MacMaster*, 113 Wn.2d 226, 231, 778 P.2d 1037 (1989), *abrogated by statutory change, recognized in State v. Salas*, 127 Wn.2d 173, 897 P.2d 1246 (1995).

An error in a to-convict instruction is particularly significant because the instruction contains the standard used by the jury to determine guilt. Misstating this standard has practical and identifiable consequences and is a manifest error affecting a constitutional right. *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); RAP 2.5(a)(3).

b. The to-convict instruction omitted the essential elements that the State must prove for a perjury conviction.

The essential elements of perjury include the requirements that the prosecution produce direct testimony of at least one witness with personal knowledge and independent corroborative evidence showing the falsity of the accused person's testimony. But the to-convict instruction only informed the jurors of the statutory elements of first

degree perjury, not the additional elements mandating a heightened standard of proof for a perjury conviction.

The to-convict instruction told jurors:

To convict the defendant of the crime of Count 1: Perjury in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 26th day of June, 2013, the defendant made a false statement;

(2) That the defendant knew the statement was false;

(3) That the statement was material;

(4) That the statement was made in an official proceeding;

(5) That the statement was made under an oath or authorized by law; and

(6) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the elements, then it will be your duty to return a verdict of not guilty.

CP 177 (Instruction 11).

This essential elements instruction did not state that these elements must be proven by direct testimony of at least one witness and clear, positive, independent corroborating evidence. Because the to-convict instruction is judged on its own, another instruction explaining

the necessary elements of proof does not satisfy the instructional requirement of a clear and complete to-convict instruction. *Johnson*, 180 Wn.2d at 306. All essential elements critical to the prosecution's burden of proof must appear in the instruction that states what the prosecution must prove to convict the accused. *Id.*

While Instruction 7³ listed the requirement that there must be direct testimony and corroborative evidence, the to-convict purports to contain all essential elements the State must prove and it does not refer to the mandatory requirement of direct testimony and corroborative proof. CP 173. In addition, Instruction 5 told jurors that “[t]he law does not distinguish between direct and circumstantial evidence in terms of their weight and value in finding the facts in this case.” CP 171.

Taking these other instructions together, Instruction 5 told jurors the law does not distinguish between direct and circumstantial evidence, undermining the force of Instruction 7's statement that one

³ Instruction 7 states:

To convict the defendant of the crime of Perjury in the First Degree, there must be either positive testimony of at least two credible witnesses that directly contradicts the defendant's statement made under oath or there must be one such direct witness along with independent direct or circumstantial evidence of supporting circumstances that clearly overcomes the oath of the defendant and the legal presumption of defendant's innocence.

CP 173.

direct witness is required for perjury. Because the to-convict instruction directed the jurors that they only needed to find the bare the statutory elements of perjury to convict Mr. Benson, and the remaining instructions confuse or undermine the common law requirements of direct testimony by a witness with firsthand knowledge, the omission from the to-convict instruction misled the jury about the proof necessary to convict Mr. Benson. CP 177.

c. The to-convict instruction permitted the jury to convict Mr. Benson based on uncharged acts.

When the Information presents one specific act as the basis of the charged crime, it is error for a trial court to instruct the jury it may convict the defendant based on other conduct. *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942); *State v. Williamson*, 84 Wn. App. 37, 42, 924 P.2d 960 (1996); *see also State v. Chino*, 117 Wn. App. 517, 539, 72 P.3d 256 (2003) (“the crime upon which the jury is instructed is limited to the offense charged in the information.”). A person “cannot be tried for an uncharged offense.” *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988).

This error occurs “regardless of the strength of the trial evidence” pertaining to the charged or uncharged means presented to

the jury. *Chino*, 117 Wn.App. at 540. Since the constitution prohibits the court from instructing the jury on an uncharged means of conviction, the error may be raised for the first time on appeal even if not objected to below. *Williamson*, 84 Wn. App. at 42; RAP 2.5(a)(3). A jury must unanimously agree on the act that underlies a conviction, and this act must be the same one charged in the Information. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984); *State v. Workman*, 66 Wash. 292, 294-95, 119 P.2d 751 (1911).

The Amended Information alleged Mr. Benson committed perjury in the first degree when he, “on June 26, 2013, during an official proceeding, made a materially false statement, to wit: that he did not purchase any drugs from John Gant on October 30, 2012, which he knew to be false under an oath required or authorized by law.” CP 122.

But the to-convict instruction did not require the jury to rest its verdict only on the particular statement about purchasing drugs from John Gant. The to-convict instruction only asked whether “on or about the 26th day of June, 2013, the defendant *made a false statement*.” CP 177 (emphasis added). As instructed, to find Mr. Benson made “a false statement,” the jury could consider any false statement Mr. Benson

made on June 26, 2013, without limitation to the specific statement charged. *See, e.g., State v. Sutherby*, 165 Wn.2d 870, 880, 204 P.3d 916 (2009) (construing “a” and “any” as having “broad and inclusive connotations”).

As Mr. Benson detailed in his own testimony, he made many statements when testifying on June 26, 2013, several of which contradicted the detective’s description of events. Mr. Benson’s statements on June 26th included his claim that the detective told him to target John Gant, which the detective denied. RP 142-43, 150, 245, 269. Mr. Benson testified about the “very poor” search the police performed of his truck, the number of people in his truck when he left Mr. Gant’s, and whether Mr. Gant was in the truck, which was inconsistent with the detective’s testimony. RP 153, 182, 230. He claimed he got high with Mr. Amour, inside his place, contrary to the detective. RP 183, 256, 275. He described being extremely under the influence of methamphetamine, unlike the detective’s description of his behavior. RP 200-01, 221, 247. He claimed the detective threatened to put him in jail if he did not buy more drugs from Mr. Gant. RP 250, 261, 270-74.

The court’s instructions did not plainly direct the jurors to consider only whether the specific statement charged in the information

was a material false statement given under oath in an official proceeding. Mr. Benson gave many statements on June 26, 2013, a number of which were different from the detective's testimony about the incident. Because Mr. Benson was only charged with making a specific false statement on June 26, 2013, but the court's instruction did not limit the jury to that particular statement, the instructions permitted the jury to convict him based on an uncharged act.

Erroneously permitting the jury to convict based on an uncharged crime is presumed prejudicial and requires reversal. *Chino*, 117 Wn. App. at 530. It may be harmless only if other instructions "clearly and specifically defined the charged crime." *Id.* Here, there are no further instructions that specifically limit the jury's verdict to only the charged crime.

d. The prosecution encouraged the jurors to dilute the burden of proof.

Prosecutors play a central influential role in protecting the fundamental fairness of the criminal justice system. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); U.S. Const. amend. 14; Const. art. I, §§ 3, 22. Because the public expects that the prosecutor acts impartially,

improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935).

It is misconduct for a prosecutor to make arguments that misstate or shift the State's burden to prove the accused person guilty beyond a reasonable doubt. *State v. Lindsay*, 180 Wn.2d 423, 434, 326 P.3d 125 (2014). This includes comparing the beyond a reasonable doubt standard to every day decision making, such as whether to have surgery or change lanes on the freeway. *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). It also includes comparing the burden of proof to a puzzle, where jurors can guess what the picture will show even if many of the pieces are missing. *Lindsay*, 180 Wn.2d at 436. Further, the prosecution may not denigrate the defense. *State v. Thierry*, 190 Wn. App. 680, 694, 360 P.3d 940 (2015).

Here, the prosecutor compared its case to a boat, and trivialized the defendant's complaints about the prosecution's insufficient evidence. It argued,

If this were a trial about whether or not a boat existed, was made, and the plaintiff was alleging this is a boat,

this would be a case where the defense is telling you, well, we're not sure because we don't know if it has one mast or two masts, maybe even three masts, when all you have to decide is, is it a boat, and will it float?

RP 413. The defense promptly objected, saying "I think counsel is trivializing the term –." But the court interjected, "Overrule." The court told the jury that the lawyers' remarks are not evidence or law, but the prosecution could, "[g]o ahead. This is argument." *Id.*

The prosecution's comparison of this case to "a boat" where the jury only needed to decide "will it float," fundamentally misrepresented and trivialized the prosecution's burden of proof, particularly in a case where it had a uniquely high burden of proving the elements of perjury based on direct and corroborative proof. By also criticizing the defense, claiming they are unreasonably nitpicking by disputing the number of masts when the only question for the jury is whether it is a boat, the prosecution impermissibly denigrated the defense. *Thierry*, 190 Wn. App. at 694.

The court's response, overruling the objection and calling it fair argument, encouraged jurors to view the case as a simple and trivial matter, while simultaneously viewing the defense as nitpicking about irrelevant issues.

In a case where the to-convict instruction made no reference to the heightened evidentiary burden imposed to convict Mr. Benson of perjury and also made no reference to the specific act of perjury alleged in the amended information, the prosecution's efforts to dilute its burden of proof in its argument further impacted the jury's deliberations and the fairness of the trial. These objected to remarks were delivered just before the jury started its deliberations and received the court's imprimatur by overruling the defense objection.

e. The instructional errors and State's misrepresentation of its burden of proof requires reversal.

The court's instructional errors, omitting essential elements from the to-convict instruction and failing to specify the precise false statement alleged in the information, are presumed prejudicial and require reversal unless the prosecution proves the errors harmless beyond a reasonable doubt. *State v. Peters*, 163 Wn. App. 836, 850, 261 P.3d 199 (2011); *see Delaware v. Van Arsdall*, 474 U.S. 673, 684, 106 S. Ct. 1431, 89 L. ED.3d 674 (1986). The combination of trial errors may deprive a person of a fair trial, even where some errors viewed alone might not be grave enough to require reversal. *State v. Coe*, 101

Wn.2d 772, 789, 684 P.2d 668 (1984); U.S. Const. amend. 14; Const. art. I, § 3.

The prosecution cannot prove the instructional errors harmless, when viewed cumulatively, because it encouraged the jurors to treat its burden of proof as a minor matter, just like whether a boat will float, without emphasizing that it has a uniquely high burden of proof in a perjury prosecution. RP 413.

Furthermore, the prosecution's case lacked direct testimony showing Mr. Benson in fact lied about buying drugs from Mr. Gant. The audiotape was disjointed and inconclusive. The prosecution offered no eyewitnesses to testify about what happened in Mr. Gant's home. By failing to provide clear, direct testimony, and without unambiguous jury instructions clearly limiting the jury's deliberations to the false statement charged in the information, the failure to accurately inform the jury of the State's burden of proof requires reversal.

F. CONCLUSION.

Delbert Benson's conviction should be reversed and dismissed due to insufficient evidence. Alternatively, a new trial must be ordered due to the instructional errors and prosecution's misrepresentation of its burden of proof.

DATED this 7th day of December 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Nancy P. Collins", written in a cursive style.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

| | | |
|----------------------|---|-----------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | NO. 35000-2-III |
| v. |) | |
| |) | |
| DELBERT BENSON, |) | |
| |) | |
| Appellant. |) | |

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