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NO. 36274-4-III

IN THE COURT OF APPEALS OF STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, RESPONDENT

v.

DELILA ELLEN REID, APPELLANT

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

Superior Court Cause No. 17-1-00650-8

The Honorable David G. Estudillo

BRIEF OF RESPONDENT

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- A. MS. REID'S COUNSEL MET WITH HIS CLIENT MULTIPLE TIMES BEFORE TRIAL AND KEPT HER UPDATED ON THE STATUS OF THE CASE AS HE OBTAINED SIX TRIAL CONTINUANCES IN ORDER TO FULLY INVESTIGATE VARIOUS AVENUES OF DEFENSE, INCLUDING POTENTIAL WITNESSES MS. REID IDENTIFIED. DURING TRIAL, COUNSEL CROSS-EXAMINED STATE WITNESSES, CONDUCTED DIRECT EXAMINATION OF MS. REID, AND MADE TIMELY OBJECTIONS. DID THE TRIAL COURT ERR BY REFUSING TO GRANT MS. REID'S MOTION FOR NEW COUNSEL MADE ON THE MORNING OF TRIAL WHEN SHE ALLEGED IRRECONCILABLE DIFFERENCES BASED ON HER BELIEF ADDITIONAL INVESTIGATION WAS NEEDED AND THAT SHE DESERVED AN ATTORNEY WHO BELIEVED SHE WAS INNOCENT? (ASSIGNMENT OF ERROR NO. 1)
- B. TWO MONTHS BEFORE TRIAL, MS. REID SIGNED A JURY TRIAL WAIVER AND ENGAGED IN A COLLOQUY WITH THE COURT IN WHICH SHE SAID SHE HAD SIGNED THE WAIVER, UNDERSTOOD SHE WAS GIVING UP HER RIGHT TO HAVE 12 PEERS DECIDE THE MATTER, AND THAT A SINGLE JUDGE WOULD DECIDE HER GUILT OR INNOCENCE. DID MS. REID KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY WAIVE HER RIGHT TO A JURY TRIAL? (ASSIGNMENT OF ERROR NO. 2)
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II. STATEMENT OF THE CASE¹

A. GENERAL FACTS

Delila Reid took construction material from Hayden Homes valuing at least \$2000. CP at 24. Following a bench trial, the court found that while Hayden Homes had given Ms. Reid permission to pick up scrap material, Ms. Reid knowingly took valuable construction material that was not scrap material, exceeding the scope of permission given by Hayden Homes. CP at 24.

At trial, Ms. Reid testified that other than the original person who had given her permission, two additional workers gave her permission to take the valuable construction material. RP at 113, 125. However, when law enforcement officers investigated the case, they could not locate the person Ms. Reid initially described. RP at 102. The project manager from Hayden Homes testified he did not know of anyone working at the construction sites matching the description Ms. Reid gave. RP at 85-86.

The court found Ms. Reid's story she told at trial not credible. CP at 24; RP at 164-67. At trial, the Hayden Home's project manager testified that the wood Ms. Reid took was still good, usable wood that could have been returned for full credit. RP at 71-72, 141-42. Based on this testimony,

¹ The record in this case, the State cites to the Record of Proceedings compiled by Tom R. Bartunek as "RP," the Record of Proceedings compiled by Charlene M. Beck as "RP Beck," and to the related clerk's papers as CP.

the court found it would be unreasonable for a construction company to give away materials the company could return for full credit. RP at 164-67. Thus the trial court found Ms. Reid's story that a worker told her that she could take a truck load of good wood, which could have been returned for full credit, not credible. CP at 24; RP at 164-67.

B. JURY WAIVER

During the court proceedings two months before trial, on April 10, 2018, Ms. Reid's attorney presented the trial court with a Waiver of Jury Trial signed by Ms. Reid. RP Beck at 3. The signed document states: "Having been advised by the court of my right to trial by jury and having had an opportunity to consult with counsel, I do hereby, with the approval of this court, waive my right to a trial by jury." CP at 17. The judge then proceeded to question Ms. Reid about the document as follows:

Ms. Reid, this document has a signature on it. Is that your signature?

MS. REID: Yeah.

THE COURT: All right. And you understand that by, in essence, signing the document you're waiving your right to have this matter decided by a jury of 12 individuals, your peers?

MS. REID: Yes.

///

THE COURT: Okay. And you're also agreeing, in essence, for a judge, such as myself, or another judge, to actually review the evidence and then make a decision about your case?

MS. REID: Yes.

THE COURT: All right. So I'm accepting then the Waiver of Jury Trial as presented.

RP Beck at 4-5.

C. REQUEST FOR SUBSTITUTE COUNSEL THE DAY OF TRIAL

On the morning of the scheduled trial, July 25, 2018, Ms. Reid expressed her desire for new counsel for the first time after six trial continuances. RP at 18, 23. When the trial court judge inquired into the basis, Ms. Reid gave two general reasons for the motion: (1) that the defense attorney had not fully investigated her claims; and (2) that her attorney neither adequately communicated with her nor expressed to Ms. Reid that he thought she was innocent. RP at 25-27, 29-30.

In response to the first claim, Mr. Bierley stated: "I had an investigator work on this case, she put in multiple hours of work interviewing witnesses provided by Ms. Reid, trying to locate witnesses provided by Ms. Reid. I believe we've investigated this case as fully as we were able to." RP at 25. The court then further inquired into whether Ms. Reid had met with the investigator and whether Ms. Reid had the chance to give the investigator the witness information. RP at 25-26. Ms. Reid

replied that she had met the investigator and that they “went over some of the witness statements or something that she had got.” RP at 26.

Additionally, the court inquired, “[D]id [the investigator] ask you, hey, who was involved, can you describe these people for me, that type of stuff” To which Ms. Reid responded, “I believe so, yes.” RP at 26.

The court asked Mr. Bierley about investigating the value of the wood. RP at 26. Ms. Reid disputed that all the wood at issue, the value of which totaled approximately \$4000, was from the one construction site. RP at 22. Mr. Bierley indicated to the court that Ms. Reid raised the issue of the value of the wood, and that his office had investigated. RP at 26.

In addition to the claimed issues about the investigation, Ms. Reid complained that she wanted a new attorney because she wanted “someone who I feel like is trying to represent me, not someone who is just like, oh, well.” RP at 22. The judge then proceeded to inquire as to whether Ms. Reid’s attorney had explained issues, provided information, and met with Ms. Reid. All of which, Ms. Reid admitted Mr. Bierley had. RP at 23-24.

The judge then inquired into Mr. Bierley’s communication with Ms. Reid. Mr. Bierley stated, “My notes document several in person meetings and phone calls.” RP at 27. These were aside from the six previous court hearings. RP at 23, 27. Mr. Bierley also explained to the

court that “it’s my practice to keep my clients advised of the status of their case that’s going on and I have done that in this case.” RP at 27.

Following up on Ms. Reid’s statements that she had, “been saying since the beginning, you know, that I just don’t feel like I’m being represented correctly,” (RP at 20), the court inquired as to whether Mr. Bierley had been aware before the trial date that Ms. Reid wanted a new counsel (RP at 27). Mr. Bierley responded that he could not recall. RP at 27.

Ms. Reid then went on to say that she previously had talked to Mr. Bierley inquiring as to whether he thought she was innocent. Ms. Reid stated their conversation went as follows: “do you even think that I’m innocent or not, and [Mr. Bierley] says that’s not his – you know, he’s not here to decide that, he’s just here to represent me.” RP at 30. Ms. Reid went on to tell the court that she wanted her attorney to believe she was innocent. RP at 30.

The court denied Ms. Reid’s motion to substitute counsel because there had been multiple continuances specifically to investigate the case. RP at 30. Additionally, even though there had been multiple hearings and continuances, the day of the trial was the first time that Ms. Reid indicated to the court that she wanted a new attorney. RP at 30. Furthermore, the court pointed out the defense’s investigator, Miss Berg, had met with Ms.

Reid at least once and investigated information Ms. Reid gave her in order to try to track evidence and identify witnesses. RP at 31.

The court went on to state that based on the information provided to the court, Mr. Bierley did not do anything unethical or that he failed to investigate. RP at 32. Additionally, the court explained to Ms. Reid that the defense attorney's job is not to decide whether Ms. Reid was innocent or not, but rather evaluate the state's case as to the sufficiency of the evidence and whether the evidence was gathered lawfully and then challenge the state if these were not met. RP at 33. In response, Ms. Reid admitted, "So as far as doing his job, like you're saying, yeah, he's done his job as far as that's concerned." RP at 34.

III. ARGUMENT

A. THE TRIAL COURT DID NOT DENY MS. REID'S RIGHT TO AN EFFECTIVE ADVOCATE WHEN IT DENIED HER REQUEST FOR NEW COUNSEL THE MORNING OF TRIAL AFTER HAVING GRANTED SIX TRIAL CONTINUANCES TO AFFORD COUNSEL AN OPPORTUNITY TO INVESTIGATE THE CASE, AND WHEN COUNSEL MET WITH MS. REID MULTIPLE TIMES, KEPT HER UPDATED ON THE STATUS OF THE CASE, CROSS-EXAMINED WITNESSES AT TRIAL, EXAMINED MS. REID, MADE TIMELY OBJECTIONS.

1. *Standard of Review*

The appellate court reviews "a trial court's decision to deny new court appointed counsel and motions for continuances for abuse of discretion." *State v. Varga*, 151 Wn. 2d 179, 200, 86 P.3d 139 (2004).

2. *Legal Principles on Review*

The United States Supreme Court in *Wheat* explained that the purpose of the Sixth Amendment provision for assistance of counsel is to ensure a fair trial for a criminal defendant. *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 1697, 100 L. Ed. 2d 140 (1988). When “evaluating Sixth Amendment claims, ‘the appropriate inquiry focuses on the adversarial process, not on the accused’s relationship with his lawyer as such.’” *Id.* (quoting *United States v. Cronin*, 466 U.S. 648, 657, n. 21, 104 S. Ct. 2039, 2046 n. 21, 80 L. Ed.2d 657 (1984)). “Thus, while the right to select and be represented by one’s preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.” *Id.* As such, while “indigent defendants can move to substitute counsel when there is an ‘irreconcilable conflict’ with appointed counsel,” *State v. Hampton*, 184 Wn.2d 656, 663, 361 P.3d 734 (2015) (citing *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 723-24, 16 P.3d 1 (2001)), “a defendant’s loss of confidence or trust in his counsel is not sufficient reason to appoint new counsel.” *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004).

In order to violate Ms. Reid's right to an effective advocate, an attorney-client irreconcilable conflict must affect the defense attorney's performance in mounting an effective defense for his client. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 724-26, 16 P.3d 1 (2001). To evaluate the whether the conflict between and defense counsel and Ms. Reid reached this level, the Washington Supreme Court adopted a three-part factor test, which is: "1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion." *Id.* at 724.

- a. Any conflict there may have been between the defense counsel and Ms. Reid was not extensive.

As the trial court judge inquired into the basis, Ms. Reid gave two general reasons for the motion: (1) that the defense attorney had not fully investigated her claims; and (2) her attorney did not express to Ms. Reid that he thought she was innocent. RP at 25-27.

The trial court then allowed the defense attorney to respond. RP at 25. The defense counsel explained that he had a defense investigator meet with him and Ms. Reid. RP at 25-26. The defense investigator had spent multiple hours both working on interviewing witnesses provided by Ms. Reid and trying to locate the witnesses provided by Ms. Reid in addition to investigating the value of the wood. RP at 25-26. The trial court inquired as to whether the investigator had met with Ms. Reid and asked questions

about the case and the people involved and Ms. Reid confirmed that the investigator had. RP at 26.

Ms. Reid also complained essentially that she wanted an attorney representing her that believed she was innocent. *See* RP at 30. However, similar to *In re Personal Restraint of Stevenson*, when Ms. Reid asserted that his attorney had not helped to prove his innocence, here whether the defense attorney believed Ms. Reid to be innocent or not is not the correct inquiry. *See* 142 Wn.2d 710, 724-26, 16 P.3d 1 (2001). Rather, the focus is whether the conflict was so bad that the defense counsel did not effectively represent Ms. Reid. *See id.* at 729-30.

The record shows that defense counsel, Mr. Bierley, engaged an investigator to investigate Ms. Reid's claims, he held several in-person meetings in addition to phone calls, he went to six previous court hearings with Ms. Reid prior to trial, and he had obtained multiple continuances to investigate the case. *See* RP at 23-27. Mr. Bierley further explained that he had advised Ms. Reid of the status of her case. *See* RP at 27.

Tellingly, when the trial court explained the role of defense counsel was to evaluate the state's case as to the sufficiency of the evidence and whether the evidence was gathered lawfully and then challenge the state if these were not met, Ms. Reid admitted, "So as far as

doing his job, like you're saying, yeah, he's done his job as far as that's concerned." RP at 34.

Additionally, at trial, Mr. Bierley provided effective counsel at trial. He made objections (some which the court sustained), cross-examined state's witnesses, conducted a direct exam of Ms. Reid, and argued in closing the defense's theory of mistake. *See e.g.* RP at 47, 113-19, 156-60.

As such, even if there was a conflict between Ms. Reid and her defense attorney, it was not a complete communications breakdown to the point that Mr. Bierley could not effectively represent Ms. Reid. *See Personal Restraint of Stevenson In re* 142 Wn.2d 710, 724, 16 P.3d 1, 9 (2001). This shows the first prong weighs against the appellant.

b. The court conducted an adequate inquiry.

Ms. Reid cites to the Ninth Circuit case *United States v. Velazquez*, 855 F.3d 1021 (2017), as support for demonstrating that the trial court did not adequately inquire into the extent of the conflict. Br. of Appellant at 11-12. However, the Ninth Circuit case is not controlling. Even if the appellate court considers *Velazquez* as persuasive law, the record does not support a reversal.

In *Velazquez*, the trial court failed to even make an inquiry into the breakdown of the communication between Ms. Reid and the defense

attorney. *Id.* at 1035. The court in *Velazquez* states, “In cases in which we have held that the adequacy-of-inquiry factor was satisfied, the district court typically held at least one hearing during which it asked specific questions.” *Id.* Here the trial court held a hearing and asked numerous questions to attempt to ascertain Ms. Reid’s assertion that she was not comfortable with the defense counsel. As such the inquiry was adequate.

The appellant also asserts that the judge’s inquiry should have been in private, again citing the Ninth Circuit. Br. of Appellant at 12. However, conducting an in-chambers private inquiry would have violated the public trial right. The public trial right serves numerous functions.

As we have explained in numerous recent cases, the public trial right attaches to proceedings that have historically occurred in open court and that implicate “the core values” underlying that right. These values include “ensur[ing] a fair trial, . . . remind[ing] the prosecutor and judge of their responsibility to the accused and the importance of their functions, . . . encourag[ing] witnesses to come forward, . . . discourag[ing] perjury, . . . promot[ing] confidence in the judiciary,”¹¹ and providing an outlet for the public’s “concern, outrage, and hostility.”

State v. Schierman, 192 Wn.2d 577, 609, 438 P.3d 1063 (2018) (internal citations omitted) (quoting *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 13, 106 S. Ct. 2735, 92 L. Ed.2d 1 (1986)). One important aspect of the public trial right is to discourage perjury. *Id.*

Here the trial court had to assess the extent of the alleged communication breakdown. In order to assess this, the court heard testimony from both Ms. Reid and her counsel. As the court required hearing testimony from the different people involved, the court appropriately held the inquiry in open court in order to discourage perjury.

Because the trial court adequately inquired into the extent of the communication breakdown at a hearing, the second factor also weighs against the appellant.

c. Ms. Reid's motion was not timely.

The Motion to Substitute Counsel was not timely as it was requested the morning of trial. Granting the substitution would have required a substantial continuance to allow a new attorney to be assigned and become familiar with the case. The State was ready to proceed and had multiple witnesses ready to testify. RP at 28-29. Contrary to the appellant's assertion that a continuance would not have caused delay or inconvenience, (Br. of Appellant at 9), at minimum, a continuance would have inconvenienced the multiple witnesses who had taken time from their work to be at the trial. The timeliness factor weighs against the appellant.

As all three factors weigh against the appellant, this Court should find that the trial court did not abuse its discretion in denying the appellant's Motion to Substitute Counsel the day of the trial.

B. MS. REID KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY WAIVED HER RIGHT TO A JURY TRIAL AS DEMONSTRATED BOTH BY THE JURY WAIVER DOCUMENT SHE SIGNED AND HER COLLOQUY WITH THE TRIAL COURT.

1. *Standard of Review*

On appeal, a the voluntariness jury trial waiver is reviewed de novo. *State v. Benitez*, 175 Wn. App. 116, 128, 302 P.3d 877 (2013).

2. *Legal Principles on Review*

While waivers of constitutional rights must be made knowingly, voluntarily, and intelligently, “waivers of different constitutional rights meet this standard in different ways.” *State v. Frawley*, 181 Wn.2d 452, 461, 334 P.3d 1022 (2014) (citing *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996); *State v. Stegall*, 124 Wn.2d 719, 725, 881 P.2d 979 (1994) (“[T]he inquiry by the court will differ depending on the nature of the constitutional right at issue.”)).

To waive a jury trial, “Washington law does not require an extensive colloquy on the record; instead ‘only a personal expression of waiver from the defendant is required.’” *State v. Benitez*, 175 Wn. App. 116, 128–29, 302 P.3d 877 (2013) (quoting *State v. Pierce*, 134 Wn. App. 763, 771, 142 P.3d 610 (2006)). “A written waiver ‘is strong evidence that the defendant validly waived the jury trial right.’” *State v. Trebilcock*, 184 Wn. App. 619, 636, 341 P.3d 1004 (2014) (quoting *Pierce*, 134 Wn. App.

at 771, 142 P.3d 610). Furthermore, while “(a)n attorney’s representation that the defendant’s waiver is knowing, intelligent, and voluntary is also relevant,” it is just a factor the court may consider and it is not dispositive. *See id.* Furthermore, CrR 6.1(a) requires only the use of a written waiver in order for a defendant to waive his or her right to a jury trial as long as the court consents to the waiver.

The appellant’s arguments are to no avail. *See* Appellant’s Br. at 15. First, the burden of proof, beyond a reasonable doubt, does not change whether a jury or the judge as a rational trier of fact decides the matter. *See Benitez*, 175 Wn. App. at 129 (“[The defendant] was not required to be informed of ‘his right to be presumed innocent until prove[d] guilty beyond a reasonable doubt or his right to an impartial trier of fact because these rights are inherent in all trials’ and are not waived by waiving the right to a jury trial.” (quoting *Pierce*, 134 Wn. App. at 772)). Second, the written Jury Waiver, signed by Ms. Reid, establishes that Ms. Reid had the opportunity to consult with her counsel. CP at 17. Finally, if counsel makes the representation to the court that he believes the client waived the jury trial voluntarily, knowingly and intelligently, the court may consider it as a relevant, but it is not a dispositive, factor. *See Trebilcock*, 184 Wn. App. at 636.

In this case, the record amply reflects the appellant’s voluntary,

knowing, intelligent waiver of a jury trial. The appellant signed the written document waiving her right to a jury trial, which is strong evidence of a valid waiver. *See* CP at 17; RP Beck at 4. The language of the signed written waiver demonstrates that she was advised of her rights by the court and she had the opportunity to consult with her counsel about the waiver.

To further strengthen the validity of the waiver, the judge engaged the appellant in a colloquy in which the appellant affirmed that she signed the waiver, that she understood by signing the waiver she was giving up her right to have the matter decided by 12 peers, and that she agreed to have a judge make a decision about her case. RP Beck at 4-5.

The appellant provided the court with both a written and oral “personal expression of waiver,” abundantly satisfying that the appellant waived her right to a trial knowingly, voluntarily, and intelligently.

C. MS. REID CANNOT DEMONSTRATE A “MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT” FLOWING FROM THE STATE’S CLOSING ARGUMENT BECAUSE REFERRING TO MISSING WITNESSES WAS NOT MISCONDUCT, AND EVEN IF IT HAD BEEN, ANY ERROR WAS HARMLESS BECAUSE THE COURT STATED IT WAS NOT CONVINCED BY THE ARGUMENT AND DID NOT RELY ON IT.

1. Standard of Review

“Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.” *State v. Lindsay*, 180 Wn. 2d 423, 430, 326 P.3d 125 (2014) (quoting *State v. Brett*, 126 Wn.2d 136, 174–75, 892 P.2d 29 (1995)).

2. *Legal Principles on Review*

Prosecutor's comments during closing argument are reviewed in the context of the entire argument, the issues, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). When claiming prosecutorial misconduct, Ms. Reid bears the burden of proving the prosecutor's conduct was first improper and if so, then demonstrate that it was prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); *State v. Emery*, 174 Wn.2d 741, 756, 759, 760, 278 P.3d 653 (2012).

- a. The prosecutor did not commit prosecutorial misconduct when he argued a reasonable inference.

Here the appellant argues that the prosecutor committed misconduct when he referred to the appellant's missing witnesses. Appellant's Br. at 20-21. However, the prosecutor's inferences were not improper.

To establish a missing witness inference, the proponent must establish the following:

First, the doctrine applies only if the potential testimony is material and not cumulative. Second, the doctrine applies only if the missing witness is particularly under the control of Ms. Reid rather than being equally available to both parties. Third, the doctrine applies only if the witness's absence is not satisfactorily explained. For example, if the witness is not competent or if testimony would incriminate the witness, the absence is explained and no instruction or argument is

permitted. Finally, the doctrine may not be applied if it would infringe on a criminal defendant's right to silence or shift the burden of proof.

State v. Montgomery, 163 Wn.2d 577, 598–99, 183 P.3d 267 (2008)

(internal citations omitted).

Ms. Reid at trial argued that she was given permission to take the wood she took by two different people. RP at 125. If she had been given permission to take the wood, she would not have committed a crime. As such, the testimony of the two people whom she claimed gave her permission was material and as no other witness could corroborate the appellant's story, it was not cumulative. Thus the first prong of the test is met.

The second prong requires that the witness, "is particularly under the control of Ms. Reid rather than being equally available to both parties." At trial, the project manager for the Hayden Homes location, testified that no one he was aware of working at the location fit the description the appellant gave of the person who gave her permission to take the building materials. RP at 85-86, 161. Since Hayden Homes could not identify the alleged witness Ms. Reid asserted gave her permission to take the building material, the State could not produce this witness. However, Ms. Reid was the one who talked to the people she alleged gave

her permission. She was the only one who would have been able to identify these people, making the witnesses within the particular control of Ms. Reid to procure meeting the second prong.

Third, Ms. Reid could not satisfactorily explain how an employee who Hayden Homes had never known about, yet that she insists gave her permission to take the wood, vanished. As the appellant could not provide a reasonable explanation for the unavailability, the third prong is met.

Fourth, the appellant's right to silence was not infringed upon as she chose to testify at trial. Also, the missing witness inference does not impermissibly shift the burden of proof. In the closing argument, Ms. Reid argued that the State had not done enough investigation and that the defense had no burden to present evidence. RP at 159-60. In response to Ms. Reid's argument, the prosecutor in rebuttal argued a reasonable inference from the testimony of the project manager, the law enforcement officer, and the testimony of Ms. Reid. The prosecutor did not argue that Ms. Reid had to present proof of innocence, but made a reasonable inference. *See State v. Blair*, 117 Wn.2d 479, 491-92, 816 P.2d 718 (1991) (arguing a reasonable inference does not shift the burden).

The reasonable inference was that the witnesses Ms. Reid said told her she had permission to take the wood, simply did not exist because the Hayden Homes project manager testified that they did not have any

employees or subcontractors meeting the description provided by Ms. Reid, and additionally law enforcement could not find them. Because the prosecutor did not shift the burden of proof, the fourth prong is met.

As all four of the prongs are met, the prosecutor comments on the missing witnesses were not error.

b. Even if there was prosecutorial misconduct, it was harmless.

Even if the prosecutor's statements were in error, the error was harmless. "The burden to establish prejudice requires Ms. Reid to prove that 'there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict.'" *State v. Thorgerson*, 172 Wn.2d 438, 442–43, 258 P.3d 43 (2011) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (alteration in original)).

The trial court stated that the prosecutor's argument for the missing witnesses did not move its decision. RP at 161. Furthermore, when the court delivered its oral decision, it did not refer to missing witnesses as part of its reasoning for finding Ms. Reid guilty. RP at 164-67. Because the court did not rely on the prosecutor's statements regarding missing witnesses, even if the statements were improper, they were not prejudicial and the error was harmless.

IV. CONCLUSION

Each of the appellant's arguments fail. First, the trial court did not

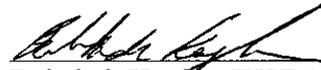
abuse its discretion in denying the appellant's motion to substitute counsel the day of the trial. Second, the appellant gave a personal expression, both written and oral, of the jury trial waiver knowingly, voluntarily, and intelligently. Third, the prosecutor's reasonable inferences were not prosecutorial misconduct, and even if the statements were improper, the error was harmless since the trial court did not rely on them.

This Court should affirm Ms. Reid's conviction for possessing stolen property in the second degree.

DATED this 8 day of July, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this day I served a copy of the Brief of Respondent in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

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Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

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