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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

CHERYL SUTTON, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## I. ISSUE PRESENTED

During deliberations, did the trial court abuse its discretion when responding to a jury note to “please refer to your instructions,” after the jury asked only once for clarification regarding the definition and elements instructions for the crime of leading organized crime?

## II. STATEMENT OF THE CASE

Cheryl Sutton was convicted by a jury of first-degree felony murder of Brett Snow with kidnapping as the predicate offense<sup>1</sup> and leading organized crime.<sup>2</sup> CP 139-40; CP 176-78. Based upon the record, Snow’s body was never found. This appeal timely followed.

### *Substantive facts.*

On August 21, 2015, law enforcement executed a search warrant on the property located at 7822 North Starr Road. RP 186, 203. Deputies were searching for suspected methamphetamine. RP 187. Sutton was found inside the shop on the premises. RP 188. Other individuals present were Ken Stone,<sup>3</sup> Alvaro Guajardo, and Colby Vodder. RP 188.

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<sup>1</sup> Sutton does not challenge the first-degree felony murder conviction.

<sup>2</sup> On September 17, 2018, Sutton was charged by first amended information with first-degree felony murder, leading organized crime, and first-degree kidnapping. CP 64-65; RP 60. At the end of the State’s case in chief, the court granted the State’s motion to dismiss the first-degree kidnapping. CP 140.

<sup>3</sup> Sutton and Stone were in a relationship with each other. RP 216, 280.

During November 2015, Russell Joyce lived in an apartment above the shop and Sutton and Stone lived in the residence on the property at the North Starr Road address.<sup>4</sup> RP 276. Neither Sutton nor Stone were gainfully employed and sold drugs for a living. RP 278. Sutton and Stone would give Joyce drugs<sup>5</sup> and, in return, he allowed them to live on the property. RP 277. During that time, Guajardo would stay overnight at the residence and he assisted in selling drugs. RP 277-78. Vodder stayed in the shop on the property, approximately one month or longer before Snow's disappearance. RP 324-25. Vodder also sold heroin inside the home. RP 283.

Joyce often observed people arrive daily at the address to purchase drugs, ranging from two to ten individuals. RP 278, 282. Sutton ran the drug operation and was the leader of the group. RP 282, 292. Joyce had personally observed at least ten hand-to-hand transactions inside the North Starr Road home within a week of Snow's disappearance which involved Sutton, Guajardo, Stone and Vodder.<sup>6</sup> RP 323-24.

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<sup>4</sup> Joyce owned the property for approximately 10 years prior to a foreclosure on the property. RP 289, 308. The property was in the Newman Lake area. RP 275. Snow had introduced Joyce to Sutton and Stone. RP 278.

<sup>5</sup> Joyce also received drugs from Guajardo. RP 313.

<sup>6</sup> The transactions with Vodder involved his selling drugs to Joyce. RP 314, 323.

Jennifer Dodd was friends with Snow since childhood. RP 490. Dodd and Snow would occasionally buy drugs from Sutton at the North Starr Road address. Snow would resell those drugs and return the proceeds to Sutton.<sup>7</sup> RP 491. At times, Sutton would become angry with Snow. RP 492. Dodd recalled an incident where Snow returned to the North Starr Road residence with some clothes, rather than cash,<sup>8</sup> after selling some drugs. RP 492. Sutton took Snow into a bedroom and told Snow to get the money or she would “f[---]k him up.” RP 492. Snow had been using Sutton’s van for several weeks for delivery of the drugs. RP 492. After Sutton’s admonition, Snow and Dodd left in the van; however, Snow did not return the van in a timely manner. RP 492. Dodd and Snow hid from Sutton during the time they had the van. RP 492. Joyce convinced Snow to come to the house to take his “lumps”<sup>9</sup> for taking the van. RP 316.

Karen Nelson was good friends with Snow. RP 176-77. Nelson gave Snow a ride to the residence on North Starr Road. RP 177-78, 275. Nelson had previously been to that house on several occasions. RP 178. The following morning, Nelson received a call from Snow around 5:00 a.m., and

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<sup>7</sup> Snow also sold drugs for Vodder. RP 495.

<sup>8</sup> Approximately \$100 for the drugs sold. RP 496.

<sup>9</sup> Slang for a beating. RP 288.

when she attempted to call him back, his phone was turned off. RP 179. Nelson did not see Snow again.<sup>10</sup> RP 179.

During the evening after Nelson dropped Snow off at the North Starr Road property, Snow visited with Joyce in his apartment above the shop. RP 285. During that time, Sutton and Stone walked up the steps to Joyce's apartment and Sutton, armed with a metal bar, yelled several times, "where's he at?" RP 286. Inside the apartment, Sutton ordered Snow to get on the ground and for Stone to tie him up, as she made remarks about disrespect.<sup>11</sup> RP 286. Stone tied Snow's hands and feet with a phone cord. RP 317. Sutton stated that she heard Snow "over the phone." RP 286. Guajardo then arrived at the apartment, took "a couple of swings" at Snow and removed Snow from the apartment. RP 287. Approximately one week later, Joyce heard what sounded like a chain being pulled across metal, inside the shop area. RP 289. Joyce investigated and heard Guajardo and

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<sup>10</sup> Lori Rison, mother of the victim, and Brittany Snow, sister of the victim, communicated with Brett Snow by either text or phone approximately one or more times a week prior to his disappearance between late November 2015 and early December 2015. RP 165-66, 172. Rison attempted to find her son and had no contact with him after Thanksgiving 2015. RP 167-68. Brittany attempted to locate her brother through social media and she also filed a missing person report with the police. RP 172-73. The victim was a drug user. RP 167, 173, 179.

<sup>11</sup> Joyce stated that if one person "disrespects" another person in the drug culture, it would generally result in only a "beating." RP 288.

Vodder inside the shop; Vodder told Joyce they had poached a deer and they did not allow Joyce inside the shop.<sup>12</sup> RP 290.

Russell Green was introduced to Sutton through Snow. RP 397. Green had observed Sutton conducting drug deals at the North Star Road address. RP 397-98, 407. At a point after Sutton and Stone moved out of the North Starr address, Sutton appeared unannounced at Green's bedroom while Guajardo was contemporaneously searching a person from Montana, near the bedroom, who Sutton believed had stolen from her. RP 399-401, 403. It appeared Sutton gave the marching orders to others. RP 401.

Christopher Schoonover had purchased drugs from Sutton and Stone primarily at the North Starr Road address and gave the money for the drugs to Sutton during November 2015. RP 416. Generally, if other individuals were present when Schoonover arrived at the residence to make a purchase, Sutton would take him into a bedroom to conduct the purchase. RP 417. This same procedure was followed with other buyers. RP 417-18. Guajardo and Vodder followed the same approach when selling drugs at the residence. RP 418. Stone also sold drugs during this period. RP 421. During that same time, Guajardo resided in a bedroom in the shop. RP 420.

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<sup>12</sup> Sutton, Stone and Guajardo had keys to the shop; Joyce did not. RP 278.

After Sutton moved out of the North Starr Road residence, Schoonover had a discussion with her. RP 427. Sutton told Schoonover that Snow was deceased and that there had been a struggle in the shop. RP 427. Sutton explained that Vodder struck Snow with a lawn mower blade, “they” dismembered his body and then disposed of it. RP 427-28. Sutton stated that she and Vodder were with Snow when the struggle occurred in the shop; however, Guajardo and Stone were inside the residence. RP 428. Notwithstanding, when the body was dismembered, Sutton said they all participated. RP 428.

On December 15, 2015, Sutton and other occupants of the residence were evicted from the North Starr Road residence. RP 210, 642. Sutton was subsequently arrested by federal authorities on September 15, 2016, for possession of methamphetamine with intent to distribute. RP 189, 202-03, 468. On September 23, 2016, a federal magistrate authorized search warrants for items collected from the property at 3924 East 29th Avenue<sup>13</sup> in Spokane, including a foot locker, backpacks, and totes affiliated with Sutton and Stone. RP 189. It appeared that Sutton and Stone had recently moved into the residence. RP 468. Law enforcement found various

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<sup>13</sup> Sutton’s and Stone’s new address after being evicted from the North Star Road address.

computers, a handgun, over \$16,000 in cash, four cell phones including two Samsung telephones, and several SIM cards.<sup>14</sup> RP 190-96.

WSP Criminal Intelligence Specialist, Dustin Baungard, forensically analyzed telecommunication records obtained from telephone companies. RP 469-70. In this case, law enforcement requested Baungard examine several SIM cards<sup>15</sup> and several social media devices. RP 471. The cards were in both Sutton's and Stone's personal belongings. RP 506. Although Snow's cell phone was not found, his SIM card was among the SIM cards located in the personal belongings. RP 508.

Detective Lyle Johnston obtained the telephone records of Sutton, Stone, and Vodder because they resided at the North Starr Road address and were associates of each other. RP 215-16. The detective also obtained AT&T phone records for Snow, dated December 2, 2015 through December 9, 2015. RP 216, 223-24. From the records, the last outgoing call from Snow's phone was on December 2, 2015, at approximately 7:38 p.m. RP 225, 243. Snow's last incoming call was from Nelson that went to voice

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<sup>14</sup> A SIM card is much smaller in size than a postage stamp. RP 201.

<sup>15</sup> Baungard explained: "So a SIM card is a very small plastic chip that's inserted into a cell phone. It allows that cell phone to identify itself to the cellular network. A SIM card can be moved from one phone to another phone and it's attached to the subscriber account. So, essentially, if you move your SIM card from one phone to another phone, you could still retain your same telephone number in that new phone." RP 471. A SIM card as a serial number attached to a particular telephone account. RP 473.

mail on December 3, 2015, at 4:09 a.m. RP 224, 243. The last incoming text message to Snow's phone was from Nelson at 4:31 a.m., on the same date.<sup>16</sup> RP 226, 243, 245-46. Snow had no outgoing text messages after December 3, 2015, RP 246. The property located at 7822 North Starr Road fell within the coverage area of the cell phone towers activated by Snow's phone on December 2, 2015, and December 3, 2015. RP 240-42. From November 1, 2015, until December 3, 2015, Sutton had called Snow 57 times and Snow had called Sutton 37 times. RP 248. In that time frame, Sutton texted Snow 416 times. RP 248. Sutton did not place any telephone calls or texts to Snow after December 3, 2015. RP 248.

During June 2016,<sup>17</sup> Johnston took a canine handler, Robyn Moug, and her cadaver dog to the shop located at the North Starr Road address. RP 248-49, 260. Moug allowed the dog to search the shop area and the dog alerted on a specific area in the shop. RP 262-63. Moug observed blood

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<sup>16</sup> From November 1, 2015, through January 31, 2016, Snow received 5,795 text messages. RP 246. In addition, Snow's cell phone had 1,921 voice calls during that time. RP 247. Of those telephone calls, there were 57 calls to Snow's phone from the number associated with Sutton, and 39 calls from Snow's phone to the number associated with Sutton, for a total of 96 calls. RP 247-48. In addition, there were 416 text messages from Sutton to Snow during that time. RP 248. After December 3, 2015, Sutton placed no phone calls or texts to Snow. RP 248.

<sup>17</sup> From the record, it appears that deputy prosecutor misspoke when he referenced June 2015, as this time frame would have preceded the murder; rather, from the chronological order of events, it appears the correct time frame was June 2016. *See* RP 260.

spatter, human tissue, and hair in a room in the shop. RP 264-65. Johnston also observed human tissue and hair mixed with blood in the crevices of the wall inside the shop. RP 328, 340-41. There was staining consistent with an effort to clean the area. RP 336. Blood spatter was observed near a utility sink and on top of a water heater in the shop and blood was located on the floor. RP 339-42. Blood swabs were collected from the utility sink, the top of the water heater, and the north wall<sup>18</sup> of the shop, which were subsequently forwarded to the Washington State Patrol Crime Laboratory for analysis. RP 352, 370-71, 374-75.

Nicole Price had known Sutton for several years prior to the murder. RP 476. Price had used drugs with Sutton and sold drugs from the North Starr Road address. RP 477. After Sutton moved out of that residence, Sutton gave Price a mattress from the bedroom in the shop used by Guajardo. RP 480. The mattress was eventually collected by law enforcement. RP 481. Stains on the mattress presumptively tested positive for blood. RP 510-11, 544-48. There was also water staining consistent with a cleanup of the mattress. RP 510. The mattress' exterior was forwarded to the WSP crime laboratory for analysis. RP 510-11. In addition, samples from the mattress were also extracted by the detective for DNA analysis.

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<sup>18</sup> The blood on the wall was described as a line which projected downward. RP 377.

RP 511-12, 544-49. The detective also forwarded reference samples from Sutton, Stone, Vodder, and Guajardo to the WSP laboratory. RP 514. Additionally, Rison provided Johnston with an article of Snow's clothing and Snow's siblings provided DNA samples for potential DNA identification of Snow. RP 168, 219-23, 514. Snow's DNA profile was subsequently developed by WSP DNA scientist Beau Baggenstoss. RP 556, 563-64.

Baggenstoss determined that the blood samples taken from the sink, floor, and wall in the shop matched Snow.<sup>19</sup> RP 564, 585. A blood sample taken from the mattress contained a mixture of three individuals, which included Snow.<sup>20</sup> RP 566-67. An additional blood sample from the bed matched Guajardo.<sup>21</sup> RP 568.

While residing at the North Starr Road address, Sutton testified that she was employed as a tattoo artist and sold drugs for a living. RP 606. Sutton had known Snow for approximately eight years prior to Snow's

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<sup>19</sup> "The estimated probabilities of selecting an unrelated individual at random from the U.S. population with a matching profile is 1 in 19 quintillion." RP 564.

<sup>20</sup> "[A]ssuming three contributors, it is 720,000 times more likely that the observed DNA profile occurred as a result of Bret Snow and two unknown contributors than if it had originated for three unrelated individuals selected at random from the U.S. population." RP 567.

<sup>21</sup> It "is 160 octillion times more likely that the observed DNA profile originated from Alvaro Guajardo rather than an unrelated selected at random from the U.S. population." RP 568.

disappearance. RP 608. Sutton remarked that she had multiple suppliers for her drug dealing. RP 609, 611. Sutton denied that she directed Snow, Stone, Guajardo and Vodder to sell drugs for her. RP 612-16.

Sutton asserted that she did not have a license, so she bought a van and asked Price to drive her on errands or for “fun.” RP 620-21. Sutton also allowed Snow to use the van. RP 621. Prior to Snow’s disappearance, Snow had borrowed the van and had not returned it for approximately three weeks. RP 622. Sutton “went looking” for Snow. RP 622. When Snow returned to the North Starr Road address, Sutton claimed that she had a “friendly,” private conversation with him behind the home. RP 623-24.

On the night of Snow’s disappearance, Sutton had knowledge that Snow was in Joyce’s apartment. RP 629. Sutton claimed she was upset with Snow because Snow, as a friend, was using heroin. RP 630. Sutton claimed she confronted Snow about his drug use in Joyce’s apartment. RP 631. Sutton asserted that Snow stood up and approached her, so she struck Snow with her fist, which caused Snow to fall to the ground. RP 631. Sutton maintained that Stone had to separate herself and Snow, and Sutton took Snow’s phone so that Snow would not leave the apartment and she could finish her conversation with him. RP 634-35. Sutton claimed she then left Joyce’s apartment as Guajardo was walking up the stairs to the apartment. RP 635. Sutton alleged that she did not observe or hear anything else related

to Snow that evening. RP 639. Sutton stated approximately one hour after she last saw Snow, Price drove Sutton to one of Sutton's drug suppliers.<sup>22</sup> RP 641, 664. Sutton admitted not being truthful with the detective during an interview with him after Snow's disappearance. RP 645. She also admitted to telling a different story to Deputy Shawn Hause. RP 648. Sutton denied telling Schoonover about the murder. RP 650.

During cross-examination, Sutton admitted the \$16,000 recovered by law enforcement during its search of her residence was acquired from her tattoo work and through the sale of drugs. RP 654. Sutton admitted that plenty of people arrived daily at the North Starr Road address to purchase drugs and for tattoo work. RP 659. Sutton claimed that if Snow had not returned any money for a drug sale, after she had fronted him the drugs for the sale, she would have done nothing to Snow and she would not be angry. RP 656. Sutton asserted that if she fronted an individual some drugs, and if they did not pay her, she would work it out with that individual. RP 658.

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<sup>22</sup> Sutton had an agreement with her supplier; she would sell methamphetamine and her supplier would sell heroin. RP 675.

### III. ARGUMENT

#### **A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S REQUEST TO GIVE A SUPPLEMENTAL INSTRUCTION TO THE JURY THAT WOULD HAVE ESSENTIALLY EMPHASIZED THE SAME LAW ALREADY PROVIDED TO THE JURY.**

In part, the State charged Sutton with the crime of leading organized crime, in violation of RCW 9A.82.060(1)(a). The court's instruction number 24, which defined the crime of leading organized crime, it stated:

A person commits the crime of leading organized crime when he or she intentionally organizes, manages, directs, supervises, or finances any three or more persons with the intent to engage in a pattern of criminal profiteering activity.

CP 169; RP 781.

The elements instruction for that crime, instruction number 25, stated:

To convict the defendant of the crime of leading organized crime as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the period between June 1, 2015, and March 1, 2016, the defendant intentionally organized, managed, directed, supervised, or financed three or more persons, Ken Stone, Alvaro Guajardo and Colby Vodder;
- (2) That the defendant acted with the intent to engage in a pattern of criminal profiteering activity, delivery of a controlled substance; and,
- (3) That any of these acts 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 of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 170; RP 782.

Instruction number 26 stated:

Pattern of criminal profiteering activity means engaging in at least three criminal acts committed for financial gain within a five-year period.

CP 171; RP 782.

During deliberations and regarding the leading organized crime charge, the jury asked the following question:

For instruction #25, must the defendant have organized (ect.) all three of the listed persons specifically, or just any 3 or more persons (as Instruction #24 states)?

CP 189.

The court requested input from the parties on an appropriate response. RP 846. The State requested the court instruct the jury to “read and follow your instructions.” RP 848. Initially, defense counsel requested either that the court follow the State’s suggestion or the court refer the jury to specific instructions already given. RP 848-49. Defense counsel then suggested his preference was to answer “yes, they do” to the jury. RP 849. After some contemplation and back and forth between defense counsel, the

State, and the court, defense counsel stated he believed the court's instructions were proper, but asked that that the court further instruct the jury:

What I would suggest in that situation, Your Honor, is we just indicate -- and I think this is appropriate because we're actually referring to a specific Instruction [number 25], that each element of the offense has to be proven beyond a reasonable doubt. That will allow them to go back, I think, read that and then come to the conclusion that this is an element of the offense that needs to be proven beyond a reasonable doubt. But I think that would, I think, alleviate some of the Court's concern that narrows the jury's focus just a little bit. That would be my thought.

RP 852

Ultimately, the trial court found instructions 24 and 25 were accurate statements of the law,<sup>23</sup> and held that:

I'm satisfied with asking them to please review the instructions as a whole. And I could write the answer's there in [instructions] 24 and 25, but I don't want to do that. I mean, it's right there, and they're reading them.

So I appreciate your input. I'm going to take the conservative route and ask them to please refer to your instructions or the instructions.

RP 853-54. In writing, the trial court responded to the jury, "Please refer to your instructions." CP 189. The jury did not request any further clarification. The jury was polled after the verdict. Each individually polled juror answered that the verdict of guilty, for both counts, was both their

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<sup>23</sup> RP 851.

personal verdict and the verdict of the jury. In delivering the unanimous verdict, the jury expressed no confusion. RP 855-56.

The crime of leading organized crime requires the State to establish beyond a reasonable doubt that the defendant intentionally organized, managed, directed, supervised, or financed any three or more persons with the intent to engage in a pattern of criminal profiteering activity. RCW 9A.82.060. Further, RCW 9A.82.010(12) defines “pattern of criminal profiteering activity” as “engaging in at least three acts of criminal profiteering,” with all three acts occurring within a five-year period. *See State v. Harris*, 167 Wn. App. 340, 356, 272 P.3d 299 (2012), *review denied*, 175 Wn.2d 1006 (2012).

As alleged in this case, criminal profiteering included the act of delivery or manufacture of a controlled substance. RCW 9A.82.010(4)(q). The statute does not require any of the three individuals led by the defendant to have actually engaged in any of the three acts of criminal profiteering. *State v. Barnes*, 85 Wn. App. 638, 666, 932 P.2d 669 (1997), *as amended on denial of reconsideration* (Apr. 18, 1997), *review denied*, 133 Wn.2d 1021 (1997). Specifically, Division Two held:

The reference to leading three or more persons is not linked conjunctively to the commission of the three predicate acts. In other words, the defendant must lead three persons as Barnes did here. And the defendant must intend to commit three acts of criminal profiteering as Barnes did here. But there is no requirement that any

of those three people actually engage in any of the charged acts of criminal profiteering. The defendant may engage in some of the activities with others and perform others alone.

*Id.* at 665-66.

*Standard of review.*

An appellate court reviews the adequacy of a trial court's jury instructions de novo, within the context of the jury instructions as a whole. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

Furthermore, a trial court's decision on whether to give an additional instruction to a deliberating jury is reviewed for abuse of discretion.<sup>24</sup> *State v. Sublett*, 176 Wn.2d 58, 82, 292 P.3d 715 (2012); *In re Det. of Pouncy*, 168 Wn.2d 382, 390, 229 P.3d 678 (2010) (review for abuse of discretion); *State v. Becklin*, 163 Wn.2d 519, 529, 182 P.3d 944 (2008); *see also* CrR 6.15(f)(1). Accordingly, it is within the sound discretion of the trial court whether to give further instructions to a jury after it has begun deliberations. *State v. Ng*, 110 Wn.2d 32, 42, 750 P.2d 632 (1988). A trial court has no duty to answer a jury question. *State v. Langdon*, 42 Wn. App. 715, 718, 713 P.2d 120 (1986), *review denied*, 105 Wn.2d 1013 (1986).

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<sup>24</sup> Whether words used in an instruction require definition is a matter of discretion to be exercised by the trial court. *In re Det. of Pouncy*, 168 Wn.2d at 390. Courts do not need to define words and expressions that are of ordinary understanding. *Id.*

A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. *State v. Scherf*, 192 Wn.2d 350, 387, 429 P.3d 776 (2018). This standard can be met when the superior court relies on unsupported facts, takes a view that no reasonable person would take, applies an incorrect legal standard, or bases its ruling on an erroneous legal view. *State v. Lord*, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007).

Due process requires that a criminal defendant be convicted only when every element of the charged crime is proved beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). “Accordingly, a trial court errs by failing to accurately instruct the jury as to each element of a charged crime if an instruction relieves the State of its burden of proving every essential element of the crime beyond a reasonable doubt.” *State v. Williams*, 136 Wn. App 486, 493, 150 P.3d 111 (2007). In addition, due process requires that the jury be fully instructed on the defense theory of the case. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Jury instructions are sufficient if they allow the parties to argue their theories of the case and properly inform the jury of the applicable law. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).

Sutton does not allege the court's instructions failed to inform the jury as to the elements of leading organized crime, that the jury was not instructed on the State's burden to establish that crime beyond a reasonable doubt, or that her counsel was not able to argue the defense theory of the case. Rather, Sutton argues the trial court should have taken the jury's "confusion" at face value and provided a supplemental instruction directing the jury to the elements instruction for leading organized crime, instruction number 25. *See* Appellant's Br. 18-19.

It is presumed that jurors follow the instructions. *State v. Swan*, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990), *as clarified on denial of reconsideration* (June 22, 1990); *State v. Morfin*, 171 Wn. App. 1, 12, 287 P.3d 600 (2012). In *Ng*, the defendant argued the trial court erred by not answering "yes" to a jury question as to whether duress applied to lesser included instructions. The trial court answered with: "Please refer to the instructions. The court cannot provide any additional instructions or explanations." 110 Wn.2d at 42. The defendant argued on appeal that the trial court should have answered "yes" because it was an accurate statement of the law. *Id.* Like what occurred in the present case, the trial court in *Ng* stated, in pertinent part: "In my opinion it would have been wrong for the court to further explain the instructions that had been given the jury. Since

the instructions answered the [question] that was being asked of the court.” *Id.* at 43 (alteration in the original).

In affirming the defendant’s convictions for first-degree robbery and second-degree assault, our high court held that where the instructions accurately state the law, the trial court need not further instruct the jury. *Id.* at 42-44. Importantly, the Court found that a trial court does not abuse its discretion by referring the jury to the instructions already given that correctly state the law. *Id.* at 42-44. More so, jury questions do not create an inference that the “entire jury was confused, or that any confusion was not clarified before a final verdict was reached.” *Id.* at 43. In addition, questions from the jury are not final determinations; “the decision of the jury is contained exclusively in the verdict.” *Id.* at 43; *see also, State v. Linton*, 156 Wn.2d 777, 787, 132 P.3d 127 (2006), *as amended* (June 19, 2006) (“[t]he mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors’ intentions and beliefs, are all factors inhering in the jury’s processes in arriving at its verdict, and, therefore, inhere in the verdict itself”).

For example, in *Langdon*, the defendant was charged with first-degree robbery, and the jury was instructed on first-and second-degree

robbery, as well as accomplice liability and theft. 42 Wn. App. at 717. Langdon claimed that his friend attacked the victim and that he struggled with his friend to make him let go. However, Langdon admitted that he picked up the victim's keys and money which had fallen during the attack. *Id.* at 716. During deliberations, the jury sent a question to the court asking, "Does 'committing' mean aid in escaping?" The trial court replied, "You are bound by those instructions already given to you." *Id.* at 717.

On appeal, Langdon argued that the judge's reply was inaccurate because it failed to answer the jury's question. Division One of this Court summarily rejected this argument, noting that the trial court had no duty to answer the question and there was no underlying instructional error to be cured. Moreover, even if the jury were genuinely confused about the accomplice instruction, that instruction was not challenged below or on appeal, so its adequacy was not before the court. *Id.* at 718.

Similarly, in *State v. Miller*, 40 Wn. App. 483, 486, 698 P.2d 1123 (1985), *review denied*, 104 Wn.2d 1010 (1985), the jury sent an inquiry to the court during deliberations: "Does the acceptance of nonsolicited money offered to prevent real or imagined injury constitute robbery?" *Id.* at 486. There was nothing in the record as to the trial court's response. *Id.* Division

One of this Court found, even accepting the facts as presented by the defendant, that:

[E]ven if the jury was confused at the time of the inquiry, this situation could have changed during deliberations. This court has recently held that questions from the jury are not final determinations, and the decision of the jury is contained exclusively in the verdict.

*Id.* at 489.

Likewise, in *State v. Bockman*, 37 Wn. App. 474, 493, 682 P.2d 925 (1984), *review denied*, 102 Wn.2d 1002 (1984), the jury asked during deliberations, “If the defendants leave the scene of a second degree burglary, then an assault occurred by a third party, are those two then guilty by association of first degree burglary?” *Id.* at 493. Like this case, the trial court told the jury, “You have received all of the Court’s instructions.” *Id.* at 493. The *Bockman* court held that the question sent to the judge is not a final determination by the jury. *Id.* at 493. Only the final verdict contains the jury’s decision. *Id.*

In like manner, in *State v. Hightower*, 36 Wn. App. 536, 549, 676 P.2d 1016 (1984), the court held that it was not error to refuse to give the defendant’s proposed supplemental instruction regarding a deadlocked jury because that instruction “was essentially duplicitous of uniform instructions given.”

In the present case, the jury was instructed on the statutory elements of leading organized crime and that the State bears the burden of proving all elements beyond a reasonable doubt. Sutton does not assign error to any particular instruction as not being an accurate statement of the law or that the instructions as a whole are unconstitutionally inadequate and violate due process. Sutton's failure to challenge the underlying instructions in the trial court and on appeal precludes a finding that the trial court abused its discretion when it referred the jury back to the proper and accurate instructions. *See Langdon*, 42 Wn. App. at 717-18.

Sutton's reliance on this Court's opinion in *State v. Backemeyer*, 5 Wn. App. 2d 841, 428 P.3d 366 (2018), *review denied*, 192 Wn.2d 1025 (2019), is unavailing. In that case, Backemeyer was charged with first-degree assault; Backemeyer asserted self-defense at trial. *Id.* at 845. Over the State's objection, the court permitted a "stand your ground" instruction proposed by the defense. *Id.* at 846. This Court found that read in isolation, the "stand your ground" instruction suggested that Backemeyer had the right to act in self-defense if he was in a place he had the right to be. *Id.* at 847. The jury had two questions concerning the self-defense instructions. To the first question, the court responded "Read your instructions." *Id.* at 847. Regarding the second question, the trial court again replied "[p]lease read your instructions." *Id.* (alteration in the original). This Court found that

the *second jury question* “made it clear that the jury had not reviewed [the self-defense] instruction.” *Id.*

On appeal, Backemeyer claimed ineffective assistance of counsel arguing that after the jury’s first question, defense counsel was concerned that the jury might be confused which could lead to a conviction without the jury understanding the defendant’s right to self-defense. This Court agreed finding defense counsel had no legitimate strategy; defense counsel should have asked the jury be instructed to specifically reread the self-defense instruction. *Id.* at 849. Moreover, this Court found the defendant was prejudiced determining that the “record is manifestly clear that the jury did not review [the self-defense instruction], which set forth the law of self-defense. The rebuttable presumption that the jury understands and follows the court’s instructions was overcome. Not once, but twice, the jury sent questions to the court that were plainly answerable if the jury had reviewed the self-defense instruction.” *Id.* at 850.

In the instant case, defense counsel requested that the trial court refer the jury to reread instruction number 25 regarding the elements instruction. The trial court exercised its discretion and chose to instruct the jury to refer to all of the instructions.<sup>25</sup> There is nothing in the record to suggest the jury

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<sup>25</sup> Sutton argues that if the court had instructed the jury per defense counsel’s request – asking the jury to reread the leading organized crime elements instruction

did not heed the trial court's admonition and reread *all* of the instructions, including the elements instruction regarding the leading organized crime charge, to resolve whatever confusion, if any, prior to reaching its verdict. Indeed, there was not a second question, as in *Backemeyer*, reflecting that one juror or more jurors continued to have a question as to which three individuals had to be involved in Sutton's pattern of criminal profiteering.

As determined by our Supreme Court in *Ng*, jury questions do not create an inference that the entire jury was confused, or that any confusion was not resolved before the jury reached its final verdict. Moreover, there is nothing in the record that the jury did not follow the court's instructions. The fact that the jury had a question does not mean it misapplied the law or the facts to the law. For the defendant to divine or speculate otherwise is simply not supported by the record.

To the extent that Sutton argues the jury's "confusion" was heightened by the State's closing argument when it referenced that Price was managed by Sutton and that the trial court's response compromised the defense case is not supported by the record. *See* Appellant's Br. at 16, 19-20. During closing argument, the deputy prosecutor unequivocally argued

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– that any potential error on appeal would have been invited. However, the defendant fails to consider or discuss a potential ineffective assistance of counsel claim if defense counsel errs in his or her recommendation to the trial court. *See Backemeyer, supra.*

to the jury that the State had to prove that Sutton “‘[o]rganized, managed, directed, supervised or financed three or more persons,’ and among those three or more persons specifically we have to prove Ken Stone, Alvaro Guajardo, and Colby Vodder.” RP 806 (emphasis added). The deputy prosecutor further remarked:

Mr. Stone was her boyfriend. Mr. Stone would also help her. He was present when she went up there to abduct Mr. Snow. He was muscle. Mr. Stone was muscle. Mr. Guajardo was muscle, also. You heard that Mr. Guajardo also sold drugs, but he also was muscle. He was out there at the Green home when they were shaking down Dillon Tower.

Mr. Stone and Mr. Guajardo, again, also helped with the abduction of Mr. Snow. And you heard Colby Vodder also responded to Ms. Sutton’s call and Colby restrained Mr. Snow during the course of that and he was out at the house frequently and he also sold drugs and was a drug dealer.

Again, these people who have participated with Ms. Sutton and worked for Ms. Sutton in her drug profiteering activities include not only dealers, and she talked about all the people she used for dealing, but also again, Mr. Stone, Mr. Guajardo and Mr. Vodder who sold and also worked as muscle for Ms. Sutton.

RP 807-08.

Regarding Price, the deputy prosecutor stated:

And you heard later in the investigation they made contact with a Nicole Price. Ms. Price ran errands frequently. She spent, according to Ms. Sutton, four hours a day with Ms. Sutton, drove Ms. Sutton all over place, got drugs. She got her tattoos over there at Ms. Sutton’s and when the Suttons were and Mr. Joyce were

evicted, Ms. Sutton gave her a mattress that she said had been in the shop.

RP 795-96.

And again, ladies and gentlemen, not only when we prove that as far as organized, managed, directed or supervised, we heard that she employed Ms. Price. Ms. Price would take her out for four hours a day for delivering the drugs. That was one of the people that worked for her. And they don't have to be people that sell, just part of her organization.

RP 807.

Defense counsel also made it clear during his summation that the State was required to prove that Sutton organized, managed, directed or financed Stone, Guajardo and Vodder regarding the leading organized crime charge:

*Who did she manage? Now, the State has charged specifically three people, that no matter who else you find she may have been in charge of under their theory, they have to prove beyond a reasonable doubt that she managed these three people. And if you believe she did not manage one of them, you have to return a not guilty to this charge.*

RP 816 (emphasis added).

Defense counsel then specifically discussed and argued that the State had not met its burden to prove that Sutton organized, managed or directed Guajardo, Stone, or Vodder for purposes of establishing the crime.

RP 816-18. Neither party presented argument on the theory that someone other than Stone, Guajardo, and Vodder were the three individuals involved

with Sutton for purposes of the leading organized crime charge. It can be inferred from the State's argument regarding Price that Sutton had control over the individuals within her network and to establish Sutton's frequent distribution of drugs in furtherance of that network.

Sutton's argument that the jury could have convicted her so long as the jury believed it could convict if any three people helped in her enterprise is pure conjecture.<sup>26</sup> There is nothing to suggest that the jury did not rely on the elements instruction to convict her of the crime. Indeed, an appellate court defers the fact finder's determination on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Trey M.*, 186 Wn.2d 884, 905, 383 P.3d 474 (2016), *cert. denied*, 138 S.Ct. 313 (2017).

In addition, neither the court's elements instruction nor the closing argument of the lawyers steered the jury in a path different than to determine whether it was Sutton's intent to organize, manage, direct or finance Guajardo, Stone, and Vodder in her enterprise. In that regard, there was testimony that Vodder came to Sutton's home approximately 10 times a

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<sup>26</sup> Sutton does assign error to or challenge the sufficiency of the evidence to support the jury's verdicts. A criminal defendant's claim of insufficient evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. *State v. Condon*, 182 Wn.2d 307, 314, 343 P.3d 357 (2015). A verdict may be supported by either circumstantial or direct evidence, as both may be equally reliable. *State v. Brooks*, 45 Wn. App. 824, 826, 727 P.2d 988 (1986).

month and sold heroin at Sutton's house. RP 283. The jury could have reasonably inferred that the sale and distribution of the heroin was connected to Sutton; otherwise, common sense dictates Vodder would have sold the heroin elsewhere out of convenience and for a higher profit. The jury could have also reasonably inferred that Vodder sold drugs for Sutton because Sutton and Stone allowed him to reside in the shop on the property. Notwithstanding, the State did not have to establish that Vodder sold drugs for Sutton, even though it can be reasonably inferred that he did.<sup>27</sup> If Sutton directed Vodder to exact punishment on those individuals who fell out of line regarding the sale of the drugs,<sup>28</sup> that action would have been factually and legally sufficient under the statute.

Sutton further claims that the trial court acted unreasonably by not further instructing the jury because instruction number 25 allegedly contained a scrivener's error; Sutton argues a colon rather than a comma should have been used to separate and precede the proper names within that instruction. *See* Appellant's Br. at 17. Because this error is raised for the

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<sup>27</sup> *See* Appellant's Br. at 19.

<sup>28</sup> Per Sutton's statement to Schoonover, Vodder struck Snow with the lawn mower blade in the shop after Snow had been tied up by Stone. RP 427. There was also testimony that Vodder did not allow Joyce to enter the shop, after Joyce heard something being dragged on the floor of the shop. The jury could have reasonably inferred that Vodder and Guajardo were moving or doing something with Snow's body for Sutton at that time. *See* RP 289-90.

first time on appeal, Sutton must show the error was manifest – how it actually affected her rights at trial.<sup>29</sup> *See State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Sutton fails to do so, and instead only offers conjecture that the jury relied on the “comma” in that particular instruction, when reaching its verdict. Sutton fails to offer any authority or argument on how the jury could have been confused or misled. Sutton’s argument fails to give the jury credit for having ordinary or above average intelligence. *See State v. Edwards*, 17 Wn. App. 355, 359, 563 P.2d 212 (1977). Even if this Court were to consider Sutton’s argument, it fails as any alleged error was harmless. Although Sutton has not claimed an omission or misstatement in jury instruction number 25, an omission or misstatement is harmless if it appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *State v. Nelson*, 191 Wn.2d 61, 69, 419 P.3d 410 (2018). Instruction number 25 properly stated the essential elements for the crime. Sutton’s argument that the jury could have been influenced by using a “comma” rather than a “colon” in that instruction is specious at best. If error, it was harmless as there is nothing in the record to support a claim that it impacted the verdict.

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<sup>29</sup> Defense counsel did not object or take exception to the court’s instruction number 25. RP 761-66. Likewise, the instruction is not challenged on appeal. Therefore, the issue of the instruction’s adequacy is not before the Court. RAP 2.5(a), RAP 10.3(g).

#### IV. CONCLUSION

Sutton has not challenged the sufficiency of the evidence for the conviction of leading organized crime. Moreover, Sutton has not assigned error or argued that any of the court's instructions contain omissions or misstatements, or that the instructions were not accurate statements of the law which did not allow her counsel to argue the defense theory of the case.

Sutton claims the trial court abused its discretion and the jury reached an incorrect verdict because the trial court answered the jury's question by instructing the jury to refer to the court's instructions as a whole rather than specifically instructing the jury to reread instruction number 25, which had previously been given to the jury. Since it is presumed that a jury reads the court's instructions, there is nothing to overcome this presumption and to suggest the jury did not reread instruction number 25 after the court answered its question to resolve an ambiguity, if any, regarding that instruction.

Lastly, *Backemeyer* should be limited to its facts. To do otherwise would always invite litigation of factual issues concerning a jury question. Sutton's position in this case would mandate that a trial court always substantively respond to a jury question, notwithstanding the Supreme Court's long-standing precedent that it is within the trial court's discretion

to do so and that a trial court need not respond to a jury question if the instructions accurately state the law.

In the instant case, the trial court did not abuse its discretion by simply referring the jury to refer to the instructions since the instructions were accurate statements of the law. The State requests this Court affirm the judgment and sentence.

Respectfully submitted this 16 day of January, 2020.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

CHERYL SUTTON,

Appellant.

NO. 36804-1-III

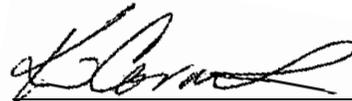
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SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on January 16, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart  
andrea@2arrows.net

1/16/2020  
(Date)

Spokane, WA  
(Place)

  
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(Signature)

**SPOKANE COUNTY PROSECUTOR**

**January 16, 2020 - 10:34 AM**

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