

70132-1

70132-1

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2013 DEC 30 PM 3:56

NO. 70132-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

TOM CHUOL,

Appellant.

REC'D
DEC 30 2013
King County Prosecutor
Appellate Unit

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

The Honorable Judith Ramseyer, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Pretrial Proceedings</u>	2
2. <u>Trial Evidence</u>	3
3. <u>Opinion On Chuol's Veracity</u>	5
4. <u>ER 404(b)/Limiting Instruction</u>	7
C. <u>ARGUMENT</u>	11
1. THE TRIAL COURT ERRED WHEN IT DENIED DEFENSE COUNSEL'S REQUEST TO SPECIFICALLY PROHIBIT JURORS' USE OF ER 404(b) EVIDENCE TO SHOW CRIMINAL PROPENSITY.....	11
2. THE TRIAL COURT'S REPEATED COMMENT ON THE EVIDENCE VIOLATED ARTICLE 4, § 16 OF THE WASHINGTON CONSTITUTION AND DENIED CHUOL A FAIR TRIAL.....	14
3. OFFICER LILJE'S COMMENT ON CHUOL'S VERACITY DENIED CHUOL A FAIR TRIAL.....	17
4. CUMULATIVE ERROR DENIED CHUOL A FAIR TRIAL.....	19
D. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Seattle v. Arensmeyer</u> 6 Wn. App. 116, 491 P.2d 1305 (1971).....	15
<u>State v. Badda</u> 63 Wn.2d 176, 385 P.2d 859 (1963).....	19
<u>State v. Becker</u> 132 Wn.2d 54, 935 P.2d 1321 (1997).....	16
<u>State v. Black</u> 109 Wn.2d 336, 745 P.2d 12 (1987).....	17
<u>State v. Coe</u> 101 Wn.2d 772, 684 P.2d 668 (1984).....	19
<u>State v. Demery</u> 144 Wn.2d 753, 30 P.3d 1278 (2001).....	17, 18
<u>State v. Foxhoven</u> 161 Wn.2d 168, 163 P.3d 786 (2006).....	12
<u>State v. Gresham</u> 173 Wn.2d 405, 269 P.3d 207 (2012).....	12, 13, 20
<u>State v. Guloy</u> 104 Wn.2d 412, 705 P.2d 1182 (1985) <u>cert. denied</u> , 475 U.S. 1020 (1986).....	19
<u>State v. Lampshire</u> 74 Wn.2d 888, 447 P.2d 727 (1968).....	15, 16
<u>State v. Levy</u> 156 Wn.2d 709, 132 P.3d 1076 (2006).....	15, 16
<u>State v. Montgomery</u> 163 Wn.2d 577, 183 P.3d 267 (2008).....	18

TABLE OF AUTHORITIES

	Page
<u>State v. Saltarelli</u> 98 Wn.2d 358, 655 P.2d 697 (1982).....	12
<u>State v. Smith</u> 106 Wn.2d 772, 725 P.2d 951 (1986).....	13
<u>State v. Thompson</u> 90 Wn. App. 41, 950 P.2d 977 <u>review denied</u> , 136 Wn.2d 1002 (1998).....	18
 <u>FEDERAL CASES</u>	
<u>Miranda v. Arizona</u> 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	5
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
ER 404(b).....	1, 2, 3, 7, 11, 12, 14, 20
Wash. Const. Art. 4, § 16	15

A. ASSIGNMENTS OF ERROR

1. The ER 404(b) limiting instructions were incomplete and insufficient.

2. The limiting instructions also contained impermissible comments on the evidence in violation of article 4, § 16 of the Washington Constitution.

3. Appellant was denied a fair trial when the court permitted a law enforcement officer to express an opinion on appellant's veracity.

4. Cumulative trial error denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. Defense counsel attempted to mitigate the improper prejudice from the State's extensive use of prior bad acts evidence. Despite counsel's efforts, the trial court refused to explicitly instruct jurors they could not use the evidence to show appellant had a propensity or particular disposition to commit criminal acts. Did the trial court err, and deny appellant a fair trial, when it used deficient oral and written limiting instructions?

2. The Washington Constitution forbids judicial comments on the evidence. A trial judge violates this prohibition when she makes a comment suggesting her opinion of the evidence. In this

case, jury instructions addressing evidence admitted under ER 404(b) indicated the critical factual dispute in the case – whether appellant made certain threats – had been resolved in the prosecution's favor, i.e., the threats were made. Do these comments on the evidence warrant a new trial?

3. Witnesses may not offer an opinion on whether a defendant told the truth. At appellant's trial, a law enforcement officer was permitted to violate this prohibition. Did this deny appellant his constitutional right to a fair and impartial trial?

4. Assuming none of these errors, alone, warrants a new trial, does their combined effect warrant that result?

B. STATEMENT OF THE CASE

1. Pretrial Proceedings

The King County Prosecutor's Office charged Tom Chuol with (count 1) Felony Harassment and (count 2) Threats to Bomb or Injure Property. CP 40-41. Chuol, a Swedish Medical Center employee, was charged in connection with statements he allegedly made to a co-worker threatening harm to her and others with whom he worked. CP 2-3.

The State identified evidence of prior bad acts it hoped to use against Chuol at trial. Supp. CP ____ (sub no. 45, State's

Memorandum Regarding the Admissibility of Evidence Under ER 404(b)). Following a hearing, the Honorable Judith H. Ramseyer found a majority of the State's evidence admissible. 1RP¹ 41-78, 111-116, 123-132.

The jury acquitted Chuol on count 2, but convicted him of the Felony Harassment charge in count 1. CP 42-43. Judge Ramseyer imposed a standard range one-month sentence, and Chuol timely filed his Notice of Appeal. CP 68, 72-73.

2. Trial Evidence

In July 2012, Chuol worked for Swedish Medical Center, Cherry Hill location, where his duties included working in the warehouse, sanitizing equipment, and general custodial tasks. 4RP 76-77. Chuol carpooled several days a week with co-worker Tracy Robinson. 3RP 28, 30-32, 51.

According to Robinson, during a ride with Chuol on July 20, 2012, Chuol was angry about issues at work. 3RP 29-30. Chuol allegedly said he wanted to blow up his co-workers with a bomb. When Robinson asked if she was included, Chuol said "yes." 3RP

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – March 4, 2013; 2RP – March 5, 2013; 3RP – March 6, 2013; 4RP – March 7, 2013; 5RP – March 11, 2013; 6RP – March 12, 13, and 29, 2013.

30, 33. Robinson claimed that Chuol also said he could kill everyone with a gun, and when she pointed out that he would go to jail, Chuol responded that he could throw the gun away after using it. 3RP 32-33.

According to Robinson, Chuol also had previously said he didn't like Americans and he didn't like Filipinos, expressing displeasure with two Filipino co-workers in particular – Frank Perez and Romulo Alejo. 3RP 33-34, 41, 82-83, 134. On one occasion, he also spoke of a mass shooting in Colorado. When Robinson told him he should not talk about that event, Chuol started laughing. 3RP 42.

Robinson felt Chuol's July 20 comments involved a workplace issue and she did not contact police. 3RP 37. Once at work the following day, however, she told a co-worker and a supervisor what Chuol had said. 3RP 38-39, 55-57. Notably, Robinson initially did not claim Chuol had said anything about a bomb or blowing up the hospital; her only allegation involved Chuol threatening to get a gun and shooting people. 3RP 124-125. The supervisor contacted police, who responded to the hospital, interviewed Robinson, and arrested Chuol. 3RP 11-21, 92-95, 143-147.

Chuol testified at trial and denied saying any of the things Robinson attributed to him. He testified no one was angry during their car ride on July 20 and nothing unusual occurred. 4RP 106-107. He never mentioned guns or bombs or any frustrations with co-workers. 4RP 111. He did not threaten Robinson. 4RP 112. He became a U.S. citizen in 2007 and loves America. 4RP 113-117. Moreover, he harbors no ill will against members of the Filipino community. 4RP 118. He testified that he had no reason to say any of the things of which he was being accused. 4RP 120-121.

3. Opinion On Chuol's Veracity

The officer who responded to Swedish and arrested Chuol was Seattle Police Officer Matthew Lilje. At trial, Lilje testified that, after he provided Chuol with Miranda² warnings, he questioned Chuol about Robinson's allegations. 3RP 21. Lilje asked if Chuol made any statements that could be interpreted as a threat to kill or blow up the hospital, asked if he said he would shoot anyone, asked if he said he would blow up the hospital, and asked if he specifically threatened to kill Robinson. 3RP 22. To each question, Chuol responded, "why would I say that"? 3RP 22.

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The following exchange then occurred during the prosecutor's questioning of Lilje:

Q: Why did you keep asking the questions and getting more specific?

[Defense]: Objection, this part is – why the officer acted, is not relevant.

Court: I'll overrule the objection.

A: I felt that the manner in which he was answering the question –

[Defense]: Objection, Your Honor. The officer is about to give an opinion on veracity. I would like to have a 403 hearing, with a balancing conducting on the record.

[Prosecutor]: Your Honor, the officer should be allowed to – there was a conversation between the defendant and the officer. The officer should be able to express why he was asking the questions that he asked.

Court: I agree. I will overrule the objection. If at a recess we need to pursue this matter, we can. I believe that the officer is allowed to provide testimony as to the conduct he took and his motivation for doing so.

A: I continued to ask the question because I felt that the answer I had been given was not complete.

[Defense]: I ask for a continuing objection on this and instruction to the jury that witnesses are not allowed to comment on the veracity of other witnesses.

Q: Did the defendant say anything else to you?

A: No, he did not.

Court: [Defense counsel], your continuing objection is noted for the record. Thank you.

Q: No further questions, Your Honor.

3RP 22-23.

4. ER 404(b)/Limiting Instruction

Given Judge Ramseyer's decision to admit significant bad acts evidence under ER 404(b), defense counsel noted the necessity of a limiting instruction, and the State proposed one for each applicable witness. 1RP 120; 2RP 3-4. Defense counsel objected, arguing the proposed instructions were insufficient because they failed to expressly instruct jurors they could not use the evidence to find Chuol was a "criminal type," had a propensity to commit crimes, and therefore likely committed the charged offenses. CP 35-36; 2RP 24-28. Judge Ramseyer overruled the defense objections, finding the specific prohibition unnecessary. 2RP 26-27.

James Ramseyer gave an oral limiting instruction during the testimony of several prosecution witnesses. During the prosecution's examination of Robinson, just prior to certain testimony, Judge Ramseyer instructed jurors:

Before this evidence is allowed, the court advises you that you may consider the evidence only for the purpose of determining whether Tracy Robinson was in reasonable fear that these threats would be carried out, determining whether the defendant had a motive to make these threats, and determining the full context and history surrounding these threats. You must not consider the evidence for any other purpose.

3RP 43-44. Robinson then testified that she was aware of an incident involving two other Swedish workers – Romulo Alejo and Frank Perez – in which Chuol had become angry with the men and “vented his anger” toward them. Chuol had also said he did not like these co-workers, causing Robinson to fear for their safety in light of Chuol’s July 20th remarks. 3RP 44-47.

Prior to the testimony of Romulo Alejo and Frank Perez, the court gave a similar instruction, limiting consideration of the evidence to Robinson’s reasonable fear, Chuol’s motive, and context/history. 3RP 74, 131. Both men are Filipino and serve as “leads,” meaning they have supervisory authority at the hospital in the absence of an actual supervisor on scene. They testified to the past incident (referenced by Robinson) where Chuol refused to recognize their authority to assign him a task at the hospital, became angry and loud, and called them and the situation “bullshit.” 3RP 75-83, 129-134. Chuol denied threatening either man and testified he had

simply been trying to explain to them that he could not take on another task without receiving additional overtime hours, which was not permitted unless authorized by an actual supervisor. 4RP 78-88.

During the testimony of Mila Pillar, one of Chuol's supervisors, the court limited jurors' consideration of the evidence to Chuol's motive to make the threats and context/history. 3RP 120. Pillar testified to an incident a few months prior to July 2012 in which she found Chuol in an area of the hospital where he was not supposed to be. According to Pillar, when confronted, Chuol became upset, raised his voice, and called her a racist. 3RP 120-121. Chuol recalled the event, but denied he was angry or that he called Pillar a racist. 4RP 89-93.

During the testimony of Mark Jupiter, another of Chuol's supervisors, the court similarly limited jurors' consideration of the evidence to motive to make the threats and context/history. 4RP 16. Jupiter testified that Chuol had complained in the past about favoritism shown toward Filipino employees, discrimination in hiring against members of his African community, and that Alejo and Perez burdened him with an unfair workload. 4RP 16-18.

Finally, during the testimony of another co-worker, Rahel Deste, the court limited jurors' consideration of the evidence to

context/history and “whether the defendant could foresee that these threats would be interpreted as serious threats.” 4RP 26. Deste then testified that one or two weeks before July 20, 2012, Chuol had talked about killing a co-worker named “Joel,” with whom he was upset. Like Chuol, Deste is from Africa, where such statements are not taken seriously. According to Deste, Chuol indicated at the time he was only joking, but Deste warned Chuol not to say such things in the U.S. 4RP 26-27. Chuol denied ever telling Deste he wanted to harm Joel. 4RP 88-89.

Consistent with the oral limiting instructions, at the end of trial, jurors were instructed as follows:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the testimony of Romulo Alejo, Franklin Perez, Mark Jupiter, and Rahel Deste; and portions of the testimony of Tracy Robinson, and Mila Pillar. It may be considered by you only for the purposes of: determining whether Tracy Robinson was in reasonable fear that these threats would be carried out, determining whether the Defendant had motive to make these threats; determining the full context and history surrounding these threats; and determining whether the Defendant could foresee that these threats would be interpreted as serious threats (as previously instructed by the court during testimony). You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 54. As with the oral instructions, Judge Ramseyer denied

defense counsel's request to include specific language prohibiting use of the evidence to establish Chuol had a particular propensity and therefore more likely committed the charged offenses. CP 35-36; 4RP 130-131; 5RP 8-9.

Moreover, as discussed more thoroughly below, all of the limiting instructions the court used referred to "these threats" rather than describing them as "alleged threats" or using similar language, thereby indicating the threats had, in fact, been made. See 3RP 43-44, 74, 120, 131; 4RP 16, 26; CP 54.

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT DENIED DEFENSE COUNSEL'S REQUEST TO SPECIFICALLY PROHIBIT JURORS' USE OF ER 404(b) EVIDENCE TO SHOW CRIMINAL PROPENSITY.

The prosecution may not use evidence to demonstrate a defendant's criminal propensity:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b). The rule "is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that a

person acted in conformity with that character.” State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

Consistent with this categorical bar, Chuol requested limiting instructions (oral and written) expressly prohibiting jurors from using any portion of the State’s ER 404(b) evidence for this purpose. CP 35-36; 2RP 24-28; 4RP 130-131. Judge Ramseyer erred when she declined these requests. 2RP 26-27; 5RP 8-9.

The defendant is entitled to a limiting instruction upon request. Gresham, 173 Wn.2d at 423 (citing State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2006); State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)). Moreover, where an instruction is requested, it must be correct. Id. at 424. And, critically, “An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character.” Id. at 423-424 (emphasis added).

While the court’s oral and written instructions identified several purposes for which jurors could use the ER 404(b) evidence and told jurors not to consider the evidence for any other

purpose, they fell short of the express prohibition mandated under Gresham. Consistent with the express language of ER 404(b), jurors also needed to be told the one way in which they absolutely could not use the evidence.

The absence of a sufficient limiting instruction requires a new trial if, within reasonable probabilities, it materially affected the outcome at trial. Gresham, 173 Wn.2d at 425 (citing State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). In Gresham, the error was harmless because “the remaining overwhelming evidence of [the defendant’s] guilt persuades us that the outcome of his trial would not have been materially affected.” Id.

In Chuol’s case, however, the evidence was not overwhelming. Chuol flatly denied making any threats to shoot or bomb his co-workers. Jurors’ verdicts turned on whom they believed – Chuol or Robinson. They may have acquitted on count 2 (Threats to Bomb or Injure Property) based, in part, on Robinson’s failure to allege a threatened bombing when she first reported her allegations to a supervisor. See 3RP 124-125 (alleging only a threatened shooting).

Count 1 would have been a closer call, and evidence Chuol previously lost his temper and engaged in threatening behavior

(including a threat to kill a co-worker named Joel) may have convinced jurors he had a propensity for such behavior and, therefore, was more likely to have threatened Robinson's life. Thus, there is a reasonable probability the absence of language expressly telling jurors they could not consider the ER 404(b) evidence for this purpose affected the ultimate outcome at trial.

2. THE TRIAL COURT'S REPEATED COMMENT ON THE EVIDENCE VIOLATED ARTICLE 4, § 16 OF THE WASHINGTON CONSTITUTION AND DENIED CHUOL A FAIR TRIAL.

Not only were the trial court's ER 404(b) limiting instructions insufficient because they failed to include an express prohibition against using the evidence to demonstrate propensity, they also contained repeated comments on the evidence. Specifically, each and every instruction referred to "these threats" – presupposing the threats actually occurred – rather than referring to "alleged threats" or using other language making it clear an essential and disputed issue was still in question.

The instruction used during Robinson's testimony, for example, told jurors:

Before this evidence is allowed, the court advises you that you may consider the evidence only for the purpose of determining whether Tracy Robinson was in reasonable fear that these threats would be carried out, determining whether the defendant had a motive to make these threats, and determining the full context and history surrounding these threats. You must not consider the evidence for any other purpose.

3RP 43-44 (emphasis added). Every other oral and written instruction also referred to “these threats” in a similar manner. See 3RP 74, 120, 131; 4RP 16, 26; CP 54.

Article 4, § 16 of the Washington Constitution provides, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” The purpose of this constitutional prohibition “is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court’s opinion of the evidence submitted.” State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968).

The prohibition is strictly applied. Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971). The court’s opinion need not be express to violate the prohibition; it can simply be implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Moreover, this constitutional violation may be raised for the first time on appeal. The failure to object or move for mistrial at the

trial level is not a prohibition to appellate review. Levy, 156 Wn.2d at 719-720; State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); Lampshire, 74 Wn.2d at 893.

A comment in violation of article 4, § 16 is presumed prejudicial and the State bears the burden to show that no prejudice resulted. Levy, 156 Wn.2d at 723-25. That jurors were instructed to disregard such comments is not determinative. Lampshire, 74 Wn.2d at 892 (instruction requiring jury to disregard comments of court and counsel incapable of curing prejudice). In deciding whether a comment on the evidence is harmless, the Washington Supreme Court has looked to whether it was directed at an important and disputed issue at trial. See Becker, 132 Wn.2d at 65 (comment addressed important and disputed issue; reversed); Levy, 156 Wn.2d at 726 (subject of comment “never challenged in any way by defendant”; harmless).

The trial court’s repeated references at Chuol’s trial to “these threats” implied the threats occurred despite the fact this was *the* critical disputed issue at trial. By failing to refer to “the alleged threats” or using another similar description, the court’s comment resolved in the prosecution’s favor a vigorously contested factual dispute. In a case where there was no physical evidence to

support the charges – only the contradictory claims of two individuals – the State cannot demonstrate the judicial comments were harmless.

3. OFFICER LILJE'S COMMENT ON CHUOL'S VERACITY DENIED CHUOL A FAIR TRIAL.

Over defense objection, Seattle Police Officer Matthew Lilje was permitted to testify that, in his opinion, the answers Chuol had provided regarding whether he had threatened to shoot, blow up, or hurt anyone were "not complete." 3RP 22-23. This was an impermissible opinion on Chuol's veracity.

"No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Included within this prohibition are opinions on whether a particular individual told the truth. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); Black, 109 Wn.2d at 349.

This prohibition stems from the Sixth Amendment to the United States Constitution and article 1, § 22 of the Washington Constitution, which guarantee the right to a fair trial before an impartial trier of fact. A witness's opinion as to the defendant's guilt, even by mere inference, violates this right by invading the province of

the jury. Demery, 144 Wn.2d at 759; State v. Thompson, 90 Wn. App. 41, 46, 950 P.2d 977, review denied, 136 Wn.2d 1002, 966 P.2d 902 (1998).

In determining whether testimony is impermissible, trial courts consider the circumstances of the case, including the following factors: "(1) 'the type of witness involved,' (2) 'the specific nature of the testimony,' (3) 'the nature of the charges,' (4) 'the type of defense, and' (5) 'the other evidence before the trier of fact.'" State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (quoting Demery, 144 Wn.2d at 759).

Here, the witness was a Seattle Police Officer, meaning his testimony carried an "aura of reliability" with jurors. Montgomery, 163 Wn.2d at 595 (quoting Demery, 144 Wn.2d at 765). The nature of the testimony was that Officer Lilje indicated he believed Chuol had not been forthcoming in his responses because "I felt that the answer I had been given was not complete." 3RP 23. In other words, Chuol was being intentionally deceptive with his truncated responses. This opinion was critical at trial because there was no third party, or other trial evidence, indicating whether it was Robinson or Chuol who was being truthful about the alleged threats.

As a constitutional error, the State bears the burden of demonstrating that the improper admission of Officer Lilje's opinion was harmless beyond a reasonable doubt; it is presumed prejudicial. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986). In a case where jurors were presented with conflicting versions of events, Lilje's opinion cannot be dismissed as harmless.

4. CUMULATIVE ERROR DENIED CHUOL A FAIR TRIAL.

Cumulative trial error may deprive a defendant of his constitutional right to a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). Assuming this Court concludes that neither the insufficient limiting instructions, nor the judicial comments on the evidence, nor the improper opinion on veracity, by itself, warrants reversal of Chuol's convictions, the combined effect of these errors certainly warrants that result. In combination, these errors eased significantly the State's ability to convince jurors it had proved Chuol's guilt while simultaneously impeding Chuol's ability to establish reasonable doubt. In combination, they denied Chuol his

constitutional right to a fair trial.

D. CONCLUSION

The trial court erred when it failed to use an adequate limiting instruction under ER 404(b) and Gresham. The limiting instructions that *were* used contained improper judicial comments on the evidence concerning the critical disputed trial issue. Moreover, a police officer was permitted to comment on Chuol's veracity. Alone and in combination these errors denied Chuol a fair trial. His conviction should be reversed.

DATED this 30th day of December, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 70132-1-I
)	
TOM CHUOL,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF DECEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] TOM CHUOL
19412 40TH AVENUE W. #213
LYNNWOOD, WA 98036

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF DECEMBER 2013.

x Patrick Mayovsky