

71959-9

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No. 71959-9-I

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

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**STATE OF WASHINGTON, Respondent,**

**v.**

**RICHARD JAY SANDERS, Appellant.**

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**BRIEF OF RESPONDENT**

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By Kimberly A. Thulin  
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Attorney for Respondent  
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COURT OF APPEALS  
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**A. ASSIGNMENTS OF ERROR**

None.

**B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether the prosecutor misstated the beyond a reasonable doubt standard in closing by arguing that Sander's story was not credible or reasonable and whether, notwithstanding that this argument is permissible and that the trial court and prosecutor's reminded to the jury that they are to follow the jury instructions regarding the reasonable doubt standard and not counsel's argument, a new trial is warranted.

**C. FACTS**

**1. Procedural Facts**

On December 2<sup>nd</sup> 2013 Whatcom County Deputy Sanders and Deputy Ratayczak were dispatched around midnight to a loud party at 6361 Blackfoot place in rural Whatcom County. RP 35, 59. Deputy Anders, having arrived before Deputy Ratayczak, parked just down the street from the Blackfoot residence and waited for Ratayczak to arrive. RP 60.

While waiting, Deputy Anders heard a Toyota pick -up truck engine start up and drive down the driveway of 6361 Blackfoot place toward the street. RP 60. When the pick-up approached the end of the driveway to the road where it likely could see Deputy Ander's police vehicle, the Toyota immediately stopped, turned off all of its lights and

began backing back up the driveway towards the residence at a high rate of speed. RP 61. In response, Deputy Anders turned on his headlights, activated his overhead emergency lights and pulled into the driveway after the Toyota. RP 61. When Deputy Ander's vehicle caught up to the Toyota in the driveway, the vehicles stopped nose to nose and Deputy Ander's turned a spot light on that illuminated the driver's cab of the Toyota pick-up. RP 61. Deputy Anders immediately recognized the driver of the Toyota as Richard Jay Sanders. RP 64. Deputy Ander's recognized him from a previous contact and knew Sanders had a warrant out for his arrest. RP 64,66. Anders got out of his patrol car and yelled for Sanders to stop and get out of his vehicle. RP 63. Instead, Sanders drove forward off of the driveway, barely missing Ander's patrol car, through the yard, over a ditch and back onto the Blackfoot road. RP 66. Deputy Ratayczak arriving to the area just as Sanders got his Toyota back onto Blackfoot Road, immediately activated his emergency lights and began pursuing Sanders in the Toyota. RP 67. Deputy Anders soon followed. Id. Sanders ignored the pursuing deputies' attempts to pull the Toyota over, continued to speed away in an erratic manner going approximately 50 mph in a 25 mph speed zone. RP 68-69. As a result of Sanders' dangerous driving, bikes and garbage from the back of Sanders pick-up truck were flying out as he drove away ignoring the emergency

lights of the pursuing police vehicles. RP 68. Eventually, Deputies lost sight of Sanders and stopped their pursuit. RP 71. Deputy Anders and Ratayczak along with several other agencies for approximately 45 minutes after deputy Anders and Ratayczak lost visual with Sander's vehicle. RP 71.

Later that evening, Anders looked up Sanders in a law enforcement databank to verify for himself that the person he contacted/tried to stop in the Toyota was in fact Richard Sanders. RP 72. Deputy Anders remembered Sanders from a previous contact with him approximately a decade earlier when he booked Sanders into jail as a juvenile. RP 83. The Richard Sanders photo in the database deputy Ander's checked matched that of the person he observed driving the Toyota truck. Id.

On December 7<sup>th</sup> 2013, Whatcom County sheriff deputy Strubel and his canine 'jag' responded to the paradise valley area-Blackfoot place in Whatcom County to look for Mr.Sanders. RP 109. The Toyota Sanders was previously affiliated with had been found rolled over in a ditch and abandoned that evening. RP 111. Jag tracked smells from the Toyota to a home on Apache drive in the area where deputy Strubel observed a person running across the back of the driveway. RP 114. When Deputy Strubel and Jag caught up to the person seen fleeing, they found Sanders on a porch pounding on the front door, yelling "let me in." Id. Sanders was

then ordered to put his hands up and lie on the ground. RP 115. Sanders complied and was then arrested. Id. Sanders was charged with attempting to elude a police vehicle based on the events from December 2<sup>nd</sup> 2013.

At trial, Sanders confirmed he bought the Toyota in question but had failed to register it in his name. RP 130-32. Additionally, Sanders testified someone stole his Toyota on October 28<sup>th</sup> 2013 and he had not seen it or driven it since. RP 133. Sanders acknowledged he had a warrant out for his arrest but denied driving his Toyota and failing to yield to the deputies on December 2<sup>nd</sup> or 7<sup>th</sup> 2013. RP 134. A jury convicted Sanders as charged. CP 30. Sanders timely appeals. CP 45-54.

#### **D. ARGUMENT**

##### **1. The prosecutor did not argue impermissibly during closing argument.**

Sanders cannot meet his burden of demonstrating the prosecutor argued improperly during closing statements or that the alleged improper argument was sufficiently prejudicial as to warrant a new trial. State v. Russell, 125 Wash. 2d 24, 882 P.2d 747 (1994). Therefore, Sanders' appeal should be denied.

In determining whether an argument is improper, this Court must review the alleged improper statement in the context of the entire argument, issues, evidence and instructions before the jury. Russell, 125 Wash. 2d, 85-86. Even if improper, this court must still determine where the defense timely objects, whether Sanders has sufficiently demonstrated there is a substantial likelihood that the alleged impermissible argument affected the jury. State v. Reed, 102 Wash. 2d 140, 145, 684 P.2d 699, 747 (1984).

Prosecutors are generally afforded wide latitude in making arguments to the jury and are permitted to drawing reasonable inferences from the evidence. State v. Gregory, 158 Wash. 2d 759, 860, 147 P.3d 1201 (2006), as corrected (Dec. 22, 2006), (Dec. 22, 2006), . The state is permitted to comment on the quality and quantity of evidence the defense presents and such arguments do not amount to misstating the reasonable doubt standard. Id.

In this case the deputy prosecutor methodically reviewed all of the evidence before the jury in conjunction with the jury instructions. RP 175. Prior to drawing an objection, the deputy prosecutor argued that it was the jury's responsibility to weigh the credibility of the testimony of each witness. And that such analysis includes looking at any personal interest each witness might have and the reasonableness of the witness' statements

in context to the all the other evidence presented. RP 175. In this context the deputy prosecutor, having reviewed the testimony credibility of the state's witness's testimony, turned to assessing the defendant's testimony, stating:

What about the defendant's testimony, is it reasonable? That's what we are talking about. We're talking about reasonable doubt. Is the defendant's testimony; is the defendant's explanation reasonable? I submit---

RP 177. Following an objection from Sanders' attorney, the Court instructed the jury it was to follow the jury instructions given as to the definition of reasonable doubt. RP 177-178. When the prosecutor resumed argument, the prosecutor concluded the credibility section of his argument by stating the defendant's explanation was "not reasonable." RP 177. The deputy additionally also again reminded jurors they were required to follow the jury instructions and not "my argument." RP 177. At this juncture the prosecutor further directed the jury to the reasonable doubt instruction in their instruction packet and directed them to the last paragraph of the instruction that states:

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

RP 178. The prosecutor then continued with argument reviewing the factual evidence and several instructions, including the ‘to convict’ instruction relating to the state’s burden of proof and what evidence was presented in support of the State’s allegations.

The prosecutor’s alleged isolated statement during closing in context of argument about assessing the credibility of the various witnesses’ when examined in the context of the arguments made as a whole and instructions given to the jury, demonstrates the prosecutor’s argument was not impermissible. The prosecutor was appropriately arguing Sanders’ testimony and story was unreasonable. Simply mentioning reasonable doubt in the midst of this argument to support the argument that the defendant’s unbelievable explanation has not created a reasonable doubt, does not misstate the reasonable doubt standard or shift the burden of proof.

Nonetheless, Sanders argues that the deputy prosecutor’s isolated statement during argument, by mentioning reasonable doubt –in the context of evaluating the credibility of the defendant- was a misstatement of the state’s burden of proof that requires reversal. Br. of App. at 6. Sanders argues the prosecutor’s statement during closing is akin to the prosecutorial error found in State v. Anderson, 153 Wash. App. 417, 220 P.3d 1273 (2009), wherein the prosecutor argued, in part, to the jury that

“in order to find the defendant not guilty you have to say “I don’t believe the defendant is guilty because,” and then you have to fill in the blank.” Id. at 431. *See also*, State v. Venegas, 155 Wash. App. 507, 228 P.3d 813 (2010)(Fill in the blank argument improper).

In Anderson, 153 Wash. App. 417, the court found many of the arguments made by the prosecutor improper but nonetheless affirmed Anderson’s conviction finding a simple curative instruction could have insulated any impropriety or burden shifting concerns. Here, in contrast to Anderson, Sanders’ points only to an isolated statement in argument, not multiple erroneous arguments. Moreover, the concern in Anderson, 153 Wash. App. 417 was that the improper fill in the blank arguments could mislead the jury into believing they had to find Anderson guilty unless they had affirmative reasonable doubt to find Anderson was not guilty. The isolated statement made in this case did not similarly shift the burden of proof or argue to the jury that it must convict if it could not find Sanders’ story was sufficient to create a reasonable doubt. Instead, the isolated statement in context, merely asserted that Sanders’ testimony was not credible, was self-serving and did not provide reasonable doubt as to Sanders’ guilt in light of the remaining evidence and testimony presented by the state. The prosecutor’s isolated statement in this context should not

be construed as shifting or minimizing the state's burden of proof in an impermissible manner.

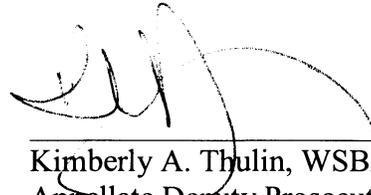
Even if the deputy prosecutor's statement during argument could be construed as misleading, Sanders' cannot demonstrate the alleged misstatement warrants reversal. The argument at issue here was isolated, the Court and prosecutor immediately re-directed the jury to the reasonable doubt instruction and reminded the jury they were to follow the court's instructions. The jury is presumed to follow the court's instructions. State v. Hopson, 113 Wash. 2d 273, 287, 778 P.2d 1014 (1989). Under these circumstances, Sander's cannot demonstrate there is a substantial likelihood this isolated statement objected to during closing could have affected the jury. Sanders' reliance on State v. Espey, 184 Wash. App. 360, 336 P.3d 1178 (2014) to argue otherwise, is misplaced. Espey relates to an improper argument made during closing that implicated the defendant's constitutional right to counsel and as such is inapplicable. No such similar impermissible argument implicating a constitutional right was made in this case. While the jury was given a different story by Sanders that his truck was stolen and he wasn't driving on December 2<sup>nd</sup> or 7<sup>th</sup>, the state's argument did not suggest that the jury should find Sanders guilty if they didn't find his story credible, only that Sanders' testimony was not credible and as such,

in contrast to Sanders' argument, his testimony should not give the jury cause to reasonably doubt the credible evidence otherwise presented by the state. Moreover, any potential prejudice the prosecutor's statement arguable could have resulted in was cured when the trial court reminded the jury to follow its instructions on the reasonable doubt standard. Sanders cannot demonstrate under these circumstances that the alleged error here warrants reversal.

**E. CONCLUSION**

For the reasons set forth above, the State respectfully requests that this court affirm Sanders' conviction for attempting to elude a police vehicle.

Respectfully submitted this March day of 8, 2015



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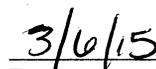
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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

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\_\_\_\_\_  
Legal Assistant

  
\_\_\_\_\_  
Date