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Court of Appeals
Division I
State of Washington

NO. 74255-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

HEYENG CHENG,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MONICA J. BENTON

BRIEF OF RESPONDENT

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A. ISSUES

1. Whether the trial court properly admitted the complaining witness's 911 call as a nontestimonial statement.
2. Whether the pattern reasonable doubt instruction properly states the law.
3. Whether Cheng has failed to show that the prosecutor committed prejudicial misconduct in closing argument.
4. Whether Cheng has failed to show that cumulative error deprived him of a fair trial.
5. Whether this Court should decline to hear Cheng's substantive due process challenge to the mandatory legal financial obligations raised for the first time on appeal.
6. Whether this Court should impose costs against Cheng if the State is the substantially prevailing party on appeal.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Heyeng Cheng with felony telephone harassment with the domestic violence allegation, and second-degree malicious mischief with the domestic violence allegation. CP 10-11. A jury acquitted Cheng of the telephone harassment charge, and convicted him of the malicious mischief charge.

CP 26-29; RP 206.¹ Based on Cheng's offender score of nine, and criminal history of "terrorizing" women, the court imposed the high end of the standard range. CP 61-70; RP 235-36.

2. SUBSTANTIVE FACTS

On December 30, 2014, Leslie Dempsey, and her adult daughter, Kira,² left their house for work around 7:30 or 8:00 a.m. RP 118, 123-24. Kira was engaged to Cheng, who had spent the night at her house, along with Kira's two young sons. RP 118, 120, 124. Cheng had been sick the night before, and had insisted on taking Kira's car. RP 122-23. Kira refused to let Cheng drive in his compromised state, and Cheng responded by threatening to take a baseball bat to the car. RP 123. At some point, Cheng fell asleep and was still sleeping the next morning when Dempsey and Kira left for work. RP 124. Cheng was alone in the house, which was in order when they left. RP 124.

Dempsey returned home a few hours later for lunch and found every room in her home turned upside down. RP 91, 124; Ex. 2D-X. Cheng was gone, as well as Kira's car. RP 100, 125.

¹ The Verbatim Report of Proceedings is consecutively paginated and designated as RP.

² To avoid any confusion, the State will refer to Kira Dempsey by her first name. The State intends no disrespect.

Dempsey's bathroom door had been torn off its hinges and smashed on an overturned chair in the living room. RP 126-27; Ex. 2D, 2F. Shards of broken glass littered the living room carpet, the dining room table was torn apart, the flat-screen TV was smashed, and fist-sized holes were punched in the wall. RP 87, 89-90; Ex. 2G, 2J-O. Kira's bedroom was ransacked, her wooden dresser was in pieces, all of her clothes strewn about, and her mattress overturned. RP 93-95; Ex. 2V-X. The crib for Kira's youngest son was also torn apart with two large gaping holes where the crib slats had been knocked out. RP 92; Ex. 2R. The damage cost over \$3,000 to repair, and took over a month to fix. RP 126, 128.

Dempsey called Kira and the police to report what had happened. RP 125. Dempsey, Kira, and Kira's sons spent the night at a motel because they did not have enough time to make the house safe for the boys. RP 129. On the drive to the motel, Cheng called Kira repeatedly. RP 129, 131. Dempsey recognized Cheng's voice when Kira placed him on speaker phone. RP 131. Cheng sounded agitated and angry, and at one point, threatened to hire a "drug fiend" to kill Kira and her sons. RP 131-32. Kira turned off the speaker phone as her sons were in the car. RP 132-33.

Shortly thereafter, Kira called 911 to report that Cheng had threatened to kill her and her sons. RP 133-34. Kira explained that she “was working with Officer Parrish earlier on a case of . . . DV mischief,” and that the person who had vandalized her house and taken her car, had just called and made “death threats” directed toward her and her children. Ex. 5³ at 1-3. Kira reported that Cheng threatened to hire a “dope fiend” to “put a hit” on her and her children, if she called the police and had Cheng arrested. Ex. 5 at 3. She also reported that Cheng threatened to damage her car.⁴ Ex. 5 at 3. Kira told the dispatcher that she was “really scared” that Cheng would kill her, and that she was staying at a motel “because of all the damage he did to our house earlier.” Ex. 5 at 2-3. The dispatcher asked Kira if she wanted to speak with an officer, and Kira said “Yeah.” Ex. 5 at 3.

The next day, December 31, Cheng was arrested at his parents’ home, with Kira’s missing car parked outside. RP 100-02. Cheng called Kira multiple times from jail about his arrest. RP 134;

³ Exhibit 5 is a transcript of Kira’s 911 call that was provided to the jury at the time the call was played. RP 170. Although the transcript was not admitted, the State is citing to it for ease of reference.

⁴ Cheng threatened to hide Kira’s car and damage the engine. RP 133.

Ex. 8.⁵ In the calls, Cheng berated Kira for being a “snitch,” and insisted that “[t]his shit wouldn’t a happened” if she had let him go home when he was sick. Ex. 8 at 2, 4. Cheng told Kira that he would “fix all the f—kin’ furniture,” although he denied breaking it, and suggested that the “bitch Mary” broke the furniture. Ex. 8 at 2. In response, Kira reminded Cheng that he had “called” and “told” her. Ex. 8 at 2. Cheng replied, “Bitch, I didn’t tell you shit,” and then in the next call told Kira, “[L]isten, they got you on speakerphone, dude. You understand? I didn’t do shit to you.” Ex. 8 at 3.

Despite Cheng’s warning, Kira asked why she should do what Cheng wanted when he did “all this damage” to her “house and stuff.” Ex. 8 at 4. When Cheng responded that he would “pay for the motherf—kin’ house,” Kira explained that it was “the principle,” rather than the cost, explaining, “we didn’t do anything to you.” Ex. 8 at 4. Cheng said that he understood, that he was sick, and that he did not “do shit like this” unless he was sick. Ex. 8 at 4. Cheng repeatedly asked Kira why she did not let him leave the house, and then blamed her for making him stay. Ex. 8 at 5.

⁵ Exhibit 8 is a transcript of the jail calls made by Cheng to Kira. Although the transcript was not admitted, it was provided to the jury as a listening aid. RP 135-36. For ease of reference, the State will cite to the transcript.

The calls ended with Kira pointing out that Cheng “could a just left instead a doin’ all that to the house.” Ex. 8 at 6. Cheng responded that they had “both f—ked up,” and criticized Kira for calling the police. Ex. 8 at 6. When Kira tried to explain that her mother had called, and that Cheng did not understand the amount of damage that was done, Cheng replied that he had paid for “everything in that f—kin’ house,” and insisted again that Kira should have let him leave. Ex. 8 at 6-7.

Prior to trial, the State sought to admit Kira’s 911 call as nontestimonial, admissible hearsay. Supp. CP __ (sub 53); RP 23-28. The court admitted Kira’s call under the present sense impression and mental condition exceptions to the hearsay rule, and reserved ruling on whether Kira’s statements were nontestimonial in the event that Kira did not testify. RP 27-28.

During a trial recess, the State argued that the 911 call should be admitted because the primary purpose for Kira’s statements was to assist law enforcement in meeting an ongoing emergency. RP 107-08. Cheng disagreed, and argued that the circumstances of Kira’s call did not suggest an imminent threat, or an ongoing emergency. RP 110-11. The court characterized the issue as a “very close call,” and allowed the parties more time to

conduct further research. RP 112. After hearing additional argument, the court admitted the call, concluding that “a reasonable listener” would find that Kira was facing an ongoing emergency because the threat had “just happened,” and the emergency dispatcher considered it concerning enough to have an officer contact Kira. RP 148-50. The State played the 911 call for the jury immediately prior to resting its case. RP 170. Kira did not appear for trial.⁶

Cheng did not propose jury instructions, explaining that the State’s proposed instructions “look[ed] good,” and that he liked “the abiding belief” language in the State’s proposed reasonable doubt instruction, which mirrored WPIC 4.01. RP 58, 154; Supp. CP ___ (sub 55). Consequently, the court instructed the jury in relevant part:

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.

CP 36 (emphasis added).

⁶ Although Kira had indicated her intent to testify, she did not appear for trial, and the State did not request a material witness warrant. RP 158.

During closing argument, the prosecutor referenced the State's burden of proof multiple times, arguing that "[p]roof beyond a reasonable doubt is a fundamentally important standard," and the "linchpin of our judicial system." RP 173. The prosecutor acknowledged that the jury might have "doubts about anything . . . but unless those doubts raise a question as to the elements of the crime, they do not control your ability to convict." RP 173.

While discussing the elements of telephone harassment, the prosecutor explained that she would spend most of her time discussing Cheng's intent to harass, intimidate, or torment Kira. RP 175. The prosecutor argued:

It can be difficult for anyone to make decisions about what is on the mind of another person. And, I think, there may be a tendency, as you're sitting there, to think how is it I'm supposed to determine what another person was thinking on a specific date and time. But don't think for a moment that you can't make those kinds of decisions or make those kinds of judgments. In fact, you do it in your life every day. Defensive driving is actually an example of that. As you're driving you're constantly making judgments about what other drivers intend to do, and acting accordingly, based on circumstantial evidence. For example, a car that veers into your lane or is driving aggressively behind your bumper, you think –

RP 175-76. Cheng objected to the prosecutor's "line of argument," claiming that it lowered the State's burden, and noting that "[i]t's

beyond a reasonable doubt in the courtroom, not on the road.”

RP 176.

The court overruled Cheng’s objection, and the prosecutor continued arguing:

Circumstantial evidence you use every day in your life to make reasonable inferences regarding the intents and conduct of other people. And, in fact, your instructions tell you that circumstantial evidence is just as good as direct evidence . . . So despite the . . . colloquial expressions about circumstantial evidence, in fact, you’re instructed that the law does not distinguish between direct and circumstantial evidence in terms of their weight or value. And circumstantial evidence really refers to evidence which, based on your common sense and experience you reasonably infer something. So, think of other times in your life that you draw reasonable inferences. In fact the more you think about, the more you realize how often you do it in your daily life, when you are sitting in the back of a restaurant and someone comes in with a wet rain coat and umbrella, even if you can’t see what’s going on outside, you say to yourself, it’s raining outside because this person came in with a wet rain coat and umbrella. That’s a reasonable inference you’re using to draw conclusions based on your common sense and experience. And that’s what the State is asking you to do regarding the defendant’s intent in this case.

RP 176-77. Immediately thereafter, the prosecutor reviewed Cheng’s words and actions that showed his malice in damaging every room in the house, and intent to harass Kira by threatening to kill her and her children. RP 177-78.

In response, Cheng argued in closing that:

You don't do anything in your daily life that is similar to the decision making process you are going through today. It is not true that decisions that you make while you're driving are similar to decisions you make when you look at a State's case and decide whether they're [sic] proven a case . . . which can result in convictions and serious limitations on a human being's liberty. It is not the same. There is nothing that's the same as this in terms of the burden that they have. You do not do that every day in your daily life. It doesn't happen.

RP 187. Cheng later argued that the "[a]biding belief" standard is a "very, very strong burden," and that the jury could not change its "mind" five or ten years later. RP 196. Cheng ended his comments by reminding the jury that "you can walk back a marriage in a way that you can't walk this back." RP 197.

In rebuttal, the prosecutor referred the jury to its instruction on circumstantial evidence, and argued that the jury could reasonably infer why Cheng called Kira and "trashed" her house based on "common sense and experience." RP 200. The prosecutor briefly addressed the reasonable doubt standard, reminding the jury that "the question isn't what evidence is out there

that could conceivably exist, it's does the evidence you have prove this case beyond a reasonable doubt."⁷ RP 203.

At sentencing, the court imposed the \$500 mandatory victim penalty assessment and \$100 DNA collection fee.⁸ CP 63; RP 236.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED THE 911 CALL.

Cheng argues that the trial court should have excluded Kira's 911 call because her statements were testimonial, and their admission prejudiced him, even though he was acquitted of the crime – telephone harassment – that Kira called to report. Objectively considering the circumstances in which Kira's statements occurred, the trial court properly concluded that the primary purpose of the interrogation was to enable the police to meet an ongoing emergency. Alternatively, any error in admitting Kira's statements was harmless beyond a reasonable doubt because overwhelming evidence, independent of the 911 call, supported Cheng's malicious mischief conviction.

The Sixth Amendment guarantees a criminal defendant's right to confront the witnesses against him. U.S. CONST. amend.

⁷ Although Cheng objected to this statement, the court overruled his objection, and he does not challenge it on appeal. RP 203.

⁸ The court also ordered Cheng to pay over \$3,000 in restitution. CP 63; RP 237.

VI. “The confrontation clause bars the admission of ‘testimonial’ hearsay unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination.” State v. Reed, 168 Wn. App. 553, 562, 278 P.3d 203 (2012) (quoting Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)). Alleged confrontation clause violations are reviewed de novo. State v. Koslowski, 166 Wn.2d 409, 417, 209 P.3d 479 (2009).

The characterization of a statement as “testimonial” or “nontestimonial” in the context of a police interrogation depends on the “primary purpose” for the interrogation during which the statement was made. Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). An interrogation “directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator,” results in a “testimonial” statement. Id. at 826. In contrast, statements made “under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency” are “nontestimonial.” Id. at 822.

Whether an ongoing emergency exists and is ongoing is a “highly context-dependent inquiry.” Michigan v. Bryant, 562 U.S.

344, 363, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011). A court must “objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties.” Id. at 359. Four relevant factors inform the court’s inquiry: (1) the timing of the statements relative to when the described incident occurred, (2) the nature of the questions and answers during the interrogation, (3) the threat of harm posed by the incident as judged by a “reasonable listener,” and (4) the level of formality of the interrogation. Davis, 547 U.S. at 827.

Here, the trial court properly concluded that the primary purpose of the emergency dispatcher’s exchange with Kira was to enable police to meet an ongoing emergency. Kira called 911 immediately after Cheng threatened to kill her and her sons. See Ex. 5 at 2 (Kira telling the operator “I’ve *just* talked to the person um that did all the vandalism . . . And um I’m really scared. He’s making death threats on me”) (emphasis added). Statements made within minutes of an assault may be considered as “contemporaneous[] with the events described.” State v. Ohlson, 162 Wn.2d 1, 17, 168 P.3d 1273 (2007); Reed, 168 Wn. App. at 566.

Further, the nature of the operator's questions and Kira's answers suggest that the elicited statements were necessary to resolve a present emergency. The dispatcher's focus on determining Kira's location, whether Cheng knew it, and the best telephone number to reach Kira, suggest that the primary purpose was to provide emergency assistance. Ex. 5 at 2-3; Reed, 168 Wn. App. at 566. The operator did not inquire about the details of Cheng's threats, but rather endeavored to ensure that an officer "working right now" would call Kira back and assist her. Ex. 5 at 4.

A reasonable listener objectively considering the situation as a whole – Cheng's threat to take a baseball bat to Kira's car, followed by his room-by-room destruction of Kira's home and young son's crib, and subsequent death threat against Kira and her children – would conclude that Cheng posed an immediate bona fide physical threat to Kira, despite the fact that he did not know her current location.

Kira's continued fear of Cheng is evidenced by her spontaneous, and largely unresponsive statements to the dispatcher:

OPERATOR: Does he know where you're at?
KIRA: No. I would not tell him.
OPERATOR: That's good. Okay.

KIRA: *I'm like scared that he's gonna like kill me actually.*
OPERATOR: Okay. As long as he doesn't know where you're at right now.
KIRA: *But he threatened me and my children.*
OPERATOR: Okay. Okay. . . .

Ex. 5 at 3 (emphasis added). The fact that Cheng was absent when Kira called 911 does not necessarily mean that he no longer posed a physical threat, or that she was not in danger, particularly since Cheng's whereabouts were unknown. Reed, 168 Wn. App. at 567; see Bryant, 562 U.S. at 347 (finding an ongoing emergency because the location of the assailant was unknown).

Finally, the lack of formality in the questioning suggests that Kira's statements were nontestimonial. The exchange took place over the phone at a hotel where Kira had fled in the wake of Cheng destroying her home and threatening to kill her and her children. The questioning did not occur in the "calm and structured setting of the station house," where Kira would have been alerted to the possible future prosecutorial use of her statements. Reed, 168 Wn. App. at 569. Objectively viewing the circumstances of Kira's 911 call, the trial court properly concluded that the primary purpose for the interrogation was to enable police assistance to meet an ongoing emergency.

Nonetheless, Cheng claims that the emergency had passed because Kira was “describing events that had already occurred,” and he was not in Kira’s “physical proximity.” Br. of Appellant at 11. Cheng’s arguments overlook relevant case law holding that a declarant’s report within minutes of an assault may be considered “contemporaneous[] with the events described,” and that an assailant may be absent and still pose a threat. Ohlson, 162 Wn.2d at 566; Reed, 168 Wn. App. at 566-67. Although Kira believed that Cheng did not know Kira’s current location, he knew where she lived, and as her fiancé, presumably knew where she worked and her children went to daycare.

To the extent that Cheng argues that Kira called 911 to “relay information about [his] threats to a specific officer,” his argument should be rejected. Br. of Appellant at 13. A close review of the 911 call reveals that Kira did not ask to speak with Officer Parrish, but merely explained that she had been “working with” him. Ex. 5 at 1. Indeed, it was the operator who asked Kira if she wanted to speak to an officer. Ex. 5 at 3. The fact that the operator concluded that an on-duty officer should call Kira first, rather than immediately visit her in person, was likely driven by staffing levels and other calls at the time. Cheng does not argue

that an emergency dispatcher's subjective assessment of a situation is dispositive, nor could he, because the court's inquiry is objective. Bryant, 562 U.S. at 359.

In any event, Cheng's confrontation clause claim is by and large futile because any error in admitting the 911 call was harmless beyond a reasonable doubt. Constitutional error is harmless if the State can show beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

Here, Cheng was *acquitted* of telephone harassment. RP 206. Very few of Kira's statements in the 911 call referred to the malicious mischief Cheng committed earlier in the day, and each of those statements was cumulative of other properly admitted evidence at trial. For example, Kira told the operator that she "was working with Officer Parrish" on a case of "DV mischief," and that she had just talked to "Heyeng" who "did all the vandalism" and took her car. Ex. 5 at 1-2. Parrish testified at trial that he met with Kira on the day of the incident, and that he took a statement from her. RP 77, 99. Further, Parrish testified that he arrested Cheng the following day at his parents' house and that Kira's missing car was parked outside. RP 100-02.

Kira's other statement that she went to a hotel "because of all the damage he did to our house earlier," was cumulative of her mother's testimony that they went to a motel that night because they did not have time to clean up the broken glass before Kira's kids returned from daycare. Ex. 5 at 2; RP 129. Thus, the handful of Kira's statements that related to the malicious mischief charge were not prejudicial because they were cumulative of other evidence at trial.

Moreover, any reasonable jury would have convicted Cheng of malicious mischief without the admission of the 911 call given the State's overwhelming evidence that Cheng committed the crime. Dempsey testified that Cheng was alone sleeping at the house when she and Kira left for work, and that when she returned a few hours later, Cheng was gone and every room in the house had been turned upside down. RP 91, 124; Ex. 2D-X. Significantly, Cheng's car was still parked in the driveway, but Kira's car, which Cheng had tried to take the night before, was missing. RP 83, 122-23. Parrish located Kira's car outside Cheng's parents' home the next day where he was arrested.⁹ RP 100-02.

⁹ Dempsey also testified that shortly after the malicious mischief she heard Cheng threaten to hide Kira's car and damage its engine, confirming that Cheng took Kira's car. RP 131, 133.

Any doubt that the jury might have had about whether Cheng committed the damage to Kira's home would have been resolved by Cheng's admissions in the jail calls to Kira. During the calls, Cheng berated Kira for being a "snitch," and repeatedly claimed that "[t]his shit wouldn't a happened" if Kira had let him leave the house. Ex. 8 at 1-2, 4-7. Cheng insisted that he would fix or pay for the damage to the house, and ultimately admitted that he had "f—ked up." Ex. 8 at 2, 4, 6. Given the circumstantial evidence that Cheng committed the crime, combined with his own statements, a reasonable jury would have convicted Cheng of malicious mischief without Kira's 911 call.

Cheng's claim that the jurors convicted him of malicious mischief based on the "damaging propensity evidence" in Kira's 911 call is both speculative and implausible. Br. of Appellant at 16. The court instructed the jury to "decide each count separately," and that their "verdict on one count should not control [their] verdict on any other count." CP 40. Jurors are presumed to follow instructions absent evidence to the contrary. State v. Dye, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013). Cheng has not provided any evidence, let alone argued, that the jury disregarded the court's instructions. Further, Cheng's argument about the prejudicial

impact of the 911 call ignores the fact that Dempsey also testified that she overheard Cheng on speaker phone threatening to “hire a drug fiend” and “put a hit” on Kira and her children. RP 131-32.

Regardless, the State provided the jury with overwhelming evidence of Cheng’s malicious intent. The trial testimony and photographs revealed the scope, force, and intimacy of Cheng’s destructiveness. Cheng damaged every room of Kira’s home, including ripping the bathroom door off its hinges, wrenching apart the dining room table, ransacking Kira’s room, punching holes in the wall, and clogging the toilet bowl. RP 85-95; Ex. 2D-X.

Arguably most incriminating was Cheng’s decision to deploy his destructive force against Kira’s children, rendering her young son’s crib unsafe and unusable, shattering a picture of her child, and leaving jagged shards of glass strewn about on the carpet. Ex. 2G, 2P, 2R. Given this record, the jury convicted Cheng based on the scale of his destruction, rather than his later death threats, which the jury ultimately acquitted him of committing. Cheng’s claim fails because he was not prejudiced by the admission of Kira’s 911 call.

2. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE MEANING OF REASONABLE DOUBT.

Cheng asserts that the language of WPIC 4.01 defining reasonable doubt as “one for which a reason exists” is a misstatement of the law and therefore his conviction (along with every other conviction where WPIC 4.01 has been given) must be reversed. This argument has no merit and was never raised below. This Court recently rejected that argument and is bound by precedent of the Washington Supreme Court upholding WPIC 4.01 and the language used therein.

a. Cheng Invited Any Error.

A defendant who invites error – even constitutional error – may not claim on appeal that the error requires a new trial. State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). “A party may not request an instruction and later complain on appeal that the requested instruction was given.” State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979). The invited error doctrine seeks to prevent parties from misleading trial courts and then receiving the windfall of a new trial. State v. Momah, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). In determining whether the invited error doctrine precludes a defendant’s claim on review, courts consider

whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it. Id. at 154.

Here, Cheng created any error by affirmatively agreeing to the State's proposed jury instructions, including the pattern instruction on reasonable doubt. RP 58 (defense counsel stating the proposed instructions "look good," and "I like the abiding language. I have no objection."). The Court should not allow him to now complain that the trial court gave the instruction he proffered.

b. The Alleged Error Is Not Manifest And Cannot Be Raised For The First Time On Appeal.

An instructional error not objected to below may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988) (failure to instruct on "knowledge" was not manifest error). To obtain review, Cheng must show that the claimed error is of constitutional magnitude and that it resulted in actual prejudice. State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). To demonstrate actual prejudice there must be a plausible showing "that the asserted error had practical and identifiable consequences in the trial of the case." State v.

Kirkman, 159 Wn.2d 918, 935, 155 P.2d 125 (2007). The error must be “so obvious on the record that [it] warrants appellate review.” O’Hara, 167 Wn.2d at 99-100.

Although the Washington Supreme Court recently reached an unpreserved challenge to the trial court’s oral explanation of reasonable doubt, it did so because the court’s erroneous statement was obvious in the record. See State v. Kalebaugh, 183 Wn.2d 578, 584, 355 P.3d 253 (2015) (trial court told the jury that reasonable doubt was a doubt for which a reason “can be given”). That is not the case here. The trial court’s use of WPIC 4.01, which defense counsel affirmatively adopted, is not an “obvious error.” There can be nothing more than pure speculation that the inclusion of the disputed language in the jury instructions had any identifiable consequences. This is insufficient to allow for appellate review. State v. Donald, 178 Wn. App. 250, 271, 316 P.3d 1081 (2013) (refusing to consider defendant’s argument regarding the “to convict” jury instructions because he failed to object below and failed to demonstrate prejudice as required under RAP 2.5). This Court should refuse to address Cheng’s unpreserved argument regarding the reasonable doubt instruction.

c. The Instruction Correctly States The Law.

Cheng contends that WPIC 4.01 is unconstitutional. He argues that the instruction required the jury to articulate a reason to doubt, thereby undermining the presumption of innocence and shifting the burden of proof. He is incorrect; the court-adopted instruction does not lead jurors to believe that that they must be able to write out their reason for acquittal. Cheng's arguments should be rejected.

Jury instructions are read as a whole and in a commonsense manner. State v. Bowerman, 115 Wn.2d 794, 809, 802 P.2d 116 (1990). A court will not assume a strained reading of an instruction. State v. Moultrie, 143 Wn. App. 387, 394, 177 P.3d 776, rev. denied, 164 Wn.2d 1035 (2008). Instructions are legally sufficient as long as they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). The instructions must define reasonable doubt and convey to the jury that the State bears the burden of proving every essential element of the crime beyond a reasonable doubt. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

In State v. Bennett, the Washington Supreme Court directed trial courts to use WPIC 4.01 in all criminal cases.¹⁰ 161 Wn.2d at 318. Last year, the state supreme court reaffirmed that WPIC 4.01 was the “proper” instruction and “the correct legal instruction on reasonable doubt.” Kalebaugh, 183 Wn.2d at 585-86. This Court, and Division Two of the Court of Appeals, recently noted the Supreme Court’s directive and upheld the use of WPIC 4.01. State v. Lizarraga, 191 Wn. App. 530, 567, 364 P.3d 810 (2015), review denied, 185 Wn.2d 1022 (2016) (Division One); State v. Parnel, ___ Wn. App. ___, ___ P.3d ___, 2016 WL 4126013 at *2 (Aug. 2, 2016) (Division Two).

Cheng has provided this Court with no basis upon which to depart from the holdings of the Washington Supreme Court in Bennett and Kalebaugh. See State v. Watkins, 136 Wn. App. 240, 246, 148 P.3d 1112 (2006) (observing that the Court of Appeals will follow the precedent of the Washington Supreme Court). Even if this Court were inclined to entertain a challenge to controlling precedent, Cheng bears the burden of making a “clear showing”

¹⁰ The Washington Pattern Jury Instruction Committee drafted WPIC 4.01 as an abbreviated form of the instruction approved in State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959). Over 100 years ago, the Washington Supreme Court approved a reasonable doubt instruction similar to WPIC 4.01. State v. Harras, 25 Wash. 416, 421, 65 P. 774 (1901) (defining reasonable doubt as “a doubt for which a good reason exists”).

that the precedent is both “incorrect and harmful.” In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). He has not done so. “The test for determining if jury instructions are misleading is not a matter of semantics, but whether the jury was misled as to its function and responsibilities under the law.” State v. Brown, 29 Wn. App. 11, 18, 627 P.2d 132 (1981). Cheng has failed to show that the Supreme Court’s multiple decisions are wrong or that this Court should depart from its recent decision in Lizarraga.¹¹ This Court should affirm.

3. CHENG RECEIVED A FAIR TRIAL FREE OF PROSECUTORIAL MISCONDUCT.

Cheng argues that the prosecutor committed reversible misconduct by allegedly diminishing the State’s burden of proof. Cheng’s claim fails. The prosecutor properly argued that defensive driving is an example of how people use circumstantial evidence on a daily basis to reasonably infer another person’s intent. Even if the prosecutor’s remark was improper, Cheng cannot show that

¹¹ Indeed, this Court has consistently adhered to Lizarraga in rejecting similar challenges in its unpublished decisions: State v. Paris, No. 73292-7-I, 2016 WL 4187765 at *1 (Aug. 8, 2016); State v. Threadgill, No. 68662-3-I, 2016 WL 3800138 at *7 (July 11, 2016); State v. Ruffin, No. 72514-9-I, 2016 WL 1222584 at *2 (March 28, 2016); State v. Parson, No. 73123-8-I, 2016 WL 885179 at *1 (March 7, 2016); State v. Reed, No. 73295-1-I, 2016 WL 885273 at *1 (March 7, 2016); State v. Corbett, No. 72453-3-I, 2016 WL 785073 at *2 (Feb. 29, 2016); State v. Taylor, No. 74163-2-I, 2016 WL 513579 at *5 (Feb. 8, 2016).

there is a substantial likelihood that the misconduct affected the jury's verdict.

Prosecutorial misconduct claims are reviewed for an abuse of discretion. State v. Lindsay, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). To establish prosecutorial misconduct, the defendant must show that the prosecutor's comments were "both improper and prejudicial in the context of the entire record and the circumstances at trial." State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (citations omitted). A prosecutor has "wide latitude" in closing argument to draw and express reasonable inferences from the evidence. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Allegedly improper comments are reviewed in the context of the entire argument, the issues presented, the evidence addressed, and the instructions to the jury. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Comments are prejudicial only if there is a substantial likelihood that the misconduct affected the jury's verdict. Thorgerson, 172 Wn.2d at 443.

A prosecutor commits misconduct by shifting or misstating the State's burden to prove the defendant guilty beyond a reasonable doubt. Lindsay, 180 Wn.2d at 434. Comparing the certainty required to convict a defendant with everyday decisions

such as figuring out a jigsaw puzzle, or crossing the street, is improper because it “minimizes and trivializes the gravity of the standard and the jury’s role.” Id. at 434-36; see also State v. Anderson, 153 Wn. App. 417, 425, 431, 220 P.3d 1273 (2009) (prosecutor improperly analogized the reasonable doubt standard to deciding to have elective surgery, leaving children with a babysitter, or changing lanes on the freeway).

Here, the prosecutor properly argued that the jury could reasonably infer that Cheng acted knowingly and maliciously when he wrecked Kira’s home based on common sense and experience. The prosecutor linked her argument to the circumstantial evidence instruction by explicitly referencing it, and relying on its language to define circumstantial evidence and explain its weight and value. RP 176; CP 37. To explain the concept further, the prosecutor provided two “daily life” examples of circumstantial evidence: (1) driving defensively by “constantly making judgments about what other drivers intend to do, and acting accordingly,” and (2) reasonably inferring that it is raining outside when a person walks inside wearing a wet rain coat and carrying an umbrella. RP 175-77.

Immediately thereafter, the prosecutor focused on Cheng's words and actions that "show[ed] what was on his mind." RP 177. The prosecutor pointed out that the "sheer scope" of Cheng's destruction, damaging "every single room in the house," and force, "tear[ing]" off the bathroom door and "smash[ing] it over an overturned chair," while "specifically targeting" Kira's son's crib and picture, revealed Cheng's malice. RP 177. The prosecutor echoed these arguments in rebuttal, referring the jury to "instruction [n]umber 3" on circumstantial evidence, and encouraging them to reasonably infer based on their "common sense and experience . . . why [Cheng] trashed that house." RP 200. Considering the context of the prosecutor's argument as a whole, and the disputed issue of Cheng's intent, the prosecutor's comments were proper.

Contrary to Cheng's claim, the prosecutor did not trivialize the reasonable doubt standard. He conflates the prosecutor's discussion of circumstantial evidence with her discussion of the burden of proof. These were separate discussions. The prosecutor referred to the reasonable doubt standard as "fundamentally important" and the "linchpin of our judicial system." RP 173. The prosecutor asked the jury "to hold the state to it's [sic] burden of proof beyond a reasonable doubt." RP 173. Further, the

prosecutor properly explained that the jury might have “doubts about anything . . . but unless those doubts raise a question as to the elements of the crime, they do not control your ability to convict.”¹² RP 173. The prosecutor’s proper remarks about reasonable doubt are a relevant factor to consider when evaluating the propriety of the challenged comment. Anderson, 153 Wn. App. at 430.

Cheng erroneously analogizes the prosecutor’s remarks to those held improper in Lindsay and Anderson. In Lindsay, the prosecutor explicitly linked the reasonable doubt standard to solving a jigsaw puzzle, and improperly suggested that “[y]ou could have 50 percent of those puzzle pieces missing” and be certain “beyond a reasonable doubt.” 180 Wn.2d at 434. The court held that “this jigsaw puzzle analogy” was improper because it quantified the standard of proof, unlike other jigsaw puzzle analogies that “merely suggested one could be certain beyond a reasonable doubt even with some pieces missing.” Id. at 435-36. Here, the prosecutor never suggested a specific number or percentage when explaining the burden of proof.

¹² In a similar vein, the prosecutor argued in rebuttal that “the question isn’t what evidence is out there that could conceivably exist, it’s does the evidence you have prove this case beyond a reasonable doubt.” RP 203.

Further, the Lindsay court disapproved of the prosecutor's narrative about crossing the street "because beyond a reasonable doubt you're confident you can walk across," reasoning that "*this* kind of analogy to everyday experiences trivializes the State's burden of proof." Id. at 436. In this case, the prosecutor properly parroted the language of the circumstantial evidence instruction, and provided the jury with real world examples of how common sense and experience are used to make reasonable inferences. The prosecutor's comments simply reiterated the concept of circumstantial evidence. The prosecutor never compared the burden of proof to everyday decisions.

Significantly, Cheng did not object to the prosecutor's subsequent comments discussing circumstantial evidence, its equal weight and value to direct evidence, "wet rain coat and umbrella" example, and appeal to the jury to use its common sense and experience to make a reasonable inference about Cheng's intent. RP 176-77. In the same vein, Cheng did not object to the prosecutor's argument in rebuttal that the jury could reasonably infer why Cheng "trashed" Kira's house based on "common sense and experience." RP 200. Cheng does not assign error to, nor debate the propriety of, these remarks.

Many of the prosecutor's statements were lifted word for word from the jury instruction on circumstantial evidence. Compare CP 37 (defining circumstantial evidence as "evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case"), with RP 176 (prosecutor arguing that "circumstantial evidence really refers to evidence which, based on your common sense and experience you reasonably infer something"). The prosecutor's argument about the weight and value of circumstantial evidence tracked the court's instruction. See CP 37 (asserting "[t]he law does not distinguish between direct and circumstantial evidence in terms of their weight or value"); RP 176 (prosecutor arguing "the law does not distinguish between direct and circumstantial evidence in terms of their weight or value"). Where Cheng's intent was at issue, the prosecutor's discussion of inferences of intent based on circumstantial evidence was not improper.

As previously discussed at length, the court properly instructed the jury on the presumption of innocence, the burden of proof, and the definition of beyond a reasonable doubt. CP 36. The court advised the jury that "the lawyers' statements are not evidence," and that it "must disregard any remark, statement, or

argument that is not supported by the evidence or the law” in the court’s instructions. CP 34. Juries are presumed to have followed the court’s instructions. Dye, 178 Wn.2d at 556. There is not a substantial likelihood that the prosecutor’s singular, isolated reference to defensive driving affected the jury’s verdict in light of the propriety of the prosecutor’s closing argument as a whole, the court’s instructions, and the overwhelming evidence of Cheng’s guilt.¹³

4. CUMULATIVE ERROR DID NOT DENY CHENG A FAIR TRIAL.

Cheng contends that the cumulative effect of admitting Kira’s 911 call, instructing the jury that a reasonable doubt is “one for which a reason exists,” and the alleged prosecutorial misconduct affected the verdict. The cumulative error doctrine is limited to cases where there have been “several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The doctrine does not apply to cases where the defendant has failed to establish any error. State v. Warren, 134

¹³ As argued more fully above, the State presented considerable circumstantial evidence of Cheng’s guilt, as well as Cheng’s own admissions on the jail calls that he had “f—ked up,” and would fix or pay for the damage to Kira’s house. Ex. 8 at 2, 4, 6.

Wn. App. 44, 69, 138 P.3d 1081 (2006), aff'd, 165 Wn.2d 17 (2008). Cheng's cumulative error claim fails because he has not shown that any error occurred at his trial.

5. THE TRIAL COURT PROPERLY IMPOSED THE MANDATORY DNA COLLECTION FEE AND VICTIM PENALTY ASSESSMENT.

For the first time on appeal, Cheng challenges the constitutionality of (1) RCW 43.43.7541, which requires trial courts to impose a \$100 DNA fee on any offender convicted of a felony or specified misdemeanor, and (2) RCW 7.68.035, which requires trial courts to impose a \$500 victim penalty assessment (VPA) on any offender convicted of a felony or gross misdemeanor. Because Cheng's claim is both unpreserved and unripe for review, and because he lacks standing to assert it, this Court should decline to review the issue.

This Court recently held in State v. Shelton that a defendant was procedurally barred from raising a substantive due process challenge to the DNA statute for the first time on appeal. ___ Wn. App. ___, ___ P.3d ___, 2016 WL 3461164 at *4-*7 (June 20, 2016). The court reasoned that until the State seeks to enforce collection of the DNA fee, or impose a sanction for failure to pay, a defendant's as-applied challenge is unripe for review and not a

manifest error subject to review under RAP 2.5(a)(3). Id. at *5-*7. Additionally, the court concluded that the defendant lacked standing because he could not show harm until the State sought to enforce collection of the DNA fee. Id. at *6, n.8.

This Court reaffirmed its holding in Shelton a week later in State v. Lewis, ___ Wn. App. ___, ___ P.3d ___, 2016 WL 3570550 at *2 (June 27, 2016). Division Three of the Court of Appeals is in accordance. State v. Stoddard, 192 Wn. App. 222, 226-29, 366 P.3d 474 (2016) (Division Three) (refusing to consider defendant's first-time substantive due process challenge to the imposition of a mandatory DNA collection fee under RAP 2.5(a)(3)).

This Court should adhere to its decision in Shelton and reject Cheng's first-time, substantive due process challenge to the trial court's imposition of the DNA fee and VPA.¹⁴ Nothing in the record reflects that the State has attempted to collect the DNA fee or VPA. Because Cheng has not been found to be constitutionally indigent and has suffered no injury in fact, he lacks standing to challenge the statutes. Shelton, at *6, n.8. Cheng's claim is unripe for review

¹⁴ Although Shelton considered the constitutionality of the DNA collection fee only, its reasoning applies with equal force to the VPA. Cheng's as-applied challenge does not distinguish between the statutes. His argument is the same for both. See Br. of Appellant at 42 ("While these statutes (DNA collection fee and VPA) serve legitimate state interests, the imposition of mandatory fees upon defendants who cannot pay the fees does not rationally serve those interests.").

and not a manifest error that can be raised at this point. This Court should decline to address the merits of Cheng's claims.¹⁵

6. APPELLATE COSTS SHOULD BE IMPOSED IF THE STATE PREVAILS IN THIS APPEAL.

This Court should not foreclose the State's option to seek appellate costs in this case, should it prevail, because the record is insufficient to make such a determination at this stage. As in most cases, Cheng's ability to pay was not litigated in the trial court because it was not relevant to the issues at trial. The State had no right to discovery about Cheng's finances. Thus, the record contains only snippets of information about Cheng's financial status.

Nonetheless, it is clear from the limited record that Cheng posted \$200,000 cash bail prior to trial. Supp. CP __ (sub 32). Cheng repeatedly told Kira in his jail calls that he bought all of the

¹⁵ In the last couple of months, this Court has repeatedly refused in unpublished opinions to reach the merits of defendants' first-time, substantive due process challenges to mandatory legal financial obligations: State v. Olson, No. 72965-9-I, 2016 WL 4272401 at *6-*7 (Aug. 15, 2016); State v. Tyler, No. 73564-1-I, 2016 WL 4272999 at *9 n.11 (Aug. 15, 2016); State v. Wittman, No. 72811-3-I, 2016 WL 4187753 at *1 (Aug. 8, 2016); State v. Sutton, No. 73052-5-I, 2016 WL 4081159 at *2 (Aug. 1, 2016); State v. Strange, No. 72953-5-I, 2016 WL 4081158 at *2 (Aug. 1, 2016); State v. Herrera-Pelayo, No. 73093-2-I, 2016 WL 4081168 at *2 (Aug. 1, 2016); State v. White, No. 73403-2-I, 2016 WL 4081179 at *1 (Aug. 1, 2016); State v. Grothaus, No. 73562-4-I, 2016 WL 4081186 at *3 (Aug. 1, 2016); State v. Neskey, No. 73011-8-I, 2016 WL 3919700 at *1 (July 18, 2016). Consequently, in the interests of judicial economy, the State will not address the merits of Cheng's substantive due process claim unless directed otherwise.

furniture in her home, and that he would pay to fix it. Ex. 8 at 2, 4, 6. Further, Cheng stated that he owned three cars, contrary to his declaration that he has no personal property. Ex. 8 at 3; CP 94.

An order authorizing appointment of appellate counsel addresses only an appellant's present financial circumstances and ability to pay appellate costs up front. It does not address an appellant's future ability to pay, or the appellant's ability to pay over time. It is the appellant's future ability to pay, rather than the appellant's current ability to pay, that is most relevant in determining whether the imposition of financial obligations is appropriate. See State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (indigence is a constitutional bar to the collection of monetary assessments only if the defendant is unable to pay at the time the government seeks to enforce collection of the assessments); Shelton, at *7 (Wash. Ct. App. June 20, 2016) (holding defendant's challenge to DNA fee is not ripe until State seeks to collect, and the defendant has not shown a future inability to pay); State v. Stoddard, 192 Wn. App. 222, 228-29, 366 P.3d 474 (2016) (constitutional challenges to DNA fee fail because they "assume his poverty" while "the record contains no information, other than Stoddard's statutory indigence for purposes of hiring an

attorney,” that he will not be able to pay the fee). Terminating the appellant’s obligation to reimburse the public for some portion of the costs of appeal defeats the clear legislative mandate that people who can pay should be required to do so.

A better approach to assessing appellate costs was recently adopted by general order of Division Three of the Court of Appeals. See IN RE THE MATTER OF COURT ADMINISTRATION ORDER RE: REQUEST TO DENY COST AWARD, http://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=021&div=III (last visited August 24, 2016). The procedure requires some showing by the appellant, signed under penalty of perjury, that he does not have the future ability to pay. Respectfully, this requirement is more true to the legislative mandate than the approach adopted in State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). The State urges this Court to utilize the procedure adopted in Division Three.

For these reasons, the State opposes Cheng’s request to terminate his payment obligations before it can be meaningfully determined what, or if, he can pay.

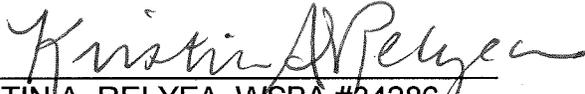
D. CONCLUSION

For the foregoing reasons, the Court should affirm Cheng's conviction and sentence.

DATED this 15th day of September, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Kevin A March, the attorney for the appellant, at MarchK@nwattorney.net, containing a copy of the Brief of Respondent, in State v. Heyeng Cheng, Cause No. 74255-8, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 1 day of September, 2016.


Name:
Done in Seattle, Washington