No. 89389-6
COA No. 67909-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PAUL DOUGLAS LOISELLE,

Petitioner.

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

The Honorable Sharon S. Armstrong

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Paul Loiselle asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Paul Loiselle*, No. 67909-1-I (August 5, 2013). A copy of the decision is in the Appendix at pages A-1 to A-10.

C. ISSUES PRESENTED FOR REVIEW

1. The State is required to prove the existence of a sentence enhancement beyond a reasonable doubt. Mr. Loiselle was charged with the use of a deadly weapon, which required the State to prove that in the manner it was used, the box cutter used by Mr. Loiselle during the assault was likely to cause death. The State proved the victim suffered a serious laceration but the State failed to prove that the box cutter, in the manner it was used by Mr. Loiselle, likely would have caused death. Is a significant question of law under the United States and Washington Constitutions involved, entitling Mr. Loiselle to reversal of the deadly weapon special verdict?

2. A prosecutor violates a defendant's right to a fair trial when he misstates the law thus impermissibly shifting the burden of proof to the defendant and relieving the State of its own burden of proof. During closing argument, the prosecutor invoked the civil standard of proof doctrine of *res ipsa loquitur*, thus inferring the defendant had a burden of proof and also inferring the State merely had to meet this civil standard, not the constitutionally mandated burden of proof beyond a reasonable doubt. Did the prosecutor's argument constitute misconduct which had a likelihood of affecting the jury verdict, thus requiring reversal of Mr. Loiselle's convictions?

D. STATEMENT OF THE CASE

On December 14, 2011, Paul Loiselle, his girlfriend, and several friends enjoyed a night out celebrating Mr. Loiselle's 42nd birthday. 8/2/2011RP 90-91. Following dinner, at approximately 10 pm, the party moved to Yen Wor, a tavern in which Mr. Loiselle had been the karaoke host. 8/2/2011RP 91, 114.

Coincidentally, Rory Tripp and several of his friends were celebrating his 28th birthday at a nearby tavern, the Crosswalk. 7/28/2011RP 108-09. At approximately 1 am, Mr. Tripp and his friends moved to Yen Wor. 8/1/2011RP 109. Mr. Tripp and five of the

other men were fairly intoxicated when they arrived at Yen Wor. 7/28/2011RP 110, 8/1/2011RP 101. Near closing time, the bartender announced last call, which Mr. Loiselle reiterated when the patrons did not appear to be leaving. 8/2/2011RP 116. Mr. Tripp's friend, Corey Flynn, took offense to Mr. Loiselle's announcement and, as he left, Mr. Flynn insulted Mr. Loiselle with a derogatory remark. 7/28/2011RP 104.

As Mr. Tripp, Mr. Flynn, and the others were leaving the tavern, Mr. Loiselle grabbed a pool cue and followed them outside. 7/28/2011RP 108, 8/2/2011 RP 145. Perry Southerland, a regular patron at Yen Wor, and Rex Waters, the karaoke host that night, followed Mr. Loiselle outside. 8/1/2011 167. Mr. Waters immediately took the pool cue away from Mr. Loiselle, and handed it to Mr. Southerland, who took the cue back inside Yen Wor. 8/1/2011RP 167-69. Mr. Southerland returned outside where he claimed he saw a box cutter, which contained a razor blade in it, in Mr. Loiselle's left hand. 8/1/2011RP 170.

Angry words were exchanged between Mr. Loiselle and the other men. 7/28/2011RP 167. Mr. Loiselle lunged at Randall Nickell, one of Mr. Tripp's friends, with his left hand and struck him in the

throat. 7/28/2011RP 169. This punch knocked Mr. Nickell to the ground, and when he stood up to return the punch, Mr. Flynn told Mr. Nickell he had been cut. 7/28/2011RP 171. Mr. Loiselle then lunged at Mr. Tripp with his left hand, cutting him as well. 7/28/2011RP 118, 8/2/2011RP 18-19. Mr. Waters herded Mr. Loiselle and the other regulars from Yen Wor back inside the tavern. 8/2/2011RP 74.

Mr. Nickell was taken to Harborview Hospital with a wound to his neck. 7/28/2011RP 174. Because of concerns the injury could have caused serious damage, a doctor specializing in neck injuries was contacted to evaluate the wound. 8/1/2011RP 24-25. Mr. Nickell was diagnosed with a penetrating stab wound to the left side of his neck which required 40 stitches to close. 7/28/2011RP 175, 8/1/2011RP 27. Mr. Nickell made a full recovery from the injury. 8/1/2011RP 64.

Mr. Tripp also suffered a far less serious injury to his neck. 7/28/2011RP 123. Mr. Tripp was also treated at Harborview, but his injury only required cleaning. 7/28/2011RP 127.

Mr. Loiselle was charged with two counts of second degree assault, one count involving Mr. Tripp, one count involving Mr. Nickell, with each count containing a sentencing enhancement for being armed with a deadly weapon. CP 6-7.

During closing argument, the prosecutor injected the civil burden of proof into Mr. Loiselle's trial:

> All right. I've been debating over and over and over with Ms. Breslin (phonetic) there and with colleagues, and there is a concept that is usually expressed in Latin, a legal doctrine or a concept, and I'm not going to use the Latin, but the concept is that the thing speaks for itself. The thin [sic] speaks for itself. All right. I'll tell you. It's *res ipsa loquitur*. It's an old legal doctrine that the thin [sic] speaks for itself. In malpractice cases, if somebody is opened up after surgery and they find a sponge inside that person, obviously, the doctor has committed malpractice, somebody screwed up. The thing speaks for itself. *Res ipsa loquitur*. That's this case.
>
> The injuries in this case speak for themselves. They're speaking to you. The evidence in this case is overwhelming. The defendant escalated the situation far beyond necessity and he used an instrument to cut intentionally the throat of Randy, and he intentionally used an instrument, a blade, to cut Rory. He's the only one that can do it. *Res ipsa loquitur*. It speaks for itself and it's speaking to you in a straight line and this and all other evidence leads to the defendant who put himself in that chair by continuing to escalate, and today that straight line leads to his conviction. He is guilty of the crimes of assault in the second degree in Count I and Count II. Thank you.

8/3/2011RP 44-45 (italics added).

The prosecutor revisited this doctrine again in his rebuttal argument:

> There's absolutely no indication whatsoever there was anything sharp on that tree or that somehow or another

> these injuries came from this tree and the key thing, ladies and gentlemen, the key thing, is that there's absolutely – there's absolutely no other explanation for how Rory received his injury which if you take a look at State's Exhibit 4 – just a second – take a look at State's Exhibit 4, that shows you right there that with his left hand, it's almost like a perfect like slash like that, almost straight in line, the shirt up that way, cut, cut, cut, all the way through. *Res ipsa.* Take a look at 28. Do you see anything sharp on that tree? The evidence is overwhelming, ladies and gentlemen.

8/3/2011RP 63 (emphasis added). Mr. Loiselle did not object to either argument.

The jury subsequently convicted Mr. Loiselle as charged. CP 79-82.

On appeal, the Court of Appeals affirmed Mr. Loiselle's convictions, finding there was sufficient evidence to support the jury's verdict on the enhancements, and finding the prosecutor's use of the concept of *res ipsa loquitar* in closing argument was "not well considered," but that it did not constitute misconduct. Decision at 4-7.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. THE STATE FAILED TO ESTABLISH THE BOX CUTTER USED BY MR. LOISELLE QUALIFIED AS A "DEADLY WEAPON"

In a criminal prosecution, the State is required to prove a sentencing enhancement beyond a reasonable doubt. U.S. Const. amend. XIV; *Blakely v. Washington,* 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Apprendi v. New Jersey,* 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is "[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

For deadly weapon sentence enhancements, there must be sufficient evidence that the defendant was armed with an *actual* deadly weapon. *State v. Tongate,* 93 Wn.2d 751, 754-55, 613 P.2d 121

(1980). Whether a weapon is deadly is a question of fact that the State must prove beyond a reasonable doubt. *Tongate,* 93 Wn.2d 754-55.

Under RCW 9.94A.533(4), if the jury finds that the defendant was armed with a deadly weapon during the commission of a felony as defined by the statute, the court must impose a consecutive term for the deadly weapon enhancement. RCW 9.94A.533(4). Second degree assault is a class B felony. RCW 9A.36.021(2)(a).

The deadly weapon finding must be made by the jury in a special verdict. RCW 9.94A.825 ("[I]f a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime").

A "deadly weapon" is defined as:

> an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

RCW 9.94A.825.

RCW 9A.04.110(6) creates two categories of deadly weapons: deadly weapons *per se*, namely "any explosive or loaded or unloaded firearm" and deadly weapons in fact, namely "any other weapon, device, instrument, article, or substance ... which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." *State v. Taylor,* 97 Wn.App. 123, 126, 982 P.2d 687 (1999). "Circumstances include 'the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted.'" *In re Martinez,* 171 Wn.2d 354, 365, 256 P.3d 277 (2011).

Thus, unless a dangerous weapon falls within the narrow category for deadly weapons *per se*, its status rests on the manner in which it is used. RCW 9.94A.825; *Martinez,* 171 Wn.2d at 366. The *Martinez* Court specifically disapproved of an approach that relied on whether the weapon was *potentially* capable of causing great bodily harm. *Martinez,* 171 Wn.2d at 368 n. 6.

For instance, in *State v. Skenandore*, a make-shift spear was found not to be a deadly weapon under the circumstances it was used, where a prison inmate used it to stab a corrections officer through a six-

by-eighteen inch opening in a cell door. 99 Wn.App. 494, 500-01, 994 P.2d 291 (2000). The spear was made out of rolled paper affixed to a golf pencil. *Id.* at 496. The spear struck the officer in the chest as he was bent over, handing a sack breakfast to the inmate through an opening in the cell door. *Id.* at 496–97. The spear did not break the skin. *Id.* at 497. The inmate was charged with second degree assault; at trial, the prosecutor argued that a sharpened pencil in the eye could cause substantial bodily injury. *Id* at 497–98. The record did not reveal any evidence that the inmate was aiming for the officer's face, or that the inmate actually stabbed the officer anywhere in the face. *Id.* at 498 n.3.

The Court of Appeals found insufficient evidence that the spear was a deadly weapon because the officer's face was not near the opening through which he was passing the inmate the sack breakfast; all blows landed on the officer's torso, well below his face; and the cell door separating the officer and the inmate restricted the spear's movement. *Skenandore,* 99 Wn.App. at 500. The Court acknowledged the spear may have had potential to cause substantial bodily harm, but the surrounding circumstances inhibited the spear's potential to cause such harm in that case. *Id.*

Here, the weapon was identified to be a box cutter, which did not fall under the category of a *per se* deadly weapon as defined in RCW 9.94A.825. The box cutter arguably used by Mr. Loiselle was never found, so the State never proved it was either a "knife having a blade longer than three inches," or a "razor with an unguarded blade." RCW 9.94A.825. As a consequence, the State had to prove the box cutter had the "capacity to inflict death from the manner in which it [was] used, [was] likely to produce or may easily and readily produce death." *Id.*

While the treating physician testified at length to the *potential* for an injury to that portion of Mr. Nickell's neck to be deadly, which is what the Court of Appeals held as well, that is not the standard under RCW 9.94A.825. The weapon used must be likely to cause death, not merely the *potential* to cause death. In addition, the actual injuries suffered by Mr. Nickell were non-life threatening. Mr. Nickell suffered a superficial deep wound to his neck. 8/1/2011RP 47-48. Had it been deep enough in specific portions of a person's neck, it had the potential to cause death given the right circumstances. But as noted, the *potential* for causing death is not the standard, yet that is all the State proved here. Following *Martinez* and *Skenandore,* the evidence failed

to prove that the sharp object was a deadly weapon as that term is defined.

This Court should grant review and find that under this Court's decision in *Martinez,* the mere potential is not enough to suffice as proof beyond a reasonable doubt, but the State must prove the weapon was used in a manner which could cause death.

2. MR. LOISELLE'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE PROSECUTOR'S MISCONDUCT DURING CLOSING ARGUMENT

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution as well as article I, section 22 of the Washington State Constitution. *Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *In re Personal Restraint of Glasmann,* 175 Wn.2d 696, 703, 286 P.3d 673 (2012). Prosecutors are more than mere advocates or partisans, rather, they represent the People and act in the interest of justice. *State v. Fisher,* 165 Wn.2d 727, 746, 202 P.3d 937 (2009).

> Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated.

State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport,* 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct and resulting prejudice. *State v. Thorgerson,* 172 Wn.2d 438, 442, 258 P.3d 43 (2011). To show prejudice the defendant must show that there was a substantial likelihood that the misconduct affected the jury verdict. *Id.*

> Thus, deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. We do not decide whether reversal is required by deciding whether, in our view, the evidence is sufficient.

Glasmann, 175 Wn.2d at 711(internal citations omitted). The ultimate inquiry is not whether the error was harmless or not harmless, but rather whether the impropriety violated the defendant's due process rights to a fair trial. *Davenport*, 100 Wn.2d at 762.

Comments made by a deputy prosecutor constitute misconduct and require reversal where they were improper and substantially likely to affect the verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). To prevail on a claim of prosecutorial misconduct, the

defendant must show that "there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict." *Thorgerson,* 172 Wn.2d at 443, *quoting State v. Magers,* 164 Wn.2d 174, 191, 189 P.3d 126 (2008).

The prosecutor's reference to the civil tort concept of *res ipsa loquitur* effectively relieved the State of its burden of proof and impermissibly shifted the burden of proof to the defense, thus violating Mr. Loiselle's right to due process and a fair trial.

Res ipsa loquitur means "'the thing speaks for itself.'" *Curtis v. Lein,* 169 Wn.2d 884, 889, 239 P.3d 1078 (2010), *quoting* W. Page Keeton Et Al., *Prosser And Keeton On The Law of Torts* § 39, at 243 (5th ed.1984).

> [T]he doctrine of *res ipsa loquitur* provides an inference of negligence from the occurrence itself which establishes a prima facie case sufficient to present a question for the jury.
> . . .
> [The doctrine of *res ipsa loquitur*] casts upon the defendant the duty to come forward with an exculpatory explanation, rebutting or otherwise overcoming the presumption or inference of negligence. *Id.*

Metro. Mortgage & Sec. Co., Inc. v. Washington Water Power, 37 Wn.App. 241, 243, 679 P.2d 943 (1984).

The doctrine of *res ipsa loquitur* recognizes that the nature of an act may allow the occurrence itself to circumstantially establish liability on the part of the defendant, without further direct proof. *Jackson v. Criminal Justice Training Commission,* 43 Wn.App. 827, 829, 720 P.2d 457 (1986). Where *res ipsa loquitur* applies, it spares the plaintiff from proving specific acts of negligence and shifts the burden to the defendant to provide an explanation. *Curtis,* 169 Wn.2d at 894. In the civil context, courts ordinarily apply the doctrine "'sparingly in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential.'" *Curtis,* 169 Wn.2d at 889 (internal quotation marks omitted), *quoting Tinder v. Nordstrom,* 84 Wn.App. 787, 792, 929 P.2d 1209 (1997).

The concept of *res ipsa loquitur* is not helpful to the jury in a criminal case, and any attempt to invoke its legal meaning is extremely problematic. This reference to *res ipsa loquitur* is inappropriate because the State bears the burden of proving its case beyond a reasonable doubt, and the defendant bears no burden. *State v. Camara,* 113 Wn.2d 631, 638, 781 P.2d 483 (1989), *citing In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). By suggesting otherwise, for instance suggesting using a civil inference standard,

suggests to the jury that the State's burden of proof is less than proof beyond a reasonable doubt, and subtly shifts the burden of producing evidence to rebut the inference to the defense. *See Thorgerson,* 172 Wn.2d at 453 ("A prosecutor generally cannot comment on a defendant's failure to present evidence because the defendant has no duty to present evidence"); *State v. Gregory,* 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006) (arguments that shift the burden of proof to the defense constitute misconduct).

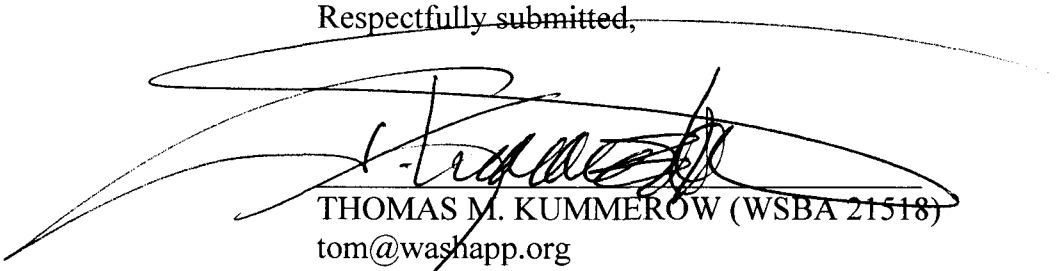
The Court of Appeals found the prosecutor's use of the term "not well considered." Decision at 7. To the contrary, the use of the term *res ipsa loquitar* was not only not well considered, it was improper and constituted misconduct on the part of the prosecutor. This Court should accept review to state unequivocally that the use of the concept *res ipsa loquitar* has no business being introduced in a criminal matter as it has the potential for diminishing the State's burden of proof.

F. CONCLUSION

For the reasons stated, Mr. Loiselle respectfully request this Court grant review, reverse his convictions, and remand for a new trial, or reverse the enhancements with instructions to dismiss.

DATED this 3rd day of September 2013.

Respectfully submitted,



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APPENDIX A

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

STATE OF WASHINGTON, Respondent/Cross Appellant, v. PAUL DOUGLAS LOISELLE, Appellant/Cross Respondent.	)	No. 67909-1-I UNPUBLISHED OPINION FILED: August 5, 2013

VERELLEN, J. — Paul Loiselle challenges his conviction by a jury for two counts of second degree assault. He argues the State did not present sufficient evidence that he was armed with a deadly weapon, specifically, that he used a box cutter in a manner capable of causing death or substantial bodily harm. He also claims the prosecutor committed misconduct by referring to the doctrine of res ipsa loquitur during closing argument. The State cross appeals the trial court's dismissal of the deadly weapon enhancements on both counts. We affirm Loiselle's convictions and remand for imposition of the deadly weapon enhancements.

FACTS

On December 14, 2010, Rory Tripp, Randy Nickell and Corey Flynn were at the Yen Wor Garden restaurant and bar in Seattle celebrating Tripp's birthday. Paul Loiselle was also at the bar with a separate group of friends celebrating his own birthday. At

approximately 1:30 a.m., bar staff announced that it was closing time. For reasons not clear from the record, Flynn and Loiselle exchanged heated words.

As Tripp, Nickell and Flynn left the bar, Loiselle grabbed a pool cue from a rack near the door and followed them out. One of the bar's employees took the pool cue away from Loiselle and returned it to the bar. Loiselle then lunged at Flynn. Perry Southerland, a regular customer at the bar, saw what he believed to be a grocery store box cutter in Loiselle's left hand. Nickell stepped between Loiselle and Flynn and hit Loiselle. Loiselle swung at Nickell, hitting him in the neck. The force of the blow knocked Nickell backwards onto the ground. Tripp attempted to intervene in the altercation and Loiselle swung at Tripp. Loiselle then went back inside the bar. Nickell's throat had a deep gash that was bleeding heavily. Tripp had a smaller laceration on his neck that was bleeding, and his T-shirt and sweatshirt had also been cut. Both Nickell and Tripp were transported to the hospital. Loiselle was arrested. The arresting officer noticed that Loiselle had dried blood on the thumb and index finger of his left hand.[1]

Dr. Amit Bhrany, a head and neck surgeon, evaluated Nickell's wound to determine the extent of the injury. According to Dr. Bhrany, Nickell's injury was consistent with being caused by a sharp object wielded with "a fair amount of force."[2] The injury resulted in lacerations to the platysma muscle, anterior jugular vein and strap muscles, as well as a superficial cut to the thyroid cartilage and a small tear to the pharynx. Surgeons cauterized Nickell's jugular vein to stop the bleeding and stitched

[1] Loiselle is left-handed.

[2] Report of Proceedings (RP) (Aug. 1, 2011) at 43.

both the interior muscles and the skin. Nickell was out of work for approximately six weeks. The box cutter was never recovered.

The State charged Loiselle with two counts of second degree assault with a deadly weapon. At trial, the trial court instructed the jury on the special verdict forms as follows:

> You will also be given special verdict forms for the crimes charged in Counts I and II. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of either Assault in the Second Degree or Assault in the Third Degree in either Count I or Count II, you will then use the special verdict form for that count and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."[3]

The trial court also instructed the jury on the State's burden of proving all elements of the crimes charged beyond a reasonable doubt.

A jury convicted Loiselle on both charges. The jury also returned deadly weapon special verdicts on both counts.

At sentencing, Loiselle moved to strike the deadly weapon enhancements, arguing that pursuant to State v. Bashaw,[4] the trial court erred in instructing the jury it must be unanimous to answer "no." The sentencing court struck the enhancements.

DISCUSSION

Sufficiency of the Evidence

When reviewing a claim of insufficient evidence, this court must decide "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational

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[3] Clerk's Papers at 121.

[4] 169 Wn.2d 133, 234 P.3d 195 (2010).

trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[5] In challenging the sufficiency of evidence, the defendant admits the truth of the State's evidence and all inferences that reasonably can be drawn from it.[6] Credibility determinations are reserved for the trier of fact; thus, we defer to the jury on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence.[7]

For the purposes of a special verdict, a deadly weapon is "an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death."[8] "Relevant to this determination are the defendant's intent and present ability, the degree of force used, the part of the body to which the weapon was applied and the injuries inflicted."[9]

Citing In re Personal Restraint of Martinez[10] and State v. Skenandore,[11] Loiselle argues the State failed to prove the box cutter was used in a manner likely to produce death. Both these cases are inapposite. In Martinez, a conviction for first degree burglary, the defendant was armed with a knife sheath but there was no evidence that he used or planned to use a knife in the commission of the crime.[12] In Skenandore, an

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[5] State v. Ortiz, 119 Wn.2d 294, 311-12, 831 P.2d 1060 (1992) (internal quotation marks omitted) (quoting State v. Bingham, 105 Wn.2d 820, 823, 719 P.2d 109 (1986)).

[6] State v. Spruell, 57 Wn. App. 383, 385, 788 P.2d 21 (1990).

[7] State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

[8] RCW 9.94A.825. Weapons that constitute deadly weapons as a matter of law include "any knife having a blade longer than three inches" and "any razor with an unguarded blade." Id. The State concedes that it was unable to prove the box cutter was a deadly weapon as a matter of law.

[9] State v. Zumwalt, 79 Wn. App. 124, 130, 901 P.2d 319 (1995), overruled in part on other grounds by State v. Bisson, 156 Wn.2d 507, 130 P.3d 820 (2006).

[10] 171 Wn.2d 354, 256 P.3d 277 (2011).

[11] 99 Wn. App. 494, 994 P.2d 291 (2000).

[12] Martinez, 171 Wn.2d at 368-69.

inmate attempted to stab a corrections officer through a cell window with a homemade spear fashioned from rolled paper bound with dental floss and attached to a golf pencil.[13] The spear did not tear the officer's clothing or skin but left pencil marks on his chest and sleeve.[14] Though the State argued that the pencil could have caused substantial bodily harm had the defendant struck the officer in the face or eye, there was no evidence to support this claim, nor was there evidence that the defendant could have hit the officer's face or eye through the window.[15]

Here, it was reasonable for the jury to infer that the manner in which the box cutter was used had the capacity to cause death. Loiselle cut both Nickell and Tripp on the neck, causing laceration and bleeding. Dr. Bhrany testified that the laceration of even a small blood vessel in the neck could cause death. The evidence in the light most favorable to the State proved that the box cutter constituted a deadly weapon.

Unanimity Requirement

The State argues the sentencing court erred when it struck the sentencing enhancements based on Bashaw. We agree. The Washington Supreme Court recently overruled Bashaw and expressly upheld an instruction identical to the one given here.[16]

Prosecutorial Misconduct

Loiselle contends the prosecutor committed misconduct by referring to res ipsa loquitur during closing argument and rebuttal:

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[13] Skenandore, 99 Wn. App. at 496.

[14] Id. at 497.

[15] Id. at 500.

[16] State v. Nuñez, 174 Wn.2d 707, 710, 285 P.3d 21 (2012).

> [T]here is a concept that's usually expressed in Latin, a legal doctrine or a concept, and I'm not going to use the Latin, but the concept is that the thing speaks for itself. . . . It's res ipsa loquitur. It's an old legal doctrine that the thin[g] speaks for itself. In malpractice cases, if somebody is opened up after a surgery and they find a sponge inside that person, obviously, the doctor has committed malpractice, somebody screwed up. The thing speaks for itself. Res ipsa loquitur. That's this case.
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> The injuries in this case speak for themselves. They're speaking to you. The evidence in this case is overwhelming. The defendant escalated the situation far beyond necessity and he used an instrument to cut intentionally the throat of Randy and he intentionally used an instrument, a blade, to cut Rory. He's the only one that can do it. Res ipsa loquitur. It speaks for itself and it's speaking to you in a straight line[.] [A]nd this and all the other evidence leads to the defendant who put himself in that chair by continuing to escalate, and today that straight line leads to his conviction. He is guilty of the crimes of assault in the second degree in Count I and Count II. Thank you.
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> . . . .
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> . . . There's absolutely no indication whatsoever there was anything sharp on that tree or that somehow . . . these injuries came from this tree[.] [A]nd the key thing, ladies and gentlemen, . . . is that there's absolutely . . . no other explanation for how Rory received his injury[.] [I]f you take a look at . . . State's Exhibit No. 4, that shows you right there that with his left hand, it's almost like a perfect like a slash like that, almost straight in line, the shirt up that way, cut, cut, cut, all the way through. Res ipsa. Take a look at 28. Do you see anything sharp on that tree? The evidence in this case is overwhelming, ladies and gentlemen. The defendant cut, cut, and substantially wounded and assaulted both men with a deadly weapon, the manner in which it was used.[17]

Loiselle did not object to the deputy prosecutor's statements.

"[T]he doctrine of res ipsa loquitur provides an inference of negligence from the occurrence itself which establishes a prima facie case sufficient to present a question for the jury."[18] Loiselle argues that the reference to res ipsa loquitur effectively relieved the State of its burden of proof.

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[17] RP (Aug. 3, 2011) at 44-45, 63-64.

[18] Metro. Mortg. & Sec. Co., Inc. v. Washington Water Power, 37 Wn. App. 241, 243, 679 P.2d 943 (1984).

To prevail on a claim of prosecutorial misconduct, a defendant must show both improper conduct and prejudicial effect.[19] Prejudice occurs only if "there is a substantial likelihood the instances of misconduct affected the jury's verdict."[20] A failure to object waives any claim of error unless the comments were so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice.[21] Defense counsel's failure to object strongly suggests the argument in question does not appear prejudicial in the context of the trial.[22] We review misconduct claims in the context of the total argument, the evidence addressed, the issues in the case, and the jury instructions.[23]

Although the common sense concept that a person's action speaks for itself is not improper, the introduction of legal terminology from civil tort law is not well considered. However, viewed in context, it is clear the deputy prosecutor was arguing only that Nickell and Flynn's neck wounds were evidence that they had been stabbed with something sharp, and the only evidence of a sharp object was Loiselle's box cutter. The deputy prosecutor relied solely on the literal meaning of res ipsa loquitur and did not suggest that the concept affected the State's burden of proof. The trial court properly instructed the jury that the State had the burden of proving all elements of the offense beyond a reasonable doubt. In light of these facts, Loiselle fails to establish that the deputy prosecutor's statements constituted misconduct.

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[19] State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 717 (2000).

[20] State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

[21] State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

[22] State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

[23] State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005).

Statement of Additional Grounds

In his statement of additional grounds, Loiselle argues that the trial court erred by: (1) admitting into evidence a small key-shaped knife that was not used in the crime; (2) allowing a law enforcement officer to testify regarding the knife; (3) instructing the jury on the careful handling of the knife; and (4) denying a defense motion to dismiss.

A few days after the stabbing, the owner of the Yen Wor Garden contacted the Seattle Police Department, reporting that a weapon had been found on the property. Officer Paul Gingrey responded and retrieved a small, key-shaped knife with a folding blade. At trial, Officer Gingrey testified that the knife appeared to have dried blood on it, and that he received an e-mail "saying there might be blood on there, from the evidence section."[24] The trial court admitted the exhibit. The jury was instructed to try to use gloves if handling the exhibit in the jury room due to the presence of blood.

At the conclusion of Officer Gingrey's testimony, defense counsel moved to dismiss, claiming that he had never received a copy of the e-mail in discovery. The State had also never seen the e-mail. To address the issue of blood on the knife, the State recalled Detective Paul Takemoto, who testified that he had not ordered it to be tested. Detective Takemoto stated he did not believe it was the weapon used in the case because the blade was too short and would have produced "more of a puncture wound."[25] Following Detective Takemoto's testimony, defense counsel agreed, stating, "I think that what we did with the detective seemed pretty curative."[26] The trial court denied the motion to dismiss, stating:

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[24] RP (Aug. 2, 2011) at 53.

[25] Id. at 85.

[26] Id. at 87.

> [T]he motion is denied. We don't really have the document that Officer Gingrey thinks he received[.] [B]ut most significantly[,] that information was never passed on to anybody who was in a position to follow it up or disclose it to defense counsel. So the prosecutor assigned the case, the detective assigned the case, never had information that someone suspected there was blood on [the key-shaped knife]. Someone put . . . biohazard tape on the exhibit, but that information apparently just wasn't passed up the chain so that anyone could do anything with it, so I've denied the motion.[27]

The admissibility of evidence rests within the sound discretion of the trial court, and this court will not disturb the trial court's decision unless no reasonable person would adopt the trial court's view.[28] While the purpose of admitting a weapon that all parties agreed was not used in the crime is somewhat unclear, we cannot say it was an abuse of the trial court's discretion. Moreover, even if the admission of evidence was error, it "requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial."[29] Detective Takemoto emphasized that the key-shaped knife was not the weapon used to stab Nickell and Tripp. Neither the State nor defense mentioned it in closing argument. We cannot say there was a reasonable probability that the verdict was affected by this evidence.

Nor are we persuaded that the trial court's statement to the jury was prejudicial to Loiselle. The trial court emphasized several times the importance of wearing gloves when handling any physical exhibit that might have blood on it. These instructions were offered for the safety of the parties and the jury and were not unduly prejudicial.

Loiselle argues that the failure of the trial court to exclude the key-shaped knife or instruct the jury to disregard Officer Gingrey's testimony "left the [d]efense with no

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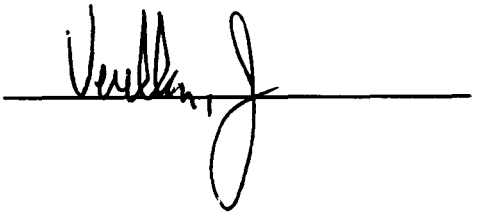
[27] Id. at 88.

[28] State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001).

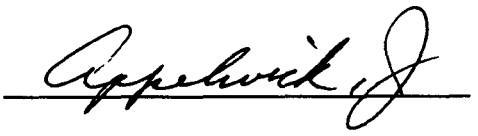
[29] State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993).

relief" other than his motion to dismiss.[30] But Loiselle's motion to dismiss was on the basis of an alleged Brady[31] violation. The trial court found no Brady violation because there was not a reasonable probability that disclosure of the evidence would have changed the outcome. Moreover, Loiselle conceded below that Detective Takemoto's testimony was sufficiently curative. The trial court did not err in denying Loiselle's motion to dismiss.

Loiselle's conviction is affirmed. We remand for resentencing with imposition of the deadly weapon enhancement.



WE CONCUR:



[30] Statement of Additional Grounds at 3.

[31] Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 67909-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Gretchen Holmgren, DPA
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: September 3, 2013