NO. 44221-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

DUANE ALLEN MOORE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 12-1-00848-3

BRIEF OF RESPONDENT

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SERVICE		
	Rita Joan Griffith 4616 25th Avenue Ne Pmb 453 Seattle, WA 98105-4523	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the right, electronically.* . I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED June 24, 2013, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

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2. Whether the Defendant's claim that the trial court erred by allowing a Service dog to sit with the victim is without merit when the Defendant did not object to the use of the service dog below and thus failed to properly preserve this issue for appeal?

3. Whether the Defendant's claim that the prosecutor improperly "testified" at the sentencing hearing is without merit when, even assuming that the prosecutor's minor comments were improper, any error in this regard was clearly harmless beyond a reasonable doubt?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Defendant, Duane Allen Moore, was charged by information filed in Kitsap County Superior Court with one count of Assault in the Second Degree (by means of strangulation) with a special allegation of domestic violence. CP 1-6. A jury found the Defendant guilty and the trial court imposed a standard range sentence. CP 39-40, 58. This appeal

followed.

B. FACTS

At trial, Sabrina Moore testified that she has been married to the Defendant for three years, but that they were separated by July 22, 2012. RP 165-66. On that day the two saw each other at church and the Defendant and his brother later came to Ms. Moore's home for dinner and a movie. RP 166. About halfway through the movie the Defendant got up and went to the bathroom, and he remained in the bathroom for approximately an hour. RP 166-67. When the Defendant came out of the bathroom his mood had changed and he immediately started yelling at Ms. Moore. RP 167-68.

Ms. Moore was sitting on the sofa at this time, and the Defendant stood over her pointing at her and shoving his face and fingers into her face and chest, and telling her to "shut up" and telling her that she talked too much. RP 168-69. Ms. Moore got up and tried to go down a hallway, but the Defendant followed her and continued to get in her face. RP 169. At this point the Defendant told Ms. Moore that she was "a no-good wife" and that she had messed up his life. RP 169.

Ms. Moore went into the bedroom and the Defendant then began pushing Ms. Moore against a wall and holding her by her shirt. RP 169-70. Ms. Moore attempted to get away from the Defendant and she had made it

back into the living room when the Defendant grabbed a full plastic tea bottle and threw it at her, striking her lower back. RP 170. Ms. Moore then went out the front door of the residence, but the Defendant followed her outside onto a porch. RP 171.

While on the porch the Defendant continued yelling at Ms. Moore and pointing at her, and Ms. Moore then told the Defendant that she wanted her house key back and that she did not want the Defendant to ever come back. RP 172. The Defendant then became more angry and put his left arm behind Ms. Moore's neck and his right forearm on her throat. RP 172. At this point Ms. Moore's back was up against a railing and she was pushed over backwards. RP 182. The Defendant applied pressure to Ms. Moore's neck with both arms. RP 172-73. Ms. Moore told the Defendant to stop because she could not breathe, but the Defendant did not stop and the strangulation continued for approximately a minute. RP 173. Ms. Moore had trouble breathing and became dizzy, and she further testified that she almost lost consciousness. RP 173.

A neighbor named Mariah Jacobs lived two doors down from Ms. Moore and heard the commotion. RP 187-88. Ms. Jacobs was sitting on her back porch when she heard screaming and yelling, and she immediately called 911. RP 188, 190. Ms. Jacobs then went to the front of her house and saw the Defendant and Ms. Moore yelling at each other.

RP 188. Ms. Jacobs testified that she saw the Defendant hold one arm up against Ms. Moore's throat and that it looked like he then hit her with his other arm. RP 189. Ms. Moore then redialed 911 to let them know that the fight had become physical. RP 190. Ms. Jacobs also testified that she heard Ms. Moore say, "He's choking me." RP 190.

Eventually a neighbor named Tobias Gomez intervened. 174, 195. Ms. Gomez testified at trial and also explained that she saw the Defendant grabbing Ms. Moore. RP 195. Ms. Gomez confronted the Defendant. RP 174, 195. The Defendant then turned his attention to Ms. Gomez and began arguing with her and told her to get off of his property. RP 174, 195. Ms. Moore then went into the house and called 911. RP 175. The Defendant eventually left the scene in a green car. RP 191.

Officer Lawrence Green of the Bremerton Police Department arrived at the scene after receiving a dispatch regarding a domestic altercation. RP 150. Officer Green found numerous people standing in the street and eventually contacted Ms. Moore. RP 150-51. Ms. Moore was crying hysterically and Officer Green saw that Ms. Moore had a red mark across the front of her throat. RP 151-52. Officer Green took photos of the injury, and the photo was admitted as an exhibit at trial. RP 153-54.

Another officer stopped the car carrying the Defendant, and the Defendant was arrested. RP 150, 155. Officer Green subsequently

interviewed the Defendant. RP 155-56. The Defendant told Officer Green that he had been trying to get away from Ms. Moore because she was making sexual advances towards him. RP 156. The Defendant further explained that they got in an argument and that he had left and that was all that had happened. RP 156.

The Defendant also testified at trial. RP 198. The Defendant acknowledged that he had a "face-to-face" and "chest-to-chest" argument with Ms. Moore, but he claimed that he never pushed, struck, or strangled Ms. Moore. RP 201-03. The Defendant also testified that he never put his forearm on Ms. Moore's neck and that he never put a hand on her at all. RP 207-08.

III. ARGUMENT

A. THE DEFENDANT'S CLAIM THAT STATE COMMITTED PROSECUTORIAL MISCONDUCT BY MISSTATING THE BURDEN OF PROOF IS WITHOUT MERIT BECAUSE THE PROSECUTOR: (1) NEVER IMPLIED THAT THE BURDEN OF PROOF WAS ANYTHING OTHER THAN PROOF BEYOND A REASONABLE DOUBT; AND (2) DID NOT OTHERWISE DENIGRATE OR MISCHARACTERIZE THE REASONABLE DOUBT STANDARD.

The Defendant argues that the prosecutor committed misconduct by misstating the State's burden of proof. App.'s Br.at 18. This claim is without merit because the defendant has failed to show that the

prosecutor's conduct was improper or that any improper conduct prejudiced his right to a fair trial. Rather, the record shows that the prosecutor properly argued the beyond a reasonable doubt standard and did not otherwise denigrate or mischaracterize the reasonable doubt standard.

To establish prosecutorial misconduct, a defendant must prove that the prosecutor's conduct was improper and that this improper conduct prejudiced his right to a fair trial. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998). If the defendant failed to object to the prosecutor's misconduct at trial, a reversal is only warranted if this Court finds that the prosecutor's misconduct was so flagrant and ill-intentioned that it caused an "enduring and resulting prejudice" incurable by a jury instruction. *State v. Sakellis*, 164 Wn.App. 170, 184, 269 P.3d 1029 (2011), *citing State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) (*quoting State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)); *see also State v. Charlton*, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

This standard requires the defendant to establish that (1) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict," and (2) no curative instruction would have

obviated the prejudicial effect on the jury. *Sakellis*, 164 Wn.App. at 184, *citing State v. Thorgerson*, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011) and *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (a defendant cannot demonstrate "enduring and resulting prejudice" without demonstrating "a substantial likelihood that the alleged prosecutorial misconduct affected the verdict.").

In addition, an appellate court is to review a prosecutor's allegedly improper comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994); *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

In determining whether prosecutorial misconduct occurred, the appellate court first evaluates whether the prosecuting attorney's comments were improper. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

The Defendant argues that the prosecutor misstated and trivialized the reasonable doubt standard and "redefine[d] it as one in which the State need only give the jury a lasting common sense impression that the defendant was guilty." App.'s Br. at 13, 20. The Defendant's argument, however, is not supported by the record. Rather, the record shows that the

State properly cited to the reasonable doubt standard in voir dire and in closing argument.

Voir Dire

The Washington Supreme Court has specifically held that it is proper to excuse a prospective juror for cause when the juror would require "100% proof," since "proof beyond a reasonable doubt does not require "100%" proof. *State v. Davis*, 141 Wn.2d 798, 859, 10 P.3d 977 (2000). Thus, it is clearly proper for the State to ask questions in voir dire that are directed to this issue in order to determine if any of the prospective jurors would hold the State to a standard higher that the actual legal standard; proof beyond a reasonable doubt. That is exactly what happened in the present case.

During voir dire the prosecutor asked the panel if they were familiar with the beyond a reasonable doubt standard, and asked the panel what the standard meant. RP 98. The first juror that responded explained that the standard required the State to prove the case "beyond a shadow of a doubt." RP 98. In response the State asked the panel if the beyond a reasonable doubt standard required "100% proof." RP 98. Several jurors responded that 100% proof was required. RP 98-99. For instance, one juror responded that "It's my personal opinion that it has to be 100 percent to be beyond a reasonable doubt." RP 99. When the prosecutor asked what

others thought, the following discussion occurred:

> PROSPECTIVE JUROR NO. 36: I think if we're talking about putting a man in prison or jail, that I've got to be about as certain of my decision as I would be for -- I got to know that as well as I know my name. If you haven't completely convinced me, I'm not going to put a man in jail.
>
> [PROSECUTOR]: I agree with you. The burden is on the State. So we have the burden to prove beyond a reasonable doubt that the defendant committed this crime, and it's a high burden. But what I'm trying to get across to you is that it's not an impossible burden.

RP 101. The prosecutor then used an example regarding the proposition that the earth was round. The State asked several jurors how they would prove this proposition, and the jurors mentioned things like books and photographs of the earth taken from space. RP 102-04. The prosecutor pointed out, however, that the jurors had not been to space to *personally* observe the shape of the earth (thus establishing *some*, albeit unreasonable, doubt). RP 104-06. This argument was clearly meant to demonstrate that "100%" proof was not required and that the standard did not require proof beyond all doubt. The prosecutor then asked one of the jurors if they agreed that proof beyond a reasonable doubt could be based on a common sense appreciation of the facts, and when that juror agreed, the prosecutor stated,

> My point is, you can be satisfied beyond a reasonable doubt based on a common sense appreciation of the facts that you're presented with. It's not an impossible standard.

RP 106. The Defendant did not object.[1]

On appeal, the Defendant argues that this portion of the voir dire somehow represents the prosecutor telling the jury that the standard of proof did not require having the State "overcome all of their reasonable doubts by the evidence presented at trial." App.'s Br. at 13.

Viewing the voir dire in its full context, however, it is clear that the State was merely discussing the reasonable doubt standard with the jury, and that during this discussion a number of jurors admitted that they believed the standard required "100% proof." In response the State merely explained that the actual standard was not an impossible standard that required proof beyond all doubt or "100% proof." The prosecutor's argument did not denigrate or mischaracterize the reasonable doubt standard of proof. The argument was consistent with the jury's instruction and was not misconduct.

Furthermore, even assuming that these comments were a misstatement of the law, had defense counsel objected, the trial court

[1] The only objection raised below during this portion of the voir dire occurred when the State started to mention what the actual instruction on reasonable doubt would say. RP 106. The trial court sustained the objection before the prosecutor was able to go through the instruction. RP 106. No other objections were made to any of the State's comments.

could have instructed the jury to ignore these comments because they were not accurate statements of the law. And these comments were not so "flagrant" or "ill intentioned" that a simple curative instruction would not have remedied any possible prejudice.[2]

Closing Argument

The Defendant also argues on appeal that the State somehow misstated the burden of proof in closing argument. App.'s Br. at 9-1120.

[2] The Defendant also briefly argues that the State argued facts not in evidence. App.'s Br. at 16. The Defendant's argument appears to be that the State improperly told the jury that they would "inevitably" not hear all the evidence. App.'s Br. at 16-17. An examination of the record shows that during the voir dire discussion regarding whether proof beyond a reasonable doubt requires "100%" proof, one of the jurors stated, "I don't think it has to be 100% proof because not all the facts are going to be displayed." RP 99. The State responded by stating,

> "Well, it's interesting that you say that. You say, all the facts. And as jurors, you're in a difficult position because inevitably we know more about the case than you do. And what you will be given, the evidence that is presented to you, is all of the facts. Now, what you get is what you get. It will be all of the facts of the case that you get to evaluate the case, and you can't consider whether there is something missing. You really can't. You'll get the facts of the case. The facts of the case are what you'll get through evidence."

RP 100. No objection was made to this comment. In addition, although the prosecutor mentioned that "we know more about the case than you do," it was very likely that this was merely a reference to the fact that during voir dire the jury knew absolutely know thing about the facts of the case, while the attorneys and the judge were aware of what the allegations were. Furthermore, even if the statement was construed as a statement that even after the testimony the attorneys would know more about the case then the jury would, there was absolutely no statement from the prosecutor that hinted or implied that there was some hidden evidence that pointed towards guilt. Rather, the State immediately pointed out that the jury was required to base its verdict solely on the evidence produced at trial. RP 100. Thus, this brief comment, even if error, could not reasonable be said to have had any impact on the ultimate result at trial. As no objection was raised below, the Defendant is required to establish that (1) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict," and (2) no curative instruction would have obviated the prejudicial effect on the jury. *Sakellis*, 164 Wn.App. at 184. The Defendant, however, has failed to show that prosecutor's brief response to the juror's statement likely affected the verdict or that no curative instruction could have obviated the prejudicial effect on the jury. His argument, therefore, must fail.

Viewing the State's closing in context, however, demonstrates that the State did not misstate the burden of proof.

In closing argument the State's overall argument was that the victim's testimony was credible because the key portions of her testimony were corroborated by the independent witnesses and that the evidence, when taken together, constituted proof beyond a reasonable doubt. Specifically, the State began its closing by going through jury instruction No. 1 which explained that the jurors were the sole judges of credibility and that in judging credibility the jury may consider "the reasonableness of the witnesses' statements in the context of all of the other evidence." RP 212. The State then immediately went to the court's instruction on reasonable doubt and explained that although the concept had been discussed in voir dire, the court's instruction represented the actual law on this subject. RP 212-13.

The State then carefully went through all of the State's evidence. For instance, the State explained that the victim had testified that the Defendant had strangled her to the point where she almost lost consciousness. RP 216, 219. In addition the testimony of the victim was corroborated by the testimony of the independent witnesses. For example, Mariah Jacobs testified that she saw the Defendant put his arm on the victim's neck. RP 220-21. Similarly, Tobias Jones heard a physical

argument and confronted the Defendant telling, him "If you're going to hit someone, hit me." RP 221. In addition, Officer Green found that the victim was hysterical and crying and that she had an obvious injury on her neck. RP 218. The State then explained that the testimony from the independent witnesses each served to corroborate the victim's testimony that she had been assaulted. RP 218, 220-22.

The State then concluded by mentioning the concept of beyond a reasonable doubt yet again. RP 223-24. The State explained that the standard of beyond a reasonable doubt could was satisfied because the victim's testimony was corroborated by the other witnesses. RP 224. Thus, their testimony, when taken together, made "sense" and warranted a guilty verdict. RP 224.

Viewing the State's argument as a whole, the State's comments in closing argument did not denigrate or mischaracterize the reasonable doubt standard of proof. Rather, the argument was consistent with the jury's instruction and was not misconduct.[3]

The Defendant also argues that the State improperly questioned the credibility his testimony and that the State implied that the in order to

[3] Furthermore, even assuming that these comments were a misstatement of the law, had defense counsel objected, the trial court could have instructed the jury to ignore these comments because they were not accurate statements of the law. And these comments were not so "flagrant" or "ill intentioned" that a simple curative instruction would not have remedied any possible prejudice.

acquit, the jury would have to find that the State's witnesses were not credible. App.'s Br. at 17. This claim is clearly without merit, as the prosecutor did not in any way state that in order to acquit the jury was required to find that the State's witnesses were not credible. Rather, the State properly pointed out that testimony of the independent witnesses corroborated the victim's version of events and did not support the Defendant's version of events. As this argument was perfectly proper under Washington law, the Defendant has failed to show misconduct.

It is true that the State did argue that the Defendant's version of events was not credible, but the State properly made this argument based on the fact that the Defendant's version was contrary to the testimony of the independent witnesses. For instance, the State explained that the Defendant had told Officer Green that he had left because his wife was making sexual advances towards him and that nothing had happened. RP 218. In addition, the Defendant claimed on the stand that he had never put his hands on the victim. RP 220. The State then merely pointed out that the testimony from the independent witnesses corroborated the victim's version of events and was contrary to the Defendant's version of events. RP 222. Thus, the Defendant's version just did not make sense and was not credible. RP 224.

This argument is completely proper under Washington law, as the State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence. *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006) (*citing State v. Gentry*, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995)). The State is entitled to comment upon the quality and quantity of evidence the defense presents. *Gregory*, 158 Wn.2d at 860, 147 P.3d 1201. Such argument does not suggest that the burden of proof rests with the defense. *Gregory*, 158 Wn.2d at 860, 147 P.3d 1201.

In short, the Defendant has failed to demonstrate that the State's argument was improper. Rather, the state merely pointed out that the testimony from the independent witnesses corroborated the victim's version of events and was inconsistent with the Defendant's version. This was entirely appropriate.

B. THE DEFENDANT'S CLAIM THAT THE TRIAL COURT ERRED BY ALLOWING A SERVICE DOG TO SIT WITH THE VICTIM IS WITHOUT MERIT BECAUSE THE DEFENDANT DID NOT OBJECT TO THE USE OF THE SERVICE DOG BELOW AND THUS FAILED TO PROPERLY PRESERVE THIS ISSUE FOR APPEAL.

The Defendant next claims that the trail court erred by allowing a service dog to sit with the victim when she testified. App.'s Br. at 21.

This claim is without merit because the Defendant did not object below and thus has not preserved the issue for appeal.

On appeal, the Defendant argues that, "Without any analysis or consideration of prejudice, the trial court allowed Sabrina Moore to testify with the court's service dog at her side." App.'s Br. at 21. The Defendant fails to mention that no objection was raised to the use of the service dog. Rather, the prosecutor explained to the trial court that the victim had requested that the service dog be allowed to sit at the witness stand and the prosecutor further explained that he had discussed this with defense counsel and that defense counsel had no objection. RP 164. The trial court allowed the use of the service dog and no objection was ever made to the use of the service dog. RP 164.

RAP 2.5(a)(3) provides, "The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed error[ ] for the first time in the appellate court: ... manifest error affecting a constitutional right." *State v. Grimes*, 165 Wn.App. 172, 179, 267 P.3d 454 (2011); *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009). As this Court has explained, the policy underlying the preservation rule is to promote "efficient use of judicial resources"; therefore, "this court will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might

have been able to correct to avoid an appeal and a consequent new trial." *Grimes*, 165 Wn.App. at 179, *quoting State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Furthermore, this Court has noted that our Supreme Court has recently explained that:

> Generally, an appellate court may refuse to entertain a claim of error not raised before the trial court. RAP 2.5(a). An exception exists for a claim of manifest error affecting a constitutional right. RAP 2.5(a). In order to benefit from this exception, "the defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial." A constitutional error is manifest if the appellant can show actual prejudice, i.e., there must be a "plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case." If an error of constitutional magnitude is manifest, it may nevertheless be harmless.

Grimes, 165 Wn.App. at 180, *quoting State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (some citations omitted) (internal quotation marks omitted) (*quoting State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). This manifest constitutional error exception, however, does not afford a defendant a means for obtaining a new trial whenever he can identify a constitutional issue not preserved below. *Grimes*, 165 Wn.App. at 180, *citing State v. Kirkpatrick,* 160 Wn.2d 873, 879, 161 P.3d 990 (2007).

In the present case, the Defendant did not object to the use of the service dog below, and he thus failed to preserve this issue for appeal. RP 164. In addition, the record shows no manifest error affecting a constitutional right. The Defendant does briefly argue that the use of the service dog constituted a "comment on the evidence." App.'s Br. at 22-23. Specifically, the Defendant claims that the use of the service dog sent a message that the trial court viewed the Defendant as "Guilty as charged." App.'s Br. at 23. This claim, however, is without merit.

Even if this Court were to assume that the use of the service dog carried some "implied" message, there is simply no support for the leap in logic that the use of the dog suggested that the message sent was that the trial court believed that the Defendant was "guilty as charged."[4] Furthermore there is nothing in the record that otherwise demonstrates any prejudice or practical and identifiable consequences of the use of the service dog in the present case. Thus, the Defendant has failed to show a manifest error affecting a constitutional right.

In short, the Defendant raised no objection to the use of the service dog in the court below and thus failed to preserve this issue for appeal.

[4] The Defendant also makes several generalized claims regarding the service dog and its effects on due process or his right to confrontation. App.'s Br. at 23-24. The Defendant, however, points to nothing in the record that demonstrates and prejudice or practical and identifiable consequences of the use of the service dog in the present case. In addition, the Court of Appeals has previously rejected the same (or similar) claim in *State v. Dye*, 170 Wn.App. 340, 344-48, 283 P.3d 1130 (2012).

Pursuant to RAP 2.5(a) and the well-established preservation rule, this Court should not sanction the Defendant's failure to point out at trial an alleged error which the trial court, if given the opportunity, might have been able to correct.

C. THE DEFENDANT'S CLAIM THAT THE PROSECUTOR IMPROPERLY "TESTIFIED" AT THE SENTENCING HEARING IS WITHOUT MERIT BECAUSE, EVEN ASSUMING THAT THE PROSECUTOR'S MINOR COMMENTS WERE IMPROPER, ANY ERROR IN THIS REGARD WAS CLEARLY HARMLESS BEYOND A REASONABLE DOUBT.

The Defendant next claims that the prosecutor improperly "testified" at the sentencing hearing. App.'s Br. at 26. This claim is without merit because, even assuming that the prosecutor's minor statements were improper, any error was clearly harmless as the record clearly shows that the prosecutor's comments played no role in the trial court's determination of the proper sentence.

The Defendant raises several points regarding sentencing. App.'s Br. at 26. First the Defendant mentions the fact that the prosecutor provided the court with a statement from the victim. App.'s Br. at 26; RP (11/16/12) 4-6. The record shows that the prosecutor sought to read the statement into the record, but defense counsel objected and suggested that the court should just read the statement silently. RP (11/16/12) 4-5. The

trial court followed the Defendant's suggestion. RP (11/16/12) 6.

It is unclear whether the Defendant is challenging this act on appeal. Any claim in this regard, however, would clearly be without merit as RCW 7.69.030 provides that a crime victim may present a statement personally or by representation at the sentencing hearing. In the present case the prosecutor explained that the victim had forwarded her statement to him and asked that it be read at sentencing. RP (11/16/12) 4. Thus, it was entirely proper for the prosecutor to present the victim's statement at sentencing.

The Defendant also argues that the prosecutor erred by stating to the court that the victim had been scared to testify, had been traumatized by the incident, and that there had been a long history of domestic violence. App.'s Br. at 26. At the sentencing the only objection from the Defendant came when the prosecutor stated that he had never seen a victim that was so scared to testify. See RP (11/16/12) 4. The defense objected that the prosecutor was "testifying as to his own opinion at this juncture." RP (11/16/12) 4. The trial court overruled the objection. RP (11/16/12) 4.

"In order to dispute any of the information presented for consideration at a sentencing hearing, a defendant must make a timely and specific challenge." *State v. Garza*, 123 Wn.2d 885, 890, 872 P.2d 1087

(1994). The only issue preserved for appeal, therefore, is whether the prosecutor's observations of the victim were improperly admitted, as this was the only specific challenge raised below.

The Defendant cites to *State v. Carreno-Maldonado*, 135 Wn.App. 77, 86, 143 P.3d 343 (2006) in support of his claim that the prosecutor does not have an independent right to speak on behalf of the victim. That case, however, deals with the issue of whether a prosecutor breached a plea agreement by making statements on behalf of victims who were present in court but did not ask for any assistance from the prosecutor in making a statement. *Carreno-Maldonado*, 135 Wn.App. at 86. *Carreno-Maldonado* does not state that a prosecutor may not mention his personal observations of the victim at a sentencing hearing.

The Defendant, however, also cites the "real facts doctrine" outlined in RCW 9.94A.530. App.'s Br. at 29. It is true that this statute provides that a trial court may rely on no more information than is admitted, acknowledged, or proved in a trial or at the time of sentencing, and that where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. RCW 9.94A.530.

In the present case the sole objection below was made when the prosecutor mentioned that the victim's teeth were chattering prior to her

testimony and that the prosecutor had never seen a victim that was so afraid to testify. RP (11/16/12) 4. It could be argued that the fact that the victim's teeth were chattering was not proved at trial, but the Defendant did not specifically challenge this fact. Rather, the Defendant only objected based on the argument that the prosecutor was offering "his own opinion;" presumably that the he had never seen a victim that was so scared to testify. See RP (11/16/12) 4. Whether this objection constituted a "dispute of material fact" that technically required an evidentiary hearing under RCW 9.94A.530 is a potential issue, but this court need address that issue to resolve this case.

Rather, even assuming the prosecutor's brief statement on this point was a technical violation, any error in this regard was clearly harmless. Rather, as the trial court explained, the most important issues with respect to the trial court's ultimate sentence were the facts of the crime and the Defendant's offender score. In addition, the trial court was able to personally observe the victim as she testified, and thus was able to draw its own conclusions about the victim. Most importantly, when the trial court announced its sentence, the judge specifically stated that it was rejecting the defense characterization of the crime as "de minimis" and that it was imposing a sentence in the middle of the standard range. RP (11/16/12) 35. The trial court further explained the basis for this decision

as follows:

> I base that because of the severity of the crime, your criminal history and because I, in fact, heard the victim and I don't find that it was de minimis so I don't find there is a basis for an exceptional sentence downwards.

RP (11/16/12) 35.

As this Court has noted, the "real facts" doctrine requires the sentence be based on the defendant's current conviction, his criminal history, and the circumstances surrounding the crime. *State v. Randoll*, 111 Wn.App. 578, 582, 45 P.3d 1137 (2002) *citing, State v. Morreira*, 107 Wn.App. 450, 458, 27 P.3d 639 (2001); *State v. Taitt*, 93 Wn.App. 783, 790, 970 P.2d 785 (1999)). The record shows that this is exactly what the trial court did in the present case. Nothing in the record suggests or implies that the sentencing court improperly considered the potentially improper comments. Rather, given the trial court's thorough record regarding the basis for its sentence, it is clear that any error with respect to brief mention of the victim's teeth chattering and prosecutor's assessment of this fact was clearly a minor error that had no impact on the trial court's ultimate sentence. Any error, therefore, was clearly harmless. *See, e.g., State v. Oxborrow*, 106 Wash.2d 525, 537, 723 P.2d 1123 (1986) (Any error in trial court's inclusion of certain letters in the sentencing record without holding an evidentiary hearing on the disputed facts was harmless

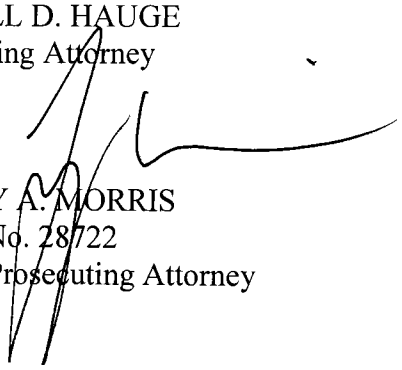
beyond a reasonable doubt as record showed trial court properly relied on other factors in determining the appropriate sentence).

IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED June 24, 2013.

Respectfully submitted,
RUSSELL D. HAUGE
Prosecuting Attorney



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Deputy Prosecuting Attorney

KITSAP COUNTY PROSECUTOR

June 24, 2013 - 12:17 PM

Transmittal Letter

Document Uploaded: 442213-Respondent's Brief.pdf

Case Name: State v Duane Moore

Court of Appeals Case Number: 44221-3

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Jeremy A Morris - Email: **jmorris@co.kitsap.wa.us**