SUPREME COURT NO. 90454-5
COURT OF APPEALS NO. 44221-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DUANE ALLEN MOORE,

Petitioner.

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

The Honorable Sally F. Olsen, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONING PARTY

Duane Moore, appellant below, asks this Court to accept review of the decision designated in Part B of this petition.

B. DECISION

Petititoner Moore seeks review of the decision of the Court of Appeals filed in his case on May 13, 2014, and the order denying his Motion for Reconsideration filed June 10, 2014.[1]

The decision is in the Appendix to this Petition at A-1 through A-9. The Order Denying Reconsideration is in the Appendix at A-10.

C. ISSUES PRESENTED FOR REVIEW

1. Does allowing a non-disabled, adult complaining witness to testify with a service dog beside her constitute an abuse of discretion where the trial judge never balanced the benefits versus unfair prejudice on the record and never found that the use of the dog was necessary? Under these circumstances, does the decision to allow the use of the dog constitute a judicial comment on the evidence where there is be no justification for the presence of the dog except the trial judge's view that the defendant has traumatized the witness? Under these circumstances, does allowing the witness to testify with the dog deny the defendant his state and federal constitutional rights to confrontation of witnesses?

2. Does a prosecutor commit misconduct by trivializing the burden of proof during voir dire and argument to the jury?

3. Does the prosecutor commit misconduct and act as an unsworn witness by telling jurors during voir dire that they will not hear all of the evidence at trial known to the state and asking the potential jurors to convict even if they do not hear all of the evidence?

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[1] The order states that it was filed on **July 10, 2014.** It was actually filed on June 10, 2014.

4. Does the real facts doctrine, by statute, apply to standard range sentences and does the prosecutor's unsworn testimony at sentencing alleging other crimes and describing the alleged victim's fear of the defendant deny the defendant a fair sentencing proceeding?

5. Does a trial court violate a defendant's right to a fair trial and due process under the 6th and 14th Amendments and Article 1 section 3 and 22 of the Washington Constitution by failing to conduct a hearing and allowing testimony to proceed after learning that one of the bailiffs knew and has greeted the complaining witness in the hall outside the courtroom?

D. STATEMENT OF THE CASE

1. Procedural and trial facts

A Kitsap County jury convicted Duane Moore of one count of second degree assault by strangulation after trial before the Honorable Sally Olsen, and found him guilty of the domestic violence special allegation. CP 1-6, 39, 40. Judge Olsen rejected the defense request for an exceptional sentence below the standard range, and imposed a sentence of 62 months, a term within the standard range. CP 58-68; RP(11/16/12) 23-24, 35.[2]

The charge arose from an argument on the evening of July 22, 2012, between Mr. Moore and his wife Sabrina Moore during which it was undisputed that they were very angry and yelled at one another. RP 149-

[2] The verbatim report of proceedings of the voir dire and trial, on October 24 and 25, 2012, are in two consecutively-numbered volumes designated RP. Other volumes of the verbatim report of proceedings are designated by date.

150, 166-169, 198, 201. The two, who were separated at the time, met at church that morning and had dinner and watched a movie later in the day, together with Mr. Moore's brother. RP 166, 198-200

Mr. Moore described them yelling "face-to-face" and "chest-to-chest," and that Ms. Moore pushed him as one pushes someone who has invaded her space. RP 201-203. He denied hitting, grabbing or choking her, or putting his forearm against her throat. RP 201-203, 207. Mr. Moore decided to leave when his friend Thomas Flores arrived, but Ms. Moore followed him out to the car to continue the argument. RP 204-205.

According to Sabrina Moore, Mr. Moore had become belligerent during the evening, yelled and pointed his finger and face towards her face and chest. RP 168-169. She testified that he followed her down the hall and into the bedroom. RP 169-170. When she went back to the living room, Mr. Moore threw a plastic bottle filled with a tea drink at her. RP 170. He followed her to the porch and, she said, for about one minute, "he pretty much had his forearm of his left hand behind my head, his right forearm around my throat, or on my throat." RP 172-173. According to Ms. Moore, when Mr. Moore's friend drove up, she went inside and called 911. RP 174-175.

Ms. Moore admitted that she never sought medical attention, RP 182, and that when Mr. Moore had his forearm across her throat, she was

against the porch railing leaning backwards, rather than up against a solid wall. RP 182.

Two neighbors heard the argument. A neighbor who lived in the second house from Ms. Moore's, said she saw the Moores come outside, and that what she saw going on between them happened "very, very quickly." RP 188-189, 191. She was hiding behind a bush and about thirty feet away at the time. RP 188-189. She said that "what really sticks in my mind is he did put her up against a wall and looked like her hit her." RP 189. She said she also thought she heard the words "he's choking me." RP 190. She told the police that evening that Mr. Moore was hitting Ms. Moore with one hand and hit her perhaps five times. RP 191. She also told the police that Ms. Moore followed Mr. Moore out to a car as he was trying to leave and continued to yell at him. RP 192.

An across-the-street neighbor heard the argument and went over and confronted Mr. Moore who she said was grabbing Ms. Moore. RP 194. When asked if she saw Mr. Moore hitting Ms. Moore, she responded equivocally, "I went over there *because of the commotion*, I don't like domestic violence" RP 195 (emphasis added).

When Officer Lawrence Green arrived, Ms. Moore was very upset and crying. RP 151-152. He took pictures of her neck, and the small of her back which she said was hit by the thrown tea bottle, and her injured

finger. RP 152-155.[3] Officer Green had not observed any injury to Ms. Moore's face. RP 157.

2. The service dog

Ms. Moore asked, through the prosecutor, to have the courtroom service dog with her at the witness stand because she was nervous and scared. RP 164. At the court's suggestion the dog was brought in before the jurors entered the courtroom. RP 164.

3. The prosecutor's argument during voir dire

During voir dire, the prosecutor began a discussion of the "concept of beyond a reasonable doubt" by asking if this standard is "100%." RP 98. After eliciting several responses, the prosecutor stated that the jurors were "in a difficult position because inevitably we know more about the case than you do." RP 100. He said that the jurors had "to consider only the facts given through the evidence" and asked, "If you don't think 100% is going to be given, and you think there's going to be stuff left out, are you going to be able to make a decision?" RP 100-101.

When a prospective juror responded that "If you haven't completely convinced me, I'm not going to put a man in jail," the

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[3] Defense counsel noted in closing argument that, in the pictures, Ms. Moore's hair, jewelry and hair were not in disarray. RP 228. Counsel noted as well that the redness at the neck was as if she were flushed on a warm July night. RP 228.

prosecutor replied:

> . . . The burden is on the State. . . . and it's a high burden.
>
> But what I'm trying to get across to you is that it's not an impossible burden. Now let me give you an example, No. 36. If I were to say to you, I will give you $100,000 if you can prove to me that the world is round in the next hour, could you do that?

RP 101-102.

After a few suggestions by the prospective jurors, the prosecutor summarized:

> Okay. I think we all know the earth is round, I think you're telling me, the resources that you would use going to encyclopedias, if those still exist, Google, the Internet, things of that nature, is [sic] you're satisfied, Juror No. 17, correct me if I'm wrong, beyond a reasonable doubt that the earth is a sphere, correct. Are you satisfied beyond that the earth is a sphere based on what you know?
>
> . . . [juror responses]
>
> "You've never been to space.
>
> . . . [juror responses]
>
> Is it fair for me to say that you're satisfied beyond a reasonable doubt based on a common sense appreciation of the facts, is that correct?
>
> . . . [juror responses]
>
> That's kind of my point. The standard of beyond a reasonable doubt, it's difficult to wrap your head around. It will be defined for you too.
>
> . . . [objection sustained to the prosecutor's giving a legal

definition of beyond a reasonable doubt]

> . . . 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 102-106.

Then, in closing argument, the prosecutor referred back to the discussion of reasonable doubt in voir dire before paraphrasing *one portion* of the reasonable doubt instruction ("If after fully, fairly, and carefully considering all of the evidence you have what's called an abiding belief in the truth of the charge then you are satisfied beyond a reasonable doubt") and telling the jurors that "abiding" belief meant a lasting or enduring belief. RP 212-213.

Towards the end of closing, the prosecutor once again harkened back to voir dire.

> Also I want you to think about the concept of beyond a reasonable doubt. I talked about the example in voir dire of how the world is round, and what makes you think the world is round, why are you satisfied beyond a reasonable doubt the world is round. What we discuss, and what we agreed on, is that you can be satisfied beyond a reasonable doubt based on a common sense appreciation of the facts. I want you to think about that in this case. If you look at the witnesses's testimony, specifically Officer Green, Sabrina Moore, Tobias Gomez and Mariah Jacobs, their testimony corroborates what happened. Their testimony makes sense.
>
> If you look at the defendant's testimony that nothing happened, the argument never became physical, Sabrina was in fact the one who assaulted him, it just doesn't make sense. . . .

RP 223-224.

4. The prosecutor's presentation at sentencing.

The prosecutor stated at sentencing:

> I spoke with the victim Sabrina Moore yesterday. She did not wish to be present for sentencing. She has been extremely traumatized by this event. It's has a significant impact on her life. She's afraid of the Defendant. She indicated that there has been a long history of domestic violence between the two of them and this is the first incident that was actually reported. I think they've been married for approximately two years. She said she was unaware of a previous domestic violence history that the Defendant had and it was kind of shocking to her and just kind of a huge realization in her life when this incident brought that aspect of the Defendant's life to light. I can tell you prior to her testifying she was sitting in my office with her teeth chattering, and, quite frankly, in all of the time that I've been doing this, I've never seen a victim quite so scared to come into the courtroom and face ---

RP(11/16/12) 3-4. The court overruled defense counsel's objection that the prosecutor was testifying as to his own opinion, RP11/16/12) 4.

The prosecutor continued that "she was very afraid of the Defendant," but provided a statement from Ms. Moore for the court to read. RP(11/16/12) 4. Although the statement was not read into the record or made a part of it,[4] the prosecutor indicated that the statement made it clear that Ms. Moore had mixed feelings about the case and

[4] "She said she didn't want to see the Defendant. She did, however, forward to me a statement that she wished I would read to the Court for the purpose of this sentencing hearing, and with your permission I would like to do that now. *She did not want to file it with the court.*" RP(11/16/12) 4 (emphasis added).

"obviously loves" Mr. Moore and wants him to get treatment, but that she did not want what happened to her to happen to someone else. RP(11/16/12) 4-5.

A number of people spoke on behalf of Mr. Moore and told the court about his good works in the community. Members of his family spoke of his being a loving and compassionate brother, and about his having turned his life around when he became a community advocate and supporter of the church. RP(11/16/12) 9-10, 13, 18-19. Others spoke of Mr. Moore's help to provide necessities to men, women and children who lacked them. RP(11/16/12) 15-16, 20-21. Others filed letters in support of Mr. Moore. RP(11/16/12) 22. Defense counsel requested an exceptional sentence below the standard range. RP(11/1/6/12) 24.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW SHOULD BE ACCEPTED ON THE SERVICE DOG ISSUE UNDER RAP 13.4(B) (1), (3) AND (4); THE DECISION IS IN CONFLICT WITH *STATE V. DYE*, IS A CONSTITUTIONAL ISSUE AND IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

Review should be accepted because the decision in Mr. Moore's case is in conflict with this Court's decision in *State v. Dye*, 178 Wn.2d 541, 309 P.3d 1192 (2013). Under the circumstances of his case, the issue implicates his constitutional rights and presents an issue of

substantial public importance for this Court. Review is necessary to clarify that adult witnesses without disabilities should not routinely be testifying with service dogs absent a showing of necessity.

In Mr. Moore's case, the trial court did no analysis or balancing on the record of the benefits or prejudice of allowing Ms. Moore to testify with a service dog. The prosecutor asked to have the courtroom service dog with her at the witness stand and the court agreed. The prosecutor never even asserted that Ms. Moore would be unable or impaired in her ability to testify without the dog; he merely asserted that she was nervous and scared. RP 164. The court gave no limiting instruction to alleviate the prejudice. *Dye* requires more.

In *Dye*, this Court held that it is the prosecutor's burden to prove that a special dispensation, such as a service dog, is necessary to enable a vulnerable witness to testify and *not* the defendant's burden to establish prejudice. *Dye*, 178 Wn.2d at 549. This Court likened the decision to allow a witness to testify with a service or comfort dog to the decision to shackle the defendant,[5] *Dye*, at 543, 548, and held that the trial court's

[5] In *State v. Finch*, 137 Wn.2d 792, 975 P.2d 967 (1999), the Washington Supreme Court reversed a death sentence where the trial court failed to consider relevant factors and less restrictive measures before allowing the defendant to be shackled. The Court noted that the "trial court must exercise discretion" before approving security measures and could not rely on broad policies. *Finch*. 137 Wn.2d at 846.

discretion in allowing the special dispensation would be upheld "unless the record fails to reveal the party's reasons for needing a support animal, or if the record indicates that the trial court failed to consider those reasons." *Id.* at 553. Mr. Moore's case fits precisely that situation in which the trial court abused its discretion.

Further, contrary to the Court of Appeals decision, under the facts of the case, the issue is constitutional and can be raised for the first time on appeal. Ms. Moore was an adult woman; there was no showing that she was mentally or physically disabled or vulnerable in any way. Under these circumstances, having her testify with a service dog necessarily conveyed to the jury the trial court's belief that Ms. Moore was a victim and had been traumatized by the defendant; there was no other reason why Ms. Moore would need the support of a dog to testify. This is unlike *Dye*, where the jury could infer that the severely disabled witness might need the comfort dog to testify whether or not he was a victim. As a judicial comment on the evidence, the issue can be raised for the first time on appeal. *State v. Hansen*, 46 Wn. App. 272, 300, 730 P.2d 706 (1986); *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

The denial of due process and confrontation are also constitutional issues which can be raised for the first time on appeal. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); U.S. Const.

amends. VI, XIV; Wash. Const. Art. 1, section 3, 22.

Review should be accepted to clarify further that service dogs should not be used routinely and absent a finding of necessity. When the jury sees an adult witness with no obvious impairment testifying with a service dog, it must conclude that either the witness has a non-obvious vulnerability or that the witness is vulnerable because he or she is having to testify in front of the defendant. The former is misleading and the latter can constitute a denial of confrontation and a comment on the evidence. Review should be accepted.

2. REVIEW SHOULD BE ACCEPTED UNDER RAP 13.4 (B) (1), (2), (3) AND (4) BECAUSE THIS DECISION OF THE COURT OF APPEALS ON TRIVIALIZING THE BURDEN OF PROOF IS IN CONFLICT WITH NUMEROUS PROSECUTORIAL MISCONDUCT DECISIONS AND A CONSTITUTIONAL ISSUE OF SUBSTANTIAL IMPORTANCE.

Review should be accepted because the decision of the Court of Appeals that the prosecutor did not commit misconduct by trivializing the burden of proof is in conflict with other reported decisions. During voir dire, the prosecutor emphasized that the beyond a reasonable doubt standard was not an "impossible standard." RP 101-102, 106. The prosecutor then compared that standard to the juror's belief that the world was round even if he or she could not prove it. RP 101-102. The prosecutor assured the jurors that beyond a reasonable doubt was equivalent to a "common sense appreciation of the facts." RP 102-106. This was a particularly insidious

"common sense" analogy because it implied that the jurors could be convinced beyond a reasonable doubt by trusting the opinions of experts. RP 102-106. The prosecutor harkened back to this analogy during closing argument. RP 223-224.

Most recently, in *State v. Lindsay*, 2014 WL 1848454 (2014), this Court reaffirmed that a prosecutor commits misconduct by comparing the burden of proof beyond a reasonable doubt to everyday decision-making because it "trivializes the standard and the jury's role" in reaching a verdict. *Lindsay*, at ¶ 28. The improper comparison was with knowing one could cross the street without getting hit. *Id.* Under *Lindsay*, this comparison of beyond a reasonable doubt standard to things we take on faith in everyday life trivializes the burden of proof and the jury's role at trial.

There are numerous other cases holding that it is misconduct for the prosecutor to trivialize the burden of proof. *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009) (reversed because of the prosecutor's misconduct in setting the reasonable doubt discussion in the context of everyday decision-making such as elective surgery, babysitting, etc.; the prosecutor "trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing the State's case against the defendant); *State v. Johnson*, 158 Wn. App. 677, 686, 243 P.3d 936 (2012) (the prosecutor committed misconduct by equating being satisfied beyond a

reasonable doubt with being convinced of what a jigsaw puzzle pictured even without all of the pieces); *State v. Venegas*, 155 Wn. App. 507, 523, 228 P.3d 813 (2010).

Most importantly, in *Johnson*, *supra*, the Court reversed, even in the absence of a trial objection, because the prejudice was deemed to be incurable by jury instruction. *Johnson*, at 686. The Court, in *Johnson*, also noted the holding in *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996), that engaging in well-recognized forms of misconduct should be deemed flagrant and ill-intentioned. *Id.*

The decision in Mr. Moore's case is in conflict with all of this authority. Review should be accepted on this issue.

3. REVIEW SHOULD BE ACCEPTED UNDER RAP 13.4(B) (1) , (3), (4) BECAUSE THE HOLDING THAT THE PROSECUTOR'S COMMENTS WERE NOT EVIDENCE AND THEREFORE COULD NOT BE UNSWORN TESTIMONY IS CONTRARY TO THE DECISION IN *STATE V. BELGARDE*, IS A CONSTITUTIONAL ISSUE AND IS AN ISSUE OF SUBSTANTIAL IMPORTANCE.

In voir dire, the prosecutor told jurors that "inevitably we know more about the case than you do," RP 100, and asked if "you think there's going to be stuff left out, are you going to be able to make a decision?" RP 100-101. In this way, the prosecutor gave the jurors to understand that there was evidence relevant to the case which would not be presented to them – that

some facts would be withheld. Since the prosecutor's office charged Mr. Moore, these facts implicitly supported his conviction.

The decision of the Court of Appeals is in conflict with the decision of this Court *State v. Belgarde*, 110 Wn.2d 504, 509, 755 P.2d 174 (1988), which held that the prosecutor committed misconduct by arguing facts not in evidence in closing argument. The court noted that by arguing facts not in evidence, the prosecutor technically *was* testifying as an unsworn witness.

In its decision, the Court of Appeals held that these comments by the prosecutor to the jurors could not constitute arguing facts not in evidence because the prosecutor's comments, made during voir dire, were not evidence. Slip Op. at 4. Under the Court's reasoning, if the prosecutor's remarks are never legitimately evidence at trial, the prosecutor would be free to tell the jurors whatever he or she wished with impunity during voir dire.

The prosecutor likely anticipated that the jurors might find the evidence at trial weak, and told them that there was evidence that they would not hear. This was misconduct. Review should be accepted on this issue.

Prosecutorial misconduct can deny a fair trial. This Court and other appellate courts should give serious consideration to these issues. In Mr. Moore's case, the analysis of the Court of Appeals was cursory and ill-logical. The Constitutional right to appeal should require more. *State v. Lennon*, 94 Wn. App. 573, 577, 976 P.2d 121, *review denied*, 138 Wn.2d

1014 (1999).

4. REVIEW SHOULD BE ACCEPTED UNDER RAP 13.4 (B) (3) AND (4). THE DECISION OF THE COURT OF APPEALS HOLDING THAT THE REAL FACTS DOCTRINE APPLIES ONLY TO EXCEPTIONAL SENTENCES IS CONTRARY TO STATUTE, AND THE PROSECUTOR'S TESTIFYING AT SENTENCING DENIED MR. MOORE DUE PROCESS OF LAW AND A FAIR OPPORTUNITY TO SEEK A SENTENCE BELOW THE STANDARD RANGE.

The prosecutor testified on behalf of Ms. Moore at sentencing: that she was traumatized by the event, that there was a history of domestic violence between her and Mr. Moore, and that she was the most frightened victim he had ever seen. RP(11/16/12) 3-4. The court overruled defense counsel's objection to this testimony by the prosecutor. RP(11/16/12) 4.

The decision by the Court of Appeals construed the issue as a challenge to Mr. Moore's sentence and held that he could not appeal a standard range sentence. Slip op. at 6-7 (citing a case noting that the state cannot ordinarily appeal a standard range sentence, but holding that the state could appeal the trial court's determination of the defendant's eligibility for a DOSA, *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003)). No analysis or authority was cited relevant to the issue raised on appeal—the right not to have the prosecutor act as an unsworn witness at sentencing to testify to facts not properly before the court.

The decision of the Court of Appeals is in conflict with other reported decisions. In *State v. Carreno-Maldonado*, 135 Wn. App. 77, 86, 143 P.3d 343 (2006), the court held that neither the Victims' Rights constitutional amendment nor RCW 7.26.030 provide the prosecutor with the independent right or the duty to speak on behalf of the victim. Such unsworn testimony denied Mr. Moore his right to due process at sentencing. *State v. Bell*, 116 Wn. App. 78, 678, 684, 67 P.3d 527, *review denied*, 150 Wn.2d 1023 (2003); *State v. Galbreath*, 69 Wash. 2d 664, 667, 419 P.2d 800 (1966) (the concept of fundamental fairness is inherent in the due process clause of U.S. Const. amend. 14); *State v. Tang*, 75 Wash. App. 473, 478, 878 P.2d 487 (1994).

Although the Court of Appeals held that the real facts issue was moot given that Mr. Moore received a standard range sentence, Slip op. at 7, RCW 9.94A.530 expressly states that it applies to standard range sentences or sentences below the standard range: "In determining a sentence *other than a sentence above the standard range*, the trial court may rely on no more information than is . . . admitted, acknowledged, or proved in trial or at the time of sentencing." (emphasis added). The purpose of this limitation is "to protect against the possibility that a defendant's due process rights will be infringed upon by the sentencing judge's reliance on false information." *State v. Herzog*, 112 Wash.2d 419, 431–32, 771 P.2d 739 (1989); Wash.

Const. art. I, § 3 ("No person shall be deprived of life, liberty, or property, without due process of law."). Nor may a prosecutor argue that the defendant's acts constituted a more serious, but uncharged and unproved crime. *State v. Bluehorse*, 159 Wn. App. 410, 433, 248 P.3d 537 (2011).

Mr. Moore requested consideration of a sentence below the standard range. RP(11/16/12) 24. It is likely that the prosecutor's unsworn testimony, which included testimony that Mr. Moore committed other uncharged crimes, prejudiced Mr. Moore. Review should be accepted. Again, Mr. Moore's right to an appeal should require review of the issue the raised on appeal.

5. REVIEW SHOULD BE ACCEPTED ON THE ISSUE FROM THE STATEMENT OF ADDITIONAL GROUNDS PERTAINING TO IMPROPER CONTACT BETWEEN BAILIFF AND WITNESS.

Bailiff Jennifer Torres was in training and assisted head bailiff Meredith Kincl at trial. RP(10/24/12) 8. The trial court introduced the bailiffs to the jury and instructed the jurors, attorneys and parties not to have even inadvertent contact. RP(10/25/12). Then after complaining witness Sabrina Moore testified, the trial court put in the record that the bailiff Jennifer Torres had recognized and greeted Ms. Moore in the hallway in the morning before court and that Ms. Kincl said it was about eight o'clock and it wasn't until Ms. Moore walked into the courtroom that Ms. Torres realized

that she and Ms. Moore knew each other. RP 164, 185. Ms. Torres was not asked on the record whether there were jurors around and no jurors were interviewed. The court represented that no jurors or the defendant saw this. RP 185. At the request of defense counsel, the court ordered that Ms. Torres not participate further in the trial. RP 185.

The trial court should have addressed the issue prior to allowing the testimony or proceedings to go forward and allowing Ms Torres to interact with the jury. RP 184. This is contrary to *State v. Robinson*, 146 Wn. App. 471, 479-483, 191 P.3d 906 (2008). Failure to address the issue constituted bailiff misconduct, ex parte contact, and judicial misconduct and prejudice. Mr. Moore asks that review be granted on this issue.

D. CONCLUSION

Appellant respectfully submits that review should be accepted and his convictions reversed and remanded for retrial and resentencing.

DATED this 2nd day of July, 2014.

Respectfully submitted,

/s/
Rita J. GRIFFITH; WSBA #14360
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 2nd of July , 2014, I caused a true and correct copy of Appellant's Opening Brief to be served on the following by e-mail

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_____/s/_____7/2/2014_____
Rita Griffith DATE at Seattle, WA

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DUANE ALLEN MOORE, Appellant.	No. 44221-3-II UNPUBLISHED OPINION

MELNICK, J.—Duane Moore appeals his conviction and sentence for second degree assault, domestic violence, after choking his wife during an argument. He argues that (1) the prosecutor committed misconduct during voir dire and closing argument when he argued facts not in evidence, made improper statements about witness credibility, and shifted the burden of proof; (2) the trial court erred when it allowed a witness to testify with a service dog; and (3) the prosecutor improperly testified at the sentencing hearing. In a statement of additional grounds (SAG), Mr. Moore alleges misconduct from an interaction between a trainee bailiff and a witness. Finding no error, we affirm.

FACTS

On July 22, 2012, when the Bremerton police responded to a domestic violence call, they found Sabrina Moore "crying hysterically." 1 Report of Proceedings (RP) at 151. She stated that during an argument with her husband, Mr. Moore, he threw a plastic tea bottle at her back. He then followed her onto the porch, backed her up against the railing, and choked her. Mr. Moore put one arm in front of Ms. Moore's throat and one arm behind it. A neighbor witnessed the incident and intervened. Mr. Moore fled the scene in a friend's car. Ms. Moore had a red mark on her throat.

The State charged Mr. Moore with second degree assault with a domestic violence special allegation. At trial, Ms. Moore testified that Mr. Moore had choked her. Two neighbors testified that they witnessed the Moores arguing when Mr. Moore grabbed Ms. Moore, hit her, and placed an arm on her throat. Mr. Moore admitted to arguing with Ms. Moore but denied touching her.

Prior to Ms. Moore's testimony and outside the presence of the jury, the State moved the court for permission to have a service dog accompany Ms. Moore on the witness stand. The prosecutor advised the court that Ms. Moore was nervous and scared about testifying and that defense counsel had no objections.

During voir dire, a prospective juror opined that "beyond a reasonable doubt" did not mean absolute certainty and that the jury would not get all the facts. 1 RP at 99. The prosecutor responded by saying the jurors were in a difficult position because "we know more about the case than you do." 1RP at 100. Mr. Moore did not object.

Also, during voir dire, the prosecutor asked the jurors how they would prove that the world is round. The jurors gave examples of information they would use to prove the world's shape. The prosecutor then asked, "Is it fair for me to say that you're satisfied beyond a reasonable doubt based on a common sense appreciation of the facts; is that correct?" 1 RP at 106. The prosecutor relied on this semi-analogy again in closing argument and asked the jurors to look at all of the testimony to see if it made sense. He suggested that the jury evaluate the evidence and the credibility of the witnesses to determine if a physical confrontation occurred, stating, "[Y]ou can be satisfied beyond a reasonable doubt [that Mr. Moore is guilty of second degree assault] based on a common sense appreciation of the facts." 2 RP at 224. Mr. Moore did not object.

The jury found Mr. Moore guilty as charged. At the sentencing hearing, Ms. Moore did not appear because, as the prosecutor stated, she was "extremely traumatized" by the event and she feared Mr. Moore because of a "long history of domestic violence." RP (Nov. 16, 2012) at 3. The prosecutor then informed the court that Ms. Moore's teeth were chattering before she testified at trial and that he had never seen a victim so scared to testify. Mr. Moore objected to the prosecutor stating this opinion. The court overruled Mr. Moore's objection. Ms. Moore submitted a written statement which the court read silently but did not make a part of the record. Mr. Moore requested an exceptional sentence below the standard range.

When sentencing Mr. Moore, the court stated its reasoning for imposing a mid-range 62-month sentence was based on "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's a basis for an exceptional sentence downward." RP (Nov. 16, 2012) at 35. Mr. Moore appeals.

ANALYSIS

I. PROSECUTOR ERROR

Mr. Moore argues that the prosecutor committed misconduct by arguing facts not in evidence, implying that the jury's job is to convict if it finds the State's witnesses more credible than the defendant, and misstating its burden of proof. We hold that the prosecutor did not commit misconduct.

"In order to prevail on a claim of prosecutorial misconduct, a defendant is required to show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial." *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). We review a prosecutor's remarks during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and

the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). It is proper argument that the evidence fails to support the defense's theory. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

A. Arguing Facts Not in Evidence

First, Mr. Moore contends that the prosecutor's statement during voir dire that the jurors were in a difficult place because "we know more about the case than you do" was improper because it argued facts not in evidence. 1 RP at 100. But the prosecutor's comments during voir dire were not evidence; therefore, he did not argue facts not in evidence. And the trial court instructed the jury that the lawyers' statements were not evidence.

B. Credibility

Mr. Moore next argues that the prosecutor committed misconduct when he implied that the jury must convict if it finds the State's witnesses more credible than the defendant. The prosecutor merely argued that the evidence supported the State's theory, not the defendant's theory, and that the jury should weigh credibility. Both arguments are proper topics for closing argument. *See Russell*, 125 Wn.2d at 87 (it is not misconduct to argue that the evidence fails to support the defendant's theory); *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (witness credibility is a jury question).

C. Burden of Proof

Lastly, Mr. Moore argues that the prosecutor misstated the burden of proof by using an analogy to describe reasonable doubt and by encouraging the jury to use common sense. We disagree.

A prosecutor's use of an analogy to explain the beyond a reasonable doubt standard is reviewed on a case-by-case basis. *State v. Fuller*, 169 Wn. App. 797, 825, 282 P.3d 126 (2012),

review denied, 176 Wn.2d 1006 (2013). When the State uses an analogy that equates its burden of proof to making an everyday choice or quantifies the level of certainty necessary to satisfy the beyond a reasonable doubt standard, it commits misconduct. *Fuller*, 169 Wn. App. at 827; *see also State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009); *State v. Johnson*, 158 Wn. App. 677, 684, 243 P.3d 936 (2010). Where, as here, the State does not minimize its burden of proof or shift the burden of proof to the defendant, there is no misconduct. *Fuller*, 169 Wn. App. at 826 (citing *State v. Curtiss*, 161 Wn. App. 673, 700-01, 250 P.3d 496 (2011)).

Additionally, the State properly argued the law of the case by telling the jury it could use common sense in assessing the evidence and the witnesses. The trial court instructed the jurors that they must consider all admissible evidence and that they have a duty to assess the credibility of the witnesses and weigh the evidence. Within the context of closing argument, the prosecutor's statement about "a common sense appreciation of the facts" was not misconduct. 2 RP at 224. After making that statement, the prosecutor further argued that the State's witnesses corroborated each others' testimony and that their testimony "ma[de] sense" while defendant's testimony was not supported by the evidence. 2 RP at 224. The prosecutor was referencing the evidence presented and urging the jury to find Mr. Moore guilty based on that evidence. This was not improper.

Because we hold that Mr. Moore has failed to establish any misconduct, we affirm the trial court.

II. SERVICE DOG

For the first time on appeal, Mr. Moore argues that the trial court erred by allowing the service dog to be present in court with Ms. Moore. He first argues that, by doing so, the trial court improperly commented on the evidence. He then posits his confrontation and due process

rights were violated by the dog's presence. Because Mr. Moore failed to raise these issues at trial, he has failed to preserve this issue.

We will not review an argument raised for the first time on appeal unless the challenging party demonstrates a manifest constitutional error. RAP 2.5(a)(3). An error is manifest if it is so obvious on the record that the error requires appellate review. *State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009). The defendant must show actual prejudice, meaning the alleged error had practical and identifiable consequences at trial. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011).

Here, Mr. Moore fails to prove that any alleged errors were manifest. There is no evidence in the record that the dog's presence made Ms. Moore appear traumatized or victimized, and thereby violated Mr. Moore's due process rights, or acted as a comment on the evidence. *See State v. Dye*, 178 Wn.2d 541, 555, 309 P.3d 1192 (2013) (holding that the court's decision to allow a service dog was reasonable and that there was no evidence on the record that the dog made the victim witness appear "pitiful to the jury and 'presupposed the victimhood of the complainant'"). It is the responsibility of the party alleging error to make a record of that error. *Dye*, 178 Wn.2d at 556. Additionally, Division One of this Court rejected a similar confrontation clause argument, holding that confrontation clause case law was inapposite because the dog's presence does not prevent face-to-face confrontation with the witness. *State v. Dye*, 170 Wn. App. 340, 346, 283 P.3d 1130 (2012), *aff'd by Dye*, 178 Wn.2d 541. We therefore reject Mr. Moore's argument and affirm the trial court.

III. SENTENCING

Finally, Mr. Moore argues that the prosecutor violated the real facts doctrine and Mr. Moore's due process rights by testifying on Ms. Moore's behalf at sentencing. Because Mr.

Moore received a sentence within the standard range, he cannot appeal his sentence. RCW 9.94A.530(1); RCW 9.94A.585(1); *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). Therefore, the argument on the "real facts doctrine" is moot.

IV. SAG

In his SAG, Mr. Moore argues bailiff misconduct, judicial misconduct, and ex parte communications arising from an incident where the trainee bailiff realized she recognized Ms. Moore. Because there was no prejudice, we disagree.

The bailiff at trial was training a new bailiff. Before the second day of testimony, the bailiff and trainee were standing in the hallway when Ms. Moore walked past. The trainee "greeted" Ms. Moore and then realized that she knew Ms. Moore briefly four years ago. 2 RP at 184. The bailiff and trainee reported this to the trial court, which then informed the parties on the record and allowed the parties to ask questions or raise objections. The bailiff clarified that no jurors witnessed the interaction. Mr. Moore requested that the trainee not participate in the rest of the trial, and the trial court dismissed the trainee.

This interaction did not prejudice Mr. Moore. No jurors witnessed the trainee bailiff greeting Ms. Moore, and the trainee was dismissed from the rest of the trial at Mr. Moore's request. There is no evidence in the record that the jury knew about or was in any way influenced by the interaction. Nor is there any evidence of ex parte communication. The trial court discussed the interaction in chambers with the bailiffs, but there is no indication that any parties were present. Rather, it appears that both parties were told about the interaction simultaneously on the record. We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Hunt, J.

Worswick, C.J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DUANE ALLEN MOORE,

Appellant.

No. 44221-3-II

ORDER DENYING MOTION FOR RECONSIDERATION

APPELLANT moves for reconsideration of the Court's **May 13, 2014** opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Hunt, Worswick, Melnick

DATED this 10th day of July, 2014.

FOR THE COURT:

Hunt, J.
PRESIDING JUDGE

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Rita J. Griffith
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