72166-6

NO. 72166-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

THAN DINH LE,

Appellant.

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

The Honorable Laura Inveen, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE STATE'S ARGUMENT THAT SUFFICIENT EVIDENCE SUPPORTED THE BAIL JUMPING CHARGE IMPERMISSIBLY SHIFTS THE BURDEN TO LE TO PROVE HE WAS NOT RELEASED BY A COURT ORDER

When the State charges a person with a crime, it bears the burden of proving all the elements of a charged offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The State does not dispute that one of the elements it had to prove was that a court order released Le. Br. of Resp't at 9 (reciting to-convict instruction). Yet the State points to no court order in evidence that released Le. Br. of Resp't at 8-12. And the State contradicts its own acknowledgment that it bears the burden of proof by asserting jurors could infer Le was released by a court order because "how else could Le have been released under these conditions unless authorized by the court?" Br. of Resp't at 11. This is not proof but post hoc conjecture that places the burden on Le to prove the absence of a court order releasing him.

There is more than one way to be released pending trial, as RCW 9A.76.170(1) establishes. Given the jury instructions, Le could have been admitted to bail rather than released by court order. CP 71; 3RP 109; RCW 9A.76.170(1); Br. of Appellant at 12-13 n.3, 16. The State dismisses this

possibility because "[t]here is no reason to conclude that the Bail Jumping statute provides mutually exclusive alternative means of committing the crime" and because being admitted to bail would have to be approved by the trial court in any event. Br. of Resp't at 12 & n.8. But the legislature "is presumed not to include unnecessary language when it enacts legislation." McGinnis v. State, 152 Wn.2d 639, 345, 99 P.3d 1240 (2004). Indeed, "[s]tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." G-P Gypsum Corp. v. Dep't of Revenue, 169 Wn.2d 304, 309, 237 P.3d 256 (2010). If being "admitted to bail" is the equivalent of being "released by court order" under RCW 9A.76.170(1), as the State suggests, the legislature's inclusion of "admitted to bail" would become meaningless surplusage. This court should reject the State's argument that Le's release by court order is supported by sufficient evidence given that Le's release could also have been secured by bail, and the State failed to present any evidence to prove one or the other.

2. OFFICER EMILY CLARK CALLED EVERYONE LIKE LE A "CRIMINAL" AND A "BAD GUY," WHICH WAS AN IMPROPER OPINION ON GUILT

a. This court should not consider the State's footnoted waiver argument

This court should reject the State's tepid RAP 2.5 argument. In a footnote at the end of its argument on the broader issue, the State suggests Le

waived his opinion-on-guilt claim because his attorney did not specifically state the nature of her objection to Officer Clark using the term "bad guy." Br. of Resp't at 15 n.9; 2RP 7. This court does not address arguments raised solely in footnotes. State v. N.E., 70 Wn. App. 602, 606 n.3, 854 P.2d 672 (1993); State v. Johnson, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993).

In any event, the nature of the objection was obvious—defense counsel did not want Clark's testimony to impress on jurors that Le was a "bad guy." Cf. Cowan v. Jensen, 79 Wn.2d 844, 848, 490 P.2d 436 (1971) (holding that "[a]lthough the court was a trifle premature in ruling upon an objection which was obviously coming" the "nature of the objection to be made was obvious"). And if Le were to argue that it was ineffective of trial counsel not to specifically state the nature of the objection, the State would instead be arguing that it was a strategic decision not to highlight the nature of the objection for jurors.

Nor do the cases cited by the State support its procedural position. The State acknowledges that a witness's opinion on guilt is a constitutional error. Br. of Resp't at 14. Yet the State relies on State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), and State v. Carlson, 61 Wn. App. 865, 869-70, 812 P.2d 536 (1991), even though those cases involved nonconstitutional evidentiary errors and are thus inapposite.

The State also cites State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007), but trial counsel did not object at all in that case. Under Kirkman, moreover, opinions on guilt are manifest constitutional errors for RAP 2.5(a) purposes when they involve an "explicit or almost explicit witness statement on an ultimate issue." Kirkman, 159 Wn.2d at 936. Here, Clark stated everyone who is the subject of her undercover operations was a "criminal" "bad guy," which qualifies as an explicit statement on the ultimate issue of Le's culpability. Le forfeited no claim of error.

RAP 1.2(a) requires that the rules be liberally interpreted "to promote justice and facilitate the decision of cases on the merits." The rule also provides that noncompliance with the rules of appellate procedure are not fatal "except in compelling circumstances where justice demands . . . ." The State does not point or even attempt to point to circumstances that justly demand the avoidance of this issue's merits. This court should reject the State's footnoted RAP 2.5 argument, reach the merits of the opinion-on-guilt claim, and reverse.

b. Referring to subjects of undercover investigations as "criminal" "bad guys" is impermissible opinion on guilt

Turning to the merits, the State does not provide any analysis regarding the five factors the Washington Supreme Court discussed in State v. Quaale, 182 Wn.2d 191, 217, 340 P.3d 213 (2014), to determine whether

testimony amounted to an improper opinion on guilt. See State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (enumerating factors to consider); Br. of Appellant at 20-22. The State instead argues Clark was merely testifying about how undercover school taught her to act like a "criminal" and a "bad guy" and "did not apply these terms to Le; she was talking about her training." Br. of Resp't at 14.

The State's myopic argument must be rejected. True, Clark started by testifying about her undercover training, where she first learned how to "play[] a role of a criminal," "how criminals act," "the way [criminals] dress," and how to "portray[] the bad guy and how to get what we need to catch the bad guy in this role." 2RP 7. But then she immediately testified about how she would dress and act differently to portray these criminal bad guys depending on which neighborhood she was in, noting that in the International District she portrays them by "look[ing] transient. I will have dirty clothes, a dirty face, dirty fingernails." 2RP 8-10. Then she turned to her operation in the International District in this case where she dressed up with "dirt," "black fingertips," and "nicotine teeth stain" to "appear as a crack us[ing]" transient criminal bad guy. 2RP 11-12. Then Clark described how her operations training to catch criminal bad guys led to Le's arrest. 2RP 12-23. While Clark might have started with describing training to catch criminal bad guys, she testified in increasingly specific detail about how she

employed this training to catch Le. Contrary to the State's reading of the record, the context and progression of Clark's testimony reveals her impermissible opinion that Le was a criminal, a bad guy, and therefore guilty.

This error was not harmless. Clark's testimony as a law enforcement officer lent an "aura of reliability" to her improper remarks. Montgomery, 163 Wn.2d at 595; Br. of Appellant at 20-21. Clark's opinion was given further credence by the trial court's refusal to sustain Le's objection to the use of the term "bad guy." State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984); Br. of Appellant at 22. Clark was the first witness to testify and her extremely prejudicial, improper labeling of all investigation subjects, including Le, as criminal bad guys set Le at odds with the jury from the start. Br. of Appellant at 21-22. The State disparaged Le's counsel for attempting to argue the jury should not adopt Clark's opinion that Le was a criminal bad guy. Br. of Appellant at 22-27; see also infra Part A.3. Though the State attempts to show this error was harmless by arguing the untainted evidence in this case was overwhelming, Br. of Resp't at 15-16, there was no untainted evidence. Clark's opinion on Le's guilt, given at the very beginning of trial, tainted all the subsequent evidence. It was not harmless beyond a reasonable doubt.

3. THE PROSECUTOR COMMITTED MISCONDUCT BY DISPARAGING COUNSEL

The State's contends the prosecutor's disparagement of defense counsel was legitimate because it responded to defense counsel's argument "that there was 'no testimony' that Le had negotiated any sort of drug transaction with Clark." Br. of Resp't at 17, 21-22. But that is not the argument the prosecutor was responding to when he disparaged counsel.

The prosecutor's remarks made clear that he was characterizing defense counsel's specific arguments attacking Clark's bias as a "conspiracy," "Alice's rabbit hole," and outside any "reasonable realm of thought." 3RP 130-31. Indeed, the prosecutor started his rebuttal, "Defense is basically either claiming one of two things with respect to the drug charge, that this is either a conspiracy or a huge coincidental misunderstanding," and then continued, "With respect to the conspiracy . . . ." 3RP 130. This makes clear he was responding to and disparaging only defense counsel's bias arguments.

And defense counsel's arguments were proper. Defense counsel is permitted to argue a witness is biased if the evidence so demonstrates. See, e.g., Herring v. New York, 422 U.S. 853, 864, 95 S. Ct. 2550, 45 L. Ed 2d 593 (1973) (holding the right to counsel includes "a right to be heard in summation of the evidence from the point of view most favorable to him").

The State claims "there was nothing in the record to establish that the police targeted Le because of bias." Br. of Resp't at 21. This claim is untenable in light of the comments themselves, which, as discussed, expressed to jurors Clark's biased opinion that Le and everyone like him was a criminal bad guy. Given that defense counsel's objections to Clark's "bad guy" characterization were overruled and therefore legitimized by the trial court, defense counsel was using closing argument to try to remedy the sting of Clark's improper opinion testimony. See Br. of Appellant at 26.

The State's disparagement of defense counsel deprived Le of an opportunity to make this legitimate argument. The prosecutor likened defense counsel's arguments to "conspiracy," "Alice's rabbit hole," and not within a "reasonable realm of thought." 3RP 130-31. This disparagement was as bad if not worse than calling defense arguments "bogus," "sleight of hand," and a "twisting" of facts to the defense's benefit, examples of prosecutorial misconduct that resulted in reversal in State v. Thorgerson, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011), and State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008). Moreover, given that the prosecutor's disparagement came in rebuttal, it was especially prejudicial. See State v. Lindsay, 180 Wn.2d 423, 443, 326 P.3d 125 (2014) ("Here, the prosecutor made several of his improper comments, including the 'crock' and 'sit here and lie' statements, during his rebuttal closing, increasing their prejudicial

effect."). The prosecutor's disparaging arguments that defense counsel was attempting to deceive, trick, or confuse the jury to avoid a conviction severely damaged Le's presentation of his version of events and theory of his case. This egregious misconduct requires reversal.

4. REQUIRING JURORS TO ARTICULATE THE REASON FOR THEIR DOUBT IS UNCONSTITUTIONAL

Because WPIC 4.01 misstates the reasonable doubt standard, it is structural error under United States Supreme Court precedent. Br. of Appellant at 35 (citing Sullivan v. Louisiana, 508 U.S. 275, 279-80, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)). Structural errors fall into a "special category" of manifest constitutional errors and may be raised for the first time on appeal. State v. Wise, 176 Wn.2d 1, 18 n.11, 288 P.3d 113 (2012); State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012). The structural nature of the instruction error on reasonable doubt overcomes the State's RAP 2.5 argument as a matter of law.[1]

The State relies on several cases that have approved of WPIC 4.01's language. Br. of Resp't at 24-27. But none of these cases controls because none has addressed Le's arguments or the more recent cases holding that an articulation requirement is unconstitutional.

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[1] As with the opinion-on-guilt claim, the State makes no attempt to show compelling circumstances that support the avoidance of this case's merits. Thus, this court should review the merits pursuant to RAP 1.2(a) and reverse.

The State relies on State v. Bennett, 161 Wn.2d 303, 317-18, 165 P.3d 1241 (2007), which required that WPIC 4.01 be given in every criminal case. Br. of Resp't at 24-25. However, the Bennett court acknowledged WPIC 4.01 was not problem-free, noting it was required only "until a better instruction is approved." 161 Wn.2d at 318. Similarly, the State cites State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975), but there the court "recognize[d] that this instruction has its detractors" yet felt "constrained to uphold it." Bennett and Thompson hardly provide a ringing endorsement for WPIC 4.01, particularly where neither court addressed the arguments or cases discussed here.

In addition to Bennett and Thompson, the State also cites State v. Tanzymore, 54 Wn.2d 290, 340 P.2d 178 (1959), for the proposition that courts have already considered and rejected Le's argument. Br. of Resp't at 24-25. But Tanzymore was decided 56 years ago and can no longer be squared with State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012), and the other fill-in-the-blank cases. See Br. of Appellant at 31-33.

In Emery, our supreme court held that an articulation requirement "impermissibly undermine[s] the presumption of innocence." 174 Wn.2d at 759. Because WPIC 4.01 requires the jury to articulate a reason for its doubt, it "subtly shifts the burden to the defense." Id. at 760. Given that the State will avoid supplying jurors with reasons to doubt, WPIC 4.01 suggests

that either the jury or the defense should supply them, which degrades the presumption of innocence. Id. at 759.

The State simplistically points out that the Emery court approved of WPIC 4.01's language. Br. of Resp't at 26. However, as Le argued in his opening brief, Emery did not explain why an articulation requirement is unconstitutionally unfair when the prosecutor argues it in closing but not unconstitutionally unfair when the trial court requires articulation in a jury instruction. Br. of Appellant at 34.

It is also telling that the State does not provide any analysis regarding the most recent case on articulation, State v. Kalebaugh, 179 Wn. App. 414, 421-23, 318 P.3d 288, review granted, 180 Wn.2d 1013, 327 P.3d 54 (2014), in which Division Two stated the articulation requirement in the trial court's preliminary instruction on reasonable doubt was error. Although the Kalebaugh majority stated it could not analogize "a prosecutor's fill-in-the-blank argument during closing[] [to] a trial court's preliminary instruction before the presentation of the evidence," it provided no explanation or analysis to support this position. Id. at 423; Br. of Appellant at 34 n.4. A judge's erroneous instruction requiring articulation of a reasonable doubt more greatly damages the presumption of innocence than a prosecutor's argument ever could. See Kalebaugh, 179 Wn. App. at 427 (Bjorgen, J., dissenting) ("[I]f the requirement of articulability constituted error in the

mouth of a deputy prosecutor, it would surely also do so in the mouth of the judge."). In light of the fill-in-the-blank cases and Kalebaugh, which all stand for the clear proposition that an articulation requirement is constitutional error, the cases cited by the State approving WPIC 4.01 can no longer control.

The State also invokes stare decisis, arguing Le must show the cases approving WPIC 4.01 are incorrect and harmful. Br. of Resp't at 25 (quoting In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). But, as discussed, because none of the cases the State cites addresses the precise issue, arguments, or case law Le raises, none needs to be overruled for Le to challenge WPIC 4.01's articulation requirement. See In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("[Courts] do not rely on cases that fail to specifically raise or decide an issue."). Moreover, given that this court lacks the authority to overrule Washington Supreme Court cases, it would be counterproductive to ask this court to do so even if it were necessary.

Finally, the State asserts "Le's argument is a hypertechnical exercise in semantics that must fail." Br. of Resp't at 27. In making this argument, the State correctly admits that courts "should be concerned with the meaning of the instruction . . . to a jury of ordinarily intelligent laymen." Br. of Resp't at 27 (quoting Wims v. Bi-State Dev. Agency, 484 S.W.2d 323, 325

(Mo. 1972)). Indeed, the State has identified the precise problem with WPIC 4.01.

The difference between "reason" and "a reason" is obvious to any English speaker. The first requires logic and the second requires an explanation or justification. Br. of Appellant at 29. The plain language of WPIC 4.01 instructs jurors they must articulate the reason for their doubt. This is not a strained or hypertechnical interpretation of WPIC 4.01 but a commonsense recognition that placing the article "a" before the word "reason" invokes a different meaning in the English language. An instruction like "a reasonable doubt is one based in reason" means something entirely different than "a reasonable doubt is one for which a reason exists." The former does not require jurors to articulate their doubt; it requires only that their doubt be based on reason and logic, which properly comports with United States Supreme Court precedent. Br. of Appellant at 28-29; see, e.g., Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). WPIC 4.01 engrafts an articulation requirement onto the reasonable doubt standard. Recognizing that it plainly does so is not "hypertechnical hairsplitting." Br. of Resp't at 28.

Nowhere in the State's response does the State actually address the substance of the articulation problem Le has identified. Instead, the State attempts to deflect the issue in hopes this court will not consider the serious flaw that a basic examination of WPIC 4.01's language reveals. This court should consider the substance of Le's arguments and reverse.

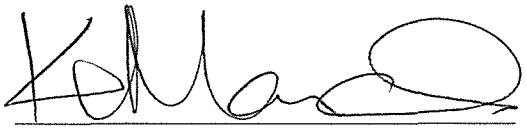
B. CONCLUSION

There was insufficient evidence to support a conviction for bail jumping, which requires reversal and dismissal of that charge. The State's lead witness's opinion on Le's guilt, prosecutorial misconduct, and the defective reasonable doubt instruction, taken individually or cumulatively, deprived Le of a fair trial, which requires reversal of Le's drug conviction and remand for a new and fair trial.

DATED this 17th day of June, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
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	)	
THAN LE,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 17TH DAY OF JUNE 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] THAN LE
DOC NO. 868524
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF JUNE 2015.

X Patrick Mayovsky