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Division I
State of Washington

NO. 72453-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BRYAN CORBETT, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA INVEEN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether Corbett can seek dismissal of this matter on the basis of a claim of governmental misconduct at the investigative stage, when he admittedly knew of but failed to present this claim or adequately develop the factual record at trial.

2. Whether the trial court properly admitted evidence of Corbett's prior acts of domestic violence against the victim as probative of her state of mind and her credibility.

3. Whether the trial court's use of the (unaltered) pattern jury instruction defining reasonable doubt was lawful.

4. Whether the deputy prosecutor delivered appropriate and acceptable closing argument.

5. Whether the trial court's use of a pattern jury instruction subsequently deemed erroneous was harmless in this case.

6. Whether remand is necessary for rehearing as to the duration of a no-contact order imposed at sentencing.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant, Bryan Corbett, Jr., was charged by amended information with first-degree burglary – domestic violence (Count 1), second-degree assault of a child – domestic violence

(Count 2), and two counts of domestic violence felony violation of a court order (Counts 3 and 4). CP 16-19. The State further alleged that each of these offenses was aggravated by the fact that it was part of an ongoing pattern of domestic abuse occurring over a prolonged period of time. CP 16-19. As to Counts 1, 2, and 3, the State alleged that each of these crimes of domestic violence was additionally aggravated by the fact that Corbett committed it in the presence of his young child. CP 16-18.

Corbett's trial was bifurcated into guilt and penalty phases; the penalty phase concerned the first aggravator described supra. By jury verdict rendered on July 22, 2014, Corbett was found guilty as charged on Counts 1, 3, and 4. CP 66, 70, 72. As to Count 2, the jury acquitted Corbett of assault in the second degree, and instead convicted him of the lesser offense of fourth-degree assault. CP 68-69. The jury also found proven beyond a reasonable doubt that Corbett had committed Counts 1 and 3 within "the sight and sound" of J.H. CP 67, 71.

A brief penalty phase commenced following the jury's decision in the guilt phase. At the conclusion of the penalty phase, the jury returned special verdicts in which it found that Counts 1, 3,

and 4 constituted aggravated domestic violence offenses. CP 73-75.

The trial court imposed an exceptional sentence of 152 months on Count 1, which was 36 months longer than the high end of the standard range for a defendant with an offender score of nine points or more (Corbett had an offender score of 23 points). CP 85-89. Corbett received standard-range sentences of 60 months on Counts 3 and 4, to run concurrently with Count 1, along with a concurrent sentence of 364 days for his misdemeanor assault conviction. CP 96-98.

2. SUBSTANTIVE FACTS

On the evening of February 2, 2014, Charnell Harris was at her apartment in south Seattle with her six-month-old son, J.H., and Corbett, her boyfriend and J.H.'s father. 5RP 111-13.[1] At that time, Corbett was prohibited by a court order, issued less than one year earlier, from having any contact with Ms. Harris. 5RP 134-35.

Ms. Harris and Corbett became engaged in a heated argument that prompted Ms. Harris to flee with her infant son. 5RP 114-15. Ms. Harris sought refuge in a number of adjoining

[1] The verbatim report of proceedings consists of nine volumes, referred to in this brief as follows: 1RP (July 11, 2014); 2RP (July 14, 2014); 3RP (July 15, 2014); 4RP (July 14, 15, and 16, 2014); 5RP (July 16, 2014); 6RP (July 17, 2014); 7RP (July 21, 2014), 8RP (July 22, 2014); and 9RP (August 15, 2014).

apartments without success, but finally was invited in by a neighbor, Suldan Mohamed. 5RP 115. Unfortunately, Corbett soon after forced his way in, pushing his way past Mohamed, who had tried to keep him out. 5RP 117.

Corbett began screaming at Ms. Harris, and then grabbed a wooden knife block from Mohamed's kitchen and threw it at her, though she was holding J.H. in her arms. 5RP 168-69, 177. The block missed Ms. Harris but struck J.H. on his head, causing him to go limp and become unconscious. 5RP 170.

Mohamed grabbed Corbett and pushed him out of his apartment, and then called 911. 5RP 120. Before first responders arrived, Ms. Harris walked outside of Mohamed's apartment and into the building's hallway. 5RP 121. After she set J.H. down on the floor, Corbett reappeared and attacked Ms. Harris again, punching her and pulling her hair. 5RP 121-22. He fled before police officers arrived. 5RP 122.

Responding medics transported J.H. and Ms. Harris to Harborview Medical Center, where they were treated for their injuries. 5RP 84-86; 6RP 222-26. While being cared for at the hospital, Ms. Harris told a social worker that Corbett was

responsible for her injuries and those of her son. 5RP 152-53, 157-58.

Ms. Harris explained to the jury that although Corbett had assaulted her and her son, she had, at one point shortly after February 2nd, contacted Seattle Police Department (SPD) Det. Adam Thorp, the lead investigator in this matter, and falsely attempted to place the blame on a fictitious person. 5RP 138-39, 197. After the trial court instructed the jury that it could consider evidence of Corbett's prior assaults of Ms. Harris as probative only as to her credibility and state of mind, Ms. Harris stated that Corbett had assaulted her In August 2012 and again in November of that year, but that she let him back into her life because she cared about him, and because he had impregnated her. 5RP 133-35. At trial, and on Mohamed's call to 911 on February 2nd, both he and Ms. Harris identified Corbett as the attacker. 5RP 179, 197.

On February 25, 2014, SPD Det. Randy Moore, assigned to a fugitive task force, went to Ms. Harris's apartment to see if Corbett was there. 6RP 251. Ms. Harris allowed Det. Moore inside, and after Corbett failed to respond to his beckoning, found Corbett hiding underneath a child's bed in a rear bedroom.

6RP 253. At that time, Corbett was still barred by the same court order from having contact with Ms. Harris. 5RP 134-35.

By stipulation, the jury was informed that Corbett had previously been convicted on two other occasions for violating the provisions of no-contact orders. 6RP 286-87.

Corbett testified in the defense case-in-chief. He claimed that he had spent the day of February 2, 2014, with his brother and sister-in-law, and had not seen Ms. Harris or J.H. that day. 7RP 351-53. He told the jury that he had thought that Ms. Harris had somehow rescinded the no-contact order barring him from seeing her several months earlier. 7RP 349. Corbett stated that he had visited Ms. Harris on February 25th because she had asked for his help with J.H., and that he had hidden from the police at that time simply because he heard his name being called out. 7RP 357-58.

Corbett's brother and sister-in-law also testified in Corbett's case-in-chief, and told the jury that they were with Corbett at a party in the Kent-Des Moines area on February 2nd. 7RP 321-22, 332-34. Both of these defense witnesses acknowledged that they each had a prior conviction for making false statements to a public servant. 7RP 330, 338.

In rebuttal, the State called Ms. Harris's older son, who shares the same initials as his younger brother. 7RP 341. Ten-year-old J.H. said that he had spent the earlier part of February 2, 2014, at Ms. Harris's apartment with her and Corbett, but had called his grandmother and asked to be picked up because his mother and Corbett were arguing too much. 7RP 342-43, 345-46.

C. ARGUMENT

1. CORBETT DID NOT ADDRESS AT TRIAL, OR OTHERWISE PRESERVE FOR REVIEW, A CLAIM OF GOVERNMENTAL MISCONDUCT HE NOW RAISES ON APPEAL.

For the first time on appeal, Corbett contends that his convictions must be reversed due to "egregious" governmental misconduct, which, he alleges, consisted of the State offering Mohamed a "bribe" in the form of a new knife block in exchange for his appearance as a witness favorable to the State in its case-in-chief. Brief of Appellant, at 12. Corbett did not seek dismissal of his case or some lesser remedy while his trial was pending or taking place, and failed to develop adequately a sufficient factual basis for this Court to address his claim on appeal. His argument should be rejected.

An appellate court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a); State v. O'Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009). As the O'Hara court observed, the policy underlying this rule is to encourage the efficient use of judicial resources, and an appellate court should be loath to sanction a party's failure to point out to the trial court an error that could have been timely corrected. Id. at 98.

Here, Corbett neither sought dismissal or other sanction as a pretrial motion *in limine*, nor did he file a post-verdict motion with the trial court for relief pursuant to CrR 7.5 or CrR 7.8. Rather, his experienced trial counsel elected to address this subject by way of cross-examination of both the investigating detective and Mohamed about their seemingly odd telephonic exchange regarding replacement of the knife block that Corbett had thrown at Ms. Harris, which had subsequently been seized by police as evidence. 5RP 183-84, 205-09.

In his brief to this Court, Corbett neglects to address the bar that RAP 2.5(a) presents due to the fact that he is asking this Court to provide relief for a purported error that he did not appropriately raise to the superior court. In order to obtain the remedy he seeks, Corbett is obligated to establish that an error of constitutional

magnitude occurred that actually affected his rights at trial. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). Corbett cites to no constitutional provision that he believes was violated. Moreover, given that Mohamed explained to the jury that the investigating detective's apparent offer of a replacement knife block had no impact on either his decision to testify or on the substance of his testimony,[2] it is difficult to see how he has demonstrated actual prejudice.

Perhaps more crucially, Corbett elected to forgo development of a complete factual record at the trial court level regarding the entire background and context of this exchange between the investigating detective and Mohamed, particularly considering that the detective was purporting to extend this offer on behalf of the prosecutor's office. His veteran trial counsel's strategic decision should be accorded a degree of deference, and seen as suggestive of the likelihood that there was less substance here than might initially meet the eye, and that this brief conversation was perhaps best utilized as a "gotcha" moment before the jury, rather than as the basis for a motion for dismissal with prejudice.

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[2] 5RP 183-84, 188.

Corbett neither provides relevant authority nor a sufficient factual basis upon which this Court should take the drastic measure he seeks. He cannot establish that a constitutional error occurred or that his trial is unavoidably tainted as a result.

2. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF CORBETT'S PRIOR ACTS OF DOMESTIC VIOLENCE AGAINST MS. HARRIS.

Corbett next asserts that he is entitled to a new trial because the superior court improperly admitted evidence of his prior abuse of Ms. Harris. Corbett does not contest the existence of his earlier bad acts or that they are relevant to Ms. Harris's credibility and state of mind. Rather, he contends that case law allows for the admission of such evidence only if the State also presents expert testimony regarding the dynamics of relationships marked by domestic violence. Brief of Appellant, at 19-20. Corbett's claim that the State's failure to present such an expert in this case is grounds for reversal is unsupported by authority and lacks common sense in 2015.

Corbett's contention is based on a too-narrow interpretation of this Court's decision in State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996). In Grant, this Court recognized the relevance, in terms of assessing an alleged victim's credibility and state of mind, of the

fact that victims of domestic violence "often attempt to placate their abusers in an effort to avoid repeated violence, and often minimize the degree of violence when discussing it with others." Grant, 83 Wn. App. at 107. Accordingly, this Court upheld[3] the admission of evidence of prior episodes of spousal abuse inflicted by Grant on his wife, so that the jury could fully understand the nature of their relationship. Id. at 108, 109 n.7 (citing numerous out-of-state cases reaching similar conclusions).

In Grant, the State additionally sought to present the testimony of Ms. Grant's therapist in order to expand upon the dynamics of a relationship marked by domestic violence. Id. at 108. This Court acknowledged that such expert testimony would *also* be proper for admission under ER 404(b). Id. at 109. However, neither this Court nor other appellate courts in this state has ever *conditioned* the admissibility of prior acts of domestic abuse on the predicate that an expert testifies about the dynamics of abusive relationships. Instead, Washington courts have recognized that the fact of prior bad acts has independent relevance justifying admission pursuant to ER 404(b). See State v. Magers, 164 Wn.2d 174, 184-86, 189 P.3d 126 (2008); State v.

[3] This Court held that this evidence was appropriately admissible under ER 404(b), rather than ER 609, the rule relied upon by the trial court.

Gunderson, 181 Wn.2d 916, 923-24, 337 P.3d 1090 (2014); State v. Ashley, __ Wn. App. __, __ P.3d __, 2015 WL 3444268 at *6 n.3 (Wash. Ct. App., May 27, 2015); Parrott-Horjes v. Rice, 168 Wn. App. 438, 444 n.6, 276 P.3d 376 (2012); State v. Baker, 162 Wn. App. 468, 474-45, 259 P.3d 270 (2011); State v. Nelson, 131 Wn. App. 108, 114-16, 125 P.3d 1008 (2006).

The need for expert testimony in this area has likely diminished since this Court decided Grant nearly 20 years ago. Domestic violence, and the variety of troubling impacts it can have on victims, is much more openly and commonly discussed and acknowledged than ever before, and jurors are likely to be more equipped to understand the ramifications of long-term abuse without the need for guidance from an expert witness. That is, past acts of assault are, on their own, more recognizably probative of a recanting victim's credibility and state of mind in 2015 than when society was less willing to face the reality of violence in the home.

Corbett cites to no decision since Grant that requires expert testimony in this context, and common sense runs against the logic of his claim. It should be denied.

3. THE PATTERN INSTRUCTION DEFINING "REASONABLE DOUBT" IS A CORRECT STATEMENT OF LAW.

Corbett argues that the language of Washington Pattern Jury Instruction 4.01, included as Instruction No. 3 in the trial court's instructions to the jury,[4] is a misstatement of law because it defines a reasonable doubt as "one for which a reason exists," and that his convictions must be reversed as a result. Corbett did not object to this or any other instruction given by the trial court to the jury. 7RP 311-12.

An instructional error that a defendant did not timely object to may be raised for the first time on appeal only if it is manifest error affecting a constitutional right with practical and identifiable consequences. RAP 2.5(a); State v. Lynn, 67 Wn. App. 339, 342-44, 835 P.2d 251 (1992). Jury instructions are read as a whole and in a commonsense manner. State v. Bowerman, 115 Wn.2d 794, 809, 802 P.2d 116 (1990). A court will not assume a strained reading of an instruction. State v. Moultrie, 143 Wn. App. 387, 394, 177 P.3d 776 (2008). The instructions are legally sufficient if they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. State v.

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[4] CP 33.

Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). A trial court's instructions must define reasonable doubt and convey to the jury that the State bears the burden of proving every essential element of the crime beyond a reasonable doubt. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

Corbett fails to demonstrate simple error, much less a manifest error of constitutional magnitude. He contends that Instruction No. 3 improperly shifted the burden of proof by somehow leading the jurors to believe that they needed to spell out a specific reason for acquittal, easing the State's responsibility to prove guilt beyond a reasonable doubt. Brief of Appellant, at 25. However, the state supreme court has held that the pattern instruction on which Instruction No. 3 was modeled is an accurate statement of law:

> We have approved WPIC 4.01 and concluded that it adequately permits both the government and the accused to argue their theories of the case. [Citation omitted.] We recognize that the concept of reasonable doubt seems at times difficult to define and explain... [b]ut every effort to improve or enhance the standard approved instruction necessarily introduces new concepts, undefined terms and shifts, perhaps ever so slightly, the emphasis of the instruction.... Even if many variations of the definition of reasonable doubt meet minimal due process requirements, the presumption of innocence is simply too fundamental, too central to the core of the

> foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction.... Trial courts are instructed to use the WPIC 4.01 instruction to inform the jury of the government's burden to prove every element of the charged crime beyond a reasonable doubt.

Bennett, 161 Wn.2d 317-18.

The Bennett decision is not the first instance in which the supreme court has ruled on similar language in jury instructions. In 1901, the court upheld an instruction which informed the jury that a reasonable doubt is one "for which a good reason exists, -- a doubt which would cause a reasonable and prudent man to hesitate and pause in a matter of importance, such as the one you are now considering." State v. Harras, 25 Wash. 416, 421, 65 P. 774 (1901) (holding that the instruction "is accorded the great weight of authority, and is not error.").

In 1959, the state supreme court addressed a challenge to a then-standard instruction that explained to the jury "that the doubt which entitled the defendant to an acquittal must be a doubt for which a reason exists." State v. Tanzymore, 54 Wn.2d 290, 340 P.2d 178 (1959). The Tanzymore court concluded that the instruction was one which "has been accepted as a correct statement of law for so many years, [so] we find the assignment

[of error] without merit." Tanzymore, 54 Wn.2d at 291; see also State v. Pirtle, 127 Wn.2d 628, 658, 904 P.2d 245 (1995) (observing that the language still included in the current version of WPIC 4.01 "previously has passed constitutional muster.").

In State v. Thompson, 13 Wn. App. 1, 533 P.2d 395 (1975), the defendant presented a challenge to the reasonable doubt instruction that is essentially identical to Corbett's, arguing "rather strenuously that this phrase [i.e., "a doubt for which a reason exists"] (1) infringes upon the presumption of innocence, and (2) misleads the jury because it requires them to assign a reason for their doubt in order to acquit." State v. Thompson, 13 Wn. App. at 4-5. In rejecting Thompson's contention, the court of appeals stated:

> Although we recognize that this instruction has its detractors, it was specifically approved in State v. Tanzymore... We are, therefore, constrained to uphold it. We would comment only that it does not infringe upon the constitutional right that a defendant is presumed innocent; but tells the jury when, and in what manner, they may validly conclude that the presumption of innocence has been overcome.
>
> Furthermore, the particular phrase, when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary. A phrase in

> this context has been declared satisfactory in this jurisdiction for over 70 years.

Thompson, 13 Wn. App. at 5.

Corbett fails to cite to or address many of these cases. Instead, he tries to equate a case of prosecutorial misconduct involving closing argument with the statement of law contained in his jury's instructions. Specifically, he claims that Instruction No. 3 amounts to asking the jury to articulate a justification for having reasonable doubt, similar to the "fill-in-the-blank" closing argument that the state supreme court found improper in State v. Emery, 174 Wn.2d 741, 759, 278 P.3d 653 (2012). However, in Emery the supreme court noted that the prosecutor had not erred when he described reasonable doubt as a "doubt for which a reason exists." Emery, 174 Wn.2d at 760. Instead, the prosecutor acted improperly when he specifically argued to the jury that they had to "fill in the blank" for what their doubt was. Id. In other words, it was the prosecutor's elaboration on WPIC 4.01 that created error, rather than the pattern instruction itself.

The doctrine of *stare decisis* requires that precedent be overruled only upon a clear showing that it is incorrect and harmful. State v. Njonge, 181 Wn.2d 546, 555, 334 P.3d 1068 (2014).

In addition, the decisions of the state supreme court are binding on the court of appeals, and it is error for the court of appeals not to follow directly controlling authority by the supreme court. State v. Pedro, 148 Wn. App. 932, 950, 201 P.3d 398 (2009). Corbett has failed to show that the state supreme court's decisions from Harras through Bennett are wrong, or that they do not control this Court's discretion as to his claim.

4. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT.

Corbett accuses the State of committing misconduct during its closing argument during the guilt phase of his trial in two regards. First, Corbett asserts that the deputy prosecutor improperly and intentionally disparaged defense counsel when he argued to the jury, in his initial closing remarks, that the idea that Ms. Harris would falsely blame Corbett for her and her son's injuries immediately after they were harmed was absurd, as would be the belief that Mohamed falsely identified Corbett as Ms. Harris's assailant in exchange for a free set of steak knives. Brief of Appellant, at 32-33. Corbett further argues that the prosecutor engaged in deliberate wrongdoing by using the term "we know" when reviewing the evidence for the jury. Corbett maintains that,

in doing so, the prosecutor both purposely vouched for the credibility of the State's witnesses and deliberately attempted to align the jury with the State against him. Brief of Appellant, at 35-37. Corbett contends that the prosecutor's remarks were so flagrant and ill-intentioned that they could not have been remedied by a curative instruction, thus entitling him to appellate relief despite his failure to object at trial to any of the statements he now attempts to depict as brazen wrongdoing.

Corbett's contentions should be rejected in their entirety. In order to establish prosecutorial misconduct, a defendant must prove that the prosecutor's conduct was improper and that it prejudiced his right to a fair trial. State v. Carver, 122 Wn. App. 300, 306, 93 P.2d 947 (2004). A defendant can establish prejudice only if he shows a substantial likelihood that the misconduct affected the jury's verdict. Id. A prosecutor's comments during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. Id. If, as here, defense counsel fails to object to the prosecutor's statements, then reversal is required only if the misconduct was so deliberate and malicious that no

instruction would have cured the resulting prejudice. See State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

With regard to Corbett's first contention, it is quite plain that, rather than attacking defense counsel, the prosecutor was addressing the fact that Ms. Harris had provided inconsistent accounts of the event that resulted in her and her son's wounds, and was simply arguing to the jury that Ms. Harris's initial explanation bore more indicia of credibility than a later account that, as she explained to the jury, she provided out of a desire to protect Corbett. It is equally self-evident that the deputy prosecutor had the same goal in mind when attempting to address any concern the jury might have had that Mohamed had tailored his testimony in hope of receiving some economic benefit from the State.

Comparison of the prosecutor's closing remarks here with those made in the cases that Corbett relies upon reveals the unmistakable weakness of Corbett's argument. In State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984), the prosecutor asked the jurors to refuse to "let a bunch of city lawyers...and city doctors who drive down here [i.e., to rural Pacific County] in their Mercedes Benz" influence their decision. Reed, 102 Wn.2d at 143-44. The prosecutor further suggested that "most all trial lawyers" make

disparaging comments for shock value, and that it must have been irritating for defense counsel to represent Reed when "you don't have anything." Id. Appellate courts have also been displeased by, though not necessarily found grounds for reversal in, express efforts by prosecutors to describe the arguments of opposing counsel as "sleight of hand," "bogus" and "desperate," and "a crock." See State v. Thorgerson, 172 Wn.2d 438, 466, 258 P.3d 43 (2011); State v. Lindsay, 180 Wn.2d 423, 433, 326 P.3d 125 (2014). In each of those cases, the prosecutor either directly targeted defense counsel as individuals or attempted to dismiss counsel's contentions as deliberate fraudulence.

Here, in contrast, the prosecutor was – in his initial closing remarks, before defense counsel had even presented its argument to the jury – merely addressing issues he suspected might be the focus of the jury's deliberations. Moreover, to the extent that he was anticipating any arguments that defense counsel would later make, it should be noted that it is not misconduct for a prosecutor to argue that the evidence does not support the defense's theory of the case. See Thorgerson, 172 Wn.2d at 465-66 (observing that even "isolated remarks calling defense arguments 'bogus' and 'desperate,' while strong and perhaps close to improper, do not

directly impugn the role or integrity of counsel, and such isolated comments are unlikely to amount to prosecutorial misconduct.").

As to Corbett's contention that the prosecutor vouched for the credibility of the State's witnesses by using the term "we know" when reviewing certain pieces of evidence, it is critical to bear in mind that while it is improper for a prosecutor to personally vouch for a witness's trustworthiness, he or she may argue inferences from the evidence, and a reviewing court cannot find prejudicial error unless "it is 'clear and unmistakable' that counsel is expressing a personal opinion." State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), quoting State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598 (1985).

It is far from "clear and unmistakable" that the prosecutor was offering his opinion of any witness's credibility here. Rather, the prosecutor used the rhetorical phrase "we know" to marshal evidence that had been admitted at trial and to draw reasonable inferences from that evidence. He did not suggest that he had any kind of special knowledge that had been kept from the jury that would support the testimony of the witnesses, or that he otherwise had some hidden reason to believe their testimony.

Furthermore, it is difficult to understand how the prosecutor's use of the term "we know," in the manner in which it was employed, constituted a loaded attempt to engender the jury's loyalty, as opposed to amounting to a simple, fairly insignificant choice of introductory pronoun. The one Washington case on which Corbett relies, Reed, is readily distinguished, insofar as the prosecutor's closing argument in that case was rife with outrageous comments and direct pleas for sympathy for himself on the basis of insider versus outsider status. Here, the term "we know" was a relatively meaningless choice of term used only to re-introduce the jury to the abundance of evidence pointing to Corbett's culpability. Moreover, any risk that the jury would have misconstrued the prosecutor's terminology could have been quickly and effectively remedied with a curative instruction, had one been sought.

5. ANY ERROR CREATED BY THE USE OF A PATTERN JURY INSTRUCTION DEFINING THE TERM "PROLONGED PERIOD" WAS HARMLESS BEYOND A REASONABLE DOUBT.

Following the jury's verdicts after the guilt phase of Corbett's trial, a brief penalty phase was conducted regarding the allegation that Corbett's crimes constituted aggravated domestic violence offenses, in violation of RCW 9.94A.535(3)(h)(i). During the penalty

phase the State presented, and the trial court admitted into evidence, six judgments and sentences imposed on Corbett over a period of ten years for various acts of domestic violence. Corbett called no witnesses to testify in his penalty phase case-in-chief, and declined to even present an opening statement or closing argument.

At the conclusion of the evidentiary stage of the penalty phase, the trial court delivered several instructions to the jury. Phase 2 Instruction No. 3 listed the elements that needed to be proved beyond a reasonable doubt for the aggravating factor to be found. CP 80-81. Included among these elements was a requirement that the State prove an ongoing pattern of abuse consisting of multiple incidents over a "prolonged period of time," and the instruction further explained that "the term 'prolonged period of time' means more than a few weeks." CP 80. This instruction strictly followed Washington Pattern Jury Instruction 300.17 (hereinafter WPIC 300.17). See Washington Practice: Washington Pattern Jury Instructions (Criminal) 300.17 (3rd Ed. 2008). Later on the same day, the jury returned special verdicts finding that Corbett's crimes of burglary and felony violations of

court orders amounted to aggravated domestic violence offenses. CP 73-75.

On July 2, 2015, the state supreme court held that WPIC 300.17 is an erroneous statement of law insofar as it purports to define "prolonged period of time" as a period lasting "more than a few weeks." State v. Brush, __ Wn.2d __, __ P.3d __, available at 2015 WL 4040831 (Wash., July 2, 2015). The supreme court seems to have concluded that it is error to instruct or imply to a jury that a period of "more than a few weeks" is necessarily a "prolonged period of time," because it is strictly within the province of a jury to decide what a "prolonged period" is. Brush, 2015 WL 4040831 at *4. Five justices of the supreme court further held that the trial court's use of the (unaltered) pattern instruction in Brush's case amounted to an unconstitutional comment by that trial court on the evidence. Brush, 2015 WL 4040831 at *3.

It appears, following the supreme court's issuance of its decision in Brush, that this Court is obligated to review the trial court's use of WPIC 300.17, as embodied in Phase 2 Instruction No. 3, for harmlessness, notwithstanding Corbett's failure to lodge

a contemporaneous objection. Due to the somewhat curious five-justice holding that the use of an unaltered pattern jury instruction can constitute a trial judge's personal opinion regarding the credibility, weight, or sufficiency of specific trial evidence, prejudice is presumed here, and the State has the burden of showing that no prejudice could have resulted to Corbett's detriment by way of Phase 2 Instruction No. 3. See Brush, 2015 WL 4040831 at *5, citing State v. Levy, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006).

Under the circumstances present in Corbett's case, this Court can comfortably conclude that he suffered no prejudice here. The supreme court was specifically troubled in Brush by the fact that Brush's prior abuse of his victim had occurred over a span of time "just longer than a few weeks" prior to her murder. Brush, 2015 WL 4040831 at * 5. In light of this time period, the Brush court concluded that a "straightforward application of the jury instruction would likely lead a jury to conclude that the abuse in this case met the given definition of a 'prolonged period of time.'" Id. Accordingly, the supreme court concluded that the State could not meet its high burden of showing an absence of prejudice. Id.

In contrast, the supreme court found no prejudice in State v. Levy, where the trial court altered a pattern instruction providing the elements of first-degree burglary in order to expressly instruct the jury that the targeted apartment in the case constituted a "building." Levy, 156 Wn.2d at 716. While finding that the trial court's tailoring of the pattern instruction amounted to an improper comment, the supreme court declined to reverse Levy's burglary conviction because the question of whether the apartment was a building had never been challenged during the trial, and the absence of any challenge – along with common sense – compelled the conclusion that the jury could not have found the apartment to be anything besides a building. Id. at 726.

Corbett's case is far more aligned with Levy than with Brush. Unlike the evidence against the defendant in Brush, which showed no more than an eight-week period of abusive behavior, here the State presented evidence that Corbett had been convicted *over the span of more than ten years of 21 crimes of domestic violence*. 8RP 454-58. And Corbett did not merely challenge the State's evidence of an ongoing pattern of abuse in a half-hearted way.

He forsook any challenge whatsoever, forgoing his opportunity to present an opening statement in the penalty phase, to contest the State's evidence during the evidentiary stage, or to offer any closing argument in opposition. Essentially, he conceded that he had engaged in multiple incidents of abuse over a prolonged period of time. Given the extreme length and extent of this ongoing pattern and Corbett's effective concession, the jury here, as in Levy, could have reached no decision other than that the aggravator applied to Corbett's instant offenses.

Finally, it should be noted that the trial court expressly imposed Corbett's exceptional sentence on the burglary charge not only because it was part of an ongoing, prolonged pattern of abuse, but because he committed that crime, along with one episode of felony violation of a court order, in the presence of J.H. 9RP 475. See RCW 9.94A.535(3)(h)(ii) (authorizing upward departure from standard range where jury find that domestic violence offense was committed within sight or sound of defendant's minor child). The record is silent as to whether the trial court would have imposed the same sentence if only one of the two aggravators had been found

proven by the jury. However, should this matter be remanded for resentencing, Corbett has presented no reason to this Court why the trial court could not impose an identical sentence on the basis of RCW 9.94A.535(3)(h)(ii) alone.

6. REMAND IS REQUIRED FOR REHEARING AS TO THE DURATION OF THE NO-CONTACT ORDER ISSUED BY THE SENTENCING COURT BARRING CORBETT FROM COMMUNICATING WITH J.H.

Corbett correctly recognizes that the trial court erred when it imposed, as a condition of Corbett's sentence, a lifetime order prohibiting him from communicating with J.H. 8RP 475. Although the trial court's decision may have been justifiable, it was required to provide its reasoning on the record before issuing an order so definitively implicating Corbett's constitutional right to parent his offspring. See In re Pers. Restraint of Rainey, 168 Wn.2d 367, 377-82, 229 P.3d 686 (2010). Because the record here is virtually silent on this matter, remand is necessary.[5] Id. at 381-82.

[5] The rehearing may be particularly brief, given that Corbett testified in his case-in-chief that he is unsure if he is J.H.'s father. 7RP 351.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Corbett's convictions and his exceptional sentence, and remand this matter only for rehearing as to the no-contact order between Corbett and J.H.

DATED this 22nd day of July, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Mary T Swift, the attorney for the appellant, at swiftm@nwattorney.net, containing a copy of the Brief of Respondent, in State v. Bryan Edwards Corbett, Jr., Cause No. 72453-3, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 22nd day of July, 2015.

uBrame

Name:
Done in Seattle, Washington