

66549-9

66549-9

NO. 66549-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
TIMOTHY DYE,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE JOAN DUBUQUE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court exercised proper discretion in allowing a witness with developmental and physical disabilities to have a trained service dog present when he testified to alleviate his anxiety about testifying.

2. Whether the trial court followed proper procedure when replacing a sitting juror with the alternate juror during deliberations when the alternate had been admonished not to discuss the case when he was temporarily excused and the trial court instructed the reconstituted jury to begin its deliberations anew.

3. Whether this Court should consider the claim that the jury instructions regarding the "vulnerable victim" aggravating factor constituted a comment on the evidence when the jury answered "no" to the special verdict in any event.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Timothy Dye, was charged with residential burglary for entering Douglas Lare's apartment and stealing Lare's belongings on or about January 24, 2008. In addition, the State

alleged the aggravating circumstance that Lare was a particularly vulnerable victim. CP 1-12.

A jury trial took place in November and December 2010 before the Honorable Joan DuBuque. Before the trial began, the prosecutor informed the trial court that Douglas Lare wanted the King County Prosecutor's Office's trained service dog, Ellie, to be present when he testified to help alleviate his anxiety. CP 104. As will be discussed in more detail below, the trial court decided to accommodate this request due to Lare's developmental disabilities. RP (11/18/10) 27-33. The trial court instructed the jury not to consider the dog's presence. CP 53.

Approximately ten minutes after the jury began deliberating, defense counsel notified the trial court and the prosecutor that Dye had had contact with one of the jurors during the trial. RP (12/6/10) 129. With the agreement of the parties, the trial court dismissed the juror, contacted the alternate juror, and instructed the reconstituted jury to begin deliberations anew. RP (12/6/10) 132-34; RP (12/7/10) 3-10.

The jury convicted Dye of residential burglary as charged; however, the jury answered "no" to the special verdict regarding the

allegation that Douglas Lare was a particularly vulnerable victim.
CP 68-69.

Dye received a prison-based DOSA sentence over the
State's objection. CP 70-79. Dye now appeals. CP 80-90.

2. SUBSTANTIVE FACTS

Douglas Lare is an adult man with developmental and
physical disabilities; he has an IQ of approximately 65, and he has
a degenerative condition in his joints. RP (11/30/10) 16-17.
According to his sister, Lare is very trusting and "has no common
sense whatsoever." RP (11/30/10) 17. Lare's reading and writing
skills are poor, and he cannot think abstractly. RP (11/30/10) 18.
Lare's cooking skills are limited to heating things up in the
microwave (which he called "Mr. Microwave"). RP (11/30/10) 19;
RP (12/1/10) 37.

Lare has his own apartment and has worked a night shift at
the Veteran's Administration Hospital for 25 years. RP (12/1/10)
10-11. However, he is unable to keep track of his finances
sufficiently to pay his own bills, so his sister hired a payee service
to do this for him. RP (11/30/10) 19; RP (12/1/10) 12.

Sometime in 2006 or 2007, Douglas Lare met Alesha Lair when they were living in the same apartment complex. Eventually, Alesha Lair became Douglas Lare's "girlfriend." RP (12/1/10) 14. Unbeknownst to Lare, Lair was already in a relationship with Dye; however, she convinced Lare that she and Dye were just friends. RP (12/1/10) 47.

In the spring of 2007, Lair, her mother, her mother's boyfriend, and her sister moved into Douglas Lare's apartment. Dye stayed there for a short time as well. RP (12/1/10) 19-20. Lair and the others took advantage of Lare financially. With Douglas Lare's money, Alesha Lair purchased a car, computers, a DVD player, DVD's, a PlayStation, and clothing. She bought cell phones for everyone. She opened several credit cards in Lare's name and maxed them out. She bought beer and cigarettes for her mother, who called Lare a "patsy." She convinced Lare to take cash from his retirement account at the VA. RP (12/1/10) 21-27. Lare's sister estimated that \$59,000 had been cashed out of Lare's retirement account, and that his credit card debt grew to approximately

\$42,000.¹ RP (11/30/10) 29-30. When Lare was asked if he bought anything for himself, he said he bought a coat "when [he] was cold." RP (12/1/10) 27.

Alesha Lair's mother and mother's boyfriend moved out of Douglas Lare's apartment in the fall of 2007, after Lare had an argument with them because they had been driving the car without a valid driver's license. Lair's mother's boyfriend assaulted Douglas Lare and broke his glasses. RP (12/1/10) 29-30. Not long after that, Alesha Lair also moved into an apartment of her own, and she spent even more of Douglas Lare's money to buy furniture for it. RP (12/1/10) 30-31. Unbeknownst to Douglas Lare, Dye moved in with Alesha Lair. Ex. 27.

Douglas Lare's apartment was burglarized three times. On the first occasion, on January 19, 2008, Lare called 911 to report that a DVD player and a DVD were missing from his bedroom. RP (12/2/10) 25-29. On January 24, 2008, Lare was awakened by noises in his apartment, and he discovered Dye rummaging through his belongings. RP (12/1/10) 38-39; RP (12/2/10) 46-48.

¹ Before Dye went to trial, Alesha Lair pled guilty to theft in the first degree with the aggravating circumstance that Douglas Lare was a particularly vulnerable victim. RP (12/6/10) 12.

Dye asked Lare if he could take his DVD player and VCR, and Lare refused. Dye left, taking some DVDs and a shelving unit with him. RP (12/1/10) 38-40; RP (12/2/10) 49-50. Lare reported this second incident to the police, and went to work. RP (12/1/10) 40; RP (12/2/10) 46-49.

When Lare returned from work the next morning, he found that the front door of his apartment had been propped open with his "big stone bulldog."² RP (12/1/10) 40. His television, VCR, DVD player, microwave, and a "bulldog" knife had been stolen. RP (12/1/10) 40. Lare reported this burglary to the police also. The responding officer could see the cleared spaces in Lare's otherwise cluttered apartment where the television and microwave used to be. RP (12/1/10) 75. When Lare's sister and brother-in-law went to Lare's apartment after the last burglary to help him install a deadbolt lock, Lare "greeted" them at the door holding a cast-iron frying pan. RP (11/30/10) 34. Douglas Lare remains very fearful as a result of the burglaries. Lare explained that he now has three locks on his front door, and that he sleeps with mace, a frying pan, and two knives in his bedroom for protection. RP (12/1/10) 41.

² Lare collected bulldogs.

During her investigation in this case, Detective Elizabeth Litalien took a statement from Dye over the telephone. Ex. 27. Dye denied that he had stolen anything from Douglas Lare, but claimed that Lare had given him a "couple things" to pawn, including a DVD player. Ex. 27. After Litalien turned off the tape recorder, Dye told her that "there was no way to pin [the crime] on him" because "his name wasn't on any of the pawn slips[.]" RP (12/2/10) 6.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY ALLOWING A SERVICE DOG TO BE PRESENT WHEN THE VICTIM TESTIFIED.

Dye first argues that he was deprived of a fair trial because the King County Prosecutor's Office's trained service dog, Ellie, was present when Douglas Lare testified in order to ease his anxiety about testifying. Brief of Appellant, at 4-14. This claim should be rejected. The trial court properly exercised its discretion in allowing the dog to be present. As the trial court observed, the dog is well-trained and unobtrusive, and Lare has disabilities that warranted use of the dog to make him more comfortable while testifying. Moreover, the trial court specifically instructed the jury

not to consider the dog's presence. The jurors rejected the special allegation that Lare was a particularly vulnerable victim, which shows that the jury followed the court's instructions and the dog's presence resulted in no prejudice to the defendant. This Court should affirm.

As a preliminary matter, Dye frames this issue under the rubric of the ADA,³ the WLAD,⁴ and GR 33 rather than in terms of a trial court's general discretion to control the manner in which trials are conducted and witnesses are questioned under ER 611. See Brief of Appellant, at 4-8. As such, Dye's framing is off the mark.

Although Douglas Lare undisputedly suffers from disabilities, both developmental and physical, the dog was not an "accommodation" for those disabilities as contemplated by GR 33. This rule contemplates accommodations such as equipment, devices, interpreters, or readers in order to allow a disabled person "to participate in any program, service, or activity made available by any court." GR 33(a)(1) and (4). Testifying as a subpoenaed witness in a criminal trial is not a "program, service, or activity made

³ Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq.

⁴ Washington Law Against Discrimination, Chapter 49.60 RCW.

available by any court." Rather, it is a mandatory obligation imposed on the witness as a direct result of the Sixth Amendment. GR 33 is not applicable here, and Dye's reliance is misplaced.

A trial court has broad discretion to control the manner in which a trial is conducted. State v. Hakimi, 124 Wn. App. 15, 19, 98 P.3d 809 (2004), rev. denied, 154 Wn.2d 1004 (2005). A trial court abuses its discretion only if its actions are manifestly unreasonable or are based on untenable grounds. State ex. rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Put another way, an abuse of discretion occurs only if no reasonable person would have done what the trial judge did. State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). In addition, ER 611(a) provides:

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

ER 611(a).

In Hakimi, this Court ruled that the trial court did not abuse its discretion under ER 611 in a child sexual abuse case when it allowed the child victims to hold a doll while they testified. Hakimi,

124 Wn. App. at 18-22. The Court reached this conclusion after observing that the record showed "that the trial judge weighed the interests of Hakimi's two victims and any prejudice to Hakimi," and that the judge acted reasonably in recognizing that holding the doll provided security and comfort to the victims in difficult circumstances (*i.e.*, testifying in the presence of the perpetrator and a room full of strangers). Id. Moreover, courts in other jurisdictions have also held that it is within the trial court's discretion to allow child witnesses to hold a doll or a teddy bear to make them more comfortable and less anxious while testifying. *See, e.g., State v. Dickson*, 337 S.W.3d 733, 742-44 (Mo. Ct. App. 2011); *State v. Powell*, 318 S.W.3d 297, 302-04 (Mo. Ct. App. 2010); *State v. McPhee*, 58 Conn. App. 501, 506-08, 755 A.2d 893 (2000); *State v. Marquez*, 124 N.M. 409, 411-13, 951 P.2d 1070 (N.M. Ct. App. 1997); *Sperling v. State*, 924 S.W.2d 722, 725-26 (Tex. Ct. App. 1996). A similar case presents itself here.

In this case, the prosecutor informed the trial court that Douglas Lare wanted Ellie the service dog to be present with him in the courtroom to alleviate "significant anxiety regarding his upcoming testimony." CP 104. As the State noted, although Lare is not a child, he functions on the level of a child due to his

developmental disabilities. CP 104. As the trial court observed, Lare functioned either on the level of a two- to six-year-old (according to the defense), or on the level of a six- to ten-year-old (according to the State), and it was appropriate to accommodate the needs of a witness with developmental disabilities in a reasonable manner. RP (11/18/10) 29. The trial judge also stated her understanding, which is not disputed in the record, that Ellie is well-trained and "unobtrusive." RP (11/18/10) 29. And when defense counsel raised concerns that Dye was allergic to dogs, the trial judge stated she was willing to accommodate that if counsel could provide more information regarding what was needed. RP (11/18/10) 29-31. No further information was provided.

When Douglas Lare testified, the prosecutor asked him -- without objection -- about the dog. Lare explained that "Ellie is to help me and to make it easier for me. And I have treats here." RP (12/1/10) 10. At the conclusion of the trial, the trial court instructed the jury to disregard the dog:

One of the witnesses in this trial may be accompanied by a service dog. Do not make any assumptions or draw any conclusions based on the presence of this service dog.

CP 53. Lastly, although the jury found Dye guilty of residential burglary, the jury answered "no" on the special verdict for the vulnerable victim aggravating factor. CP 68-69.

This record demonstrates that the trial court properly exercised its discretion in allowing the service dog to be present when Douglas Lare testified. Although Lare is an adult, his disabilities make him similar to the children who testified in Hakimi and the other cases cited above. Both the prosecutor and Lare stated that the dog would help alleviate Lare's anxiety about testifying. The trial court weighed these interests against the potential for prejudice, and acted within its discretion in allowing the dog to be present.

In addition, the trial court gave an instruction to the jury to minimize any possible prejudice to the defendant. The jury is presumed to follow the trial court's instructions absent evidence to the contrary. State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). The record plainly shows that the jurors followed the court's instruction to disregard the dog because they rejected the "vulnerable victim" aggravating factor. If the jurors had harbored undue sympathy for Lare because of the dog, they likely would have answered "yes" to the special verdict rather than "no." In

sum, Dye has not shown a manifest abuse of discretion or prejudice, and this Court should affirm.

Nonetheless, Dye argues that the dog's presence amounted to a due process violation because the truth-seeking function of cross-examination "is foiled by the use of a comfort dog, whose presence suggests the final outcome of the trial, presupposing to the jury the very victimhood of the complainant, invading the jury's exclusive province as finders of fact, along with the defendant's presumption of innocence." Brief of Appellant, at 11. The record in this case reveals nothing of the kind. Douglas Lare was subjected to an extensive cross-examination, during which defense counsel highlighted his memory problems and elicited a number of inconsistent statements.⁵ RP (12/1/10) 42-120. And again, the jury rejected the "vulnerable victim" aggravating factor, which demonstrates that there was no effect on the outcome of the trial.

In other words, there is no evidence that cross-examination was "foiled" by the dog, that the dog usurped the jury's fact-finding

⁵ An Idaho appellate court has rejected an argument similar to Dye's, *i.e.*, that allowing a child witness to hold a doll "hampered" the defendant's right of cross-examination. State v. Cliff, 116 Idaho 921, 923-24, 782 P.2d 44 (Idaho Ct. App. 1989). In rejecting this argument, the court observed that the Confrontation Clause is satisfied "if defense counsel receives wide latitude at trial to question witnesses." Id. at 923 (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 53, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987)). That is certainly the case here.

function, or that the presumption of innocence was undermined. Indeed, the record belies these claims, and Dye's arguments are without merit.

Dye also cites three cases where courts found error in allowing a child witness to have a toy on the witness stand in support of his argument that Douglas Lare should not have been allowed to have a service dog near him during his testimony. See Brief of Appellant, at 11 (citing State v. Palabay, 9 Haw. App. 414, 844 P.2d 1 (1992), State v. Aponte, 249 Conn. 735, 738 A.2d 117 (1999), and State v. Geverez, 61 Ariz. 296, 148 P.2d 829 (1994)). These cases are inapposite.

In Palabay, the intermediate appellate court of Hawaii found that it was error to allow a child witness to hold a teddy bear absent a finding of "compelling necessity" by the trial court. Palabay, 9 Haw. App. at 424. But as the Wyoming Supreme Court later observed, the Palabay court relied on other authorities in an "ill-considered and ill-advised" way by citing them for a "clear and unequivocal rule of law" that did not, in fact, exist. Smith v. State, 119 P.3d 411, 419 (Wyo. 2005). In other words, Palabay is an outlier, and the "compelling necessity" test does not appear to be the rule in any other jurisdiction.

In Aponte, the issue was not whether the trial court abused its discretion in allowing a child witness to hold a toy for comfort. Rather, the issue was whether the prosecutor had committed misconduct by giving the child a gift -- a stuffed dinosaur -- to hold while she testified. The court concluded that giving the child such a gift was improper, as it may have unduly influenced the child in favor of the prosecution. Aponte, 249 Conn. at 751-52. Moreover, the error was compounded when the trial court limited the defendant's cross-examination of the child regarding her contact with the prosecutor. Id. at 752-53. In sum, the issues in Aponte do not resemble what occurred in this case.

In Geverez, the court held that it was error to allow a child to hold a doll belonging to her deceased mother during the child's testimony regarding her mother's murder, while the victim's mother sat "within close proximity of the jury," "wept bitterly," and was consoled by the bailiff. Geverez, 61 Ariz. at 305-06. The court found that the combination of these events deprived the defendant of a fair trial. Id. But nothing of that sort occurred in this case, and thus, Geverez is also not on point.

Lastly, Dye cites a recent New York Times article regarding a legal challenge to the use of a service dog in a New York case,

and the use of service dogs generally. See Brief of Appellant, at 10 (citing William Glaberson, By Helping a Girl Testify at a Rape Trial, a Dog Ignites a Legal Debate, N.Y. Times, Aug. 6, 2011, http://www.nytimes.com/2011/08/09/nyregion/dog-helps-rape-victim-15-testify.html?_r=2). Dye notes that a psychologist quoted in the article stated that the dog at issue in the New York case "nudges" children when they "start talking about difficult things." Id. Whether or not this would result in a constitutionally unfair trial -- a position the State questions in any event -- again, there is no evidence that any "nudging" occurred in this case.⁶

In sum, the trial court acted within its broad discretion in allowing a trained service dog to be present with Douglas Lare in order to ease his anxiety when he testified. The record demonstrates that the presence of the dog did not interfere with cross-examination, which was lengthy and thorough. The record also demonstrates that the jury followed the trial court's instruction not to consider the dog in any way. And as a matter of policy, this Court should hold that allowing a trained service dog to be present

⁶ Douglas Lare is also quoted in the New York Times article: "Ellie gave him courage when he was afraid, Mr. Lare said in an interview: 'It was like I had no other friends in the courthouse except Ellie,' he said." Id.

at the request of children or vulnerable adults who are afraid of testifying furthers rather than hinders the truth-seeking function of the trial. This Court should affirm.

2. THE TRIAL COURT FOLLOWED PROPER PROCEDURE WHEN SUBSTITUTING THE ALTERNATE FOR A SITTING JUROR DURING DELIBERATIONS.

Dye next claims that the trial court committed reversible error because it did not question the alternate juror regarding his impartiality before replacing a sitting juror with the alternate during deliberations. As a result, Dye claims that his right to an impartial and unanimous jury was violated. Brief of Appellant, at 15-21. This claim should be rejected. The alternate juror had been excused a very short time before the trial court called him back, and the trial court had specifically instructed the alternate before he was excused that he was still prohibited from discussing the case with anyone. Therefore, the trial court did not abuse its discretion by not inquiring further. Moreover, the trial court instructed the reconstituted jury to begin deliberations anew as required. The trial court followed proper procedure, and Dye's claim is without merit.

Under CrR 6.5, an alternate juror may be recalled to replace a sitting juror if the sitting juror is unable to continue to serve. In accordance with this rule, if a sitting juror is replaced by the alternate during deliberations, the trial court must instruct the reconstituted jury to disregard prior deliberations and begin deliberations anew. State v. Stanley, 120 Wn. App. 312, 315, 85 P.3d 395 (2004); State v. Ashcraft, 71 Wn. App. 444, 460-61, 859 P.2d 60 (1993). The failure to instruct the jury to begin deliberations anew is a manifest constitutional error that is not harmless unless the record demonstrates that jury unanimity was preserved. Stanley, 120 Wn. App. at 315-16.

Although the failure to instruct the reconstituted jury to begin deliberations anew is error of constitutional magnitude, the decision whether to inquire of the alternate juror regarding impartiality is a decision addressed to the sound discretion of the trial court:

Where the trial court seats an alternate juror after temporarily excusing that juror, the court must instruct the reconstituted jury to begin deliberations anew. The trial court need not, however, determine on the record that the alternate juror remains impartial, as the rule governing the seating of alternate jurors confers upon the trial court the discretion to determine whether such an inquiry is necessary.

State v. Chirinos, 161 Wn. App. 844, 845, 255 P.3d 809 (2011).

The facts of Chirinos are instructive here.

In Chirinos, the trial court temporarily excused the alternate juror after closing arguments. Before excusing the alternate, the trial court admonished her that she was still under the court's instructions not to discuss the case with anyone. Chirinos, 161 Wn. App. at 846-47. The following week, the alternate juror was called back to replace a sitting juror who could not continue due to work obligations. The original jury had been deliberating for approximately one hour. Id. at 847. After seating the alternate, the trial court instructed the jury to begin its deliberations anew; the trial court did not inquire further of the alternate to confirm that she had abided by the court's instructions not to discuss the case. Id.

In rejecting a claim identical to Dye's, this Court held that the trial court followed proper procedures in seating the alternate juror. The alternate had been appropriately admonished before she was temporarily excused "to continue to abide by her obligation not to discuss the case." Id. at 850. Therefore, as this Court observed,

Without some indication that [the alternate] had become biased during her temporary excusal, the trial court was no more obligated to voir dire [the alternate] upon her return than it was to voir dire the other

jurors, who had gone home for the weekend, before permitting them to continue deliberation.

Id. The same is true in this case.

In this case, after closing arguments were concluded, the trial court temporarily excused the alternate juror after admonishing him to continue to abide by the court's instructions not to discuss the case with anyone. RP (12/6/10) 128-29. Immediately after the ensuing recess, defense counsel disclosed that Dye had had contact with one of the sitting jurors on the train during the trial. RP (12/6/10) 129-31. The trial court proposed questioning the juror or replacing her with the alternate, and both parties agreed to the latter proposal. RP (12/6/10) 132. The trial court announced that the sitting juror would be excused immediately, the alternate juror would be contacted, and that deliberations would begin anew. RP (12/6/10) 132-33. The trial court observed that it had admonished the alternate that he was still under the court's instructions, and that it was fortunate that the original jury had not been deliberating for very long. RP (12/6/10) 133. The court estimated that the jury had been deliberating for ten minutes. RP (12/7/10) 4. The sitting juror who had contact with Dye was excused. RP (12/6/10) 134. The next morning, the alternate juror

appeared, and the trial court instructed the reconstituted jury to begin deliberations anew. RP (12/7/10) 10.

As in Chirinos, the trial court followed proper procedure and did not abuse its discretion in deciding not to inquire further of the alternate juror. As in Chirinos, the trial court admonished the alternate to continue to abide by the court's instructions before temporarily excusing him, and as in Chirinos, there was no indication that the alternate had become biased during the brief interval between his temporary excusal and his being called back into service. In sum, Chirinos is directly on point, and Dye's claim should be rejected.

3. THE ALLEGED COMMENT ON THE EVIDENCE HAD NO IMPACT ON THE JURY'S VERDICT, AND THUS, ANY POSSIBLE ERROR IS NOT "MANIFEST" UNDER RAP 2.5.

Lastly, Dye claims that the trial court impermissibly commented on the evidence by using the word "victim" in the jury instructions for the "vulnerable victim" aggravating factor. Brief of Appellant, at 22-25. But the jury answered "no" on the special verdict form for the aggravating factor. Therefore, even if these

instructions were a comment on the evidence,⁷ any error is not "manifest" under RAP 2.5 because the alleged error had no effect on the outcome of the trial. Consequently, this claim should not be considered for the first time on appeal under the applicable legal standards.

It is well-settled that appellate courts generally will not consider issues raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). An exception exists for manifest errors affecting the defendant's constitutional rights. RAP 2.5(a)(3); State v. Walsh, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). But this exception is a narrow one. State v. Kirkman, 159 Wn.2d 918, 934, 155 P.3d 125 (2007). In order to raise a claim for the first time on appeal, the defendant must show that the error alleged is both truly "manifest" and of constitutional

⁷ The State does not concede that the jury instructions in question constitute a comment on the evidence. To the contrary, the instructions comport with the language of the statute defining the "vulnerable victim" aggravating circumstance. See RCW 9.94A.535(3)(b). Moreover, in accordance with the instructions as a whole, the jury would not have considered the aggravating circumstance until after finding Dye guilty of the underlying offense; thus, at the time the jurors considered the aggravating circumstance, they had already found beyond a reasonable doubt that Douglas Lare was, in fact, a "victim." However, there is simply no need to address this claim on the merits because Dye cannot make the requisite showing of prejudice.

dimension. State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492

(1988). In other words,

The defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual prejudice that makes the error "manifest," allowing appellate review.

Kirkman, 159 Wn.2d at 926-27. Put another way, a manifest error is "unmistakable, evident or indisputable" in light of the record as a whole. State v. Burke, 163 Wn.2d 204, 224, 181 P.3d 1 (2008) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

In this appeal, Dye does not provide an analysis under RAP 2.5. But at trial, Dye did not raise any objection to the jury instructions he now claims were a judicial comment on the evidence. See RP (12/2/10) 69. Therefore, Dye appears to presume that because comments on the evidence are constitutional in nature, they may always be raised and considered for the first time on appeal without further analysis. However, Dye must still make a showing of prejudice in order to meet the standard for manifest constitutional error under RAP 2.5. That showing cannot be made in this case for several reasons.

First, the jury in this case received the standard instruction to disregard any apparent comments on the evidence:

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during the trial or in giving these instructions, you must disregard this entirely.

CP 46-47. Furthermore, the jurors were specifically instructed not to consider the aggravating circumstance unless they found Dye guilty of residential burglary. CP 59. In accordance with this instruction, the jurors would not have begun considering whether Douglas Lare was a particularly vulnerable victim unless and until they had already convicted Dye on the underlying charge. Finally, and most importantly, the jury answered the special verdict "no." CP 69. This clearly shows that the use of the term "victim" in the jury instructions for the special verdict had no effect on the jury's decision-making. Therefore, the use of the term "victim" in the jury instructions for the aggravating circumstance, even if error,⁸ is not "manifest" under RAP 2.5 because there is no prejudice.

⁸ Again, the instruction is proper because it follows the language of the statute; however, there is simply no need for this Court to consider this issue on the merits.

Accordingly, Dye cannot raise this claim for the first time on appeal, and this Court need not consider it further.

But even if the Court were to consider this issue for the first time on appeal, it would still fail for a lack of prejudice, among other reasons. Although a judicial comment on the evidence in a jury instruction is "presumed to be prejudicial," reversal is not required when "the record affirmatively shows that no prejudice could have resulted." State v. Levy, 156 Wn.2d 709, 132 P.3d 1076 (2006). For the same reasons that Dye cannot show a constitutional error that is "manifest," (*i.e.*, the record demonstrates that the questioned instructions had no effect on the jury's decision-making) any alleged error is also harmless because "the record affirmatively shows that no prejudice could have resulted." Id. Dye's claim should be rejected for this reason as well.

D. CONCLUSION

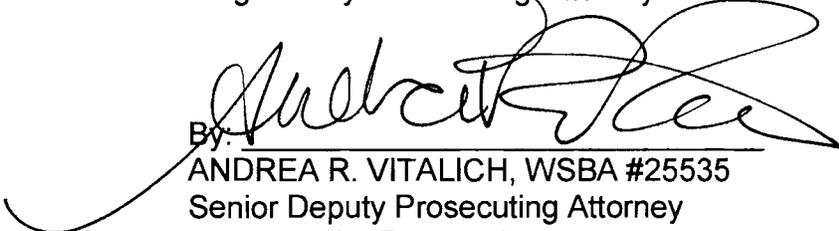
The trial court exercised sound discretion in allowing a service dog to be present when the victim testified. Also, the trial court followed proper procedure in replacing a sitting juror with the alternate juror during deliberations. Finally, the defendant cannot demonstrate manifest constitutional error regarding the jury

instructions. For the reasons set forth above, this Court should affirm the defendant's conviction for residential burglary.

DATED this 14th day of October, 2011.

Respectfully submitted,

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