

. 66907-9

66907-9

NO. 66907-9-1

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

STATE OF WASHINGTON

Respondent

v.

ANTHONY L. PINES,

Appellant

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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I. ISSUES

1. The trial judge received a report that one juror may have had some difficulty staying awake during trial, but did not personally observe the juror having trouble. The judge invited the attorneys to investigate the claim and raise it again if either party believed it was necessary. Neither party raised the issue again.

a. Did the defendant waive any claim of prejudice when he did not bring the matter to the trial court's attention again?

b. Did the trial judge abuse his discretion in asking the parties to investigate the claim and raise the issue again if necessary?

c. Is there any evidence in the record that the defense attorney performed deficiently when he did not ask for a hearing on whether a juror had been sleeping during trial or that the defendant was prejudiced thereby?

2. In closing argument the prosecutor discussed the reasonable doubt burden of proof by using several examples of circumstantial evidence that could impact a decision using that standard of proof. The defendant did not object to that argument.

a. Was the argument misconduct?

b. If the argument was erroneous, could any prejudice from the argument have been neutralized by a curative instruction?

c. Is the defendant entitled to a new trial on the basis of ineffective assistance of counsel because his trial attorney did not object to the prosecutor's argument?

II. STATEMENT OF THE CASE

The evening of January 11-12, 2010 was a busy night at McCabe's located in Everett, Washington. There were between 150 and 200 patrons present when the defendant, Anthony Pines, arrived with some friends. The defendant was wearing a red jacket and hat. His clothing was distinctive because no one else in the establishment wore that color of clothing. 3-1-11 RP 12-17, 61, 82-83, 128, 143, 175, 178, 189, 198, 203-08.

Jacob Garl and Brock McDonald were working as bouncers that night. The bouncers considered preventing the defendant and his group from coming in because it was past the time they normally allowed patrons to enter, but the management ultimately decided to permit them to come inside. 3-1-11 RP 14-18, 204.

Tiffany Henken was working as a bartender at McCabe's that night. The defendant asked her for a drink. It was after last call had been called, so Ms. Henken refused to serve him. Ms.

Henken next saw the defendant take a bottle of liquor from the well behind the bar. 3-1-11 RP 81-82, 176-77, 196, 203-04.

Ms. Henken notified another bartender, Steven Leigh. Mr. Leigh got the bottle back from the defendant and told Ms. Henken to get Mr. McDonald to have the defendant escorted out. Mr. Leigh and Mr. McDonald then escorted the defendant out of the building. Mr. McDonald verbally told the defendant to leave, lightly pushing him at the same time, and told him not to return that night. The defendant became defensive. He told Mr. McDonald that if he continued to put his hands on the defendant, Mr. McDonald would regret it. Mr. McDonald asked the manager to call the police. Melese Small, who was managing that night, did call the police, because she expected there might be trouble. 3-1-11 RP 12, 19, 21, 39, 128, 177-179.

About 10 seconds after the defendant was escorted out of the bar he returned. The defendant was again told to leave. He was warned that if he did not leave of his own accord, he would be physically removed from the premises. The defendant began to physically threaten Mr. McDonald, telling him that if he put his hands on the defendant Mr. McDonald would not be going home that night, and that he would not be seeing his family. The

defendant repeated the threat two or three times. Mr. Garl stepped in to help Mr. McDonald. The two bouncers then physically threw the defendant out of the bar. 3-1-11 RP 21-24, 35, 130, 189-90; 3-2-11 RP 12-13.

After the defendant was thrown out Mr. McDonald stayed at the front door. His back was to the defendant as the defendant retreated around the corner toward his car. Mr. Garl had seen the defendant arrive with his group in a silver Jaguar which he parked on the side of the building. After the defendant had been thrown out Mr. Garl went back in the bar and looked out the back door. He saw the defendant, whom he recognized from his distinctive clothing. The defendant was near his silver Jaguar, but was heading back toward the front door. Mr. Garl then turned and headed toward the front door again. 3-1-11 RP 177, 190, 204-05; 3-2-11 RP 14, 17-20.

Mr. McDonald was standing in the doorway with Ms. Jodi Nelson, the cashier. Because it was closing time there were other patrons in the doorway also preparing to leave. Mary Clark, Alendra Fallon, and Oscar Gonzales were three of those patrons. Ms. Nelson saw the defendant returning to the front. Although she did not see his face, she recognized his red coat and hat as he was

the only one she saw wearing that kind of clothing that night. Ms. Nelson stood up when she saw the defendant because she thought he had a gun. As she turned, Mr. McDonald and Ms. Nelson heard a shot ring out. Mr. McDonald also smelled gunpowder. 3-1-11 28-30, 63, 66, 126, 130-33; 3-2-11 64, 73, 102.

Thomas Brophy was working as a taxi driver that night. He had dropped off some people at McCabe's earlier in the evening and had arranged to pick them up at closing, around 1:30 a.m. Mr. Brophy was parked in front of McCabe's when he saw a man wearing a red shirt and hat approach the front door. The man raised his hand near Mr. McDonald's head. Mr. Brophy then heard and saw a shot fired. The man then walked back around the side of the building. Mr. Brophy moved forward and saw the man get into a silver Jaguar and drive off. Mr. Brophy called 911 and gave a description of the car. He tried to follow the car, but had to wait for his customer to come out of the bar, and was too far behind to catch up. 3-2-11 RP 45-55.

As a result of the shooting Mr. McDonald's hearing was impaired for the rest of the night. Ms. Clark, Ms. Fallon, and Mr. Gonzales all suffered gunshot wounds. 3-1-11 RP 29, 70-71, 74, 199; 3-2-11 RP 74, 90, 104-09, 119, 178-80.

McCabe's has a video surveillance system. Detective Steve Paxton, a video forensics detective, responded to the scene. There he worked with the manager to review the surveillance video to identify the suspect based on the description he had been given. The video showed the defendant stealing another bottle of liquor before he was caught stealing the one that caused him to be ejected from the bar. The video also showed that he was removed physically from the bar at 1:30 a.m. It showed people in the doorway ducking and running at 1:31 a.m. 3-1-11 RP 33-35, 92-94;3-2-11 RP 142,149.

Detective O'Hara took still photos from the video surveillance and constructed a bulletin that went to all Washington law enforcement agencies in an attempt to identify the defendant. He first received a call from a detective in Seattle. He then received a call from Winnie Chan. Ms. Chan met the defendant through her work. She had regular contact with him between April and September 2009. Ms. Chan recognized the defendant from the still photos. Detective O'Hara then constructed a photo line up. Both Mr. McDonald and Ms. Hanken identified the defendant from that line up. 3-1-11 RP 37-39, 99-100; 3-2-11 RP 136-38, 193-97.

After the bulletin went out the defendant's uncle contacted the police on January 19. The uncle told police the defendant had dropped the Jaguar off at his home in Federal Way a couple of days before. The Jaguar was impounded and searched. Police found documentation with the defendant's name on it in the car, as well as a red hat. 3-3-11RP 19-24.

Police also found a fired bullet and a fired bullet casing in front of McCabe's. The bullet and casing were examined by Brian Smelser of the State Patrol Crime Lab. The examination showed the bullet was a .38 caliber bullet which would have been fired from a .38 automatic firearm. The bullet was a hollow point, which was designed to kill people. The nose of the bullet was damaged, which indicated that it had hit something hard. 3-2-11 RP 78, 92-93, 155-162.

Police located the defendant about two months later on March 16, 2010. 3-3-11 RP 27. He was charged with four counts of first degree assault while armed with a firearm and one count of unlawful possession of a firearm in the first degree. 1 CP 85-86. At trial the defendant stipulated that he had been convicted of a serious offense. 3-3-11 RP 15. The jury convicted the defendant of all counts. It found the defendant had been armed with a firearm

at the time he committed the first degree assaults. 1 CP 18, 19, 21,22, 24, 25, 27, 28, 30.

III. ARGUMENT

A. THE TRIAL JUDGE ACTED WITHIN HIS DISCRETION WHEN HE RECEIVED INFORMATION THAT A JUROR MAY BE SLEEPING. THE RECORD DOES NOT SUPPORT THE CLAIM THAT DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A HEARING ON WHETHER A JUROR WAS SLEEPING DURING TRIAL.

During the third day of trial the trial judge alerted the parties that his law clerk had provided information that “someone apparently was indicating that Juror no. 4 was having some challenges staying awake or something along those lines.” The judge stated that he had not observed the juror having any trouble staying awake. The judge then invited the parties to check with custodial staff or other persons who were watching the trial and may have observed the juror during the proceedings. The court then took a short recess. 3-2-11RP 130-31.

After returning from the recess the court and the parties discussed an evidentiary issue. At the conclusion of that discussion the trial court asked defense counsel if there was anything further he wanted to put on the record. Counsel stated there was nothing. 3-2-11 RP 131-36. At the end of the day the judge again invited the parties to put anything they wanted to the

record. Neither the prosecutor nor the defense attorney had anything else they wanted to put on the record. 3-2-11 RP 199.

The defendant now challenges the trial court's handling of the information about the juror. He argues the court abused its discretion by not holding a hearing and inquiring of the juror.

1. The Defendant Has Waived Any Claim That He Is Entitled To A New Trial On The Basis That A Juror May Have Been Sleeping.

The defense never raised a claim at trial that a juror was sleeping or otherwise inattentive during trial. Even after the trial court noted he had received some information that a juror was having difficulty staying away, the defense did not make a motion to have a hearing on the matter, or to excuse the juror in question. The defendant has therefore waived the issue on appeal. State v. Hughes, 106 Wn.2d 176, 204, 721 P.2d 902 (1986).

Even when there is no question that a juror was sleeping during portions of the trial, a party waives the right to claim error on appeal if he does not bring it to the court's attention and seek a remedy at the time of trial. Casey v. Williams, 47 Wn.2d 255, 287 P.2d 343 (1955).

The question is not whether the trial court abused its discretion at the time the allege error occurred, for

plaintiff's counsel, at that time, asked for no relief and the court exercised no discretion. The question is: whether, as a matter of law under the facts of this case, plaintiff waived his right to claim error for alleged misconduct of the jury...

Such conduct of a juror (if prejudicial) is prejudicial when it occurs, and a party with knowledge must seek relief at that time. He cannot gamble on the verdict of the jury and seek relief thereafter in the event the verdict is unfavorable to him. Directing the trial court's attention to the alleged misconduct, without asking for relief of any kind, does not, under the circumstances of this case, preserve the error for one who takes the calculated risk of permitting the case to go to the jury.

Casey, 47 Wn.2d at 257.

Other courts are in accord that a party waives the issue if he does not make a contemporaneous objection to an allegedly sleeping juror. State v. Henderson, 355 N.W. 2d 484 (Minn. 1984), Chubb v. State, 640 N.E.2d 44 (Ind. 1944), United States v. Carter, 433 F.2d 874 (10th Cir. 1970), United States v. Curry, 471 F.2d 419 (5th Cir. 1973), cert. denied, 411 U.S. 967 (1973).

The defense had the opportunity to raise the issue with the court if it discovered evidence that a juror was sleeping. If necessary, remedial action could have been taken. Since the defense chose not to further address the question with the court, the issue has been waived.

2. The Trial Judge Acted Within His Discretion When He Invited The Parties To Investigate A Claim Of Juror Inattention And Request Further Proceedings If Necessary.

When a trial judge does get a report that a juror may have been dozing during portions of the trial the court has “considerable discretion” in deciding how to respond. Samad v. United States, 812 A.2d 226, 230 (D.C. 2002), cert. denied, 538 U.S. 934 (2003), State v. Elmore, 155 Wn.2d 758, 773, 123 P.3d 72 (2005). “The determination as to whether a juror is so inattentive that the defendant was prejudiced is a matter within the trial court’s discretion, and is reviewed only for abuse of that discretion.” Hughes, 106 Wn.2d at 917. A trial court abuses its discretion when its decision is based on untenable grounds or is made for untenable reasons. State ex. rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In Hughes the court was aware that some jurors were drowsy due to poor ventilation. The court handled the situation by providing jurors frequent stretch breaks. It did replace one juror when those breaks did not keep one juror from dozing off. Under the circumstances the court did not abuse its discretion. Hughes, 106 Wn.2d at 204.

Here the trial court was given information that an unnamed person noticed a juror was having trouble staying awake “or something along those lines.” 3-2-11 RP 130. There was no evidence in the record to support that claim. The judge had not personally noticed that any juror had been sleeping or appeared to be dozing during the trial. Neither the prosecutor nor the defense attorney indicated they had seen evidence that would support that claim.

Under the circumstances it was reasonable for the court to follow the procedure that it did. The court gave the parties the opportunity to investigate the claim through their own observations or by interviewing other courtroom observers. If the parties discovered any evidence that supported the claim that a juror had been sleeping during trial, then the court said it would entertain the question further. 3-2-11 RP 131. The court then gave the parties the opportunity to raise the issue after the recess and at the end of the day. The defense did not take that opportunity to raise the issue again. Since the issue was not raised, it was not further addressed.

The defendant argues that the court had a duty to sua sponte hold a hearing on the fitness of the juror to proceed when he

received reliable information that the juror may have been sleeping. BOA 11-12. His argument rests on the assumption that the only way the court could have properly exercised its discretion was to hold a hearing to determine if the juror was actually sleeping during the trial.

The argument misconstrues the information presented to the judge, and the law clerk's role in the matter. He assumes that the law clerk was reporting first hand information. The record does not support that conclusion. The judge initially referred to his law clerk as "Mr. Flint Stebbins" 2-28-11 RP 4 (Jury Impaneling and Opening Statements). When discussing the question here defense counsel asked

Mr. Sayles: Did your Honor receive a note from your law clerk about Juror no. 4?

Court: I just, I was going to inquire, I guess, further about that. But maybe we can talk about this at this point that someone apparently was indicating that Juror no. 4 was having some challenges staying awake or something along those lines. Is that the concern?

3-2-11 RP 130.

The court would not have referred to the source of the information as "someone" had that source been his law clerk, whom

he had previously referred to by name¹. Nor would the judge have asked for clarification if he was certain that the report was a juror had been sleeping. Rather the record clearly indicates that the law clerk was not the source of the information, but only the conduit through which the message was transferred to the judge.

The information presented was hearsay from an unknown person. In the context of assessing probable cause for a search warrant that kind of information is not considered reliable. State v. Mickle, 53 Wn. App. 39, 43, 765 P.2d 331 (1988). Similarly there is no reason in this circumstance why the court should have found the information sufficiently reliable to warrant a hearing when the court had no other information to support it. The court did not abuse its discretion when it chose the course it did rather than holding a hearing sua sponte, when there was no request to hold a hearing, and no competent evidence to support the otherwise uncorroborated claim.

The circumstances in this case are far different from those in

¹ The judge also referred to his law clerk by name or as "my law clerk" later in the trial. 3-3-10 RP 35, 57.

the cases cited by the defendant to support his argument. In each of those cases there was substantial evidence that a juror was actually sleeping during some portion of the proceedings. In Hampton the defense attorney reported that a juror had been sleeping during the testimony. That report was corroborated by the judges' own observations. The Court said under these circumstances the appropriate course of action was to conduct a fact finding to establish a basis for the exercise of the court's discretion. State v. Hampton, 549 N.W.2d 756, 760. (Wis. 1996). It was error not to hold a hearing. Id.

The court has similarly found a hearing is required when the attorneys and the court are aware of juror somnolence during trial. Commonwealth v. Braun, 905 N.E.2d 124 (2009), People v. Valerio, 529 N.Y.S.2d 350 (1988), People v. South, 576 N.Y.S.2d 314 (1991). But the Court has also been careful to state "we do not suggest that every complaint regarding juror inattentiveness requires a voir dire." Braun, 905 N.E.2d at 127.

Finally, the defendant argues he is entitled to a new trial even if there is no evidence in the record of juror misconduct. He compares the circumstances of this case to those in which the court knows or should know of a potential attorney client conflict, or

where there is reason to doubt the defendant's competency, citing State v. Regan, 143 Wn. App. 419, 177 P.3d 783, review denied, 165 Wn.2d 1012, 198 P.3d 512 (2008), State v. McDonald, 143 Wn.2d 506, 22 P.3d 791 (2001), and In re Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001). In Regan and McDonald the trial court had competent evidence before it that the defendant's right to conflict free counsel may have been compromised. In Fleming the defendant claimed ineffective assistance of counsel where counsel for the defendant had two psychological reports containing opinions about the defendant's competency to stand trial that counsel failed to present to the court before the defendant entered his guilty plea. Because there was no similarly competent evidence that a juror was actually sleeping during trial before the court here these cases do not support the argument that the defendant is entitled to a new trial even in the absence of evidence of juror misconduct.

In addition, Regan stated that automatic reversal is only the remedy when the defense has made a timely objection to a claimed conflict and the court fails to hold a hearing. Regan, 143 Wn. App. at 426. Absent a timely objection the defendant is entitled to reversal only if he can show that an actual conflict existed and that conflict prejudiced him. Id. Here the defendant made no such

timely objection to the juror. To the extent these cases are comparable at all, they demonstrate that a defendant is entitled to relief when a court fails to conduct a hearing to inquire into the possible violation of a constitutional right when the defendant raises an objection and there is competent evidence in the record to show that there is a basis for that objection. Here where neither circumstance existed, the defendant is not entitled to a new trial on the basis that the trial court did not hold a hearing on the question.

3. There Is No Evidence In The Record To Support The Claim That The Defendant Received Ineffective Assistance Of Counsel.

Finally, the defendant argues that he is entitled to a new trial because he received ineffective assistance of counsel when his attorney did not object to the court's failure to hold a hearing, or request to inquire of the juror himself. A defendant who claims he is entitled to relief on this basis must show that counsel's performance was deficient and that as a result the defendant was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That standard is highly deferential to defense counsel. Id. at 689.

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances

of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy

Strickland 466 U.S. at 689.

When a claim of ineffective assistance of counsel is raised on direct appeal the Court does not consider matters outside the trial record. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Thus the Supreme Court rejected the conclusion that a failure to raise a suppression motion in the trial court was per se deficient performance. Id. at 336-37. Similarly the record here fails to demonstrate either that trial counsel performed deficiently or that the defendant suffered any prejudice when counsel did not request a hearing on the question of juror inattention.

A defendant must show that a juror was actually inattentive and that he was thereby prejudiced in order to be entitled to have a juror dismissed. Hughes, 106 Wn.2d at 917. There is no evidence in the record that the defense counsel had any competent evidence to present to the court that would justify holding a hearing. Counsel for both parties was invited to investigate the matter by talking to

other courtroom observers. There is no evidence that counsel did not talk to those witnesses, or that when talking to them they reported any information that would support holding a hearing. Nor is there any evidence in the record that defense counsel made any observations that would support holding a hearing. Finally there is no evidence in the record that any juror was so inattentive that the defendant did not receive a fair trial. The defendant's claim of ineffective assistance of counsel should fail.

B. THE PROSECUTOR'S DISCUSSION ABOUT REASONABLE DOUBT WAS NOT ERROR ENTITLING THE DEFENDANT TO A NEW TRIAL. DEFENSE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE REFRAINED FROM OBJECTING TO THAT ARGUMENT.

The defendant argues that the prosecutor's discussion about the reasonable doubt instruction trivialized the burden of proof, and was therefore misconduct which entitled him to a new trial. When a defendant argues that a prosecutor committed misconduct he bears the burden to prove that the prosecutor's comments were improper and that he was prejudiced by them. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), cert denied, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995). Failure to object to an allegedly improper remark waives the error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice

that could not have been neutralized by an admonition to the jury. Id. at 86. “In other words, a conviction must be reversed only if there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict”. Id. A decision not to object to a prosecutor’s statement suggests that it had little impact on the trial. State v. Curtiss, 161 Wn. App. 673, 699, 250 P.3d 496, review denied, 172 Wn.2d 1012, 259 P.3d 1109) (2011).

The prosecutor’s challenged argument is considered “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998). When analyzed in light of those considerations the prosecutor’s argument was not error.

1. The Prosecutor’s Discussion About The Reasonable Doubt Instruction Was Proper.

The parties agreed that there were two main issues that were contested at trial. First, who was the shooter? Second, did the shooter intended to inflict great bodily harm on the victims? 3-3-11 RP 109-10, 116-18, 129, 137-38.

No witness directly identified the defendant as the shooter. Instead the State relied on circumstantial evidence to prove the defendant shot at Brock McDonald and the other victims. The jury was instructed that “circumstantial evidence’ refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case. The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case.” 1 CP 36.

The State pointed to evidence that the defendant had been positively identified as the person caught stealing liquor in the bar. He was identified as the person who was thrown out by the bouncers twice; the second time he was the person who threatened the bouncer that he “was not going home to your family tonight.” The defendant was identified by his distinctive clothing and his build as the person who went back to his car the second time he was thrown out, and within a minute or two was back at the front door of the bar. 3-3-11 RP 111-14. In contrast the defense characterized the circumstantial evidence of identity as a “smoke screen.” 3-3-11 RP 129.

To establish the defendant acted with intent to cause great bodily harm the prosecutor pointed to evidence the defendant used a hollow point bullet. The State's expert witness had testified those kinds of bullets are used to kill people. The prosecutor also pointed to evidence the taxi driver who was outside waiting for a fare thought the bouncer had been assassinated based on the position of the gun when it was fired and the bouncer's reaction afterwards. That evidence coupled with the defendant's earlier threats established intent to inflict great bodily harm. 3-2-11 RP 117-18. In response defense counsel argued the position of the gun was inconsistent with intent to inflict great bodily harm. 3-3-11 RP 137.

The jury was accurately instructed on the burden of proof beyond a reasonable doubt. 1 CP 35. The instruction defined the burden as "a reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is a doubt that would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence." Id.

The prosecutor reiterated the court's definition of reasonable doubt in her comments regarding the burden of proof. 3-3-11 RP 106. The discussion of the burden of proof immediately preceded the arguments regarding the circumstantial evidence which the

prosecutor argued supported the conclusion that the defendant was the shooter and he intended to inflict great bodily harm. The reasonable doubt argument contained several examples of circumstances which may affect the determination of whether a fact exists. The prosecutor's arguments were used to illustrate how circumstantial evidence may affect one's assessment of whether any point had been proven beyond a reasonable doubt. The prosecutor then proceeded to discuss the evidence as it related to the elements of the assault charges. She concluded her discussion of the assault charges by referring to the instruction on direct and circumstantial evidence. In regard to both she argued "all of this is saying that you don't need to see a person's face, I don't have to be staring at one's face while they shoot a gun to know that they shot the gun... So, remember this instruction when you are evaluating all the evidence." 1 CP 36; 3-3-11 RP 123-24.

The argument was similar to the argument made in Curtiss. There the Court held that an argument discussing the reasonable doubt standard was not misconduct because it focused on describing the relationship between circumstantial and direct evidence and the beyond a reasonable doubt burden of proof. Curtiss, 161 Wn. App. at 700. The Court contrasted that argument

to the one found improper in Anderson. There the prosecutor compared the reasonable doubt standard to the choice of getting elective dental surgery where “‘if you go ahead and do it, you were convinced beyond a reasonable doubt’ that you needed it. Id. at 701 quoting State v. Anderson, 153 Wn. App. 417, 425, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002, 245 P.3d 226 (2010).

Like the argument in Curtiss the argument here did not suggest jurors should approach the decision facing them in deliberations with the kind of certainty they would approach choices made in everyday life. Rather it suggested a common sense illustration of how circumstantial evidence could affect one’s decision in light of the reasonable doubt standard. In the context of the issues at trial, the entire argument, and the court’s instructions, the prosecutor’s arguments here were a proper discussion of the reasonable doubt standard.

The defendant argues the Court has already decided the argument made in this case was flagrant misconduct, citing State v. Walker, 164 Wn. App. 725, 265 P.3d 191 (2011). The argument in Walker was different than the argument here. There the prosecutor described the reasonable doubt standard as “‘a common standard that you apply every day’ and compared it to having surgery and

leaving children with a babysitter.” Id. at 196. It was just like the arguments made in Anderson. It made no attempt to illustrate the interplay between the types of evidence presented and the reasonable doubt standard, as the argument in this case did.

In addition, unlike the arguments in Anderson and Walker, the prosecutor here did not attempt to downplay the seriousness of the burden of proof. The prosecutor acknowledged that reasonable doubt was a difficult concept. She then went on to talk about that concept as it related to evidence in understandable terms. 3-2-11 RP 106.

The arguments did not render “the presumption of innocence inapplicable,” as the defendant argues. BOA at 28. The argument did not even reference the presumption of innocence, which is an entirely different concept than proof beyond a reasonable doubt. When discussing the elements instruction the prosecutor reminded the jury it should acquit if it was not convinced of any element beyond a reasonable doubt. 3-2-11 RP 105. Because Walker is factually different from this case, it does not control the question of whether the argument made here was improper.

2. Any Prejudice Resulting From The Single Argument Which The Defendant Identifies As Improper Could Have Been Cured With An Instruction If The Argument Was Improper.

Even if improper the defendant has not shown that any error could not have been neutralized by an instruction. When considering whether an instruction could cure any resulting prejudice from an erroneous argument the Court has looked to the nature of the arguments made, the other instructions given by the court, and the strength of the State's case.

In Anderson the prosecutor made three arguments relating to the burden of proof which the Court held were improper. One of the arguments trivialized the State's burden of proof by comparing the standard to everyday decision making. The Court found none of these arguments were so prejudicial in themselves that an instruction could not have cured the error. The Court's conclusion was further supported by the trial court's instruction regarding the presumption of innocence which minimized any negative impact on the jury. Anderson, 153 Wn. App. at 431-32.

In Thorgerson the court noted that an improper argument did not warrant reversal where the victim's testimony throughout trial was consistent with what witnesses testified she told them before trial. State v. Thorgersen, 172 Wn.2d 438, 452, 258 P.3d 43

(2011). In contrast, where the State's case was largely a credibility contest with many disputed facts, and the prosecutor made numerous improper arguments which were highlighted with power point presentations, the cumulative prejudice could not be cured by an instruction. Walker, 265 P.3d at 199.

Here the court properly instructed the jury on the burden of proof and the role of counsel's arguments. 1 CP 33. The jury was instructed that the State bore the burden of proof, and the defendant had no burden of proving a reasonable doubt existed. 1 CP 35. The court also properly instructed the jury on the presumption of innocence, which may only be overcome by evidence beyond a reasonable doubt. 1 CP 35. The jury was instructed that the evidence consisted of the testimony and the exhibits. 1 CP 33.

Throughout her argument the prosecutor made it clear it was the State's burden to prove each element of the offense. When discussing the jurisdictional element she argued "if I hadn't asked that question, I wouldn't have been able to prove all of those elements." 3-3-11 RP 108. When discussing the firearm element the prosecutor said "we don't have a firearm, obviously" but then went on to talk about the circumstantial evidence that a firearm had

been used to commit the assaults. 3-3-11 RP 114-15. She concluded her opening remarks by asking the jury to return guilty verdicts “after we have proved this case beyond a reasonable doubt.” 3-3-11 RP 128.

The evidence was not disputed. Rather the dispute revolved around whether that evidence was relevant in determining whether the elements of the crimes had been proved. The prosecutor argued the defendant’s presence in the bar and motive to harm the bouncer were circumstances which proved he was the shooter. The defense agreed there was no dispute the defendant was in the bar and stole the liquor but argued that evidence was irrelevant to proving the identity of the shooter.

Unlike the arguments addressed in Walker there was only one argument the defendant identified here that he argues was improper. The prosecutor did not highlight the argument with power point slides. The argument was relevant to the discussion of evidence as it related to the State’s burden of proof. Finally, the court accurately instructed the jury on the burden of proof, the presumption of innocence, and the role counsel’s arguments had in the trial. Under these circumstances, even if this Court finds the prosecutor’s discussion about the reasonable doubt burden of proof

was improper, any prejudice could have been cured by an instruction. The defendant has therefore waived the claim that the prosecutor's argument entitles him to a new trial.

3. The Decision To Not Object To The Prosecutor's Argument Was A Strategic Decision. Defense Counsel Did Not Perform Deficiently And The Defendant Was Not Prejudiced.

Finally, the defendant argues that it was ineffective assistance of counsel for his trial attorney to fail to object to the prosecutor's discussion regarding reasonable doubt in closing argument. As discussed in section III.A.3 above a defendant who makes this argument must show that counsel's performance was deficient and that as a result the defendant was deprived of a fair trial. Strickland, 466 U.S. at 687. The court is highly deferential of counsel's conduct when considering the issue. Id. at 689. Review of counsel's challenged conduct is viewed at the time of counsel's conduct in light of the facts of the particular case. Id. at 690.

When a prosecutor's argument is proper, defense counsel does not perform deficiently for refraining from objecting to that argument. In re Davis, 152 Wn.2d 647, 717, 101 P.3d 1 (2004). Because lawyers do not commonly object during closing "absent egregious misstatements" a decision not to object falls within the

wide range of permissible professional conduct. Id. quoting, United States v. Necochea, 986 F.2d 1273, 1281 (9th Cir. 1993).

Here when considered in the context of the entire argument, the evidence, and the issues in the case, the prosecutor's discussion about the reasonable doubt standard was not improper. The decision not to object was reasonable under the circumstances.

The defendant argues counsel was incompetent when he failed to object and that there is a reasonable probability that the outcome of the trial was affected, relying on State v. Horton, 116 Wn. App. 909, 68 P.3d 1145 (2003). In Horton the court found trial counsel performed deficiently when she failed to lay a proper foundation for impeachment evidence when that evidence was critical to the defense and failed to object to the prosecutor's closing argument personally guaranteeing the defendant was guilty. Id. at 916-17, 921. With respect to the closing argument it had long been held that a prosecutor errs when expressing a personal opinion about the defendant's guilt. Id. at 921. The State conceded it was error, and a timely objection would have been sustained. Id.

The Court concluded that the defendant was prejudiced by the combination of errors. The failure to lay the foundation as a

predicate to impeachment evidence negatively impacted the defense. The failure to object to the “experienced prosecutor’s” personal opinion that the defendant was guilty significantly exacerbated the problem created when impeachment evidence was rejected. Id. at 922.

Horton is far different from this case. The defendant points to no errors counsel made which negatively impacted the presentation of his case or hindered his strategy of the case. Unlike Horton there was not a body of authority that pre-dated the trial which clearly and specifically said the specific argument made by the prosecutor here was error. As discussed above, the argument found improper in Anderson was not like the argument made here. In the context of this case the argument made here was proper.

The defendant also fails to establish prejudice from his trial attorney’s decision to not object to the argument. The argument did not exacerbate an already prejudicial error made by counsel. Additionally, the jury was properly instructed to disregard any argument that was not supported by the law as given to them by the court 1 CP 33. The court presumes the jury followed the court’s

instructions. State v. Foster, 135 Wn.2d 441, 472, 957 P.2d 712 (1998).

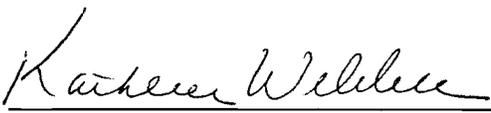
Finally, the defendant has not shown that had his counsel objected the trial court would have sustained the objection. Where an objection would not likely have been sustained, the defendant does not show prejudice from his attorney's decision to refrain from objecting. McFarland, 127 Wn.2d at 337, n.4. Prosecutors are afforded wide latitude in closing argument. State v. Gregory, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). As discussed, the argument properly discussed the burden of proof in light of the nature of the evidence presented. Because it was a proper argument, the trial court would likely have overruled the objection. The defendant therefore fails to show any prejudice from counsel's representation.

IV. CONCLUSION

For the foregoing reasons the State asks the Court to affirm the defendant's conviction.

Respectfully submitted on February 9, 2012.

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