

70132-1

70132-1

NO. 70132-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TOM JOHN CHUOL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDITH H. RAMSEYER

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A trial court has broad discretion in crafting the specific wording of jury instructions, so long as the instructions accurately state the law and do not mislead the jury. The trial court in this case gave the standard WPIC limiting instruction for ER 404(b) evidence, rejecting the defendant's request to redundantly list one particular improper use of the evidence. Did the trial court properly exercise its discretion in doing so?

2. A trial court may not make a comment that conveys to the jury the judge's personal opinion of the evidence. The defendant alleges that the trial court committed reversible error when it gave an ER 404(b) limiting instruction without including the word "alleged" in front of the word "threats" when referring to the threats the victim had just testified about. However, the remainder of the instruction indicated that the jury needed to evaluate whether the threats had actually occurred. Did the trial court maintain the necessary balance between its obligations to give a satisfactory limiting instruction and to refrain from commenting on the evidence?

3. A witness may not offer an opinion on the veracity of another witness, though it is permissible to describe the

characteristics of another witness's statements, such as how detailed or consistent the statements were. Here, a witness testified that the defendant's answers to questions were "not complete." Did the trial court properly exercise its discretion in allowing the testimony?

4. The occurrence of multiple errors that are individually harmless may still require reversal if the cumulative prejudice denies the defendant a fair trial. In this case, no errors occurred which prejudiced the defendant either individually or collectively. Should this Court reject the defendant's claim that the cumulative error doctrine requires reversal of his conviction?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The defendant, Tom John Chuol, was charged by amended Information with one count of felony harassment and one count of threats to bomb or injure property. CP 40-41. A jury found him guilty of the felony harassment, but not guilty of the threats to bomb or injure property. CP 42-43. Chuol received a standard range sentence of one month in jail. CP 65-68. He timely appealed. CP 72-73.

2. SUBSTANTIVE FACTS.

Tracy Robinson worked with Chuol as a housekeeper at Swedish Medical Center. 3RP¹ 28, 30. One night, as Chuol was giving Robinson a ride home from work, Chuol was very angry. 3RP 29. Chuol said that he did not like Americans or Filipinos and did not like his job, and complained about a few Filipino coworkers in particular. 3RP 33-34, 83, 134. Chuol told Robinson that he wanted to make a bomb and blow up the hospital and his coworkers, including her. 3RP 29, 33. Chuol also talked about getting a gun and killing someone. 3RP 32. He appeared to be serious, and his comments scared Robinson. 3RP 32, 35. Chuol also referenced a recent mass shooting in Colorado, and merely laughed when Robinson told him he should not say things like that. 3RP 42. Robinson was aware of prior incidents in which Chuol had expressed animosity toward two Filipino coworkers, and Chuol had been warned previously that threats to kill were taken seriously in the United States. 3RP 44-45; 4RP 27.

Robinson reported the incident to a coworker and her supervisor. 3RP 38. Hospital security and the police were notified,

¹ The report of proceedings is referenced as follows: 1RP – 3/4/13; 2RP – 3/5/13; 3RP – 3/6/13; 4RP – 3/7/13; 5RP – 3/11/13; 6RP – 3/12/13, 3/13/13, & 3/29/13.

and Seattle Police Officer Matthew Lilje responded to investigate. 3RP 11, 14, 95. After taking a statement from Robinson, Lilje arrested Chuol. 3RP 16, 21.

Additional facts are included below in the sections to which they pertain.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN GIVING THE STANDARD WPIC LIMITING INSTRUCTION.

Chuol contends that the trial court erred when it declined to include Chuol's proposed language, which would have specifically prohibited consideration of ER 404(b) testimony as evidence of propensity or predisposition, in the limiting instruction governing the jury's consideration of ER 404(b) evidence. This claim should be rejected. The standard WPIC given by the court accurately informed the jury of the purposes for which it could consider the 404(b) evidence and prohibited consideration of the evidence for "any other purpose," which necessarily included the purpose specified in Chuol's proposed language. The trial court properly exercised its discretion in electing to give the standard WPIC instruction and rejecting Chuol's more piecemeal language.

a. Relevant Facts.

During pre-trial motions, the trial court ruled that the State would be permitted under ER 404(b) to offer testimony from multiple witnesses regarding several prior incidents involving Chuol. 1RP 111-16. The State joined Chuol in requesting that a limiting instruction be given to the jury regarding the ER 404(b) evidence. 1RP 120. The State proposed that the court give WPIC 4.64.01 as an oral limiting instruction prior to the applicable testimony, and WPIC 5.30 as a written instruction at the end of the trial, with language added in to describe the purposes for which the evidence could properly be considered. 2RP 3. WPIC 4.64.01 states:

I am allowing this evidence, but you may consider *[the evidence] [the answer(s)]* only for the purpose of _____. You must not consider *[the evidence] [the answer(s)]* for any other purpose.

WPIC 5.30 states:

Certain evidence has been admitted in this case for only a limited purpose. This *[evidence consists of _____ and]* may be considered by you only for the purpose of _____. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

Chuol objected to the language prohibiting consideration of the evidence "for any other purpose," and asked the court to add or substitute language specifically prohibiting the jury from considering

the testimony as evidence of propensity or predisposition. CP 35-36; 2RP 25-26; 4RP 132. The trial court denied the motion, finding that the requested change would make the instruction more difficult to understand. 2RP 26-27. Prior to each relevant section of testimony and in the final written instructions, the court issued the standard WPIC limiting instruction setting out the specific purposes for which the evidence could be considered and informing the jury that “you must not consider it for any other purpose.” 3RP 43-44, 74, 120, 131; 4RP 16, 26; CP 54.

b. The Trial Court Properly Exercised Its Discretion In Choosing Not To Deviate From The Standard WPIC Instruction.

Jury instructions are reviewed de novo to ensure that they accurately state the applicable law, do not mislead the jury, and allow the parties to argue their theories of the case. Anfinson v. FedEx Ground Package Sys., Inc., 159 Wn. App. 35, 44, 244 P.3d 32 (2010), aff'd, 174 Wn.2d 851 (2012). Once those criteria are met, a trial court's decision regarding the specific wording of instructions is reviewed only for abuse of discretion. Id. A trial court abuses its discretion only when no reasonable judge would

have reached the same conclusion. State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997).

Evidence Rule 404(b) prohibits the use of evidence of prior acts “to prove the character of a person in order to show action in conformity therewith.” However, it allows the admission of such evidence for other purposes, such as proof of motive, intent, or knowledge. ER 404(b). Evidence Rule 105 states that “[w]hen evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.”

A limiting instruction for ER 404(b) evidence “should explain to the jury the purpose for which the evidence is admitted, and should give a cautionary instruction that the evidence is to be considered for no other purpose.” State v. Brown, 113 Wn.2d 520, 529, 782 P.2d 1013 (1989). The WPIC-based limiting instruction that the trial court gave in this case followed exactly that pattern—it set out the specific purposes for which the evidence could permissibly be considered, and informed the jury that “you must not consider [the evidence] for any other purpose.” 3RP 43-44, 74, 120, 131; 4RP 16, 26; CP 54.

This format has been approved by this Court and the Washington Supreme Court on multiple occasions. E.g. Brown, 113 Wn.2d at 529; State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); State v. Anderson, 31 Wn. App. 352, 356-57, 641 P.2d 728 (1982); State v. Davenport, 33 Wn. App. 704, 707, 657 P.2d 794 (1983). A trial court is not obliged to give an ER 404(b) limiting instruction in the exact language proposed by the defendant. State v. Hartzell, 156 Wn. App. 918, 937, 237 P.3d 928 (2010).

Chuol relies on State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012), for his contention that an ER 404(b) limiting instruction is inadequate if it does not explicitly inform the jury that “the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character.” Id. at 423-24. His reliance is misplaced. The court in Gresham was not ruling on the precise wording required in a limiting instruction; instead, it was reviewing the trial court’s failure to give any limiting instruction at all after the defendant proposed an inadequate instruction. 173 Wn.2d at 424.

In the language relied on by Chuol, the Gresham court was describing the information that the defendant’s proposed instruction

had lacked,² and was not attempting to set forth exact wording that must be used. The Gresham court cited State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995), for support. In Lough, the wording of the limiting instruction was once again not at issue on appeal. Instead, the court in Lough had merely described the limiting instruction the trial court had given in that particular case³ in holding that the evidence was properly admitted under ER 404(b) and that there was no evidence in the record that the evidence had been used for an improper purpose. 125 Wn.2d at 864.

In light of the issues before the court in Gresham and Lough, Gresham cannot properly be viewed as establishing the categorical rule that Chuol ascribes to it. The fact that the instruction in Lough, which did contain the explicit prohibition Chuol requested here, was cited favorably in Gresham does not mean that an instruction not including that language is reversible error.

² The defendant's proposed instruction in Gresham "would have informed the jury that evidence admitted to demonstrate a common scheme or plan could not be considered 'as evidence that the defendant's conduct in this case conformed with the conduct alleged in the prior allegation.'" Gresham, 173 Wn.2d at 424.

³ The Lough limiting instruction "told the jury that the evidence of the uncharged allegations could not be considered to prove the character of the Defendant in order to show that he acted in conformity therewith, and could only be considered to determine whether or not it proved a common scheme or plan." Lough, 125 Wn.2d at 864.

Indeed, if the trial court in this case had substituted the specific prohibition requested by Chuol for the more general one, it would have also needed to enumerate every other purpose for which the jury was *not* permitted to consider the evidence, lest the jury be misled by omission into thinking that one of the improper purposes was permissible. And to include both the general prohibition against all unenumerated purposes and a specific prohibition against considering the evidence as establishing propensity or predisposition would be redundant and potentially confusing to the jury.

In light of the many cases approving of the format in which the permissible uses of the 404(b) evidence are explicitly set out and all other uses are prohibited, it cannot be said that the trial court abused its discretion in choosing the more straightforward language of the WPIC over the wording proposed by Chuol.

c. Any Error Was Harmless.

Even if this court finds that the trial court abused its discretion in not adopting the language proposed by Chuol, the error was harmless. The failure to give a proper ER 404(b) limiting instruction is harmless unless there is a reasonable probability that

the outcome of the trial would have been materially affected had the error not occurred. Gresham, 173 Wn.2d at 425. Here, the trial court's instructions properly informed the jury of the only permissible uses of the ER 404(b) evidence. Had a juror wondered whether the testimony could be used as evidence of propensity, the limiting instruction given would have correctly answered that question. Jurors are presumed to follow the trial court's instructions. Lough, 125 Wn.2d at 864. There is not a reasonable probability that the outcome of the trial would have been affected had the court worded the instruction in the way Chuol proposed, therefore any error in failing to do so was harmless.

2. THE LIMITING INSTRUCTION DID NOT
CONSTITUTE A JUDICIAL COMMENT ON THE
EVIDENCE.

Chuol asserts that his conviction must be reversed because the wording of the ER 404(b) limiting instructions constituted an unconstitutional judicial comment on the evidence. This claim should be rejected. The alleged error was invited by Chuol, and the trial court's limiting instruction, taken in context and as a whole, did not suggest to the jury that the existence of the threats had been proven. Furthermore, the record affirmatively shows that the jury's

verdicts were not affected in any way by the alleged judicial comment.

a. Relevant Facts.

At trial, Tracy Robinson testified about the threats that Chuol had made on July 20, 2012, which were the basis for the charges against Chuol. 3RP 29-42; CP 40-41. She testified that Chuol had told her he wanted to bomb the hospital and “blow up” his coworkers, including her. 3RP 29-33. She also testified that Chuol had talked about getting a gun and killing someone with it. 3RP 32. After Robinson had described the threats made on July 20th and the surrounding circumstances, the prosecutor prompted the trial court to issue a limiting instruction before the prosecutor moved on to elicit testimony about a prior incident that the trial court had ruled admissible under ER 404(b). 3RP 43-47; 1RP 111-14. The trial court stated:

Members of the jury, Mr. DeSanto is about to examine the witness in an area, and I want to instruct you about the testimony that he will be eliciting. Before this evidence is allowed, the court advises you that you may consider the evidence only for the purpose of determining whether Tracy Robinson was in reasonable fear that these threats would be carried out, determining whether the defendant had a motive to make these threats, and determining the full

context and history surrounding these threats. You must not consider the evidence for any other purpose.

3RP 43-44. Thereafter, the court used the same language to describe the purposes for which the jury could consider ER 404(b) evidence each time an oral or written limiting instruction was given. 3RP 74, 120, 131; 4RP 16, 26; CP 54. At no time did Chuol object to the court's use of the words "these threats" to reference the threats testified to by Robinson. When discussing proposed written jury instructions, Chuol specifically requested that the trial court give the same limiting instruction it had been giving orally throughout the trial, with one modification to the last sentence (described in section one) that is not relevant to this issue. CP 36.

b. The Invited Error Doctrine Bars Review.

Under the invited error doctrine, the appellate courts will not review a party's assertion of an error to which the party "materially contributed" at trial. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). This doctrine applies even to constitutional errors such as judicial comments on the evidence that, if manifest, would otherwise be reviewable for the first time on appeal under RAP 2.5. State v. Elmore, 139 Wn.2d 250, 280, 985 P.2d 289 (1999). Courts apply the invited error doctrine strictly,

sometimes with harsh results. See, e.g., State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999) (holding doctrine prohibited review of legally erroneous jury instruction even though it was standard WPIC when defendant proposed it); State v. Smith, 122 Wn. App. 294, 299, 93 P.3d 206 (2004) (noting that defendant who participates in drafting of jury instruction may not challenge the instruction on appeal).

In this case, defense counsel initially submitted his reactions to the State's proposed jury instructions in an email. CP 36. The State's initial proposed instructions had not included a written version of the ER 404(b) limiting instruction that the court had been giving orally throughout the trial. CP 99-120. In his email, defense counsel asked the trial court to give a written limiting instruction consisting of the oral limiting instruction the court had been giving throughout the trial plus some additional language on a specific prohibited use of the ER 404(b) evidence.⁴ CP 36.

⁴ The email stated, "I request that the [sic] my proposed modification to the state's 'evidence for a limited purpose' be given with the instruction that the court has been giving throughout the trial. The language was provided in my prior email." CP 36. An email from defense counsel the previous day had set out his objections to the last line of the oral limiting instruction, which told the jury that "you must not consider [the evidence] for any other purpose," and had proposed language specifically prohibiting considering the testimony as evidence of propensity or predisposition. CP 35.

Although the trial court did not give Chuol's proposed modification to the general prohibition on other uses of the ER 404(b) evidence, the court granted the rest of Chuol's request by giving a written version of the oral instruction the court had given throughout the trial. The written instruction used the same language the oral instructions had used, including the phrase "these threats," to describe the purposes for which the ER 404(b) evidence could be considered. CP 54.

By asking the trial court to give a written limiting instruction consisting of the oral instruction the Court had been giving throughout the trial plus some additional wording, Chuol asked the court to give an instruction containing the language of which he now complains.⁵ Thus, any error was invited by Chuol, and this Court should decline to review his claim. Even if this Court does reach the merits of Chuol's claim, his conviction should be affirmed for the reasons below.

⁵ The fact that Chuol had not specifically proposed the "these threats" language in the initial oral instructions is immaterial, for neither did he object to it. Chuol is in no different a position than if, at the beginning of the trial, he had proposed an oral instruction without that language and a written instruction with it, and the trial court had merely chosen to model the oral instructions on the proposed written instruction, without objection. Any error in the written instruction is invited, and the occurrence of the same alleged error elsewhere adds no additional prejudice.

c. The Trial Court's Limiting Instruction Did Not Constitute A Judicial Comment On The Evidence.

Article 4, section 16 of the Washington State Constitution prohibits a judge from making comments that convey to the jury the judge's personal opinion of the credibility, weight, or sufficiency of evidence introduced during a trial. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). Thus, a court may not instruct the jury that matters of fact have been established as a matter of law. Hartzell, 156 Wn. App. at 938. A jury instruction challenged for judicial comment on the evidence is reviewed de novo, in the context of the instructions as a whole. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

In evaluating whether a trial court's words or actions amount to a comment on the evidence, the appellate courts look at the facts and circumstances of the particular case. Jacobsen, 78 Wn.2d at 495. A trial court must strike a balance between the obligation to give a satisfactory limiting instruction and the obligation to refrain from commenting on the evidence. Hartzell, 156 Wn. App. at 940-41. The fact that a limiting instruction could have been worded differently to more clearly avoid any issue of comment on the

evidence does not necessarily mean that the wording used was improper. Id. at 939-40.

When the limiting instruction here is viewed as a whole and in context, it is apparent that the judge's use of the words "these threats" did not have the effect of suggesting that the existence of the threats had been established. The instruction was first issued in the midst of Tracy Robinson's testimony, immediately after she had finished describing the threats that were the basis of the charges. 3RP 43. In that context, the words "these threats" in the trial court's statement that the jury could consider the upcoming evidence "only for the purpose of determining whether Tracy Robinson was in reasonable fear that these threats would be carried out" were clearly meant merely to direct the jury's attention to the threats Robinson had just testified about, rather than other threats by Chuol that were testified to at various points in the trial and had likely been mentioned in opening statements.⁶ 3RP 43. The trial court's use of identical language each time a limiting instruction was given merely communicated to the jury that each limiting instruction was referring to the same testimony by Robinson.

⁶ Opening statements are not transcribed in the report of proceedings.

The trial court's very next words in the instruction made it clear that the jury still needed to determine whether the threats had in fact been made. The court listed the second permissible use of the upcoming testimony as "determining whether the defendant had a motive to make these threats." 3RP 44. However, the existence of a motive was not an element of any of the charges; its only relevance was to help the jury determine whether or not the threats had actually been made. CP 59, 61. Thus, the jury would not have interpreted the words "these threats" as suggesting that the threats had in fact been made.

Chuol offers no analysis or argument in support of his contention that the trial court's reference to "these threats" constituted a judicial comment on the evidence. He merely asserts that the use of the words "these threats" necessarily presupposes that the threats had actually occurred, and moves on to argue that the alleged error was not harmless. Appellant's Brief at 14-16. This bare assertion does not prove the point, as the appellate courts conduct a more holistic analysis. See Hartzell, 156 Wn. App. at 935-41.

In light of the context in which the initial limiting instruction was given and the explicit reference in each instruction to the jury's

need to determine whether Chuol had a motive to make the threats, the trial court's use of the words "these threats" to refer to the threats alleged by Robinson did not communicate to the jury that the existence of the threats had been established. It therefore did not constitute a judicial comment on the evidence.

d. Any Error Was Harmless.

If an improper judicial comment on the evidence is found to have occurred, Washington courts presume it to be prejudicial, and reversal is required unless the State shows that the defendant was not prejudiced or the record affirmatively shows that no prejudice could have resulted. Hartzell, 156 Wn. App. at 937. In this case, even if this Court finds that the words "these threats" did constitute a judicial comment on the evidence, Chuol's conviction should be affirmed because Chuol was not prejudiced by the error.

The trial court instructed the jury at the beginning and the end of the trial not to ascribe any meaning to potential comments 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 appears to you that I have indicated in

any way my personal opinion concerning any evidence, you must disregard this impression entirely.

CP 49; 2RP 35-36 (slightly different wording). Jurors are presumed to follow the court's instructions. State v. Kirkman, 159 Wn.2d 918, 937, 155 P.3d 125 (2007). The record in this case shows that the jurors did follow the court's instruction and were not affected by any suggestion that the existence of the threats had been established.

Tracy Robinson testified that Chuol had stated that he wanted to make a bomb and blow up the hospital, and that he wanted to kill his coworkers, including her. 3RP 29-33. When the trial court used the words "these threats" in the limiting instruction to refer to the threats testified to by Robinson, it did not distinguish between the threat to bomb and the threat to kill. 3RP 42-44. And yet, the juror's verdicts indicated that they believed one threat had been made, but not the other.

In finding Chuol guilty of felony harassment, the jury necessarily found not only that the threat to kill Robinson had been made, but also that Robinson was placed in reasonable fear that the threat to kill would be carried out, that Chuol acted without lawful authority, and that the threat occurred in Washington. CP 42, 59. In contrast, in order to convict Chuol of the charge of

threatening to bomb or injure property, the jury would have needed only to find that the threat to bomb the hospital had been made, and had occurred in Washington. CP 61. The jury nevertheless found Chuol not guilty of the latter charge. CP 43.

The jury's verdicts show that the jury believed Robinson's testimony that a threat to kill her had occurred, but did not believe that a threat to bomb had occurred. This may have been due to testimony by the supervisor to whom Robinson first reported the threats that Robinson had not mentioned a bomb at the time. 3RP 124. If the jurors had been affected by the alleged judicial comment suggesting that the existence of the threats testified to by Robinson had been established, one would expect them to have returned a verdict of guilty on the charge of threatening to bomb, as the existence of the threat was the only disputed element in that charge. The fact that they did not do so, despite their verdict regarding the threat to kill, affirmatively shows that the jury was not affected by the alleged judicial comment, and the defendant was therefore not prejudiced by it. See State v. Stephens, 83 Wn.2d 485, 488-89, 519 P.2d 249 (1974) (citing fact that jury convicted defendant of charges to which he confessed on the stand, but acquitted him of charge he denied, in holding that defendant was

not prejudiced by comment alleged to have undermined his credibility).

Chuol seems to contend that because the existence of the threats was a central issue at trial, he was necessarily prejudiced by the alleged comment on the evidence. However, whether the subject of a judicial comment was a disputed issue is not determinative. State v. Jackman, 156 Wn.2d 736, 744-45, 132 P.3d 136 (2006). In this case, the record affirmatively shows that the jury's verdicts were not affected by the alleged judicial comment.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING OFFICER LILJE TO TESTIFY THAT CHUOL'S ANSWERS WERE "NOT COMPLETE."

Chuol contends that Officer Lilje improperly commented on Chuol's veracity when Lilje testified that he had continued to ask Chuol questions, despite Chuol's repeated answers of "Why would I say that?", because "I felt that the answer I had been given was not complete." This claim should be rejected. Lilje's testimony did not constitute an impermissible opinion on Chuol's guilt or veracity, and any error was harmless.

a. Relevant Facts.

Officer Matthew Lilje testified at trial that after taking a report from Tracy Robinson, he arrested Chuol, read him Miranda rights, and questioned him. 3RP 16, 21. Lilje testified that he asked Chuol a series of questions, such as whether Chuol had made any statements that people might interpret as a threat to kill or to blow up the hospital, whether Chuol had said he would shoot anyone, whether Chuol had said he would bomb the hospital, and whether Chuol had threatened to kill Robinson. 3RP 22. Each time, Chuol responded by saying “Why would I say that?” Id. Over Chuol’s objection, the trial court allowed Lilje to testify that he had continued to ask Chuol the same question “because I felt that the answer I had been given was not complete.” 3RP 23.

b. Lilje’s Testimony Did Not Constitute An Impermissible Opinion On Chuol’s Veracity.

Generally, a witness is not allowed to testify to his or her opinion regarding the guilt of the defendant or the veracity or credibility of the defendant or a witness, because such testimony invades the exclusive province of the jury. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). However, a trial court’s decision on whether to exclude evidence as an impermissible

opinion on the defendant's veracity will not be overturned on appeal absent an abuse of discretion. Id. at 758. A trial court abuses its discretion only if no reasonable judge would adopt the same view. Bourgeois, 133 Wn.2d at 406.

When determining whether testimony constitutes an impermissible opinion on guilt or veracity, the courts consider the circumstances of the case, including the specific nature of the testimony, the nature of the charges, the type of witness involved, the type of defense, and the other evidence before the trier of fact. Kirkman, 159 Wn.2d at 928. This Court has "expressly declined to take an expansive view" of claims that testimony constitutes an impermissible opinion on guilt or veracity. City of Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993).

A witness's description of the qualities of a defendant's or victim's statements, such as their clarity, amount of detail, or consistency, does not constitute an opinion on veracity or credibility, as such details do not necessarily coincide with truth or falsehood. Kirkman, 159 Wn.2d at 929-30 (holding doctor's testimony that victim's report of sexual abuse was very detailed and "clear and consistent" was not an opinion on credibility).

More generally, testimony by a witness regarding his or her own sensory perceptions, and opinions or conclusions formed from those perceptions, does not constitute an opinion on guilt or veracity. E.g. State v. Allen, 50 Wn. App. 412, 418, 749 P.2d 702 (1988) (testimony that defendant's grief appeared insincere not improper opinion on veracity where prefaced with foundational observations regarding facial expression and lack of tears or redness). In such instances, the jury is in a position to independently assess the opinion in light of the evidence on which it is based. Heatley, 70 Wn. App. at 581 (testimony in DUI trial that defendant was "obviously intoxicated" and "could not drive a motor vehicle in a safe manner" not an improper opinion on guilt because not a direct opinion on guilt and based on witness's observations of defendant).

Here, Lilje's testimony did not express an opinion on Chuol's guilt or veracity. Lilje merely observed that Chuol's answers were "not complete" after testifying that Chuol had answered "Why would I say that?" in response to numerous questions regarding whether Chuol had made specific statements. 3RP 22-23. The description of Chuol's answers as "not complete" was factually accurate, as Chuol had not actually answered the questions.

Furthermore, having heard Lilje's testimony regarding the substance of the statements, the jury was in a position to independently assess Lilje's characterization of them. The effect on the jury was no different than if Lilje had explained his repetitive questioning by observing that Chuol had not answered the question. Neither that statement, nor the one Lilje actually made at trial, expresses an opinion on Chuol's guilt or veracity.

Chuol appears to claim that because Lilje's testimony arguably supports an inference that Chuol was being intentionally deceptive in his answers, it should be treated no differently than if Lilje had actually testified that he believed Chuol was being intentionally deceptive in his answers. However, Chuol offers no authority for this proposition. To the contrary, even when testimony is an opinion encompassing ultimate factual issues, the fact that the testimony *supports* the conclusion that a defendant is guilty or not credible does not make the testimony an improper opinion on guilt or credibility. Heatley, 70 Wn. App. at 579; Kirkman, 159 Wn.2d at 929-30. "It is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material." Heatley, 70 Wn. App. at 579 (quoting State v. Wilbur, 55 Wn. App. 294, 298 n.1, 777 P.2d 36 (1989)).

Lilje's description of Chuol's responses as "not complete" was no more an opinion on veracity than was testimony by the doctor in Kirkman that the victim's account of the abuse was "clear and consistent." 159 Wn.2d at 930. The trial court therefore properly exercised its discretion in allowing the testimony.

c. Any Error Was Harmless.

Even if this court finds that the trial court did abuse its discretion in admitting Lilje's testimony, the error was harmless. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.

State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

A non-constitutional error is harmless if there is not a reasonable probability that the outcome of the trial would have been materially affected had the error not occurred. State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). Caselaw is not entirely clear on which standard applies to a witness's improper opinion testimony as to the veracity of another witness.

Where the improper testimony is clearly an opinion on the defendant's *guilt*, courts have treated the error to be of constitutional magnitude. State v. Carlin, 40 Wn. App. 698, 700, 700 P.2d 323 (1985) (finding defendant raised a constitutional claim when asserting that testimony regarding "fresh guilt scent" was an opinion as to guilt), overruled on other grounds by Heatley, 70 Wn. App. 573. However, as noted previously, the courts take a narrow view of what constitutes an opinion on guilt. Heatley, 70 Wn. App. at 579. Even when police officers have explicitly testified to their opinion that a key witness told the truth, this Court has held that it did not constitute an opinion on the defendant's guilt, and instead analyzed such testimony as an improper expert opinion, to which the nonconstitutional harmless error standard applies. Wilbur, 55 Wn. App. at 298-99.

Because Lilje's testimony did not constitute an opinion on Chuol's guilt, this Court should apply the nonconstitutional harmless error standard if it finds that the trial court abused its discretion in admitting the testimony. However, the alleged error was harmless even under the higher constitutional standard.

The trial court instructed the jurors that “you are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness.” CP 48. Jurors are presumed to follow the court’s instructions. Kirkman, 159 Wn.2d at 937. Proper instructions can “obviate the possibility of prejudice,” and thus the giving of proper instructions is important in the determination of whether opinion testimony prejudices the defendant. State v. Blake, 172 Wn. App. 515, 531, 298 P.3d 769 (2012).

Additionally, here the jury’s verdicts affirmatively show that the alleged opinion testimony did not affect the result of the trial. The defendant denied all of the allegations against him. As discussed in relation to a similar issue in section 2(d) above, if the jury had been swayed by Lilje’s testimony into finding the defendant not credible across the board, one would have expected them to find the defendant guilty on both counts. However, they acquitted the defendant on the more straightforward charge of threatening to bomb or injure property, showing that their verdicts turned on something other than a simple rejection of the defendant’s testimony. CP 43.

Finally, even assuming Lilje's testimony was an improper opinion on Chuol's veracity, it was an opinion on the veracity of what Chuol had told him at that time. And yet, Chuol had not actually said anything of substance to Lilje. He had only repeated "Why would I say that?" each time Lilje asked a question. 3RP 22. There were no factual assertions by Chuol for the jury to be influenced into finding not credible. Instead, Lilje's comment that Chuol's answers were "not complete" was merely cumulative with the evidence properly before the jury that Chuol had repeatedly given nonresponsive answers when asked whether or not he had made the threats. As such, the outcome of the trial would have been the same had the comment not been made.

4. CHUOL'S CUMULATIVE ERROR CLAIM SHOULD BE REJECTED.

Chuol contends that the cumulative effect of the trial errors alleged requires reversal, even if the errors are found to be harmless individually. This claim should be rejected.

An accumulation of errors that do not individually require reversal may still deny a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). In order to seek reversal

pursuant to the cumulative error doctrine, however, the defendant must establish the presence of multiple trial errors *and* that the cumulative prejudice affected the verdict. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). The doctrine does not apply “where the errors are few and have little or no effect on the outcome of the trial.” Id.

Instead, reversals due to cumulative error are justified only in rather extraordinary circumstances. See, e.g., State v. Perrett, 86 Wn. App. 312, 323, 936 P.2d 426 (1997) (police officer’s comment on defendant’s post-arrest silence, testimony regarding prior confiscations of defendant’s guns, and trial court’s exclusion of key witness’s conviction for crime of dishonesty cumulatively warranted a new trial), rev. denied, 133 Wn.2d 1019 (1997); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (prosecutor’s remarks regarding personal belief in defendant’s guilt, coupled with two instructional errors of constitutional magnitude, warranted a new trial).

Here, as explained in the sections above, no error occurred that affected the outcome of the trial, either individually or cumulatively.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Chuol's conviction.

DATED this 12th day of March, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David B. Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. TOM JOHN CHUOL, Cause No. 70132-1-I, 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 12 day of March, 2014

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Name
Done in Seattle, Washington