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Division I  
State of Washington      NO. 73954-9-1

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

DONNA ELIZABETH GREEN,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE MONICA J. BENTON

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Because the defense of good faith claim of title is inapplicable as a matter of law to a charge of theft by deception, did the trial court properly refuse to give the instruction in this case, where the only theft charge was theft by deception?

2. Was the jury instruction defining knowledge, which has been approved by the Supreme Court, correct and sufficient?

3. Did the trial court properly overrule objections to three arguments of the prosecutor in his rebuttal closing?

4. Did the trial court properly refuse to appoint new counsel for defendant Green when she expressed unhappiness with the amount of communication she had with her attorney while the case was pending, but did not describe an irreconcilable conflict with counsel, and counsel provided aggressive, effective representation of Green?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant, Donna Elizabeth Green, was charged with theft in the first degree, contrary to RCW 9A.56.030, and five counts of forgery, contrary to RCW 9A.60.020. CP 7-9. The

Honorable Monica Benton presided over a jury trial that began on June 9, 2015. 1RP 16.<sup>1</sup> The jury found Green guilty on all counts. CP 115-20. The court imposed a first-offender waiver sentence of 100 hours of community restitution and six months of supervision. CP 132-39.

## 2. SUBSTANTIVE FACTS

Donna Mae Green<sup>2</sup> died on May 13, 2012. 2RP 9. She had been collecting survivor's benefits from the Social Security Administration (SSA) at the time of her death, and those benefits continued to be deposited directly to her bank account at Bank of America after her death. 2RP 8, 10. The SSA deposited a little over \$17,000 to Donna Mae Green's bank account after her death, at a rate of about \$700 per month. 2RP 10. When the SSA became aware of the death of Donna Mae Green, it tried to recover the money paid after her death, but there was only \$2000 in her bank account. 2RP 12.

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<sup>1</sup> The Report of Proceedings is in two volumes, each containing multiple days. It is referred to in this brief in the same manner as in the Appellant's Brief, as follows: 1RP – volume beginning on July 24, 2014; 2RP – volume beginning on June 23, 2015.

<sup>2</sup> Donna Mae Green is referred to throughout this brief by her full name to distinguish her identity from the defendant, Donna Elizabeth Green. Defendant Green is referred to by either her full name or as "Green."

Donna Elizabeth Green, the defendant, is Donna Mae Green's daughter. 2RP 20, 26. The two had opened bank accounts at Bank of America on the same day, May 23, 2011, and Donna Mae Green specified that she was the only person authorized to sign on her account. 2RP 26, 48; Ex. 3, 4. Nor was defendant Green designated as a personal representative or representative payee for Donna Mae Green for purposes of receiving SSA payments for Donna Mae Green while she was alive. 2RP 15.

After Donna Mae Green's death, defendant Green signed checks written against her mother's account on a regular basis. Ex. 2; 2RP 29-32, 41-45. She wrote about one check each month, the amount of each was between \$700 and \$800, and most if not all of them were presented by Green at the Bank of America, for cash. 2RP 44-45. Green signed these checks "Donna Green." 2RP 43.

When questioned by SSA investigator Scott Henderson in 2014, Green admitted knowing that SSA benefits continued to be deposited to her mother's account after her mother's death, and admitted writing the checks against her mother's account. 2RP 8, 26-31. Green said she thought she had withdrawn about \$19,000

in SSA benefits from her mother's account. 2RP 33. Asked if she would be willing to repay the money, she replied "I guess." 2RP 33. Green said that after paying for her mother's cremation, she used the rest of the money for her personal bills and expenses. 2RP 27. She said that she believed it was the responsibility of the SSA to stop paying benefits when it was appropriate. 2RP 29.

Green told the investigator that she did not know if she was an authorized signer on her mother's bank account. 2RP 26. She could not explain why she wrote all of the checks for cash instead of paying bills directly from her mother's account. 2RP 31. Green said her mother had given her permission to access her mother's account. 2RP 35. Green said she told the bank tellers that it was her mother's account when she withdrew money and that she presented her own debit card as identification. 2RP 37.

A fraud investigator for Bank of America testified that the bank would not cash a check if the bank employee was aware that it was written by a person who was not an authorized signer on the account. 2RP 52-53.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY REFUSED AN INSTRUCTION AS TO GOOD FAITH CLAIM OF TITLE.**

Green argues that she was deprived of due process because the trial court refused to instruct the jury that good faith claim of title is a defense to theft. Because the only charge before the jury was theft by deception, that defense was inapplicable. Washington courts have repeatedly held the defense inapplicable under these circumstances. The trial court properly refused the instruction.

The defense of good faith claim of title is statutorily defined: “The property or services was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable.” RCW 9A.56.020(2)(a). This Court in State v. Stanton held that the good faith claim of title defense is inapplicable as a matter of law to a charge of theft by deception. 68 Wn. App. 855, 868, 845 P.2d 1365 (1993). Theft by deception means “by color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.” RCW 9A.56.020(1)(b). The court in Stanton concluded that the required finding that a defendant

obtained control of the property by color or aid of deception “necessarily includes an implied finding that the defendant did not obtain control over the property ‘openly and avowedly under a good faith claim of title.’” 68 Wn. App. at 868.

In State v. Casey, this Court reaffirmed that holding. 81 Wn. App. 524, 527, 915 P.2d 587 (1996). It rejected the argument raised by Green, that because RCW 9A.56.020(2) provides that good faith claim of title is a sufficient defense in any prosecution for theft, the instruction is required in every theft case where it is supported by substantial evidence. Id. The court held that the instruction is not required in a case of theft by deception because “it is logically impossible to convict without impliedly rejecting any claim of good faith.” Id.

The court in Casey noted that the Supreme Court had reached the same conclusion when it held the good faith claim of title defense inapplicable to the charge of larceny by obtaining money by false pretenses, in State v. Mercy, 55 Wn.2d 530, 533, 348 P.2d 978 (1960). Obtaining money by false pretenses under the former larceny statute, effective prior to July 1, 1976, encompassed theft by deception under the current theft statute.

Former RCW 9.54.010 (1915).<sup>3</sup> The defense of good faith claim of title appeared in former RCW 9.54.120 in the same form it appears in the current statute: "In any prosecution for larceny it shall be a sufficient defense that the property was appropriate openly and avowedly under a claim of title preferred in good faith, even though the claim be untenable." The Court in Mercy held that the defense was unavailable in a prosecution for larceny by obtaining money by false pretenses, because making a false representation to deprive another of property is inconsistent with an open, good faith claim of title. 55 Wn.2d at 533. The Court also relied on its earlier holding to the same effect in State v. Emerson, 43 Wn.2d 5, 12, 259 P.2d 406 (1953).

A number of intermediate appellate court decisions in addition to Casey, supra, have followed these holdings and applied them to the current theft statute, finding the defense of good faith

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<sup>3</sup> Former RCW 9.54.010 provided:  
Every person who, with intent to deprive or defraud the owner thereof –  
...  
(2) Shall obtain from the owner or another the possession of or title to any property, real or personal, by color or aid of any order for the payment or delivery of property or money or any check or draft, knowing that the maker or drawer of such order, check or draft was not authorized or entitled to make or draw the same, or by color or aid of any fraudulent or false representation, personation or pretence or any false token or writing or by any trick, device, bunco game or fortune-telling; or  
...  
Steals such property and shall be guilty of larceny.

claim of title inapplicable to theft by deception. State v. Ellard, 46 Wn. App. 242, 245, 730 P.2d 109 (1986); State v. Pestrin, 43 Wn. App. 705, 708-10, 719 P.2d 137 (1986); State v. Wellington, 34 Wn. App. 607, 612, 663 P.2d 496 (1983). See also State v. Hull, 83 Wn. App. 786, 799, 924 P.2d 375 (1996) (defense inapplicable when patently deceptive means were used to accomplish theft).

In order to convict Green of theft, the jury was required to find that she committed theft by deception. CP 96. Green proposed an instruction that good faith claim of title was a defense to that charge and proposed a to-convict instruction on the theft charge that included an element requiring disproof of that defense. CP 12, 19<sup>4</sup>. The trial court properly rejected those instructions because that defense was inapplicable. 2RP 70-71.

Green argues that the holding of Casey is incorrect, but does not acknowledge the great weight of authority that has reached the same conclusion, including two Supreme Court cases. The doctrine of stare decisis requires a “clear showing that an established rule is incorrect and harmful” before precedent is abandoned. In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508

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<sup>4</sup> Defense proposed instructions were filed on June 9 and on June 22, 2015. The documents appear to be exact duplicates. Compare CP 11-27 with CP 150-66.

(1970). Green has not established that this well-established rule is incorrect and harmful, as required before it will be abandoned.

Green misplaces her reliance on the Supreme Court's decision in State v. Ager, 128 Wn.2d 85, 904 P.2d 715 (1995). The theft charges in that case were theft by embezzlement, not theft by deception. Id. at 87. The Court's decision addressed the evidence necessary to warrant a good faith claim of title instruction in an embezzlement case, but did not refer to the charge of theft by deception, which was not at issue there. Id. at 87-96. The court in Casey distinguished Ager, noting that there is no element of theft by embezzlement that would necessarily negate a good faith claim of title defense. Casey, 81 Wn. App. at 527.

Green's analogy to self defense instructions also is inapposite. She asserts that when a defense negates an element, the defendant is entitled to an instruction on the defense. App. Br. at 14. In the cases cited, however, the analysis of whether a defense "negates an element" is in the context of establishing the burden of proof, not the right to an instruction. See State v. Acosta, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984); State v. McCullum, 98 Wn.2d 484, 495, 656 P.2d 1064 (1983); State v. Hanton, 94 Wn.2d 129, 133, 614 P.2d 1280 (1980). As to theft by deception, the

elements of the crime negate the defense of good faith claim of title, so no additional instruction is necessary.

Even if the court improperly refused the instruction, that decision was harmless beyond a reasonable doubt as to the theft conviction because to convict, the jury had to conclude that Green obtained the money, which was property of another, by color or aid of deception. CP 96. It would be impossible to make that finding without rejecting the theory that Green was acting openly and in good faith. That is the reason all courts that have considered this question have found the defense inapplicable, as discussed above. For the same reason, any error in refusing the instruction was harmless.

The claimed error is entirely irrelevant to the forgery convictions, as the defense is unavailable for forgery and the proposed instructions specified that it would be applicable only as a defense to theft. CP 12, 19. Theft is not an element of forgery. RCW 9A.60.020. All of the forgeries occurred after Donna Mae Green's death, so Green could not have been signing on Donna Mae Green's behalf. In convicting Green of forgery, the jury concluded that Green acted with intent to defraud and there is no reason that an instruction that it is a defense to theft that a person

acted openly and with a good faith claim to title would have affected that conclusion.

**2. THE INSTRUCTION DEFINING “KNOWLEDGE” WAS CORRECT AND SUFFICIENT.**

Green claims that the trial court erred by submitting a jury instruction defining “knowledge” drawn from the Washington Pattern Instructions. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.02 (3d ed. 2014) (WPIC). This argument lacks merit. As the trial court recognized, the Supreme Court has approved the definition in WPIC 10.02. 2RP 65.

“Knowledge” is defined in Washington’s criminal code:

(b) KNOWLEDGE. A person knows or acts knowingly or with knowledge when:

(i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

RCW 9A.08.010(1)(b). Pursuant to subsection (b)(ii), knowledge may be proven through circumstantial evidence. State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015).

In State v. Shipp<sup>5</sup>, the Supreme Court concluded that a jury instruction using the exact wording of the statutory definition of knowledge was improper because it could be interpreted as creating a mandatory presumption, or as defining knowledge as the equivalent of negligent ignorance. 93 Wn.2d at 514-16. The Court held that those two interpretations were unconstitutional and “the statute must be interpreted as only permitting, rather than directing, the jury to find that the defendant had knowledge if it finds that the ordinary person would have had knowledge under the circumstances.” Id. at 516.

In response to Shipp, the WPIC definition of knowledge was revised to correct the problem identified by the Court. State v. Leech, 114 Wn.2d 700, 710, 790 P.2d 160 (1990); WPIC 10.02, Comment. The revised instruction states that a jury is permitted but not required to find that a person acted with knowledge if that person had information that would lead a reasonable person to believe that the facts existed. Leech, 114 Wn.2d at 710; WPIC 10.02. Courts have consistently upheld the constitutionality of the revised language. Leech, 114 Wn.2d at 710 & n.20 (citing cases); State v. Bryant, 89 Wn. App. 857, 872, 950 P.2d 1004 (1998).

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<sup>5</sup> 93 Wn.2d 510, 610 P.2d 1322 (1980).

The court in the case at bar instructed the jury using the language of WPIC 10.02, as follows:

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly is required to establish an element of a crime, the element is also established if a person acts intentionally.

CP 108 (Court's Instruction 19).

The language of the current WPIC 10.02, used in this case, has been modified slightly since Leech. It has removed the reference to the facts in question being "described by law as being a crime," referring instead to knowledge of "a fact" and "that fact." Compare Leech, 114 Wn.2d at 709-10 & n.2 with WPIC 10.02; see WPIC 10.02 & Comment. Green has not suggested that these revisions are of significance to her argument.

Green contends that the instruction does not require a finding of actual knowledge, but her argument refers only to the second paragraph of the instruction, which describes the

permissible inference. App. Br. at 19. Green does not include the first paragraph of the instruction, which states in its first sentence, “A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result.” CP 108. This sentence established that actual knowledge is the standard.

Green is wrong in stating that the Supreme Court in Allen “acknowledged” that the current pattern instruction could mislead the average juror. App. Br. at 21. The Allen court actually said that the language of the statute could be misinterpreted:

We have recognized that a juror could understandably misinterpret Washington’s culpability statute to allow a finding of knowledge “if an ordinary person in the defendant’s situation would have known” the fact in question, or in other words, if the defendant “should have known.” Shipp, 93 Wash.2d at 514, 610 P.2d 1322.

Allen, 182 Wn.2d 364 at 374. The Court’s reference to the problem identified in Shipp did not implicate the current pattern instruction.

The court in Allen explicitly approved the instruction given in that case, stating the jury instructions “correctly stated the law regarding ‘knowledge.’” Id. at 372. The instruction given was quoted:

A person knows or acts knowingly or with knowledge with respect to a fact or circumstance when he or she is aware of that fact or circumstance.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

182 Wn.2d 364 at 372. That instruction follows WPIC 10.02 and is in all relevant respects identical to the instruction given here.

Green cites no instance in which the prosecutor in this case misstated the definition of knowledge, as the prosecutor in Allen did. The prosecutor in this case made it perfectly clear that actual knowledge was required, stating:

So if you believe that Donna Elizabeth Green did not know she couldn't sign her name on checks based on things she said, after the things she said and her behavior that she had no idea she couldn't collect her mother's social security after she died then I guess she's not guilty. If you believe that she did know those things that your own common sense and experience would tell you that anybody in her age and situation would understand that then she is guilty beyond a reasonable doubt.

2RP 108 (emphasis added). Defense trial counsel commended the prosecutor's explanation of the knowledge instruction: "To his credit I think Mr. Peterson did a very fair and reasonable job of explaining that instruction to you." 2RP 127. The jury was not misled.

The instruction defining “knowledge” that was given in this case has been explicitly approved by the Supreme Court, its meaning was clear, and its use was not error.

### **3. THE PROSECUTOR DID NOT ERR IN HIS REBUTTAL ARGUMENT.**

Green claims that the prosecutor in his rebuttal closing argument mischaracterized the burden of proof, improperly shifted the burden to the defendant, and improperly appealed to the passion or prejudice of the jury. These arguments should be rejected. The prosecutor’s arguments were not improper.

A defendant who claims that prosecutorial misconduct deprived him of a fair trial generally bears the burden of establishing that the conduct was both improper and prejudicial.<sup>6</sup> State v. Emery, 174 Wn.2d 741, 759-60, 764 n.14, 278 P.3d 653 (2012). To establish prejudice, the defendant must show a substantial likelihood that the improper conduct affected the jury’s verdict. Id. In analyzing potential prejudice, improper comments

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<sup>6</sup> The exception to this rule is that if the defendant has established that the prosecutor flagrantly or apparently intentionally appealed to racial bias in a way that undermined the defendant’s credibility or the presumption of innocence, the State must establish beyond a reasonable doubt that the misconduct did not affect the jury’s verdict. State v. Monday, 171 Wn.2d 667, 680, 257 P.3d 551 (2011). In this case, there is no claim that there was any appeal to racial bias at any point during the trial.

are not viewed in isolation, but in the context of the total argument, the issues, the evidence, and the instructions given to the jury. Id. at 764 n.14; State v. Rafay, 168 Wn. App. 734, 824, 829-30, 285 P.3d 83 (2012).

As to each of the arguments challenged here, defense counsel objected to the argument and the objection was overruled, as described below.

Remarks of the prosecutor, even if they are improper, ordinarily are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her statements. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

**a. The Prosecutor's Remarks Did Not Shift The Burden Of Proof.**

The prosecutor's statement in rebuttal that defense counsel could have asked a particular question of a state's witness was a fair response to the defense closing and did not improperly shift the burden of proof.

A prosecutor cannot make an argument that shifts the burden of proof onto the defendant, but a prosecutor may comment

on the absence of specific evidence if someone other than the defendant could have testified regarding that evidence. State v. Brett, 126 Wn.2d 136, 176-78, 892 P.2d 29 (1995); State v. Jackson, 150 Wn. App. 877, 887, 209 P.3d 553 (2009).

In its closing, defense counsel argued that although Exhibit 3 included a signature card prepared when Donna Mae Green opened her account (May 23, 2011) less than a year before her death (May 13, 2012 (2RP 9)), the witness from Bank of America did not testify the records of her account were complete, implying there might be another signature card authorizing Green to sign on the account.<sup>7</sup> 2RP 116. On rebuttal, the prosecutor noted that only a portion of the bank records had been admitted, and continued:

What Mr. Wolf didn't ask Mr. Lemon, I think intentionally so, is, "Is there any other signature card? Is that record incomplete? Is there another place we could look to find out that Donna Mae Green has a different signature card in which she inserted Donna Elizabeth Green's name?" And I think the reason he didn't ask the question --

[Objection made and overruled.]

MR. PETERSON: He didn't ask that question because he didn't want to know the answer. Because the answer might have been, "I looked and this is it." And think about it yourself --

[Objection made and overruled.]

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<sup>7</sup> Defense counsel did not argue that the signature card was "a few years old," as reported in Green's brief on appeal. App. Br. at 26.

MR. PETERSON: Again ask yourself, you probably all opened bank accounts sometime in your life, how many times you fill out a signature card? Once. The time you opened the account. Did you go back? Did the bank call you back and say, "Hey, we need another signature card?" (Inaudible) presume based on what we know that the signature card that's in the bank records we have is the one.

2RP 134-35.

In this case the prosecutor properly observed that defense counsel could have asked the bank witness whether there was another signature card in the records. The situation is similar to Jackson, supra, in which the court held that it was proper to comment on the failure of the defense to elicit testimony from a defense witness regarding whether the defendant was intoxicated. 150 Wn. App. at 887-88. See also State v. Vassar, 188 Wn. App. 251, 261, 352 P.3d 856 (2015) (approving prosecutor's argument that the defense had not produced a document referred to by the defendant during her testimony, which would corroborate the defendant's story).

In State v. Thorgerson,<sup>8</sup> the court approved the prosecutor's argument that the defense had not raised any inconsistencies in the prior statements a witness had made, holding it did not improperly shift the burden of proof. 172 Wn.2d at 467. The court noted that

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<sup>8</sup> 172 Wn.2d 438, 258 P.3d 43 (2011).

when the defense tried to extract contradictions from the witnesses, it opened the door to this argument. Id. Likewise, when Green asked the bank witness whether the records were complete but did not ask about additional signature cards, then argued there could be additional signature cards, it opened the door to the State's response that he could have asked the witness if there were.

This argument did not shift the burden of proof, which had been orally explained at the beginning of the trial, and was clearly set out for the jury in the instructions. CP 91, 96, 103-07; 1RP 85.

**b. The Prosecutor's Remarks Did Not Mischaracterize The Burden Of Proof Or Appeal To Passion Or Prejudice.**

Green's remaining two claims of prosecutorial error in the rebuttal argument both involve the same section of argument. They will be addressed jointly so that the entire context of each can be considered. The prosecutor's remarks must not be viewed in isolation, but "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." Emery, 174 Wn.2d at 764 n.14; Rafay, 168 Wn. App. at 824, 829-30.

Green claims that the prosecutor trivialized the burden of proof by arguing that the jury need not “bend over backwards” to find her not guilty, however that was not the argument made. Green also argues that the prosecutor made an improper appeal to passion when he said that the case was “about holding people accountable for the things that they do,” but Green takes this statement out of context; the argument was a proper response to the defense closing argument that the prosecution was motivated by government anger over missing money.

In rebuttal, the prosecutor observed that the defense was asking jurors to conclude that Green knew nothing about the Social Security system and knew nothing about checks. 2RP 136. He argued that her statement that she had authority to sign checks on her mother’s account lacked credibility, and continued:

When you are asked to bend over backwards pretty soon the whole world is upside down and nothing makes any sense. And if that’s the standard for proving things beyond a reasonable doubt, bend over backwards so far that you have [to] see the world in a completely upside down light in order to find someone not guilty, then no one’s going to be guilty of anything. The test is –

MR. WOLF: Your Honor, I’d object to that characterization of reasonable doubt as well.  
THE COURT: Overruled.

MR. PETERSON: The test is in the jury instructions. If you have an abiding belief in the truth of the charge, based on your common sense and experience, that you're to find defendant guilty and it doesn't matter how you feel personally about her. This is not personal. It's not about Donna Green. It's not about the Social Security Administration's anger. It's not about any of that. It's about holding people accountable for the things that they do. If you consider the evidence and testimony you've heard, the exhibits in evidence –

MR. WOLF: Your Honor, I'd object also to the request to hold the defendant accountable. We're not here to hold her accountable. We're here to determine facts.

THE COURT: Overruled.

MR. PETERSON: You'll find the defendant is guilty. All the elements have been proved beyond a reasonable doubt beyond any doubt in your minds and that she is guilty as charged.

2RP 136-38.

It is improper for the State to minimize or trivialize its burden of proof beyond a reasonable doubt. State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). The State is not permitted to compare proof beyond a reasonable doubt to making a mundane decision or to quantify the amount of certainty necessary to meet the standard (although it is permissible to say it is less than 100 percent certainty). State v. Fuller, 169 Wn. App. 797, 826-28, 282 P.3d 126 (2012). However, it is not error to make an analogy that does not minimize the burden. Id.

The remarks referring to bending over backwards did not minimize or quantify the burden of proof – they were not improper. The prosecutor said that the standard of proof beyond a reasonable doubt does not require that jurors “bend over backwards so far that you have [to] see the world in a completely upside down light to find someone not guilty.” 2RP 137. The analogy to seeing the world upside down was a reference to abandoning common sense, as the preceding statement of the prosecutor confirms: “When you are asked to bend over backwards pretty soon the whole world is upside down and nothing makes any sense.” 2RP 136-37. This criticism, that the defense theory of the case would require the jurors to abandon common sense, was proper argument.

The prosecutor was turning to the definition of proof beyond a reasonable doubt in the jury instructions when he was interrupted by defense counsel’s objection. 2RP 137. After the objection was overruled, the prosecutor completed his reference. 2RP 137. The argument that the standard did not require jurors to view the world upside down did not minimize the State’s burden.

Green argues that the next portion of the argument was improper because the prosecutor stated that the case was “about holding people accountable.” The prosecutor made two points in

this section of the argument. The first was that if the jury had an abiding belief in the truth of the charge, the instruction provided that they were to convict Green, no matter how they “feel personally about her.” 2RP 137. This was a call to conduct their deliberations without being swayed by passion or prejudice.

The second point of this portion of the argument was a response to the defense argument in closing that Green is not a criminal, but “the government is mad that there’s money missing and they want somebody to be punished for it.” 2RP 111. The defense repeatedly returned to the theme that Green was “not a criminal” and the case should be a civil matter. 2RP 109, 111 (not a criminal), 123 (should be addressed civilly), 125 (it’s civil), 130 (is she a criminal?). The prosecutor responded by stating:

This is not personal. It’s not about Donna Green. It’s not about the [SSA]’s anger. It’s not about any of that. It’s about holding people accountable for the things that they do.

2RP 137. This was a fair response to the defense argument.

Green argues that a reference to holding people accountable for what they do suggested the case was about something bigger than Green, but the context shows that the reference was part of the prosecutor’s effort to discourage the jurors from being swayed by matters outside the elements of the crimes, such as the defense

suggestion of improper motivation for the prosecution. This case did not involve crimes that would inflame the passions of jurors, or vulnerable victims for which jurors might feel sympathy. A comment that a criminal case involves determining whether a person is accountable for crimes charged cannot be considered an improper appeal to passion, as it describes the criminal justice system at its most basic level.

This argument that the case was about holding people accountable for their behavior is similar to arguments to the jury that they are acting as the conscience of the community, which are not improper unless they are specifically designed to inflame the jury. State v. Davis, 141 Wn.2d 798, 873, 10 P.3d 977 (2000); see State v. Finch, 137 Wn.2d 792, 842, 975 P.2d 967 (1999) (citing federal cases). Examples of such impropriety include exhorting the jury to send a message to society, or telling the jury that they would be violating their oath as jurors if they do not render a verdict in favor of the State. Finch, 137 Wn.2d at 840-42. Here, the context of the references made by this prosecutor show that use of the phrase “holding people accountable” was not an effort to inflame the jury, but an observation as to their role.

Jurors are presumed to follow the court's instructions. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). The jury was properly instructed as to the definition of reasonable doubt, and was instructed that it should not reach its decision based on sympathy, prejudice, or personal preference. CP 90, 91; 1RP 85. There is no reason to believe that the jury in this case was influenced to deviate from those instructions by the prosecutor's remarks.

**4. THE TRIAL COURT PROPERLY DENIED GREEN'S REQUESTS FOR APPOINTMENT OF A NEW ATTORNEY.**

In this appeal, Green contends that she was denied her right to conflict-free counsel, in essence because her attorney did not satisfy Green's expectations regarding the type of personal attention she should be provided while the case was pending. Her complaints about delays in responding to messages and lack of in-person meetings do not establish that she and her attorney had a complete breakdown of communication that resulted in denial of counsel.

A defendant's right to counsel under the Sixth Amendment does not extend to the choice of a particular advocate. State v.

DeWeese, 117 Wn.2d 369, 375-76, 816 P.2d 1 (1991). Whether a defendant's dissatisfaction with counsel justifies appointment of a new attorney lies within the discretion of the trial court. Id. at 376; State v. Thompson, 169 Wn. App. 436, 457, 290 P.3d 996 (2012).

If the relationship between a defendant and the defendant's appointed lawyer "completely collapses," there is an irreconcilable conflict and the refusal to appoint a new attorney violates the defendant's Sixth Amendment right to effective assistance of counsel. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 722, 16 P.3d 1 (2001) (Stenson I). "Counsel and the defendant must be at such odds as to prevent presentation of an adequate defense." Thompson, 169 Wn. App. at 457 (quoting State v. Schaller, 143 Wn. App. 258, 268, 177 P.3d 1139 (2007)). It is not enough to warrant substitution of counsel that a defendant has lost trust or confidence in the attorney. Thompson, 169 Wn. App. at 457.

The Sixth Amendment does not guarantee a "meaningful relationship" between a defendant and defense counsel. Stenson v. Lambert, 504 F.3d 873, 886 (9th Cir. 2007) (Stenson II) (citing Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983)). An irreconcilable conflict occurs only where there is a complete breakdown in communication and the breakdown

prevents effective assistance of counsel. Stenson II, 504 F.3d at 886.

In determining whether the trial court erred in failing to substitute counsel on the basis of alleged irreconcilable conflict, appellate courts consider the extent of the conflict, the adequacy of the trial court's inquiry, and the timeliness of the motion. Stenson I, 142 Wn.2d at 724; Thompson, 169 Wn. App. at 458. In evaluating the extent of the conflict, the reviewing court examines both the extent and nature of the breakdown in communication and the effect on the representation the defendant actually receives. Stenson I, 142 Wn.2d at 724; Thompson, 169 Wn. App. at 458.

The first time Green asked for a new attorney was October 13, 2014, before Criminal Presiding Judge Jim Rogers, when she complained that her attorney had not met with her in person to discuss the case and "it's just not working out." 1RP 5. Green complained about difficulty getting in touch with her attorney and said that she did not like her attorney's comments to her about what contact was required, saying "I'm not feeling good about it." 1RP 7. The trial court ordered the two to meet in person, stating that after that was done, it would seriously consider the request. 1RP 7.

Green did not raise any concern about counsel again until March 20, 2015, at the trial readiness hearing, which was also before Judge Rogers. 1RP 8, 10. The court at that time noted that there had been seven intervening hearings before the court. 1RP 13. On March 20, Green began by stating she was concerned that her attorney did not have time to go over the material with her before trial, especially since the State had just given the attorney more information to review. 1RP 10. The court noted that the attorney already had told the court that he needed to review the new material to see if additional time was needed to prepare for trial. 1RP 11. Green complained that her attorney had not “sat down and talked or discussed as to what the representation would be, like as to what’s going to be asked or anything like that,” and that there did not seem to be enough time. 1RP 11. At this hearing, Green characterized her original concern about her attorney as “maybe there not being enough time to handle the case.” 1RP 11-12.

After the court directed Green and her counsel to talk, there was a four minute break and Green moved to discharge her counsel. 1RP 12. Green said that her attorney had told her that he tried to contact her, but that was untrue. 1RP 13. She said she

was nervous because trial was approaching and she was “still having the same issue [as] at the beginning, where to get in touch with the public defender that you’re having to contact their boss.” 1RP 14. She complained that it could take five days to get a response, saying she had done that a few times. 1RP 14. She concluded that she felt she was not “getting proper representation.” 1RP 14. The court concluded that there was not a breakdown in communication, “It’s simply you’re saying that you haven’t had enough chance to talk with him.” 1RP 14.

The case was assigned to a trial court on June 9, 2015, but before reporting to the trial court, Green again moved to discharge counsel before the Presiding Judge, who on this date was Judge Bill Bowman. 1RP 15. Green said she had not had good representation so far and it had not gotten better. 1RP 15. Asked for any input, defense counsel said he was prepared for trial.<sup>9</sup> 1RP 16. The court concluded that there was not a communication issue that was sufficient to discharge counsel, noting that it was the day of trial and defense counsel was prepared for trial. 1RP 16. Green then asked if she could say more, and the court told her she was

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<sup>9</sup> In the transcript of the audio-recorded proceeding, this comment is attributed to the prosecutor, but it is clearly Mr. Wolf’s response to the judge’s direct question.

going directly to the trial court and could talk to the trial judge. 1RP  
16. Green did not raise this issue with the trial judge.

These exchanges indicate only that Green was dissatisfied with the amount of time that her attorney spent reviewing the case with her, and the time delay before her attorney responded to her when she contacted him. These concerns do not establish a complete breakdown in communication that prevented effective representation. There was no indication of any breakdown in communication, or any refusal of counsel or Green to communicate. Green thought her attorney should respond to her pretrial contacts more quickly and should spend more time with her, but there is no suggestion that the preparation her attorney did for trial was inadequate, or that he did not communicate with her at a time and in a manner that was sufficient to provide effective representation.

Green's assertion on appeal that she "explained" that "communication between her and defense counsel had broken down to such an extent that she no longer trusted him" cannot be found in the record at the page cited. App. Br. at 32. Her words at the hearing cited were "I don't think it's going to work out good" and "I'm not feeling good about it." RP 6-7. As far as the State can

determine, Green never used the word “trust” in her complaints about her attorney. Her unhappiness with counsel’s attitude or his lack of in-person meetings outside the courtroom did not deprive her of effective counsel.

Green does not suggest any effect that the alleged irreconcilable conflict had on her representation during this short trial. Defense trial counsel was quite active in pretrial motions and in raising objections during trial and closing arguments.

The court’s inquiry into the nature of the alleged conflict was adequate. Green had the opportunity to express her concerns, as she did at three separate hearings. The argument that denial of the motions establishes that the inquiry was insufficient is unsound – the judge has discretion to evaluate the claims as they are presented. The inquiry that is required is adequate if it provides a “sufficient basis for reaching an informed decision.” Thompson, 169 Wn. App. at 462 (quoting United States v. Adelzo-Gonzalez, 268 F.3d 772, 777 (9th Cir. 2001)). No private inquiry was required given the nature of the complaints raised here.

The State agrees that the first two motions to discharge counsel were timely, but they were not denied because they were untimely. They were denied because there was no irreconcilable

conflict. Even as to the motion brought the day the case was assigned for trial, the court noted that it was the day of trial and counsel was prepared, but denied the motion because it concluded that there was not a communication issue that was sufficient to discharge counsel. 1RP 16. Because the trial court did not rely on timing to deny the motions, the timing of the motions has little significance to the analysis on appeal.

As the Ninth Circuit court has observed, although a complete breakdown in communication may occur even when counsel provides competent representation, appellate courts have come to that conclusion only in extreme cases. Stenson II, 504 F.3d at 887. That court observed that in United States v. Nguyen,<sup>10</sup> on which Green relies, the trial judge was sitting by designation in Guam and improperly emphasized his own inconvenience if new counsel was appointed, the judge refused to consider the relationship between Nguyen and his attorney, and by the time of trial, there was no communication at all between the two. Stenson II, 50 F.3d at 887. Other cases finding irreconcilable conflicts also rely on the lack of any communication at all, which limited the lawyer's ability to

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<sup>10</sup> 262 F.3d 998 (9th Cir. 2001).

effectively prepare a defense. Daniel v. Woodford, 428 F.3d 1181, 1198-1201 (9th Cir. 2005).

While Green was not happy with her appointed counsel, she has not demonstrated that the trial court abused its discretion in refusing to appoint a different attorney. She has not established that there was an irreconcilable conflict that deprived her of effective assistance of counsel.

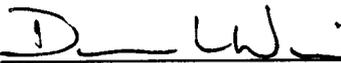
**D. CONCLUSION**

For the foregoing reasons, the State respectfully asks this Court to affirm Green's convictions and sentence.

DATED this 18<sup>TH</sup> day of August, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Kathleen A. Shea, containing a copy of the Brief Of Respondent in State v. Donna Elizabeth Green, Cause No. 73954-9-1, 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.

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington

08-18-16  
Date