NO. 46919-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

AKEEM HENDERSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Stephanie Arend

No. 14-1-00930-7

Brief of Respondent

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B. STATEMENT OF THE CASE.

1. Procedure

On July 9, 2014, Akeem Henderson (hereinafter "defendant") was charged with three counts of felony harassment (counts 1, 2, 3), third degree escape (count 4), two counts of obstructing a law enforcement officer (counts 5, 11), third degree assault (count 6), first degree unlawful possession of a firearm (count 7), three counts of unlawful possession of a controlled substance ("UPCS") while armed with a firearm (counts 8, 9,

10), and third degree driving while in suspended or revoked status in Pierce County, Washington. CP 17–23.

Prior to trial, defendant moved to proceed pro se. (10/6/14)RP 2.[1] After engaging in a colloquy with defendant, the court found defendant knowingly, intelligently, and voluntarily waived his right to counsel and permitted him to represent himself. (10/6/14)RP 9–15; CP 6. Defendant accepted the court's offer for standby counsel. (10/6/14)RP 15. The same attorney who had been representing defendant acted as standby counsel. 1RP 3. Defendant did not object to his former attorney acting as his standby counsel. 1RP 3.

Following a CrR 3.5 hearing, the court found statements made by defendant to officers were admissible. 2RP 140. After the State rested its case-in-chief, defendant moved to dismiss the case on three grounds: the search warrant, in furtherance of justice, and failure to comply with discovery rules. 3RP 383, 391. The motion was denied. 3RP 388.

The jury found defendant guilty of counts 1, 2, 4, 5, 7, 8, 9, 10, 11, and 12. 4RP 506. By special verdict, the jury found defendant was armed with a firearm at the time of the commission of UPCS (counts 8, 9, and 10). 4RP 506. Defendant was sentenced to a standard range sentence of 85 months, with three 18-month consecutive firearm enhancements, totaling

[1] The verbatim report of proceedings will be referred to by volume, RP, and page number (#RP #). The pre-trial hearing will be referred to by date, RP, and page number ((10/6/14)RP #). The sentencing hearing will be designated as follows: (Sentencing)RP #.

139 months. CP 106–107. On the three counts of UPCS, defendant's standard range exceeded the statutory maximum for the crime. (Sentencing)RP 7–8. The court reduced the term of confinement, to thirty months, to accommodate a 12 month term of community custody, in addition to the 18 month weapon enhancement, contrary to the terms of RCW 9.94A.701(9).[2] The court ordered mandatory and discretionary legal financial obligations. (Sentencing)RP 17. Defendant appealed timely. CP 122.

2. Facts

On February 23, 2014, defendant failed to signal and failed to stop at an intersection while driving. 3RP 345. Tacoma Police Officer Albert Schultz attempted to pull defendant over. 3RP 345. Defendant did not initially stop. 3RP 349. When defendant finally did stop his vehicle, he did so in the middle of the road and then got out of the car. 3RP 349. When the officer ordered defendant back into his car, defendant turned and fled the scene. 3RP 353.

[2] Under the terms of this statute, the court should not have imposed a term of community custody rather than reducing the period of confinement. RCW 9.94A.701(9) ("The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.").

On March 8, 2014, Tacoma police officers—including Officer Joshua Boyd—went to defendant's residence because there was a warrant for his arrest. 2RP 148, 156. When officers initially knocked, they asked for "Gloria." 2RP 186. Defendant appeared, then officers saw him go back up the stairwell momentarily, before reappearing and answering the door. 2RP 186. Officers arrested defendant. 2RP 156. As they got defendant to the patrol car, defendant asked the officers to pull up his pants which were falling down. 2RP 157. When the officers tried to help, defendant took off running down the street. 2RP 158. As defendant ran away, he said to the officers, "Fuck you guys. I fucking ran from that other cop because I had three ounces of black."[3] 2RP 197. Defendant made it approximately 100 yards before falling down and being apprehended once more. 2RP 158.

Officer Joshua Boyd transported defendant to the jail in his patrol car. 2RP 225. While in the back of Officer Boyd's patrol car, defendant loudly explained "how big of a drug dealer that he was; that he sold $1,000 worth of heroin . . . a day." 2RP 225–226. Defendant assured Officer Boyd he would bail out that night. 2RP 227. Defendant said that when he first answered the door, he was holding his fully loaded Sig Sauer .40 handgun, and that he "should have blasted" the officers when they came to the door. 2RP 228–229. Once Officer Boyd and defendant arrived at the jail for booking, defendant continued calling Officer Boyd "a bitch,"

[3] "Black" is a street term for heroin. 2RP 198.

threatening to "beat [Boyd's] ass if he wasn't in handcuffs," and saying he would shoot Boyd or another officer. 2RP 230, 232, 235. Defendant attempted to push Officer Boyd. 2RP 232. Based on defendant's angry demeanor and numerous comments, Officer Boyd was concerned defendant would carry out the threats. 2RP 235.

On March 12, 2014, officers returned to defendant's residence[4] to serve a search warrant. 2RP 149, 159. Defendant was not present at the time because, for safety reasons due to his prior firearm threats, officers waited for him to leave before executing the warrant. 2RP 150. In defendant's bedroom, officers found prescription style pills in a jacket. 2RP 239. These pills were later identified as methadone and clonazepam. 3RP 310, 316, 318. There was also a sticky black substance in the pill bottle, which later tests showed to be black tar heroin. 2RP 309, 321. Under defendant's mattress, officers found a Sig Sauer .40 firearm. 2RP 244.

When defendant returned to his residence, he was arrested. 2RP 150. Defendant told officers the gun found under his mattress was the same gun he had answered the door with on March 8. 2RP 251. While in the back of the patrol car, defendant told the officers that "he took his black . . . and his money out of the house, and he wished he would have

[4] Defendant admitted to living at the residence and his employee identification card, receipts with his name, and various letters addressed to him were found in the bedroom. 2RP 251.

took [sic] the gun also instead of leaving it behind." 2RP 160.

The defendant did not testify or call any witnesses. 3RP 399.

C. ARGUMENT.

1. THE STATE PRESENTED SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT DEFENDANT THREATENED OFFICER BOYD AND WAS ARMED WHILE UNLAWFULLY POSSESSING CONTROLLED SUBSTANCES.

For the court to find there was sufficient evidence on appeal it must determine, after viewing the evidence in the light most favorable to the State, whether any rational jury could have found the defendant guilty beyond a reasonable doubt. ***State v. Green***, 94 Wn.2d 216, 220–22, 616 P.2d 628 (1980); ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). An insufficiency claim admits the truth of the State's evidence and all reasonable inferences which can be drawn from it. ***State v. Thereoff***, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980); ***Salinas***, 119 Wn.2d at 201. Credibility determinations are for the trier of fact and cannot be reviewed on appeal. ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Circumstantial and direct evidence are considered equally reliable. ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

a. There was sufficient evidence to find defendant guilty of harassment against Officer Boyd because defendant threatened to "blast" Officer Boyd with his gun numerous times.

To convict defendant of harassment as charged in Count II, the jury had to find beyond a reasonable doubt:

> (1) That on or about 8th day of March, 2014, while in a patrol car, the defendant knowingly threatened to cause bodily injury to Joshua Boyd immediately or in the future;
>
> (2) That the words or conduct of the defendant placed Joshua Boyd in reasonable fear that the threat would be carried out;
>
> (3) That the person threatened was a criminal justice participant while performing his official duties, and the fear from the threat was a fear that a reasonable criminal justice participant would have under all the circumstances;
>
> (4) That the defendant acted without lawful authority; and
>
> (5) That the threat was made or received in the State of Washington.

CP 34. Harassment requires the defendant knowingly communicate a threat and that the person threatened learn of the threat and be placed in reasonable fear the threat will be carried out. ***State v. J.M.***, 144 Wn.2d 472, 481, 28 P.3d 720 (2001); ***State v. Kiehl***, 128 Wn. App. 88, 93, 113 P.3d 528 (2005).

There was sufficient evidence adduced at trial for the jury to find defendant threatened Officer Boyd. To put the threat in context, defendant first told Officer Boyd that he should have "blasted" him and the other officers when they first came to the door. 2RP 229. Defendant told Officer

Boyd that he first came to the door with a fully loaded firearm. 2RP 228. Defendant then told Officer Boyd that the next time police officers came to his door, he was going to blast the officers. 2RP 229. From this evidence, the jury could infer that defendant had a weapon, he was prepared to use that weapon, he thought about using it against Officer Boyd, later regretted that he had not done so, and he threatened to "blast" Officer Boyd if he ever returned to defendant's residence.

Not only was defendant prepared to use the weapon against Officer Boyd, defendant put Officer Boyd in reasonable fear that the threat would be carried out. While in Officer Boyd's car, the defendant was very agitated and referred to Officer Boyd as "a bitch" the entire ride. 2RP 230. Officer Boyd was concerned that defendant would carry out the threats directed at him. 2RP 235. Based on defendant's numerous comments, defendant's aggravated demeanor, and Officer Boyd's fear, there was sufficient evidence for the jury to find defendant guilty of felony harassment.

Defendant attempts to mischaracterize the threats made, as threats to unnamed to-be-determined officers. *See* Br. of App. p. 12–13. However, that is not how Officer Boyd described the threats made in the patrol car. Officer Boyd said, "[Defendant] said that he should have blasted – blasted *us* when the officers came to the door," and that next time he would. 2RP 229 (emphasis added). Officer Boyd was among the officers that went to

defendant's residence that day. Although Officer Boyd came around the back of the residence, 2RP 223, the jury could still infer that defendant's numerous comments directed toward Officer Boyd and Officer Boyd feeling included in the threats was sufficient to find defendant guilty of harassing Officer Boyd.

Additionally, defendant's "law of the case" argument is misguided. Looking at the jury instructions as a whole, the phrase, "while in the patrol car, the defendant knowingly threatened to cause bodily injury to Joshua Boyd" in the instruction for Count II was intended to distinguish between the three separate incidents giving rise to the three separate harassment charges. CP 33–35.[5] There is sufficient evidence to show the threatening statements defendant made to Officer Boyd threatening to blast him and other officers were made in Officer Boyd's patrol car. Defendant made the statements upwards of six times while in the back of the patrol car. 2RP 229. Therefore, defendant's conviction for harassment against Officer Boyd should be affirmed.

[5] The instruction for Count I included the phrase, "prior to being placed in a patrol car, the defendant knowingly threatened to cause bodily injury to Tyler Meeds." CP 33. The instruction for Count III included the phrase, "while at the Pierce County Jail, the defendant knowingly threatened to cause bodily injury to a person." CP 35.

b. There was sufficient evidence that defendant was armed with a firearm while committing the crimes of unlawful possession of a controlled substance because the firearm was readily available and had a nexus to the crime.

For the jury to determine by special interrogatory that defendant was armed with a firearm while committing the crimes of unlawful possession of a controlled substance:

> [T]he State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime charged in that count.
>
> A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the weapon and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime and the type of weapon.

CP 68.

A person is armed with a firearm if it is easily accessible and readily available for use. ***State v. Brown***, 162 Wn.2d 422, 431, 173 P.3d 245 (2007) (*citing* ***State v. Easterlin***, 159 Wn.2d 203, 208–209, 149 P.3d 366 (2006)). There must be a nexus between the defendant, the crime, and the weapon. *Id.* Applying the nexus requirement analyzes "the nature of

the crime, the type of weapon, and the circumstances under which the weapon is found." ***Brown***, 162 Wn.2d at 431 (*quoting* ***State v. Schelin***, 142 Wn.2d 562, 570, 55 P.3d 632 (2002)). The nexus requirement is not applicable to firearm enhancements when there is actual, rather than constructive, possession of a firearm. ***State v. Hernandez***, 172 Wn. App. 537, 544, 290 P.3d 1052 (2012) (*citing* ***Easterlin***, 159 Wn.2d at 173).

The mere presence of a firearm at the crime scene, close proximity of the weapon to the defendant, or construction possession of the firearm alone is insufficient to show the defendant is armed. ***Brown***, 162 Wn.2d at 431. The present case, however, contains more than "mere" constructive possession alone. Rather, on March 12, the evidence showed defendant constructively possessed a firearm—which he previously admitted to actually possessing—in close proximity to his drug dealing operation.

Defendant told officers he was a "big" drug dealer that sold $1,000 worth of heroin a day. 2RP 225. On March 8, when defendant initially answered the door for police, he was holding his fully loaded Sig .40. 2RP 228. Four days later, when officers executed the search warrant on defendant's bedroom, they found the same gun under defendant's mattress and the controlled substances in the bedroom's closet. 2RP 244, 249. Although defendant was not at the house when officers executed the search warrant, he was in the house immediately before. 2RP 150. Officers intentionally waited until defendant had left the residence because of his

prior firearm threat. 2RP 150. From defendant's prior actual possession of the gun while answering the door, the jury could find the gun was easily accessible and readily available to defendant for offensive and defensive purposes when he was inside the house immediately before the search warrant was executed. Further, defendant admitted to disposing of his heroin and money, but wishing he had gotten rid of the gun as well. 2RP 161. Defendant himself spoke of the nexus between the weapon and the crime of unlawful possession when he made this statement.

In ***Schelin***, the Court upheld the jury's finding that the defendant was armed with a firearm based on the defendant being in close proximity to a loaded gun which he constructively possessed to protect his marijuana grow operation. 147 Wn.2d at 574. The Court found the nexus requirement was satisfied because the defendant constructively possessed the firearm which the jury could have inferred was intended to protect his drug operation. *Id.* In the present case, the jury was presented with similar evidence of defendant's drug dealing operation and nearby firearm. Therefore, there was sufficient evidence for the jury to find defendant was armed with the firearm when he unlawfully possessed the controlled substances. Defendant constructively possessed the controlled substances and the gun, the gun was easily accessible and readily available to him—as evidenced by his prior actual possession inside the apartment—and

there was a nexus between the gun and defendant's drug dealing operation.

2. ALTHOUGH ONE OF THE PROSECUTOR'S STATEMENTS WAS IMPROPER, THE COURT SUSTAINED THE OBJECTIONS TO THIS ARGUMENT, THE OTHER TWO STATEMENTS WERE NOT IMPROPER, AND DEFENDANT HAS FAILED TO SHOW PREJUDICE BECAUSE THE JURY WAS PROPERLY INSTRUCTED.

In a prosecutorial misconduct claim, the defendant bears the burden of proving the conduct was both improper and prejudicial. ***State v. Emery***, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Failure to object to an improper remark is a waiver of 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." ***State v. Russell***, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Objections are required both to prevent further improper remarks and to prevent potential abuse of the appellate process. ***Emery***, 174 Wn.2d at 762. The focus of a reviewing court should be less on whether the misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured. ***Emery***, 174 Wn.2d at 762. When reviewing a claim that prosecutor's statement requires reversal, the court should review the statements in the context of the entire case. ***State v. Thorgerson***, 172 Wn.2d 438, 443, 258 P.3d 43 (2011) (citing ***Russell***, 125 Wn.3d at 86).

As a quasi-judicial officer, a prosecutor must insure the defendant receives a fair trial. ***Thorgerson***, 172 Wn.2d at 443; ***State v. Boehning***, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). However, in closing argument, a prosecutor has wide latitude to argue reasonable inferences from the evidence. ***Thorgerson***, 172 Wn.2d at 448. Appellate courts review a prosecutor's comments during closing argument in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the jury instructions. ***State v. Brown***, 152 Wn.2d 529, 561, 940 P.2d 546 (1997). Where the defendant claims prosecutorial misconduct, he bears the burden of establishing the impropriety of the prosecutor's comments as well as their prejudicial effect. ***State v. Anderson***, 153 Wn. App. 417, 427, 220 P.3d 1273 (1009) (*citing* ***State v. Brown***, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

a. <u>The prosecutor properly stated the law of constructive possession in closing argument, and defendant has failed to show prejudice.</u>

If a prosecutor mischaracterizes the law and there is a substantial likelihood the misstatement affected the jury's verdict, the defendant is denied a fair trial. ***State v. Gotcher***, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988). The prosecutor in the present case did not misstate the law on constructive possession, thus did not commit flagrant and ill intentioned misconduct.

"A person actually possesses something that is in his or her physical custody, and constructively possesses something that is not in his or her physical custody but is still within his or her 'dominion or control.'" ***State v. Davis***, 182 Wn.2d 222, 227, 340 P.3d 820 (2014) (*citing* ***State v. Callahan***, 77 Wn.2d 27, 29, 459 P.2d 400 (1969)). A court examines whether, under the totality of the circumstances, the defendant exercised dominion and control. *Id.* at 234. "Showing dominion and control over the premises where the drugs are found is a means by which constructive possession of drugs is often established." ***State v. Spruell***, 57 Wn. App. 383, 387, 788 P.2d 21 (1990) (*citing* ***State v. Partin***, 88 Wn.2d 899, 567 P.2d 1136 (1977)).

The prosecutor began this section of his closing argument by distinguishing between actual and constructive possession. *See* 4RP 466–467. In explaining constructive possession, the prosecutor began: "It's in my dominion and control. That's the other kind of possession. That's called constructive possession." 4RP 467. The prosecutor continued:

> The defendant had actual possession of the gun that he went to the door when the police arrived there. He had constructive possession of it when he didn't have the gun and had control over those premises . . . . *The defendant had been in that apartment on March 12th, in that structure where the gun was, where the drugs were. He was in constructive possession* on that day as well.

4RP 467 (emphasis added). The prosecutor further argued:

> [Defendant] was in constructive possession of each of those items. They were in his room. The defendant resided there. He had mail there. He had documents there. He had his ID badge there. His gun was there, all in that room that he had dominion and control over.

4RP 468. Defendant did not object. 4RP 467–468. He now argues the italicized portion of the argument was improper. Br. of App. p. 19. Considering the totality of the prosecutor's argument, rather than an excerpt from the middle, the prosecutor did not misstate the law of constructive possession.

The prosecutor's statement of the law accurately characterized constructive possession. The prosecutor explained, in the context of the evidence presented, how defendant had dominion and control over both the items at issue and the premises where they were found. Further, the prosecutor argued the totality of the circumstances—defendant's admitted actual possession of the gun, the dominion and control over the bedroom, and the items linking defendant to that bedroom—that could inform the jury's determination of whether defendant was in constructive possession of the gun or the drugs. What defendant claims is a mischaracterization of the law can only be achieved through the isolation of one sentence in the middle of the prosecutor's argument, rather than looking at the argument on constructive possession in its entirety. The prosecutor's statements on the law of constructive possession, taken as a whole, were a proper

characterization of the law and did not constitute flagrant and ill intentioned misconduct.

Further, defendant has failed to show the requisite prejudice. The jury was instructed on the proper legal standard:

> Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.
> Proximity alone without proof of dominion and control is insufficient to establish constructive possession . . . .
> In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstance in the case . . . . No single one of these factors necessarily controls your decision.

CP 60. The jury was further instructed:

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. *You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.*

CP 27 (emphasis added). The jury is presumed to follow the trial court's instructions. ***State v. Hopson***, 113 Wn.2d 273, 287, 778 P.2d 1014 (1989). Therefore, the jury was properly instructed on the law of constructive possession and instructed to disregard any argument by the prosecutor that conflicted with that instruction. Defendant has failed to show the prosecutor committed flagrant and ill intentioned misconduct, and

defendant has failed to show he was prejudiced by the alleged misstatement of the law.

b. The prosecutor's argument in rebuttal closing was improper, but the error was harmless beyond a reasonable doubt because the jury was properly instructed.

Remarks of a prosecutor, even if improper, do not warrant reversal if they were invited by defense counsel and are in reply to his statements, unless the remarks are not a pertinent reply or are sufficiently prejudicial that a curative instruction would be ineffective. ***Russell***, 125 Wn.2d at 86 (*citing* ***State v. Dennison***, 72 Wn.2d 842, 849, 435 P.2d 526 (1967)); ***State v. Dykstra***, 127 Wn. App. 1, 8, 110 P.3d 758 (2005). When a defendant objects to statements by a prosecutor during trial, he must prove the statements were improper and prejudicial to warrant reversal. ***Emery***, 174 Wn.2d at 756.

During rebuttal closing, the following occurred:

> [PROSECUTOR]: Defendant asked you, Well, why didn't the State call the other officers that were there? Well, you could ask the same question of the defendant. Why didn't he call the other officers if they had something different to say?
> [DEFENDANT]: Objection, Your Honor. Burden shifting.
> [PROSECUTOR]: Your Honor, this is not shifting the burden.
> THE COURT: I'm going to sustain the objection.
> [PROSECUTOR]: The defendant tells you, Where is Tera Hill, the defendant's own girlfriend? Where is Tera Hill? Certainly someone that could have been called, but she has nothing to say –

[DEFENDANT] Objection, Your Honor.
THE COURT: What's the basis of the objection?
[DEFENDANT]: Same.
THE COURT: I'm going to sustain the objection.

4RP 496–497. The prosecutor then argued the evidence was sufficient to convict defendant absent those witnesses. *See*, 4RP 497–498. The trial court properly sustained the objections to the improper argument. Defendant did not request any curative instruction. 4RP 496–497.

Defendant has failed to show the requisite prejudice, especially in light of the fact that his objections were sustained. For allegations that the prosecutor shifted the burden of proof, the constitutional harmless error standard is applied. ***State v. Staten***, 60 Wn. App. 163, 174, 802 P.2d 1384 (1991). Any alleged error must be harmless beyond a reasonable doubt. *Id.* In the present case, the prosecutor's improper argument was harmless beyond a reasonable doubt.

First, prior to closing argument, the judge reminded the jury that the State had the burden of proof. 4RP 435. Then, in rebuttal closing argument, the State emphasized, "make no mistake, *I have to prove beyond a reasonable doubt* that these crimes were committed, and that is not a light burden by any means." 4RP 489–490 (emphasis added). Additionally, the jury was properly instructed that the burden in the case belonged to the State alone and the defendant bore no burden. CP 29. Appellate courts presume the jury followed the instructions given. ***State v. Hopson***, 113 Wn.2d at 287. Therefore, the jury instructions on the burden

were reinforced by the prosecutor shortly after the improper argument was made.

In ***State v. Cleveland***, the court found a burden shifting statement of the prosecutor to be harmless error. 58 Wn. App. 634, 794 P.2d 546 (1990). In ***Cleveland***, the prosecutor commented: "[Defendant] was given a chance to present any and all evidence that he felt would help you decide. He has a good defense attorney, and you can bet your bottom dollar that [the defense attorney] would not have overlooked any opportunity to present admissible, helpful evidence to you." *Id.* at 647. Despite this direct comment on defendant's failure to call witnesses, the court found the objectionable argument was harmless beyond a reasonable doubt because the trial court's instructions made clear the burden of proof was on the State. *Id.* at 648. Therefore, the improper argument in the present case is also harmless error because the jury was properly instructed and the State reinforced that instruction.

Defendant asserts that the trial court should have struck the arguments from the record or admonished the jury to disregard the arguments after sustaining defendant's objection. *See*, Br. of App. p. 24. However, defendant did not request the argument be stricken or the jury told to disregard at trial. 4RP 496–497. Defendant has failed to show he was prejudiced by the prosecutor's improper argument.

c. The prosecutor's use of the idiom "belief in your heart of hearts" did not constitute flagrant and ill intentioned misconduct, and defendant has failed to show he was prejudiced.

After emphasizing that the State bore a heavy burden of proof and reading the instruction defining a reasonable doubt to the jury, the prosecutor stated, "If you believe in your heart of hearts that, yes, these elements have been proven," before moving on to argue the evidence. 4RP 490. Defendant did not object to this statement. 4RP 490. "Heart of hearts" is an idiom.[6] Defendant has failed to show how belief in one's heart of hearts is any different than having an "abiding belief" in the truth of the charge, *see* CP 29, an instruction on reasonable doubt that has been upheld numerous times and which defendant does not challenge. *See, e.g.*, ***State v. Pirtle***, 127 Wn.2d 628, 658, 904 P.2d 245 (1995) (finding the State's burden of proof was not misstated in the abiding belief instruction); ***State v. Kinzle***, 181 Wn. App. 774, 784, 326 P.3d 870 *review denied*, 337 P.3d 325 (2014) ("The phrase 'abiding belief in the truth of the charge' merely elaborates on what it means to be 'satisfied beyond a reasonable doubt.'"). In the context of the prosecutor's overall statements on the reasonable doubt standard, and in the absence of defendant articulating how the idiom actually differs from the reasonable doubt

[6] The expression "in my heart of heart" originated in Shakespeare's *Hamlet* and has remained in modern vernacular. WILLIAM SHAKESPEARE, HAMLET, act 3, sc.2.

standard, the short "heart of hearts" statement did not constitute flagrant and ill intentioned misconduct.

Defendant has also failed to show he was prejudiced by the prosecutor's allegedly improper statement. In ***State v. Anderson***, the prosecutor stated that "in order to find the defendant not guilty, you have to say 'I don't believe the defendant is guilty because' and then you have to fill in the blank." 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). This was improper burden shifting that undermined the presumption of innocence. *Id.* However, the court nonetheless found that the trial court's instructions regarding the presumption of innocence minimized any prejudicial effect. *Id.* at 432. The jury is presumed to follow the trial court's instructions. ***State v. Hopson***, 113 Wn.2d at 287. Therefore, the defendant failed to show the requisite prejudice. In the present case, the jury was properly instructed by the trial court on the presumption of innocence and the State's burden of proof. CP 29. During rebuttal closing argument, the State reiterated that it bore the burden of proof and read the reasonable doubt instruction aloud to the jury. 4RP 489–490. Defendant has failed to show any alleged improper statements prejudiced him.

3. AS DEFENDANT KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT TO COUNSEL AND MOVED TO PROCEED PRO SE, AND AS DEFENDANT HAS NO RIGHT TO STANDBY COUNSEL, HE CANNOT SHOW A VIOLATION OF HIS RIGHT TO COUNSEL.

Criminal defendants have a constitutional right to self-representation. U.S. Const. amend. VI; Wash. Const. art. I, § 22. When a defendant moves to go pro se, the court must determine if the request is unequivocal and timely. ***State v. Madsen***, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). The court must then determine if the defendant's request is voluntary, knowingly, and intelligent. *Id.* (*citing* ***Faretta v. California***, 422 U.S. 806, 835, 95 S. Ct. 2525 (1975)). An unequivocal request to proceed pro se is valid even if combined with an alternative request for new counsel. ***State v. Madsen***, 168 Wn.2d 496, 507, 229 P.3d 714 (2010). Once the court has found an unequivocal waiver of counsel and permits self-representation, "the defendant may not later demand the assistance of counsel as a matter of right since reappointment is wholly within the discretion of the trial court." ***DeWeese***, 117 Wn.2d at 376–377. In this case, the court granted defendant's request to go pro se after determining the request was voluntarily, knowing, and intelligent. (10/6/14)RP 15. That ruling is not challenged on appeal.

There is no absolute right to standby counsel. ***State v. DeWeese***, 117 Wn.2d 369, 379, 816 P.2d 1 (1991) (*citing* ***Locks v. Sumner***, 703 F.2d

403, 407 (9th Cir. 1983)). The trial court simply has the authority to appoint standby counsel. ***State v. McDonald***, 143 Wn.2d 506, 511, 22 P.3d 791 (2001) (*citing* ***McKaskle v. Wiggins***, 465 U.S. 168, 177–178, 104 S. Ct. 944 (1984)). It has been suggested that a defendant may claim ineffective assistance of standby counsel, if standby counsel violated a duty or obligation owed to the pro se defendant. ***State v. Pugh***, 153 Wn. App. 569, 579, 222 P.3d 821 (2009) (*citing* ***McDonald***, 143 Wn.2d at 512). In the present case, however, defendant is not claiming "ineffective assistance" of his standby counsel.[7] He is claiming that a right—the right to counsel—that he knowingly and voluntarily *waived* was subsequently violated because the judge did not inquire into the attorney-client relationship with his former attorney who then acted as standby counsel.

Defendant further mischaracterizes the role of the judge in "appointing" standby counsel. First, the judge asked defendant if he wished to have standby counsel. (10/6/14)RP 15. The defendant answered affirmatively. (10/6/14)RP 15. The judge said, "And I'll ask [Department of Assigned Counsel (DAC)] to assign somebody as standby counsel." (10/6/14)RP 15. The prosecutor asked if the court intended to keep the same attorney on as standby. (10/6/14)RP 15. Defendant did not object. (10/6/14)RP 15. In response, the judge made clear: "I don't have any

[7] It should also be noted that standby counsel assisted defendant throughout the trial. Counsel helped with exhibits, defendant asked to confer with counsel on multiple issues, and counsel was present at all stages of the trial. *See, e.g.*, 1RP 95; 2RP 124, 136, 172, 255, 271; 3RP 302, 369, 401, 411.

intent. I just – *it's up to DAC*." (10/6/14)RP 16 (emphasis added). This exchange is inconsistent with defendant's characterization that the judge "appointed the same attorney as [defendant's] standby counsel." Br. of App. p. 27.

Defendant knowingly, intelligently, and voluntarily waived his right to counsel and moved to exercise his constitutional right to represent himself at trial. After a careful colloquy, the judge granted defendant's motion to go pro se. Given that defendant waived his right to counsel, he cannot now contend that his right to counsel was violated because of an alleged conflict with his standby counsel. Defendant has no constitutional right to standby counsel. He did not object to the standby counsel who was appointed to him. He has failed to articulate any basis for a Sixth Amendment violation.

4. DEFENDANT HAS FAILED TO ARTICULATE THE PROPER EIGHTH AMENDMENT CONSTITUTIONAL STANDARD BECAUSE A CATEGORICAL CHALLENGE IS NOT APPROPRIATE; THUS DEFENDANT HAS NOT MET HIS BURDEN OF PROVING RCW 69.50.4013 UNCONSTITUTIONAL BEYOND A REASONABLE DOUBT.

Defendant was convicted of three counts of unlawful possession of a controlled substance. CP 76–78. The controlling statute, in relevant part, states:

> (1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner

> while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

RCW 69.50.4013. The statute does not contain a knowledge or intent element. RCW 69.50.4013. The legislature has the authority to create a crime without a mens rea element. ***State v. Bradshaw***, 152 Wn.2d 528, 532, 98 P.3d 1190 (2004) (*citing* ***State v. Anderson***, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000)); ***State v. Warfield***, 119 Wn. App. 871, 876, 80 P.3d 625 (2003) ("it is undoubtedly within the legislatures prerogative to create strict liability by declaring an offense but writing the mens rea element out of it"). A statute is presumed constitutional, and the party challenging the statute bears the burden of proving it unconstitutional beyond a reasonable doubt. ***State v. Halstien***, 122 Wn.2d 109, 118, 857 P.2d 270 (1993).

The Eighth Amendment provides that "[e]xcessive bail shall not be required . . . nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. A punishment will be deemed "cruel and unusual" when it is grossly disproportional to the crime. ***Graham v. Florida***, 560 U.S. 48, 60, 130 S. Ct. 2011 (2010). There are two ways an appellant can raise a proportionality claim: (1) an appellant can challenge the sentence given all the circumstances in a particular case (the as-applied challenge); or (2) an appellant can challenge an entire class of sentences as unconstitutionally disproportionate given the characteristics of the offender and the nature of the offense (the categorical challenge). ***United States v. Shill***, 740 F.3d 1347, 1355 (9th Cir. 2014) *cert. denied*, 135 S. Ct. 147 (2014) (*citing*

Graham, 560 U.S. at 59–60)). Although it is unclear, defendant in the present case appears to be making a *categorical* challenge to RCW 69.50.4013 for its application to possession of residue without a scienter requirement, rather than challenging the statute as-applied to his particular case. *See*, Br. of. App. p. 31 ("The Eighth Amendment *categorically* prohibits certain punishments;" relying on cases making *categorical* challenges under the Eighth Amendment) (emphasis added). The challenge appears to be limited to his conviction for UPCS (count 10) of heroin. *Id.*

A categorical challenge is not appropriate for the present case. Before ***Graham***, the categorical approach was only used for categorical restrictions on the death penalty. ***Graham***, 560 U.S. 60–61. ***Graham*** applied the categorical approach to a sentence of life imprisonment without the possibility of parole for juveniles convicted of non-homicide crimes. *Id.* at 75. Subsequently, ***Miller v. Alabama*** applied the categorical approach to sentences of life without the possibility of parole for juveniles convicted of homicide crimes. ***Miller v. Alabama*** __ U.S. __, 132 S. Ct. 2455, 2466, 183 L.Ed.2d 407 (2012). ***Miller*** emphasized that the expansion of the categorical approach was appropriate because life without parole for juveniles was "akin" to the death penalty. *Id.* In the present case, defendant is not a juvenile and his 60 month sentence for

unlawful possession of a controlled substance is not "akin" to the death penalty.

The Ninth Circuit has taken a similar approach when confronted with a categorical challenge under the Eighth Amendment. ***Shill***, 740 F.3d at 1357. The court rejected the defendant's categorical challenge to his ten-year sentence by declining to extend ***Graham*** and ***Miller***. *Id.* The court wrote, "Neither ***Graham*** nor ***Miller*** suggest that a ten-year mandatory prison term is the type of sentencing practice that requires categorical rules to ensure constitutional proportionality. [Defendant] is not a juvenile, and his ten-year mandatory minimum is no way akin to the death penalty." *Id.* Therefore, the court refused to apply the categorical approach to the defendant's sentence. *Id.* This court should similarly reject defendant's categorical challenge in the present case because defendant is not a juvenile and his 60 month sentence is not akin to the death penalty. Therefore, ***Graham*** does not apply, and a categorical challenge is inappropriate.

A reviewing court should not rule on constitutional issues unless absolutely necessary to the determination of the case. ***State v. Hall***, 95 Wn.2d 536, 539, 627 P.2d 101 (1981) (*citing* ***Ohnstad v. Tacoma***, 64 Wn.2d 904, 907, 395 P.2d 97 (1964)). In the present case, this court should decline to entertain defendant's constitutional challenge to RCW 69.50.4013. First, defendant has not articulated a proper constitutional

challenge to RCW 69.50.4013 because a *categorical* challenge under the Eighth Amendment is inappropriate and defendant has not attempted to make an as-applied challenge. Second, the Washington Supreme Court has upheld the constitutionality of RCW 69.50.4013 multiple times. *See,* ***Bradshaw***, 152 Wn.2d at 533; ***State v. Cleppe***, 96 Wn.2d 373, 380, 635 P.2d 435 (1981). Finally, defendant has not proved beyond a reasonable doubt that his sentence is grossly disproportionate to his crimes of unlawful possession of a controlled substance given defendant's lengthy criminal history and that the jury found him to be armed with a firearm during the commission of the offenses. Defendant has failed to prove that RCW 69.50.4013 is unconstitutional beyond a reasonable doubt.

5. DEFENDANT'S CHALLENGE TO THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS SHOULD BE REJECTED BECAUSE IT IS NOT RIPE FOR REVIEW, WAS NOT PRESERVED FOR APPEAL, AND FAILS ON ITS MERITS.

There are mandatory court costs and fees, which sentencing courts must impose, including a criminal filing fee, a crime victim assessment fee, and a DNA database fee. RCW 36.18.020(h); RCW 7.68.035; RCW 43.43.7541. Trial courts may also require a defendant to pay costs associated with bringing a case to trial, such as recoupment for Department of Assigned Counsel pursuant to RCW 10.01.160. There are two limitations in the statute to protect defendants:

> (3) The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.
> (4) A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs . . .

RCW 10.01.160. In this case, defendant fails to distinguish between the mandatory and discretionary legal financial obligations (LFOs) imposed. *See*, Br. of App. p. 41.[8] The only discretionary LFO imposed in this case was $500 for Department of Assigned Counsel recoupment; all other LFOs imposed were mandated by statute, and the judge did not have the authority to ignore the legislature's mandate. CP 105.

a. This court should decline to review the issue of legal financial obligations because the issue is not ripe for review until the State attempts enforcement.

Challenges to orders establishing LFOs are not ripe for review until the State attempts to curtail a defendant's liberty by enforcing them. ***State v. Lundy***, 176 Wn. App. 96, 108, 308 P.3d 755 (2013). *See also,* ***State v. Smits***, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009) ("the time to examine a defendant's ability to pay is when the government seeks to collect the obligation"). In the present case, there is nothing in the

[8] Defendant attempts to mislead the court that because LFOs may only be imposed upon a convicted offender, RCW 9.94A.760(1), his acquittal on two felony charges should have impacted the LFOs ordered. Br. of App. p. 43. This argument completely ignores that defendant was, in fact, convicted of six felonies, therefore is a "convicted offender" within the meaning of RCW 9.94A.760(1).

record showing that the State has attempted to enforce the LFOs. Therefore, the issue is not yet ripe for review, and this court should decline to review it.

b. This court should decline to review the issue of legal financial obligations because the issue was not properly preserved for appeal.

Failure to object precludes raising an issue on appeal. ***State v. Guloy***, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). A defendant may only appeal a non-constitutional issue on the same grounds that he objected on below. ***State v. Thetford***, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); ***State v. Hettich***, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993). Objecting to an issue promotes judicial efficiency by giving the trial court an opportunity to fix any potential errors, thereby avoiding unnecessary appeals. *See* ***State v. Lindsey***, 177 Wn. App. 233, 247, 311 P.3d 61 (2013).

Defendant had an opportunity to object to the LFOs imposed and provide the trial court with any information of his circumstances that would make payment inappropriate during his sentencing hearing. *See*, (Sentencing)RP 13. Although defendant asked the court to modify the LFOs recommended by the State, defendant failed to object to the LFOs during the sentencing hearing. (Sentencing)RP 13. Defendant failed to properly preserve the issue at the trial level.

The appellate court may grant discretionary review for three issues raised for the first time on appeal: (1) lack of trial court jurisdiction, (2)

failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. RAP 2.5(a). *See also,* ***State v. Riley***, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993); ***State v. Sisouvanh***, 175 Wn.2d 607, 618, 290 P.3d 942 (2012). To fall under the exceptions provided in RAP 2.5(a), defendant would need to claim there was a manifest error—requiring actual prejudice—affecting a constitutional right. *See,* ***State v. Lynn***, 67 Wn. App. 339, 345, 835 P.2d 251 (1992); ***State v. Gordon***, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). Only if a defendant proves an error that is both constitutional and manifest does the burden shift to the State to show harmless error. ***State v. McFarland***, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Defendant has failed to provide any evidence of prejudice required for a manifest constitutional error, so this court should decline to exercise its discretionary RAP 2.5(a) review.

Defendant relies on ***State v. Blazina*** to support the proposition that this court should exercise its powers under RAP 2.5(a) and reach the merits of the case despite the failure to preserve the issue below. __ Wn.2d __, 344 P.3d 680 (2015); Br. of App. p. 43. Although the Supreme Court did exercise its RAP 2.5(a) discretion to reach the merits in that case, the Court specifically held that "the Court of Appeals did not err in declining to reach the merits." ***Blazina***, 344 P.3d at 681. The Court further stated, "Each appellate court must make its own decision to accept discretionary review. National and local cries for reform of broken LFO

systems demand that *this court* exercise its RAP 2.5(a) discretion and reach the merits of this case." *Id.* at 683 (emphasis added).

As this state's highest court, the Supreme Court is in a unique position which necessitated that it address the LFO concerns. The Court made it clear that other appellate courts are not obligated to exercise their discretion in the same way, and this court should decline to exercise such discretion where defendant has failed to present an argument for why, in this specific case, justice demands this court exercise its power of discretionary review under RAP 2.5(a).

c. The trial court properly exercised its discretion in imposing legal financial obligations, as evidenced by the judge waiving one fine and reducing the other.

Even if the court were to reach the issue, the imposition of LFOs should be affirmed because there is sufficient evidence in the record that the trial court considered defendant's ability to pay. Although formal findings of fact about a defendant's present or future ability to pay LFOs are not required, the record must be sufficient for the appellate court to review the trial court judge's decision under the clearly erroneous standard. ***State v. Bertrand***, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1914, 287 P.3d 10 (2012). RCW 10.01.160(3) requires the record reflect an individualized inquiry by the judge into the defendant's current and future ability to pay before the imposition of LFOs. ***State v. Blazina***, __ Wn.2d __, 344 P.3d 680, 685 (2015).

The question of whether LFOs were properly imposed is controlled by the clearly erroneous standard. ***Lundy***, 176 Wn. App. at 105. A decision by the trial court "is presumed to be correct and should be sustained absent an affirmative showing of error." ***State v. Wade***, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). The party presenting an issue for review has the burden of proof. RAP 9.2(b); ***Sisouvanh***, 175 Wn.2d at 619. If the appellant fails to meet this burden, the trial decision stands. ***State v. Tracy***, 128 Wn. App. 388, 294-95, 115 P.3d 381 (2005) *aff'd*, 158 Wn.2d 683, 147 P.3d 559 (2006). Therefore, the defendant has the burden of showing the trial court judge improperly exercised her discretion by showing an affirmative error.

A review of the record in the present case shows the trial court considered defendant's ability to pay the LFOs when she imposed them. Defense counsel asked the court to waive the $1,500 DAC recoupment and $1,000 statutory fine under the controlled substance act requested by the State. (Sentencing)RP 13. RCW 10.01.160; RCW 69.50.430. Defense counsel explained defendant's financial position, "You know, while [defendant] was a bit braggadocious about his success as a drug dealer, I would note that he has been adjudged to be indigent and that there were no substantial amounts of money seized at the time of the search, at least none that were preserved as evidence." (Sentencing)RP 13. After hearing this, the judge ruled: "[defense counsel] asked about waiving the

thousand-dollar drug find, and I would waive that, and I would reduce the DAC recoupment to $500." (Sentencing)RP 17. The fact that the judge took into consideration defense counsel's argument about defendant's current financial situation and reduced the State's recommendation for LFOs by $2,000 does not support defendant's contention that the judge abused her discretion by imposing the $500 discretionary DAC recoupment. Defendant has failed to show the trial court judge acted in a clearly erroneous manner or abused her discretion.

D. CONCLUSION.

First, there was sufficient evidence for the jury to reasonably find defendant guilty of felony harassment and find the defendant was armed with a firearm when he committed the crimes of unlawful possession of controlled substances. Second, although one of the prosecutor's statements was improper, the trial court sustained defendant's objection. The other two challenged arguments were not objected to below and are not improper. Further, the defendant has failed to show that he was prejudiced by any of the statements because the jury was properly instructed. Third, defendant knowingly, intelligently, and voluntarily waived his right to counsel and cannot subsequently allege his right to counsel has been violated because of an alleged conflict with his standby counsel. Fourth, defendant has failed to prove RCW 69.50.4013 is unconstitutional beyond a reasonable doubt because an Eighth Amendment *categorical* challenge

is not appropriate, and defendant has not articulated an as-applied challenge. Finally, defendant's challenge to the imposition of discretionary legal financial obligations is not ripe, was not preserved for appeal, and fails on its merits because the judge considered his financial position.

There is however an error in defendant's sentence which should be corrected on remand, as the trial court did not comply with RCW 9.94A.701(9).

The State respectfully requests defendant's convictions be affirmed.

DATED: June 30, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Jordan McCrite
Rule 9 Legal Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6-30-15
Date Signature

PIERCE COUNTY PROSECUTOR

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- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Respondent's
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

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