

NO. 48523-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN JOSEPH HAMEL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00987-5

BRIEF OF RESPONDENT

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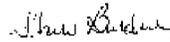
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court acted within its discretion in excluding evidence under ER 608(b) that was not germane to the issues on trial, that was remote in time, and in any event would not have affected the outcome where two civilian witnesses also saw Hamel kick Berntsen?

2. Whether the prosecutor properly argued to the jurors that they knew in their gut that Hamel was guilty?

3. Whether the Washington Supreme Court has explicitly mandated the use of the reasonable doubt instruction given in this case?

4. Whether the sentencing condition that Hamel undergo a substance abuse evaluation should be stricken? [CONCESSION OF ERROR]

5. Whether the trial court properly found that the Arizona offense of leaving the scene of an injury accident was comparable to the Washington offense where “registration number” and “vehicle license number” both clearly refer to the license plate number?

6. Whether Hamel’s claim regarding appellate costs is moot where the State will not be seeking costs?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Benjamin Joseph Hamel was charged by information filed in

Kitsap County Superior Court with third-degree assault. CP 10. The jury found him guilty as charged. CP 34.

B. FACTS

Spencer Berntsen, who had been a Bremerton Police Officer since 1996, was dispatched to the Rite-Aid on Kitsap Way, where an individual was threatening customers. RP 48-49. He arrived about five minutes later and saw Hamel walking with another man in front of the Rite-Aid. RP 50. Although Hamel fit the description of the reported person, Berntsen continued to the drug store, so he could make certain he was contacting the correct person. RP 50-51.

After contacting the person who reported the incident, Berntsen proceeded to the parking lot that Hamel was walking toward. RP 52. As Hamel and his companion approached, Berntsen said, "Gentlemen, I need to talk to you." RP 52. Hamel, who appeared agitated and upset, responded, "Gentlemen, who?" RP 52. Hamel kept walking, and as he went by, Berntsen grabbed his arm and told him he was not free to leave. RP 52.

Hamel was not under arrest; Berntsen was trying to investigate the incident in the Rite-Aid. RP 55. Because of Hamel's demeanor, Berntsen wanted to pat Hamel down for safety reasons, and attempted to escort Hamel to his car. RP 54. Hamel told him to let go or he would "go off

on” Berntsen. RP 54.

Berntsen was able to get Hamel to the trunk of the car, though Hamel struggled the entire time. RP 56. Hamel had his back against the trunk and was facing Berntsen. RP 56. He repeatedly told Hamel to put his hands on the trunk so he could frisk him for safety. RP 56.

Hamel pushed off the trunk and pushed Berntsen backwards. RP 57. Berntsen drew his taser and pointed it Hamel, hoping the threat would get Hamel to comply. RP 57. Hamel responded that if he was going to tase him he would already have done so. RP 57. His bluff having been called, Berntsen reholstered his taser and called for backup. RP 57, 59.

Berntsen then put a hold on Hamel and pulled him to the ground, trying to cuff him, which Hamel continued to resist. RP 58. Repeated attempts to handcuff him were unsuccessful, and Berntsen ultimately decided to disengage and wait for backup. RP 59. He stood up and instructed Hamel repeatedly to stay on the ground. RP 60.

Hamel briefly complied, but then began to get up. RP 60. Berntsen attempted to get on top of him, but Hamel said, “Let’s do this,” and began kicking him. RP 60-61. He made contact several times, below his groin, and between his knees and waist. RP 61. He was not injured. RP 61. Berntsen was able to get on top of Hamel and tried to tase him, but the taser did not work. RP 61-62. Hamel asked if it was working. RP 62.

Berntsen was able to remove the cartridge and directly tase Hamel. RP 62, 74. Officer Corey arrived shortly thereafter and handcuffed Hamel. RP 63.

In addition to Berntsen's testimony, the jury also heard from three bystanders. Matthew Pebley was riding down Kitsap Way when he saw the struggle. RP 81. It seemed odd to him, so he pulled into the lot and parked his motorcycle in front of the police car. RP 81. He walked to within ten feet of them, where other bystanders were watching. RP 82. They were standing near the car, and the officer had the man by his arm, and he was struggling. RP 83. The officer kept telling him to stop. RP 84. The man tried to bolt and the officer ended up taking him to the ground. RP 84.

After putting him on the ground, the officer stepped back out of reach. RP 84. The officer was not doing anything at that point. RP 85. Then Hamel stated, "it's on now" or words to that effect. RP 85. He also called the officer a faggot and started kicking at his legs. RP 86. Some of the kicks made contact. RP 87. The officer commanded him to stop several times and then pulled his taser. RP 87. The first time with the darts did not work. RP 88. Then he tased him directly. RP 88.

Hamel was very defiant and angry the whole time. RP 88. The officer's demeanor was calm. RP 88. Another officer arrived shortly after

the second tasing. RP 88. Pebley did not know either the officer or Hamel. RP 89.

Kenneth Maples was also driving down Kitsap Way when he saw the shoving match. RP 93. Because the officer appeared to be alone, Maples pulled into the parking lot. RP 94. He got out and stood near his vehicle, about 20 to 50 feet from the officer. RP 94-95. Shortly after he arrived, Maples called 911 to request backup for the officer. RP 97.

The officer was trying to get the man to turn around to face the trunk, but he kept turning back around. The officer drew his taser and then reholstered it. RP 96. Ultimately, the officer put the man on the ground. RP 96.

Maples could not see the man's legs when he was on the ground. RP 97-98. Eventually he was tased and cuffed. RP 96. Hamel was very loud and aggressive during the incident. RP 98. The officer was amazingly calm. RP 98. He could not hear the officer say anything during the incident. RP 99. Maples did not know the officer or Hamel, either. RP 99.

Michael Nelson was at work at the Verizon store facing the parking lot. RP 107. He looked outside and saw someone fighting with a police officer, and then calm down. RP 107. The officer spoke into his radio. RP 108. Then the man lunged at the officer. RP 108. He was not

sure if it was an attack or an attempt to get away. RP 108.

They went to the ground, and then it was calm for a short while. RP 108. Then the man started kicking the officer. RP 108. It looked like they made contact. RP 110. The officer got on top of him and tased him twice. RP 108. Then the second officer arrived. RP 110.

Nelson was inside his store the whole time and could not hear anything. RP 111. The officer did not appear to be overaggressive. RP 111. The man was definitely being more aggressive than the officer. RP 111. Nelson did not know Hamel or Berntsen. RP 110-11.

Nelson recorded the incident on his phone. RP 112. He was not able to start recording until the man was already on the ground. RP 112. Because, as Nelson explained, he accidentally turned his phone for a moment, he did not capture Hamel kicking the officer:

A. ... And then this is where he starts kicking the officer, and that's when he gets on top of him.

Q. So when you pan to the right, that's when the kicking occurred?

A. Yeah. When I panned to the right, because I was watching it. For some reason -- I'm not sure -- I just panned to the right. And then, when I saw him kicking the officer, that's when I took the phone back, so it was delayed.

Q. So the kicking isn't actually captured on this video?

A. It is not, no.

RP 115-16.

The State's final witness, Bremerton Officer Joseph Corey , was patrolling about 10 minutes away when the initial call came. RP 125. While he was on his way to the area, he heard Berntsen report that he was fighting. RP 125. Corey activated his lights and siren and arrived in about five minutes. RP 125. Berntsen was on the ground on top of Hamel when he arrived. RP 125-26. Corey immediately ran to Hamel and cuffed him. RP 127. The Rite-Aid employee was brought to the scene and identified Hamel as the person who had been causing the disturbance there. RP 127.

The defense presented no evidence.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE UNDER ER 608(B) THAT WAS NOT GERMANE TO THE ISSUES ON TRIAL, THAT WAS REMOTE IN TIME, AND IN ANY EVENT WOULD NOT HAVE AFFECTED THE OUTCOME WHERE TWO CIVILIAN WITNESSES ALSO SAW HAMEL KICK BERNTSEN.

Hamel argues that his confrontation rights were violated when the trial court excluded evidence that seven years earlier the victim, Berntsen, was suspended for 30 days for lying to his former supervisor. In that incident, he had exercised leniency and not arrested a driver for driving with a suspended license, despite instruction from his supervisor to do so. He had then given an inaccurate account of what occurred to the

supervisor, resulting in the disciplinary action. *See* CP 6. There does not appear to have been any other substantiated incident of untruthfulness by Berntsen in the 20 years he has been a member of the Bremerton Police Department. This claim is without merit because the prior incident was germane to the issues, and was remote in time. Moreover, any error would be harmless where two civilian witnesses verified that Hamel kicked Berntsen.

1. A trial court does not abuse its discretion in excluding evidence under ER 608(b) that is not relevant to veracity or germane to the issues on trial.

On appeal, this Court reviews a trial court's ruling on a motion in limine for abuse of discretion. *State v. O'Connor*, 155 Wn.2d 335, 351, 119 P.3d 806 (2005). Therefore, the Court will reverse "only if no reasonable person would have decided the matter as the trial court did." *O'Connor*, 155 Wn.2d at 351; *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).

A person accused of a crime has a constitutional right to confront his or her accuser. U.S. Const. amend. VI; U.S. Const. amend. XIV; Const. art. 1, § 22; *Darden*, 145 Wn.2d at 620. The primary and most important component is the right to conduct a meaningful cross-examination of adverse witnesses. *State v. Foster*, 135 Wn.2d 441, 456, 957 P.2d 712 (1998).

Nevertheless, the right to confront a witness through cross-examination is not absolute. *Darden*, 145 Wn.2d at 620. The trial court still maintains discretion to control the scope of cross-examination and may reject lines of questions that only remotely tend to show bias or prejudice, or where the evidence is vague or merely speculative or argumentative. *State v. Kilgore*, 107 Wn. App. 160, 185, 26 P.3d 308 (2001), *aff'd*, 147 Wn.2d 288 (2002). And, a court's evidentiary determinations are limited by general considerations of relevance. *Darden*, 145 Wn.2d at 621; see ER 401, 403. There is no right, constitutional or otherwise, to have irrelevant evidence admitted. *Darden*, 145 Wn.2d at 624. Even if the evidence is relevant, a defendant's right to introduce relevant evidence must also be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the trial. *Darden*, 145 Wn.2d at 621.

Under ER 608(b), a party may introduce "[s]pecific instances of the conduct of a witness," other than conviction of a crime, and only "for the purpose of attacking or supporting the witness' credibility...." The conduct may not be proved by extrinsic evidence. ER 608(b). The proponent may, however, cross-examine the witness about the conduct if the inquiry is probative of the witness's character for truthfulness or untruthfulness, and the court exercises its discretion to allow the

questioning. ER 608(b).

It is well-established in Washington that “not every instance of a witness’s (even a key witness’s) misconduct is probative of a witness’s truthfulness or untruthfulness under ER 608(b).” *O’Connor*, 155 Wn.2d at 350. “Specific instances of lying may be admitted whether sworn or unsworn, but their admission is *highly discretionary* under ER 608(b).” *State v. Kunze*, 97 Wn. App. 832, 859, 988 P.2d 977 (1999) (emphasis added). “In exercising its discretion, the trial court may consider whether the instance of misconduct is relevant to the witness’s veracity on the stand and whether it is germane or relevant to the issues presented at trial.” *O’Connor*, 155 Wn.2d at 349. The materiality of the misconduct may also diminish with the passage of time. *State v. Wilson*, 60 Wn. App. 887, 893, 808 P.2d 754 (1991) (instances of misconduct “must be probative of truthfulness and not remote in time”).

2. *The evidence here was not germane to the issues on appeal.*

As the Supreme Court noted in *O’Connor*, in addition to being probative of truthfulness, for evidence to be admitted under ER 608(b), it must also be germane to the issues at trial. Here, Hamel presumably wished to argue that Berntsen’s recollection of being kicked by him was inaccurate or fabricated. However, a single incident where Berntsen lied to his boss after granting *leniency* to a driver in no way suggests that

Berntsen would fabricate evidence of a crime. As such, under both ER 608(b) and ER 403, the did not abuse its discretion in concluding that he evidence was not germane to the issues at trial, and even if minimally probative of Berntsen's veracity, was more prejudicial than probative.

3. *The evidence was remote in time.*

The incident was also remote in time. This single incident in Berntsen's 20 years on the force occurred seven years before trial. It was therefore of questionable relevance to the issue of Berntsen's veracity.

4. *Any error would be harmless where two other civilian witnesses also saw Hamel kick Berntsen.*

An error under ER 608 is harmless unless, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Ferguson*, 100 Wn.2d 131, 137, 667 P.2d 68 (1983). An alleged violation of the confrontation clause is subject to the constitutional harmless error standard. "The correct inquiry is whether, assuming that the damaging potential of the cross examination were fully realized, [the Court] can nevertheless say that the error was 'harmless beyond a reasonable doubt.'" *State v. Farnsworth*, ___ Wn.2d ___, 2016 WL 3546034, *13 (Jun. 23, 2016) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct 1431, 89 L. Ed. 2d 674 (1986)) (alteration added).

First of all, the State did not stress Berntsen's credibility per se.

Indeed, it acknowledged that as a victim, the jury might expect him to be biased. RP 151, 153. The State's only argument regarding Berntsen's credibility was that he did not exaggerate number of kicks or the degree of injury. RP 151-52. The State instead primarily relied on the testimony of the other witnesses. RP 153-55.

Then, in closing, Hamel conceded that he had made contact with Berntsen:

And what I observed, what I think – what you observed when you watched the video is, Mr. Hamel kind of going back on his back, and his legs do come up because the officer is coming in kind of a defensive position. His legs do come up. It's highly likely that his legs did make contact with the lower body of the officer.

And maybe the officer interpreted that as a kick, especially if it was accompanied by Mr. Hamel saying things like, "Let's do this," or "It's on now." Certainly the officer would have reason to believe that that statement, accompanied by his legs coming up like this, is part of a defensive position. He was attempting to kick.

But you did hear from Michael Nelson that, "I did see him in that one second to two seconds where I panned camera to the right before I came back, it looked like he did kick at him a couple of times during that time frame."

What I suggest happened is that the officer, who's had enough of Mr. Hamel, kind of comes at him at an angle and Mr. Hamel's legs come up, and he moves his legs forward. But it doesn't appear as if it really had any impact on his legs or, if it did, it was incidental. So for those reasons, I'm suggesting that no assault occurred under what the law is.

RP 160. Hamel's primary argument was thus that he had no intent to assault:

So Instruction No. 8 -- and I'll go over it again; Ms. Franklin did -- assault is an intentional touching or striking. So it has to be on purpose. It can't be sort of incidental contact. You hold up your legs defensively and the person sort of runs into them. It has to be an intentional striking.

I would suggest, if there was an assault, given the small amount of time it would have had to have taken place in and the fact that the officer is rushing towards him, the State can't prove beyond a reasonable doubt that that was intentional contact on the part of Mr. Hamel.

RP 161.

Hamel clearly recognized that he was in a difficult position in that even if the jury thought Berntsen was untruthful, at least two other witnesses saw Hamel kick him. Those witnesses did not know each other, the victim, or Hamel.

Additionally, Hamel's contention that the accounts of the three civilian witnesses was inconsistent is not supported by any fair reading of their testimony. In his argument, Hamel does not identify these "serious discrepancies," or where the witnesses' testimony "conflicted significantly." *See* Brief of Appellant at 8 n.3, 9. In his footnote he cites to RP 80-92 and 93-105. The former citation is to the entirety of Pebley's testimony, and the latter is to the direct and cross, but not the redirect, of Maples's. Hamel does not reference Nelson's testimony, so presumably he is acknowledging that Nelson fully corroborated Berntsen's testimony that Hamel kicked him. And Nelson did so testify. RP 108, 115-16.

Further, contrary to Hamel’s claim, the testimony of all four witnesses was remarkably consistent with regard to the essential events:¹

Event	Berntsen	Pebley	Maples	Nelson
Berntsen had Hamel’s arm, and he was resisting	RP 55-56, 67	“struggle” RP 83	“shoving match” RP 93	“fighting” RP 107
Berntsen drew his taser but did not use it	RP 56-57	_____	RP 96	_____
Berntsen called for backup on his mic	RP 58-59	_____	RP 98	RP 108, 109
Hamel struggled or bolted, was taken to the ground	RP 58	RP 84	RP 96	RP 108, 109
Hamel calmed and Berntsen stepped back	RP 59	RP 84	_____	RP 108, 117
Hamel made a “let’s fight” type of comment	RP 60-61	RP 85	_____	could not hear anything from inside the store RP 111
Hamel kicked Berntsen	RP 60, 61	RP 86	could not see Hamel’s legs RP 97-98, 102-03 ²	RP 108, 110
First tase not work	RP 61	RP 88	_____	_____
Tase subdued Hamel	RP 62	RP 88	RP 96	RP 110
Second officer arrived shortly after	RP 63	RP 88	_____	RP 116

¹ The blank cells indicate no testimony on the subject, not inconsistency.

² Note that at 20-50 feet away, Maples was the furthest from the altercation. RP 94-95.

Event	Berntsen	Pebley	Maples	Nelson
Hamel was very agitated; Berntsen was calm considering the circumstances	RP 74	RP 88	RP 98	RP 111

As can be seen, all four witnesses were in virtually complete agreement as to every step of the confrontation. The only “discrepancies” are either things the witnesses did not mention at all, or which are easily explainable by the witness’s vantage point.

The State’s case was quite strong, and uncontradicted. Even if the trial court should have allowed the impeachment, any error would clearly have been harmless beyond a reasonable doubt. This claim should be rejected.

B. THE PROSECUTOR DID NOT COMMIT MISCONDUCT WHEN SHE ARGUED TO THE JURORS THAT THEY KNEW IN THEIR GUT THAT HAMEL WAS GUILTY.

Hamel next claims that that the prosecutor committed misconduct in her closing argument by arguing that they knew in their gut that Hamel was guilty. Hamel did not object to the comment at trial. This comment was not improper in context, and even if it were Hamel fails to meet his burden of showing enduring prejudice where the jury was properly instructed on reasonable doubt, and where, indeed, the comment immediately followed the prosecutor’s quotation of that instruction.

To establish prosecutorial misconduct, a defendant must prove that the prosecutor's conduct was improper and that this improper conduct prejudiced his right to a fair trial. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). If the defendant failed to object to the prosecutor's alleged misconduct at trial, a reversal is warranted only if this Court finds that the misconduct was so flagrant and ill-intentioned that it caused an "enduring and resulting prejudice" incurable by a jury instruction. *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

This standard requires the defendant to establish that (1) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict," and (2) no curative instruction would have obviated the prejudicial effect on the jury. *State v. Thorgerson*, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011). The focus of this inquiry is more on whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remark. *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

In addition, this Court reviews a prosecutor's allegedly improper comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *Russell*, 125 Wn.2d at 85-86; *Dhaliwal*, 150 Wn.2d at 578. In determining whether prosecutorial misconduct occurred, the Court first evaluates

whether the prosecuting attorney's comments were improper. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

Hamel argues that the prosecutor's brief reference to the jurors' gut belief "minimiz[ed] and mischaracterize[ed] the state's burden of proof." Brief of Appellant at 10. The record does not support this contention. Rather, the record shows that the State properly and repeatedly cited to the reasonable doubt standard in closing argument.

In closing argument the State's overall argument was that the victim's testimony was credible because the key portions of his testimony were corroborated by the independent witnesses and that the evidence, when taken together, constituted proof beyond a reasonable doubt. Specifically, the State began its closing by going through the to-convict jury instruction and the assault definitional instruction, tying these instructions to the evidence. RP 147-51. The prosecutor then discussed the instruction on credibility and how the evidence showed that the witnesses were credible. RP 151-55. She then summed up her initial closing argument by highlighting the State's burden:

So from the State's perspective, all of these elements have been proven beyond a reasonable doubt. Now, the State has the opportunity -- because I have the burden of proof in this case on behalf of the State, I will have the opportunity to address you in closing remarks two times.

RP 155.

In her rebuttal argument the prosecutor serially addressed a number of contentions Hamel had raised. RP 163-66. She then made the statement to which Hamel now objects. In his brief,³ however, Hamel omits the sentence that immediately preceded the one of which he complains:

You have your instruction on beyond a reasonable doubt, and *that's an abiding belief in the truth of the charge*. That's Instruction No. 3. In your gut, do you believe that a crime was committed.

RP 166 (emphasis supplied).

In *State v. Curtiss*, 161 Wn. App. 673, 702, 250 P.3d 496 (2011), under similar circumstances, this Court concluded that the State's remarks urging the jury to "trust its gut" and references to the jury's heart—to which there was no objection—were not improper misconduct. *Curtiss*, 161 Wn. App. at 702. The Court further held that, in any event, Curtiss had not shown prejudice because the jury had been instructed to reach a decision "based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict." *Curtiss*, 161 Wn. App. at 702. Finally, the Court held that Curtiss failed to show that the alleged errors to which she had not objected could not have been cured by an additional instruction.

³ Brief of Appellant at 10.

Curtiss, 161 Wn. App. at 702.

This same reasoning applies here, because, as in *Curtiss*, there was no objection by defense counsel and the jury was properly instructed. This single brief comment above came directly on the heels of a verbatim quote of the reasonable doubt instruction. The jury was given an instruction that accurately reflected the State's burden of proof. CP 22. As in *Curtiss*, the trial court instructed the jury to reach its decision based on facts and law and not on sympathy, prejudice, or personal preference. CP 20. This Court presumes the jury followed these instructions. *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009).

Consequently, even if the prosecutor's remarks were improper, Hamel cannot demonstrate enduring prejudice resulting from this brief comment. Nor has Hamel made any appreciable showing that the alleged prejudice could not have been cured by an additional instruction. The trial court could have cured any misunderstanding the jury may have had as it pertains to the proper standard, which was accurately defined in the instructions they received. Hamel had thus failed to preserve his prosecutorial misconduct argument, and it should be denied.

C. THE WASHINGTON SUPREME COURT HAS EXPLICITLY MANDATED THE USE OF THE REASONABLE DOUBT INSTRUCTION GIVEN IN THIS CASE.

Hamel next claims that the trial court's reasonable doubt instruction was improper. However, the Washington Supreme Court has held that WPIC 4.01 is mandatory. Since the instruction given at trial followed WPIC 4.01 verbatim, this Court lacks authority to consider the present claim.

WPIC 4.01 provides:

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Instruction 3 in this case provided:

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt

exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 22.

In *State v. Bennett*, 161 Wn. 2d 303, 317-18, 165 P.3d 1241 (2007), the Supreme Court mandated the use of WPIC 4.01 in all criminal trials:

Even if many variations of the definition of reasonable doubt meet minimal due process requirements, the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction. We therefore exercise our inherent supervisory power to instruct Washington trial courts not to use the Castle instruction. We have approved WPIC 4.01 and conclude that sound judicial practice requires that this instruction be given until a better instruction is approved. Trial courts are instructed to use the WPIC 4.01 instruction to inform the jury of the government's burden to prove every element of the charged crime beyond a reasonable doubt.

This Court "is bound to follow precedent established by [Washington's Supreme Court.]" *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 590, 146 P.3d 423 (2006). Because the Supreme Court has mandated

the use of the instruction in question, this Court may not find error in the trial court following the Supreme Court's explicit mandate.

Moreover, even it could, Hamel fails to show error. He contends that the phrase "If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt" encouraged the jury to undertake an impermissible search for the truth. But our Supreme Court has expressly affirmed the use of this language. *Bennett*, 161 Wn.2d at 318; *see also State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

Further, Hamel's reliance on *State v. Emery*, where the prosecutor in closing told the jury both that their "verdict should speak the truth" and to "speak the truth by holding these men accountable for what they did" is also misplaced. As this Court has explained:

Fedorov lastly challenges the court's reasonable doubt instruction. He claims it was error to instruct the jury that "[i]f, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." Fedorov argues, "The 'belief in the truth' language encourages the jury to undertake an impermissible search for the truth." Br. of Appellant at 22.

We disagree. *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007), and *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995), control. Fedorov relies on *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012), to challenge the "abiding belief" language. He claims this language is similar to the impermissible "speak the truth" remarks made by the State during closing. *Emery*, 174 Wn.2d at 751. Emery found the "speak the truth" argument improper

because it misstated the jury’s role. Here, read in context, the “belief in the truth” phrase accurately informs the jury its “job is to determine whether the State has proved the charged offenses beyond a reasonable doubt.” *Emery*, 174 Wn.2d at 760, 278 P.3d 653. The reasonable doubt instruction accurately stated the law.

State v. Fedorov, 181 Wn. App. 187, 199-200, 324 P.3d 784 (2014), *review denied*, 181 Wn. 2d 1009 (2014); *accord State v. Kinzle*, 181 Wn. App. 774, 784, 326 P.3d 870 (2014), *review denied*, 337 P.3d 325 (2014) (“We reject Kinzle’s argument that the optional language impermissibly suggests that the jury’s job is to “search” for the truth. The phrase “abiding belief in the truth of the charge” merely elaborates on what it means to be “satisfied beyond a reasonable doubt.”).

This Court is bound by Supreme Court precedent. Even if it were not, Hamel’s claim would be without merit.

D. THE SENTENCING CONDITION THAT HAMEL UNDERGO A SUBSTANCE ABUSE EVALUATION SHOULD BE STRICKEN [CONCESSION OF ERROR].

Hamel next claims that the condition of his community custody that he undergo substance abuse evaluation was not crime-related and should be stricken. The State concedes error.

RCW 9.94A.505(9) permits a trial court to impose “crime-related prohibitions” as conditions of a sentence. The term “crime related prohibition” is defined in RCW 9.94A.030. Under that section, no causal

link need be established between the prohibition imposed and the crime committed, so long as the condition relates to the circumstances of the crime. *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). Sentencing conditions, including crime-related prohibitions, are reviewed for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 36–37, 846 P.2d 1365 (1993).

Additionally, RCW 9.94A.703(3) permits courts to impose certain discretionary conditions as part of any term of community custody, including requiring the defendant to:

- (c) Participate in crime-related treatment or counseling services;
- (d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community;

However, such conditions must be related to the crime. *State v. Munoz-Rivera*, 190 Wn. App. 870, 893, 361 P.3d 182 (2015); *see also State v. Jones*, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003).

The State made no argument below regarding this condition and the trial court made no findings. Hamel’s behavior was peculiar and certainly could have been the result of substance abuse. However, there was no evidence presented to substantiate that theory. The State therefore concedes that this condition should be stricken on remand.

E. THE TRIAL COURT PROPERLY FOUND THAT THE ARIZONA OFFENSE OF LEAVING THE SCENE OF AN INJURY ACCIDENT WAS COMPARABLE TO THE WASHINGTON OFFENSE WHERE “REGISTRATION NUMBER” AND “VEHICLE LICENSE NUMBER” BOTH CLEARLY REFER TO THE LICENSE PLATE NUMBER.

Hamel next claims that his Arizona conviction for leaving the scene of a serious injury accident⁴ was not comparable to the similar Washington offense. This claim is without merit because the Arizona term “registration number of the vehicle” and the Washington term “vehicle license number” clearly refer to the same thing: the license plate number.

Washington courts employ a two-part test to determine the comparability of a foreign offense. *State v. Thieffault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007); *In re Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005); *State v. Olsen*, 180 Wn.2d 468, 472, 325 P.3d 187, *cert. denied*, 135 S. Ct. 287 (2014). First, the Court determines whether the foreign offense is legally comparable – “that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense.” *Thieffault*, 160 Wn.2d at 415. Second, if the foreign offense elements are broader than Washington’s elements, precluding

⁴ See CP 139 et seq.

legal comparability, the Court determines “whether the offense is factually comparable – that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute.” *Thiefault*, 160 Wn.2d at 415. “In making its factual comparison the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt.” *Thiefault*, 160 Wn.2d at 415.

As Hamel notes, RCW 46.52.020(3) requires provision of the driver’s “name, address, insurance company, insurance policy number, and vehicle license number.” Ariz. Rev. Stat. § 28-663(A)(1) requires the provision of the “driver’s name and address and the registration number of the vehicle the driver is driving.”

Hamel complains that the Arizona offense is broader, and therefore not legally comparable, because he could have been convicted of failure to provide his vehicle registration number. The flaw in Hamel’s argument is that under Arizona law, it is clear that the term “registration number” is the number that appears on the license plate. It is thus identical to the Washington term “vehicle license number.”

The Arizona Revised Statutes do not directly define the term “vehicle registration number.” Nor does there appear to be any case law that defines the term, either. However, a search of the statutes shows that there are only a few sections that use the term in conjunction with

vehicles. These sections make it quite clear that the term refers to the license plate number. For example, Ariz. Rev. Stat. § 28-2483(B) provides:

The registration numbers and license plates assigned to classic cars shall be manufactured from Arizona copper and shall run in separate numerical series commencing with “classic car no. 1”. The license plates shall be of a distinguishing color but different from the color selected for license plates issued under § 28-2482 or 28-2484. The director may allow a request for classic car special plates to be combined with a request for personalized special plates. If the director allows such a combination, the request shall be in a form prescribed by the director and is subject to the fees for the personalized special plates in addition to the fees required for the classic car special plates.

Similarly, Ariz. Rev. Stat. § 28-2482(B) stipulates:

The registration numbers and license plates assigned to horseless carriages shall be manufactured from Arizona copper and shall run in separate numerical series beginning with “horseless carriage no. 1”. The license plates shall be of a distinguishing color.

These provisions certainly indicate that the registration number and the license plate bear the same number.

Ariz. Rev. Stat. § 28-2484(B) makes this even clearer:

The registration numbers and special license plates assigned to the historic vehicles *shall be manufactured from Arizona copper and shall run in separate unique numerical series*. The license plates shall be of a distinguishing color but different from the color selected for license plates issued under § 28-2482 or 28-2483.

(Emphasis supplied). Clearly the “numbers” and the “plates” are a single unit. Finally, Ariz. Rev. Stat. § 28-2411(B) makes this conclusion even

more clear:

A person who complies with subsection A may apply for personalized street rod vehicle special plates by indicating on the application the letters, numbers or combination of letters and numbers requested as a registration number. The department shall determine the number of positions allowed on the personalized street rod vehicle special plates. The personalized street rod vehicle special plates shall not conflict with existing plates and shall not duplicate registration numbers. The department may refuse to issue or may suspend, cancel or revoke any combination of letters or numbers or any combination of letters and numbers that carries connotations that are offensive to good taste and decency, any combination that is misleading or any combination that duplicates other plates.

(Emphasis supplied). The statute refers to requesting the “registration number” for a personalized plate. It likewise prohibits a special plate from duplicating “registration numbers.”⁵

Clearly, the registration number is the numbers and letters appearing on the license plate. So is the “vehicle license number” referenced in the Washington statute. These statutes are directly legally comparable. The trial court did not err in including the Arizona offense in Hamel’s offender score.

F. THE STATE WILL NOT BE SEEKING APPELLATE COSTS.

Hamel next argues that appellate costs should not be awarded. Given the current state of the law, the State will not be seeking appellate

⁵ Cf. RCW 46.18.275 (“Personalized license plates.”).

costs.

IV. CONCLUSION

For the foregoing reasons, Hamel's conviction and sentence should be affirmed, and the matter remanded for the striking of the condition requiring substance abuse evaluation.

DATED July 5, 2016.

Respectfully submitted,

TINA R. ROBINSON
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RS', with a long horizontal line extending to the right.

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July 05, 2016 - 8:02 AM

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