

No. 95194-2

No. 49184-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN CHACON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Gary R. Tabor, Judge
Cause No. 16-1-00266-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether, given the lack of evidence to support third degree assault, the trial court correctly refused to instruct the jury on an inferior degree of second degree assault.

2. Whether the prosecutor committed misconduct during closing argument by either minimizing the State's burden of proof or disparaging defense counsel.

3. Whether omitting a sentence from the reasonable doubt jury instruction, to which the defendant did not object, resulted in reversible error.

4. Whether the court should award appellate costs to the State should it substantially prevail on appeal.

B. STATEMENT OF THE CASE.

1. Substantive facts.

The Olympia Center in Olympia, Washington, is a private nonprofit organization. RP 61-62, 88. Space in the building is rented, and these rooms are not open to the public. RP 66. This includes a Senior Center. RP 62-63, 87.¹ The Senior Center is available only to persons over the age of 55 who are members, or the guests of members. RP 67, 88. It offers classes and activities for its members. RP 88-87. There is a lobby associated with the Senior Center where people gather to "hang out" and it is a responsibility of the organization to make that a safe place for

¹ All references to the Verbatim Report of Proceedings are to the four-volume transcript dated March 16, Jun2 27, 28, 29, and July 14, 2016.

seniors. RP 88. The clientele is mostly in the 70- to 80-year-old range and includes those with developmental disabilities and physical limitations. RP 89.

On February 16, 2016, Timothy Henshell, a security guard at the Olympia Center, found a person smoking marijuana in the second floor restroom. The person refused to leave upon request, and had to be escorted out of the building with the assistance of the police. RP 64. Chacon inserted himself into the situation and insisted the person had the right to smoke in the building. RP 64. After giving his opinion, Chacon walked away in the direction of the Senior Center. RP 65. Later in the same day, Henshell was summoned to the Senior Center by Chris Quimby, the Director of the Senior Center. RP 67, 86. Quimby had noticed Chacon sitting by the coffee bar in the Senior Center and observed that he appeared to be under the age of 55. Quimby spoke to Chacon, who was wearing headphones and at first ignored Quimby. RP 91-92. He falsely claimed to be the guest of a member, and when being asked to leave, he said, "I'll do whatever I want." RP 92-93.

Henshell contacted Chacon, who said he was 35 years old, and when told he could not be in the Senior Center because of his age, Chacon responded, "If you don't get the fuck away from me

I'm going to take you outside and beat the fuck out of you." RP 68. The police were called, and it was decided that a formal trespass notice would be issued to Chacon. RP 69. When law enforcement arrived, Olympia Police Officer Duane Hinrichs informed Chacon that a trespass order was being issued. Chacon walked out of the building and down the street. RP 193-94. Hinrichs later contacted him a few blocks from the Olympia Center and tried to serve him with a copy of the trespass order, but Chacon refused to sign or accept it. RP 174,196. He was orally told that he could not return to the Center, and he responded, "I'll see you tomorrow." RP 174, 196-97.

The following day, February 17, 2016, a custodial employee of the Olympia Center, Danny Morrison, saw Chacon walking down the stairs. He drew Morrison's attention because he repeatedly looked over his shoulder, acting as if he knew he wasn't supposed to be there. RP 116-18. Morrison was aware that Chacon had been trespassed from the building, and he told Chacon if he didn't leave somebody would likely call the police. Chacon ignored him. RP 119. Morrison notified Ina Fennell, an employee at the front desk, and the police were called. RP 121.

Officer Hinrichs responded to the call, accompanied by officers Jeffrey Davis and Douglas Curtright. RP 198. When they arrived Chacon was sitting at a table, drinking a cup of coffee, in an area used by elderly people. RP 199, 254-55. Because Chacon had been argumentative the previous day, and Hinrichs expected resistance, Chacon was immediately placed under arrest for criminal trespass and handcuffed while he was still seated. RP 199, 204, 278. Because of his large size, two sets of handcuffs were used to make them more comfortable for him. RP 204-05. Chacon stood up, after repeated commands, and with Hinrichs on one side and Davis on the other, they began walking toward the door. RP 205-06, 379.

After a few steps, Chacon went limp and dropped to the floor. RP 205, 256, 380. When told to stand up, Chacon replied, "Fuck you, drag me," RP 381, or "Just drag me." RP 206. After he refused multiple requests to stand up, the officers rolled him over, set him on his buttocks facing backward, and dragged him across the linoleum floor to the front doors of the building. RP 207, 257, 381-82. At the door, they encountered a mat on the floor which stopped their momentum. Chacon laid down and rolled partway over. RP 382-83. This time, when asked to stand up, Chacon did

and they walked out to a patrol car which was parked just west of the doors to the building. RP 208, 258, 383.

Chacon was placed against the side of the car and searched, his pockets emptied. RP 210, 384. He was blocking the rear car door so that the officers could not open it to put him inside. RP 210, 384. He braced himself against the door and, after being asked many times to move, said, "Fuck you, I'm not moving." RP 385. Chacon is large enough that the officers could not easily move him. Davis pushed on his shoulders in an effort to move him aside, RP 211, and then used his knee to strike Chacon on his right thigh, hoping to deaden the muscles and incapacitate him sufficiently that they could move him. RP 386-87. It was completely ineffective. RP 388. Davis planned to try again, but before he could do so Chacon shifted his weight toward Davis and struck at the inside of Davis's right knee with his right leg. RP 388-89. Davis heard a sickening popping sound and intense and immediate pain. His right leg no longer supported him and he had to hold onto the car door, which had finally been opened, to keep from falling over. RP 389-90. His knee cap was moved from its normal position and his leg was locked at a 90-degree angle. RP 393-396.

Surprised that Davis has let go of Chacon, and not understanding what had happened, Hinrichs instructed Curtright to help him and they immediately took Chacon to the ground. RP 212-13. Hinrichs testified at trial that Davis was standing on the outside of the open car door, hands on top of the door frame, wide-eyed and speechless. RP 213. Chacon was flailing around on the ground and rubbing his head and face on the pavement. RP 214, 266, 393. Hinrichs put a hand under Chacon's chin and grabbed the hair on the side of his head, holding Chacon's head off the ground. RP 214. Curtright laid across Chacon's back to help control him and Hinrich notified dispatch they had a fighter and that he was trying to injure himself. RP 214, 263.

Meanwhile, Davis felt his kneecap pop back into place and he could put light pressure on the leg but he could not bend it. RP 394, 396. Realizing that Hinrichs and Curtright needed help, and since there were no other officers yet at the scene, Davis grabbed Chacon's legs, unsuccessfully trying to control them. Chacon kicked Davis in the legs several times before Davis laid a baton across Chacon's legs to trap them to the ground, holding the baton in place with his own left leg. RP 268, 394-96. Finally Davis

tapped Curtright on the shoulder and asked Curtright to take his position, saying that he couldn't do it anymore. RP 268-69.

While the struggle was going on Sgt. Jeff Herbig arrived with additional officers, and Davis maneuvered away from the scene. RP 396. When the backup officers arrived, Chacon said he was done fighting and they were able to get him into the jail van. RP 216, 240, 269.

Davis suffered a dislocated kneecap. RP 428. He went first to the emergency room, where he was given a straight-leg fixed brace, and two days later saw an orthopedic surgeon. RP 398. The knee took several weeks to heal, and during that time Davis was assigned to light duty at the station. He was not cleared for full duty until May 25, 2016. RP 358, 397-99, 405.

2. Procedural facts.

Chacon was initially charged with one count of third degree assault on February 23, 2016. CP 4. A first amended information filed on February 29, 2016, charged second degree assault and first degree criminal trespass. CP 5. On the first day of trial, a second amended information was filed, charging the same offenses but correcting the dates. CP 9; RP 36.

There were no pretrial motions; trial began on June 27, 2016, and concluded on June 29. The jury found Chacon guilty on both counts. CP 38, 39. He was sentenced on July 14, 2016, to a total of 18.5 months in confinement. CP 41, 44.

C. ARGUMENT.

1. The court correctly refused to instruct the jury on a lesser included or inferior degree of second degree assault because there was no evidence presented at trial to support a lesser charge.

The jury was instructed as to the charged offense of second degree assault. CP 32-34. Chacon assigns error to the refusal of the trial court to instruct the jury as to the inferior degree offense of third degree assault. Appellant's Opening Brief at 7. He bases this claim on the theory that the evidence supported a finding by the jury that Chacon kicked Officer Davis,² but that the actual injury to the officer resulted from Davis striking Chacon with his knee in an effort to disable him long enough to get him into the police car. Id.

The State does not dispute a defendant's right to a lesser included instruction when the law and the facts of the case permit. Amendments V, VI, and XIV of the federal constitution require the trial court to give a requested instruction when the lesser included

² At trial, Chacon's counsel argued that there was no evidence at all that Chacon kicked Davis. RP 553-58.

offense is supported by the evidence. Vujosevic v. Rafferty, 844 F.2d 1023 (1988). This right protects a defendant who might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because it wishes to avoid setting him free. Keeble v. United States, 412 U.S. 205, 212-13, 36 L. Ed. 2d 844, 93 S. Ct. 1993 (1973).

Chacon sought an instruction for third degree assault, which is an inferior degree of second degree assault. RCW 10.61.003 provides:

Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

Inferior degree crimes are often lumped together with lesser included offenses, which are defined in RCW 10.61.006:

In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged in the indictment or information.

See also State v. Bowerman, 115 Wn.2d 794, 805, 802 P.2d 116 (1990). This right applies when (1) each element of the lesser offense is a necessary element of the crime charged, and (2) the evidence supports an inference that only the lesser included crime

was committed. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997). This two-prong test reflects consideration for the specific constitutional rights of the defendant, particularly his right to know the charges against him and to present a full defense. Peterson, 133 Wn.2d at 889. An inference that only the lesser offense was committed is justified “[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.” State v. Fernandez-Medina, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000) (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)). See also State v. Daniels, 58 Wn. App. 646, 651, 784 P.2d 579, *review denied*, 114 Wn.2d 1015 (1990) (“Even under this statute [RCW 10.61.003], and under RCW 10.61.010, a defendant may only be convicted of a lesser degree when there is evidence that the lesser crime *alone* has been committed.” (Emphasis in original.))

The party requesting the lesser included instruction must point to evidence that affirmatively supports the instruction and may not rely on the possibility that the jury will disbelieve the opposing party’s evidence. Fernandez-Medina, 141 Wn.2d at 456; State v. Lereimia, 78 Wn. App. 746, 755, 899 P.2d 16 (1995).

A trial court's refusal to give a lesser included offense instruction is reviewed for abuse of discretion when the decision is based upon the facts of the case. State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds*, State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997). Here the court based its decision on the lack of evidence to support the lesser offense. RP 488. When there is evidence to support the defendant's guilt solely on the lesser charge, the trial court's refusal to instruct on the lesser charge compromises a defendant's ability to present his theory to the jury and can constitute reversible error. State v. Jones, 95 Wn.2d 616, 628 P.2d 472 (1981). Failure to instruct on a lesser included offense is not a manifest error affecting a constitutional right. State v. Scott, 110 Wn.2d 682, 688 n.5, 757 P.2d 492 (1988).

"[T]he terms 'lesser included offense' and 'inferior degree offense' have often been used interchangeably." State v. Tamalini, 134 Wn.2d 725, 731, 953 P.2d 450 (1998), citing to a number of cases. Chacon relies heavily on State v. Parker, 102 Wn.2d 161, 683 P.2d 189 (1984), which cites to State v. Young, 22 Wash. 273, 276-77, 60 P. 650 (1900). The language taken from Young is as follows:

Inasmuch, then, as the law gives the defendant the unqualified right to have the inferior degree passed upon by the jury, it is not within the province of the court to say that the defendant was not prejudiced by the refusal of the court to submit that phase of the case to the jury, or to speculate upon probable results in the absence of such instructions. If there is even the slightest evidence that the defendant may have committed the degree of the offense inferior to and included in the one charged, the law of such inferior degree ought to be given.

Parker, 102 Wn.2d at 163-64; Young, 22 Wash. 276-77.

Parker then goes on to say that it adheres to the test set forth in State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978), which includes a two-prong test for deciding whether a lesser included offense instruction is required. Those prongs are (1) that each element of the lesser offense must necessarily be an element of the charged offense, and (2) that the evidence must support an inference that the lesser crime was committed. Parker, 102 Wn.2d at 164. In Parker, the issue before the court was a lesser included offense, not an inferior degree. Id. at 162.

In Peterson, 133 Wn.2d at 886, the defendant had been charged with first degree assault. During trial the State was allowed to amend the charge to second degree assault, over Peterson's objection. Id. at 888. The Court of Appeals reversed on timeliness grounds, Id. The Supreme Court, which reversed the

Court of Appeals, did agree with the lower court that second degree assault was not a lesser included offense of first degree assault because one could commit first degree assault without committing second degree assault. Id. at 891. It also held, relying on State v. Foster, 91 Wn.2d 466, 589 P.2d 789 (1979), that the amendment was permissible because second degree assault is an inferior degree of assault in the first degree. Peterson, 133 Wn.2d at 892. In Chacon's case, therefore, the issue is an inferior degree instruction, not a lesser included.

This distinction matters because the analysis is different between lesser included and inferior degree instructions, but only as to the legal component. Fernandez-Medina, 141 Wn.2d at 454-55.. The factual component of the Workman test applies to both lesser included and inferior degree offenses. Id. at 455.

Necessarily, then, the factual test includes a requirement that there be a factual showing more particularized than that required for other jury instructions. Specifically, we have held that the evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense.

Fernandez-Medina, 141 Wn.2d at 455, emphasis in original.

The reviewing court must consider the evidence in the light most favorable to the party requesting the inferior degree jury

instruction. Id. at 455-56. The inferior degree instruction should be given “if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.” Id. at 456, (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997), which in turn cited Beck v. Alabama, 447 U.S. 625, 635, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980)). There must be evidence that “affirmatively establish[es]” that the inferior degree offense was committed. A defendant cannot simply claim that the jury may disbelieve the evidence which supports the greater degree offense. Fernandez-Medina, 141 Wn.2d at 456.

The court in Tamalini, formulated the analysis as follows:

[A] defendant is entitled to an instruction on an inferior degree offense when (1) the statutes for both the charged offense and the proposed inferior degree offense “proscribe but one offense” . . . ; (2) the information charges an offense which is divided into degrees, and the proposed offense is an inferior degree of the charged offense . . . ; and (3) there is evidence that the defendant committed only the inferior offense

Tamalini, 134 Wn.2d at 732 (internal cites omitted).

In Chacon’s case, there is no evidence whatsoever that he committed only third degree assault, much less sufficient evidence to permit a rational jury to find him not guilty of second degree assault but guilty of third degree. The evidence he cites is the

testimony of the doctor that Davis's leg strike could have resulted in the dislocation of his knee, the short distance between Chacon and Davis, and the fact that the officer holding onto his arm did not notice the kick. Appellant's Opening Brief at 10.

Dr. Hamblin testified on cross-examination that it was possible for the kneecap to have been dislocated if Davis had hit something with the corner of his kneecap rather than straight on. RP 441, 447. She also testified that it would take a great deal of force to dislocate a kneecap. RP 454-55. A theoretical possibility that something could have happened does not constitute evidence that it did happen. The actual evidence was that it did not happen that way.

Dr. Hamblin also testified that a person would notice a dislocated kneecap right away. RP 441. It would prevent the person from either straightening the leg or bending it further. It locks the knee in place. RP 449. Davis testified that he delivered the knee strike without effect. RP 386, 388. As he was readying himself to try again, Chacon struck Davis's knee with his right leg. RP 388-89. The pain was immediate and intense. RP 389. His knee was locked at a 90 degree angle and he had to hold onto the car door to keep from falling over. RP 390, 392.

Office Hinrichs testified that Chacon was between him and Davis. RP 209. He knew that Davis was pushing on Chacon only because Chacon's head and upper body moved toward him. RP 232. Hinrichs did not see Chacon kick Davis, RP 236, but he did not see Davis's knee strike to Chacon either, which Chacon argues was the cause of the injury. RP 237.

Officer Curtright was behind Hinrichs, Chacon, and Davis. RP 259. He did not see Davis's knee strike to Chaco, RP 285, nor did he see Chacon kick Davis. RP 290, 300.

The evidence, then, of Davis's knee strike to Chacon and Chacon kicking Davis came only from Davis. The scene described by all three officers is one of a chaotic struggle taking place in a very small area over a short period of time, with a large defendant situated between Davis and Hinrichs. Davis said he was kicked by Chacon and he immediately felt pain. RP 389. Nobody said that Davis's knee strike to Chacon was the cause of his dislocated knee. Chacon is essentially arguing that because the doctor said it was a theoretical possibility that a knee strike could dislocate a kneecap, the jury might disbelieve Davis. That is not enough to entitle him to an instruction on an inferior degree offense. Fernandez-Medina, 141 Wn.2d at 456. Chacon does point to the

narrow space—12 to 18 inches—between Davis and Chacon, arguing that this was insufficient room for him to withdraw his leg and kick Davis. However, there was no evidence whatsoever about the distance necessary for an effective kick or knee strike to take place. Presumably the same distance separated them when Davis made his knee strike, and Davis testified that Chacon used the same sort of knee strike on him. RP 389. If there was sufficient room for Davis to dislocate his knee by striking Chacon, there was enough room for Chacon to dislocate Davis's knee by kicking Davis or striking him with his knee.

In sum, taking the evidence in the light most favorable to Chacon, there is nothing to support even an inference that he committed third degree assault but not second degree assault. The trial court correctly refused to instruct the jury on the inferior degree offense.

2. The prosecutor did not commit misconduct during closing argument by either minimizing the State's burden of proof or disparaging defense counsel.

Chacon complains that the prosecutor committed misconduct in two respects during closing argument. He did not object in either instance.

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). “Any allegedly improper statements should be viewed within the context of the prosecutor’s entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.” Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a “substantial likelihood the instances of misconduct affected the jury’s verdict.” Id. A defendant’s failure to object to improper arguments constitutes a waiver unless the statements are “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” Id. “Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.” Jones v. Hogan, 56 Wash. 2d 23, 27, 351 P.2d 153 (1960). The absence of an objection by defense counsel “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Rebuttal argument is treated slightly differently than the initial closing argument. Even if improper, a prosecutor's remarks are not grounds for reversal when invited or provoked by defense counsel unless they were not a pertinent reply or were so prejudicial that a curative instruction would be ineffective. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). "Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request." Id., at 85.

As a general rule, remarks of the prosecutor, including such as would otherwise be improper, are not grounds for reversal where they are invited, provoked, or occasioned by defense counsel and where [the comments] are in reply to or retaliation for [defense counsel's] acts and statements, unless such remarks go beyond a pertinent reply and bring before the jury extraneous matters not in the record, or are so prejudicial that an instruction would not cure them.

State v. La Porte, 58 Wn.2d 816, 822, 365 P.2d 24 (1961).

While it is true that a prosecutor must act in a manner worthy of his office, a prosecutor is an advocate and entitled to make a fair response to a defense counsel's arguments. Russell, 125 Wn.2d at 87. See also State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005). A prosecutor has a duty to advocate the State's case against an individual. State v. James, 104 Wn. App. 25, 34, 15 P.3d

1041 (2000). It is not error for the prosecutor to argue that the evidence does not support the defense theory. State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990).

a. The prosecutor's argument that if the jury believed Chacon was guilty then the State had met its burden of proof was not a misstatement of the law.

Chacon challenges the portion of the prosecutor's closing argument in which she said, in context:

So reasonable doubt. We talked a little bit in voir dire about what reasonable doubt is. The Court's instructed you now on it, essentially twice, once in voir dire, just now, and there was some discussion about what that means. It's not beyond a shadow of a doubt, not beyond any or all doubt, because that's not possible. . . .

RP 512-13.

If you have an abiding belief in the truth of the charge, that's what we mean by reasonable doubt, an abiding belief. A long-lasting, a long-term belief. I believe it in 20 minutes after I have made the decision. Tomorrow morning when I wake up, if I've come to a verdict I still believe the same verdict. Next week, I still believe. If you believe that he did it, you believe it today, you believe it tomorrow, you believe it next week, next month, next year, you have a long-lasting belief.

RP 513.

And sometimes we'll hear from folks, well, I believe he did it, I really believe he did it, but you didn't prove it to me. And I would submit to you I did. If you believe he did it, then I did prove it to you because remember, you came in here in terms of the evidence from this

case, you came in here as a blank slate. You didn't know anything else. The only information you got in this case came from the witness stand, came from the exhibits. The only way you can say to yourself when you walk out, I really believe he did it, is if you have been given that information and you have formed that belief based on that information. You don't get to that point if it hasn't been proved to you beyond a reasonable doubt. So please, hold the State to the burden of proof that you are instructed on and not a higher level or a greater level of proof.

RP 514.

Chacon seems to argue that when the prosecutor told the jury that if it believed he "did it," she was referring to something less than all of the elements of the crimes. Appellant's Opening Brief at 12-13. That simply mischaracterizes the prosecutor's argument. She merely said that if the jury believed Chacon "did it," i.e., committed the crimes on which the jury was instructed, the State had met its burden of proof. There is nothing in the argument to lead to the conclusion that the prosecutor was arguing that even if Chacon did not cause the injury to Davis it would be satisfied beyond a reasonable doubt.

The prosecutor in State v. Thorgerson, 172 Wn.2d 438, 258 P.3d 43 (2011), made a similar argument. That prosecutor argued that if the jury believed the victim it must find Thorgerson guilty "unless there is a reason to doubt her based on the evidence in the

case.” Id. at 454. The prosecutor also said that the jury could not say they believed her but still acquit the defendant. Id. The Supreme Court held this not to be misconduct. Id.

Even if the prosecutor’s argument here had been improper, however, Chacon does not explain why a curative instruction would have been ineffective. It is extremely unlikely that the jury could have believed that he kicked Davis but did not dislocate Davis’s knee, or that he somehow reasonably believed that a trespass order was not in effect the day following its issuance. But even if that were the case, there is no reason a timely objection from the defense and an instruction from the court could not have clarified the burden of proof. Dhaliwal, 150 Wn.2d at 578. To establish prejudice, Chacon must show a substantial likelihood that the claimed misconduct affected the jury verdict. Thorgerson, 172 Wn.2d at 442-43. That can at best be characterized as a faint possibility, not a substantial likelihood. There was no prejudice to Chacon even if the prosecutor’s argument was incorrect, which it was not.

b. The prosecutor did not disparage defense counsel. Criticizing defense counsel's argument is not the same as disparaging counsel.

Chacon claims that the prosecutor disparaged defense counsel when she said in rebuttal argument:

Folks, there is no question he knew he was not supposed to be there. And all of that other stuff with the ceramic coffee cup and the poor gal behind the counter who didn't tell him to leave, that is white noise, ladies and gentlemen. Listen, listen, listen, buzz, buzz, buzz, buzz. Don't pay attention to the facts and the legal instructions that you have been given. It's not the coffee gal's job to tell him to go. In fact, the coffee gal's job is to give people coffee.

.....

So this idea that he's got this privilege to stay there and drink his coffee even though he's been trespassed is ludicrous because he's paid his 50 cents for coffee.

RP 576-77. Chacon did not object.

During the defense closing argument, counsel had argued the following (narrating a video as it played).

This is the coffee shop. Over here on your right John is walking into the coffee shop. They call it a lounge, they call it a coffee shop, he's coming in here. He walks up to the counter. He puts money down on the counter. The person behind the counter—there's his money. The person behind the counter then goes to the coffee machine, grabs a ceramic cup, fills it with coffee, brings it over to John, takes his money, gives

him the coffee. He walks over and he sits, puts his bag down, sits in the chair at a table in the coffee shop and drinks his coffee.

RP 545.

When John walked in, did you see anyone stop him? When he walked in and he put his money down on the counter, did this person say I'm not taking your money, you're not a senior, I can't serve you? I would submit when he put his money down and he was given a coffee in a ceramic cup, not a to-go cup, this is a cup specifically designed to be drank (sic) at the site. They had to-go cups. In fact, it was testified that they had to-go cups. They gave him a ceramic cup, he gave his money, they took his money and gave him the ceramic coffee (sic) and he sat down. That, ladies and gentlemen, is his privilege. That, ladies and gentlemen, is his license.

You are a consumer. You engage in a single license when you give money and you're given service or a product back. That's what happened here. No one said you need to leave. He walked in, bought a coffee and sat down. There's no notice saying he can't do that. Show me. Show me a legal document, show us a legal document that says he's not supposed to be there.

RP 546-47.

The closing argument of the prosecutor is reviewed in the "context of the total argument; the issues in the case, the evidence addressed in the argument, and the jury instructions." State v. Jones, 144 Wn. App. 284, 290, 183 P.3d 307 (2008). Even if the remarks constitute misconduct, they are nor grounds for reversal if they were "invited or provoked by defense counsel and are in reply

to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” State v. Weber, 159 Wn.2d 252, 276-77, 149 P.3d 646 (2006); see also, Jones, 144 Wn. App. at 300; State v. Lindsey, 180 Wn.2d 423, 442, 326 P.3d 125 (2014). Prejudice will be found where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” Dhaliwal, 150 Wn.2d at 578 (quoting Pirtle, 127 Wn.2d at 672).

A prosecutor is prohibited from impugning the role or integrity of defense counsel. Lindsey, 180 Wn.2d at 431-32. Pointing out that the matters defense counsel is arguing are irrelevant does neither. In Lindsey, the court cited to some examples of remarks that would not alone be reversible—“We’re going to have like a sixth grader [argument]”; “[W]e’re into silly.” Id. at 432. It also referred to remarks from other cases which were reversible error.

In Negrete³, for example, the prosecutor said that defense counsel was “being paid to twist the words of the witnesses.” 72 Wn. App. at 66. In State v. Gonzales, the prosecutor impermissibly contrasted the roles of prosecutor and defense counsel, stating that while the defense attorney’s duty was to his criminal client, the prosecutor’s duty was “to see that

³ State v. Negrete, 72 Wn. App. 62, 863 P.2d 137 (1993), review denied, 123 Wn.2d 1030, 877 P.2d 695 (1994).

justice is served.” 111 Wn. A... 276, 283, 45 P.3d 205 (2002). And in *Bruno*⁴, “the obvious import of the prosecutor’s comments was that *all* defense counsel in criminal cases are retained solely to lie and distort the facts and camouflage the truth.” 72 F.2d at 1194.

Lindsey, 180 Wn.2d at 433 (emphasis in original).

A prosecutor has the right to point out to the jury the fallacies of the defense theory of the case. State v. Osman, 192 Wn. App. 355, 367, 366 P.3d 956 (2016). She has “wide latitude” to comment on evidence admitted at trial and to draw reasonable inferences from that evidence. Id. Here the prosecutor did not misrepresent the defense argument, which would be misconduct. State v. Thierry, 190 Wn. App. 680, 694, 360 P.3d 940 (2015), *review denied*, 185 Wn.2d 1015, 368 P.3d 171 (2016) (“The tactic of misrepresenting defense counsel’s argument in rebuttal, effectively creating a straw man easily destroyed in the minds of the jury, does not comport with the prosecutor’s duty to ‘seek convictions based only on probative evidence and sound reason.’” (Quoting State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991))).

Even if the prosecutor’s comments had been improper, Chacon did not object and cannot show prejudice. Although he is

⁴ Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983).

fond of the phrase “draw a cloak of righteousness,” Appellant’s Opening Brief at 15, 17, this melodramatic characterization does not even remotely apply to the prosecutor’s statements in this case. In State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008), the prosecutor described the defense counsel’s argument as a “classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing.” Id. at 29. Warren did not object, and the Supreme Court held that the comments were not so flagrant and ill-intentioned that they could not have been cured with an instruction. Further, Warren did not show prejudice. Id. at 30.

The court also found misconduct in Thorgerson where the prosecutor had called defense tactics “sleight of hand,” “bogus,” and “desperation.” 172 Wn.2d at 450, 452. “The prosecutor’s disparaging remarks essentially told the jury to disregard what the prosecutor believed was irrelevant evidence.” Id. at 452. Even so, the court found that prejudice was unlikely and that a curative instruction would have been effective. Id.

In Chacon’s trial, the prosecutor essentially told the jury that a portion of the defense argument centered around irrelevant evidence, but in less inflammatory words than the prosecutor used

in Thorgerson. While Chacon argues that the evidence against him was not overwhelming, Appellant's Opening Brief at 16, it actually was. The State presented a solid case and the defense argued nothing but speculation. There was no misconduct and no prejudice.

3. Failure to give WPIC 4.01 verbatim was error. However, Chacon does not identify any practical and identifiable consequences from the instruction given and therefore there is no manifest constitutional injustice that can be raised for the first time on appeal. Even if the court considers it, the error was harmless.

Chacon asks this court to reverse his convictions because the reasonable doubt instruction given by the trial court was not taken verbatim from WPIC 4.01. It omitted one sentence.

WPIC 4.01 reads:

[The] [Each] defendant has entered a plea of not guilty. That puts in issue every element of [the] [each] crime charged. The [State] [City] [County] is the plaintiff and has the burden of proving every element of [the] [each] 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.]

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01 (4th ed. 2016).

The State proposed WPIC 4.01 verbatim, including the bracketed sentence in the third paragraph. Supp. CP _____. The instruction the court actually gave omitted the final sentence of the first paragraph. The record lacks any discussion about that instruction, and presumably this was an oversight on the part of the court. Chacon excepted to the court's refusal to instruct the jury on the inferior degree crime of third degree assault, but he did not object to the reasonable doubt instruction as given by the court. RP 484-494.

Jury instructions are reviewed de novo, and considered in the context of the instructions as a whole. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007); State v. Castillo, 150 Wn. App. 466, 469, 208 P.3d 1201 (2009).

The failure of a trial court to use WPIC 4.01 to instruct the jury on burden of proof and reasonable doubt is error. State v.

Lundy, 162 Wn. App. 865, 871, 256 P.3d 466 (2011). In Bennett, the Supreme Court exercised its supervisory power to instruct trial courts to use WPIC 4.01 “until a better instruction is approved.” 161 Wn.2d at 318. In Bennett, however, the issue was the definition of “beyond a reasonable doubt,” particularly the “abiding belief” language, not which party bears the burden of proof. And even though the Bennett court disapproved the instruction given in that case, it nevertheless affirmed. Id. at 318. A failure to use WPIC 4.01 verbatim is not, therefore, always reversible error.⁵ It is subject to a constitutional harmless error analysis because the Supreme Court’s directive to use WPIC 4.01 was an exercise of its supervisory powers to enact procedural rules rather than an invocation of its constitutional error-correcting authority. Lundy, 162 Wn. App. at 872.

There is a split of opinion in the Court of Appeals; Division I, in Castillo, reversed, in part because the reasonable doubt instruction omitted the sentence at issue in Chacon’s case, stating that the defendant has no burden of proving reasonable doubt exists. Castillo, 150 Wn. App. at 473. The court did so because

⁵ The instruction used in that case did include the sentence “The defendant has no burden of proving that a reasonable doubt exists.” Bennett, 161 Wn.2d at 309.

“[t]he absence of this wording is significant *in this case* because the prosecutor’s cross-examination and closing argument suggested Castillo needed to explain why R.G. might be lying.” *Id.* (emphasis added). The instruction given in the Castillo case, however, also included a lengthy paragraph explaining reasonable doubt that was drafted by the trial judge and was very different from WPIC 4.01. Castillo, 150 Wn. App. at 470-71. The Court of Appeals found that it could be confusing. *Id.* at 474. That instruction was very different from the instruction given in Chacon’s trial. Division II, in Lundy, expressly declined to follow Castillo, and found the instruction used in Lundy’s trial to be harmless error. Lundy, 162 Wn. App. at 872-73.⁶

In Chacon’s trial, there was nothing in the State’s questioning of any witness, nor in the closing argument, that even hinted that Chacon had any obligation to prove or disprove anything. The concern that the court had in Castillo is not present in this case. And Chacon does not show that the error in the instruction given actually affected his rights at trial. State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). He argues only that the “instruction left open the possibility that Mr. Chacon

⁶ The instruction given in Lundy did include the sentence “The defendant has no burden of proving that a reasonable doubt exists. Lundy, 162 Wn. App. at 871.

had the burden of raising a reasonable doubt.” Appellant’s Opening Brief at 21.

Jury instructions must define reasonable doubt and clearly communicate that the State carries the burden of proof. Bennett, 161 Wn.2d at 307. Instructing the jury in a manner that relieves the State of its burden to prove every element of an offense beyond a reasonable doubt violates due process and requires automatic reversal. Id. But not every omission or misstatement in a jury instruction relieves the State of its burden. State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). The question, then is whether omitting from WPIC 4.01 the sentence “The defendant has no burden of proving that a reasonable doubt exists” relieves the State of its burden to prove every element of an offense beyond a reasonable doubt by allowing the jury to infer that Chacon had a burden of establishing enough doubt to acquit.

The United States Supreme Court has approved a reasonable doubt instruction that does not include the sentence at issue here. Victor v. Nebraska, 511 U.S. 1, 7, 18, 22-23, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994). In that case, the issue was whether the definition of reasonable doubt lowered the State’s burden of proof, Id. at 22-23, and the Victor court did not decide

whether the statement that the defendant has no burden to prove reasonable doubt is required for the jury to understand the correct allocation of the burden of proof.

However, even without the omitted sentence, the jury instruction stated unequivocally that the State has the burden to prove each and every element of the crime beyond a reasonable doubt. CP 30. Taken as a whole, the instructions correctly conveyed the State's burden of proof on every element, and there is no reasonable likelihood that the jury interpreted the instructions to infer that Chacon had either the burden to prove that reasonable doubt existed or that he had any obligation to present evidence to prove he was not guilty. See Victor, 511 U.S. at 6 (recognizing that "the proper inquiry is not whether an instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it") (emphasis in original) (quoting Estelle v. McQuire, 502 U.S. 62, 72, n.4, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1981); State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002) (stating that jury instructions are to be read as a whole).

Because the challenged jury instruction accurately states that the burden of proof is entirely on the State, Chacon cannot

show that the omission of the one sentence has practical and identifiable consequences at his trial. Therefore, his claim does not fall within the narrow exception of RAP 2.5(a)(3). Because he did not object to the instruction at trial, and because he does not show a manifest error, this court should not consider his claim for the first time on appeal.

Even if the court does consider his claim, it should find that the error was harmless beyond a reasonable doubt, for all the same reasons that there was no manifest error. “Constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless.” State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); Lundy, 162 Wn. App. at 871-72 (“An erroneous jury instruction, however, is generally subject to a constitutional harmless error analysis. . . . Even misleading instructions do not require reversal unless the complaining party can show prejudice.”)

All of the evidence at trial showed that Chacon knew of and disregarded an order that he not enter the Olympia Center. All of the evidence showed that Davis’s kneecap was dislocated when

Chacon struck Davis with his own knee. While he argued that he could have misunderstood the lack of expiration date on the trespass order, and there was testimony that the injury to Davis could theoretically have happened differently, there was zero evidence that he did or it did. Looking at the record as a whole, it is most unlikely that the missing sentence from Instruction No. 3, CP 30-31, had any impact on the verdict.

4. The State will not seek appellate costs.

This court has routinely denied the State's request for appellate costs in other cases and the State expects that it will do so if appellate costs are requested in this case. Therefore, no such request will be made.

D. CONCLUSION.

The trial court correctly declined to instruct the jury on the inferior degree offense of third degree assault. The prosecutor did not commit misconduct during closing argument. The error in Instruction No. 3 was not manifest and should not be considered for the first time on appeal, but if the court does so, it was harmless

error. The State will not seek costs should it substantially prevail on appeal. The State respectfully asks this court to affirm Chacon's convictions.

Respectfully submitted this 17th day of February, 2017.



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CERTIFICATE OF SERVICE

I certify that I served a copy of Brief of Respondent on the date below as follows:

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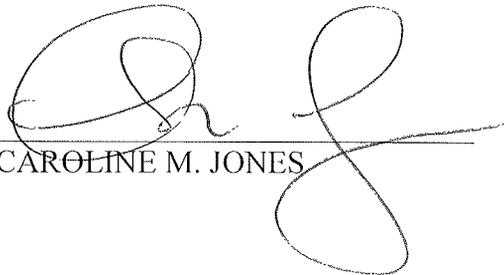
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 21 day of February, 2017, at Olympia, Washington.


CAROLINE M. JONES

THURSTON COUNTY PROSECUTOR

February 21, 2017 - 8:50 AM

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