NO. 1038534

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LANCE BOWERS,

Petitioner

APPEAL FROM THE SUPERIOR COURT FOR OKANOGAN COUNTY

ANSWER TO PETITION FOR REVIEW

ALBERT LIN
Okanogan County Prosecuting Attorney

THOMAS C. PAYNTER
Deputy Prosecuting Attorney
Attorneys for Respondent

Okanogan County Prosecuting Attorney
237 Fourth Avenue North
Okanogan, Washington 98840-1130
(509) 422-7280 FAX (509) 422-7290

TABLE OF CONTENTS

TABLE OF CONTENTS.....1

TABLE OF AUTHORITY.....3

INTRODUCTION.....5

ISSUES PRESENTED.....7

1.A. Surveillance camera video footage admitted at trial captured important interactions between Bowers, his brother, and his wife, as well as other events leading up to the murder. The State relied extensively on the videos in closing. Bowers did not designate the videos for inclusion in the record. The Court of Appeals held that the record is inadequate to review Bowers' sufficiency claim. Does this holding present a significant issue of constitutional law warranting review under RAP 13.4(b)?

1.B. If this Court grants review: Did the Court of Appeals err by holding that the record is inadequate?

1.C. If the record is adequate: Is the evidence of guilt insufficient?

2.A. Was the Court of Appeals correct in holding that the prosecutor committed flagrant and ill-intentioned misconduct by commenting on Bowers' silence?

2.B. Bowers argues that the Court of Appeals applied the ordinary, rather than the constitutional,

harmless error standard to the prosecutor's remarks. Is Bowers correct about which standard the court applied?

2.C. If the Court of Appeals correctly applied the constitutional harmless error standard, does the court's holding that the error was harmless warrant review under RAP 13.4(b)?

3.A. Does the court's holding that the jury instructions were not misleading present a significant issue of constitutional law warranting review under RAP 13.4(b)?

3.B. If this Court grants review: Did the Court of Appeals err by holding that the instructions were not misleading?

STATEMENT OF THE CASE 9

ARGUMENT 9

I. This Court should either decline to review, or affirm, the Court of Appeals' rejection of Bowers' sufficiency challenge……...9

A. The court's holding that the record is insufficient is not reviewable under RAP 13.4(b).....9

B. Bowers has not presented an adequate record for review.....12

C. The court correctly recognized that the evidence for Bowers' guilt was overwhelming.....18

II. The prosecutor's comments on Bowers' silence were proper, and any error was harmless……21

A. The prosecutor's remarks were proper comments on pre-arrest silence.....21

B. Bowers' argument that the court did not apply the correct harmless error is frivolous. 32

C. Is the finding of harmlessness appropriate for review under RAP 13.4(b)? 35

D. Because the evidence was overwhelming, any error was harmless merit. 36

III. The jury instruction issue does not present a significant question of constitutional law and so is not reviewable…….. 36

CONCLUSION.....37

TABLE OF AUTHORITY

CASES

In re Disciplinary Proceeding Against Jones, 182 Wash. 2d 17, 41, 338 P.3d 842, 854 (2014) 35

State v. Burke, 163 Wash. 2d 204, 222, 181 P.3d 1 (2008).....34

State v. Delmarter, 68 Wash. App. 770, 777, 845 P.2d 1340 (1993).....26

State v. Detrick, 90 Wn. App. 939, 941 n. 1, 954 P.2d 949 (1998).....14

State v. Drum, 168 Wn.2d 23, 38, 225 P.3d 237 (2010).....14

State v. French, 101 Wash. App. 380, 389, 4 P.3d 857 (2000).....22, 27, 32

State v. Garcia, 45 Wn. App. 132, 140, 724 P.2d 412 (1986).....14

State v. Hernandez, 6 Wash.App.2d 422, 431 P.3d 126 (2018).....12, 13

State v. Jackson, 150 Wn. App. 877, 885-86, 209 P.3d 553 (2009).....25

State v. O'Connell, 83 Wash. 2d 797, 839, 523 P.2d 872 (1974).....26

State v. Osman, 192 Wn. App. 355, 367, 366 P.3d 956 (2016).....25

State v. Perez-Valdez, 172 Wash. 2d 808, 819, 265 P.3d 853 (2011).....27

State v. Wade, 138 Wn.2d 460, 465, 979 P.2d 850 (1999).....14

COURT RULES

RAP 13.4(b)..... passim

INTRODUCTION

Lance Bowers killed his wife Angela Bowers by shooting her twice in the head and neck. He concealed her body in the trunk of his car, and when the car became disabled, he set the car on fire and fled the scene. When police confronted him he pulled the pistol he had used to shoot Angela from his pocket and raised it towards the officers, requiring them to shoot him to protect themselves. A jury convicted Bowers of the first-degree premeditated murder of his wife and first-degree assault against the deputies, among other charges.

In the Court of Appeals Bowers argued *inter alia* that: the evidence of first-degree murder was insufficient; the prosecutor committed flagrant and ill-intentioned misconduct by commenting on Bowers' silence; and certain instructions pertaining to the first-degree assault charges were manifest constitutional error.

The Court of Appeals declined to review Bowers' sufficiency challenge because he failed to transmit a sufficient record for review, omitting such key evidence as video surveillance footage. Although the court declined to review the sufficiency challenge, it recognized that the evidence of Bowers' guilt was "overwhelming". The court was correct to decline review, and on the merits, the evidence was more than sufficient.

The court held that the prosecutor's comments on Bowers' silence constituted flagrant and ill-intentioned misconduct. Here the court erred, because the prosecutor's remarks pertained only to Bowers' pre-arrest silence. The court, however, correctly held that any error was harmless.

The court correctly held that the jury instructions were not misleading, informed the jury of the applicable law, and permitted Bowers to argue his theory of the case.

ISSUES PRESENTED

1.A. Surveillance camera video footage admitted at trial captured important interactions between Bowers, his brother, and his wife, as well as other events leading up to the murder. The State relied extensively on the videos in closing. Bowers did not designate the videos for inclusion in the record. The Court of Appeals held that the record is inadequate to review Bowers' sufficiency claim. Does this holding present a significant issue of constitutional law warranting review under RAP 13.4(b)?

1.B. If this Court grants review: Did the Court of Appeals err by holding that the record is inadequate?

1.C. If the record is adequate: Is the evidence of guilt insufficient?

2.A. Was the Court of Appeals correct in holding that the prosecutor committed flagrant and ill-intentioned misconduct by commenting on Bowers' silence?

2.B. Bowers argues that the Court of Appeals applied the ordinary, rather than the constitutional, harmless error standard to the prosecutor's remarks. Is Bowers correct about which standard the court applied?

2.C. If the Court of Appeals correctly applied the constitutional harmless error standard, does the court's holding that the error was harmless warrant review under RAP 13.4(b)?

3.A. Does the court's holding that the jury instructions were not misleading present a significant issue of constitutional law warranting review under RAP 13.4(b)?

3.B. If this Court grants review: Did the Court of Appeals err by holding that the instructions were not misleading?

STATEMENT OF THE CASE

The State relies on the Court of Appeals' statement of the facts and procedural history of the case, with one exception. The surveillance videos the State discussed and played in closing argument, showing the last time Angela Bowers was seen alive as well as the activities of Lance and Joe Bowers before the murder, were recorded in the early morning hours, not the afternoon. For instance, Angela last appeared on the videos at 5:10 a.m., not 5:10 p.m., as the Opinion states. RP 2828-31; Opinion at 3.

ARGUMENT

I. This Court should either decline to review, or affirm, the Court of Appeals' rejection of Bowers' sufficiency challenge.

A. The court's holding that the record is insufficient is not reviewable under RAP 13.4(b).

The Court of Appeals' refusal to address Bowers' sufficiency challenge rested on grounds of appellate procedure: Bowers' failure to present an adequate record. Opinion at 25. Under the appellate rules, this Court will grant a petition for review only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). The court's refusal to review the sufficiency issue is not itself reviewable under RAP 13.(b).

Although Bowers argues that this holding presents both "a significant constitutional issue and substantial issue of public interest", he fails to articulate what either might be. Petition at 22. RAP 13.4(b) is not satisfied merely because an issue touches on a constitutional right; the issue must present a *significant question of*

constitutional law. Bowers failed to present an adequate record and as a result the court declined review. If this Court granted review of that holding, what significant question of constitutional law or matter of public interest would the Court be addressing? Bowers does not and cannot provide an answer. The holding is not reviewable under RAP 13.4(b).

The underlying issue of the sufficiency of the evidence may be constitutional, but the court's refusal to review the issue is a matter of procedure. In *State v. Hernandez*, 6 Wash.App.2d 422, 431 P.3d 126 (2018), review denied 193 Wash.2d 1003, 438 P.3d 129 (2019), Hernandez argued that his constitutional right to be present was violated when the court granted his attorney's motion to withdraw in an in-camera proceeding. *Id.* at 423-24. The *Hernandez* court noted that a defendant's presence is not required when his attorney must withdraw for ethical reasons. *Id.* at 429. "Here, the

record does not disclose why Mr. Crowley moved for withdrawal. This gap in the record, *which is attributable to Mr. Hernandez's litigation strategy*, is dispositive of Mr. Hernandez's argument on appeal." *Id.* at 429 (emphasis added). In other words, despite the constitutional nature of the underlying issue, the Court of Appeals declined to review it because the appellant failed to present an adequate record. Just as in *Hernandez,* the inadequate record here is due to Bowers' litigation strategy, that is, what parts of the record he chose to designate. Even when the underlying issue is constitutional, the court's decision not to review the issue is a matter of appellate procedure and so is not itself reviewable under RAP 13.4(b).

B. Bowers has not presented an adequate record for review.

1. Bowers bears the burden of presenting an adequate record.

If this Court grants review, it should affirm the holding. The burden of providing an adequate record for review falls on the appellant. "As the party seeking review, it was Drum's responsibility to designate the necessary portions of the record. *See* RAP 9.6(a). In the absence of an adequate record, we decline to review Drum's sufficiency of the evidence claim on this basis." *State v. Drum*, 168 Wn.2d 23, 38, 225 P.3d 237 (2010). "An appellate court may decline to address a claimed error when faced with a material omission in the record." *State v. Wade*, 138 Wn.2d 460, 465, 979 P.2d 850 (1999); *accord State v. Detrick,* 90 Wn.App. 939, 941 n. 1, 954 P.2d 949 (1998) (refusing to review claimed error in denying motion to sever where motion was not included in record); *State v. Garcia,* 45 Wn.App. 132, 140, 724 P.2d 412 (1986) (declining to address ineffective assistance claim where appellant failed to designate the evidence at issue).

Although Bowers cites court rules that give the State and the reviewing court the opportunity to have additional material included in the record, he fails to cite any authority that either the State or the court must do so. Petition 18, 20. As shown above, case law places that obligation firmly on the appellant. Bowers attempts to shift this burden, arguing "The parties have transmitted all the record they believe necessary for review of the claims[.]" Petition at 20. But the State has made no claims, and has no burden to provide the exhibits necessary to substantiate any claims. Neither the State nor the court has an obligation to save Bowers from his own litigation strategy.

2. The record Bowers transmitted omits key evidence.

The court below was correct that the videos were important evidence in the case. Bowers argues, "If these exhibits were in fact 'key evidence' the State would have

certainly highlighted it in its closing argument." Petition at 18. Bowers' use of hypothetical language here is inexplicable; the State *did* highlight the video evidence extensively in closing, because it was key to the State's case. As the Court of Appeals said, "During its closing argument, the State presented a PowerPoint slideshow that included pictures…*and video footage* from the Alumbaughs' surveillance system. The record sent to this court…excludes the video exhibits played for the jury." Opinion at 10 (emphasis added).

The State's discussion of the video evidence spanned some 10 transcript pages. RP 2821-31. The State used the video to establish that Bowers' relationship with his wife was troubled. The videos showed Bowers and Angela leaving in Bowers' car at about 7:51 p.m., Angela wearing unlaced sneakers that were too big for her. RP 2823. At 8:03 p.m. Bowers returned in the car alone. RP 2823. 20 minutes later, Angela arrived back

home, “her arms full of stuff”, walking in the oversized, unlaced shoes. RP 2823. The video showed Angela with crossed arms, not looking happy. RP 2824.

The videos then showed Joe arriving at 9:10 p.m., and showed Joe and Bowers interacting, with body language showing “who the dominant figure between the two of them is.” RP 2824-25. Joe looked “dejected” and would not make eye contact with his brother, while Bowers was staring at Joe. RP 2825-26. The video also showed something poking out of Bowers’ pocket—implicitly the pistol he used to kill Angela. RP 2825.

At 4:24 a.m., Joe ran outside and picked up a stick as if to defend himself; Bowers took it away from him, again displaying dominant body language. RP 2826-27. Then they left together in Bowers’ car. RP 2827. From 4:59 a.m. to 5:10 a.m., the videos showed Angela looking at the cameras themselves, as if she was trying to figure

something out. RP 2829-30. That is the last time she was seen alive.

At 5:20 a.m. Bowers and Joe returned, and spent time rearranging things in Bowers' car. RP 2830-31. Then they walked into the house, Bowers with his hand in his front right pocket—implicitly, holding the pistol. RP 2831. At 5:59 a.m. the cameras stopped recording.

The inferences the State asked the jury to make from these videos are clear. Bowers and Angela were not happy, with Bowers driving home without Angela, leaving her to walk home awkwardly with a load of items in oversized, untied shoes. Bowers wanted Joe to do something. Joe resisted, but Bowers used his dominance as the older brother to compel Joe to go along. Bowers, the jury could infer, already had the revolver in his pocket. Angela for some reason was concerned about the surveillance cameras, perhaps wanting to know that they were working. Bowers and Joe rummaged around in the

car, perhaps making room for the tote, arranging the fuel cans, or otherwise making ready to conceal Angela's body.

This was key evidence, in particular, because although there was copious evidence of Bowers' actions after he murdered Angela, the videos were the best evidence of the behavior and demeanor of Bowers, Angela, and Joe before the murder. The video also showed Bowers manipulating the green tote in which Angela's body was later found. RP 2432. The Court of Appeals was correct to hold that without the videos, the record is inadequate.

C. The court correctly recognized that the evidence for Bowers' guilt was overwhelming.

Contrary to Bowers' assertion, the Court of Appeals did not "question the evidence before it" in the sense of perceiving any "lack of evidence". Petition at 21. On the contrary, the court called the evidence "overwhelming"

three times in the opinion, and also found "that substantial evidence supported a conviction as the principal[.]" Opinion at 20, 36, 42. The State described the overwhelming case against Bowers at length below. Brief of Respondent at 29-36.

Both in the Court of Appeals and in this Petition, Bowers' sufficiency argument relies on Joe's presence to argue "[I]t was just as likely Joe killed Angela." Petition at 14. Bowers also appears to suggest that even if the evidence that Bowers killed Angela is sufficient, the evidence for premeditation is not. These arguments lack merit, first, because they ignore the mass of evidence tying Bowers, not Joe, to the crime: Bowers' possession of the murder weapon and Angela's body, his efforts to destroy her body and to clean up the crime scene with bleach, their troubled relationship, etc. Opinion at 42. Second, as the Court of Appeals recognized, Bowers was charged as both principal and accomplice so that even if

Joe pulled the trigger, Bowers' obvious participation in the crime still makes him guilty. Opinion at 42.

Finally, the argument about premeditation is a red herring. Angela was shot twice, and Bowers seems not to dispute that this shows premeditation on the part of the killer. Petition at 15. He argues, however, that the State's argument "begs the question of who was the killer." Petition at 15. In other words, Bowers claims the evidence of premeditation was insufficient for the same reason he claims the evidence as a whole was insufficient: lack of proof Bowers committed the murder. But as the court said, the evidence of Bowers' guilt—whether as principal or accomplice—was overwhelming. No matter whether Bowers or Joe pulled the trigger, the two bullets show premeditation and the overwhelming evidence shows Bowers was responsible.

II. The prosecutor's comments on Bowers' silence were proper, and any error was harmless.

A. The prosecutor's remarks were proper comments on pre-arrest silence.

1. The first remark the court found improper was directed at defense counsel's argument, not Bowers' silence.

The Court of Appeals erred by holding that the prosecutor committed misconduct. The court correctly acknowledged that the law permits the State to comment on the defendant's pre-arrest silence. Opinion at 30. The court, however, erroneously held that two of the prosecutor's remarks were comments on Bowers' post-arrest silence. "[A] comment violates a defendant's right to remain silent if it is of such character that the jury would naturally and necessarily accept it as a comment on the defendant's failure to testify." *State v. French*, 101 Wash. App. 380, 389, 4 P.3d 857 (2000) (internal quotation marks omitted, citing *State v. Fiallo–Lopez*, 78 Wash.App.

717, 729, 899 P.2d 1294 (1995) and *State v. Ramirez,* 49 Wash.App. 332, 336, 742 P.2d 726 (1987)).

An examination of the State's remarks in context shows that they pertained only to pre-arrest silence. The first remark the court held was misconduct was:

> Let's talk about the murder. Defense Counsel argues at length that apparently his brother killed Angela. *What evidence did he provide to you? Say something.* One thing. The fact that he was there?

(Opinion at 33, emphasis in Opinion.) But in context, the State was referring to defense counsel's failure to provide evidence, not Bowers' silence. The key to understanding this is tracking the referent for the State's various uses of the pronouns *he/his.* When those referents are made explicit, it becomes clear that the State did not refer to Bowers' silence:

> Let's talk about the murder. Defense Counsel argues at length that apparently [Bowers'] brother killed Angela. What evidence did [defense counsel] provide to you? Say something. One thing. The fact that [Joe] was there?

RP 2919 (bracketed language added]. This is the only logical way to understand these referents. In context "his brother" can only mean "Bowers' brother". The last "he" must refer to Joe; defense counsel was not there, and the fact that Bowers was there would not tend to establish that Joe killed Angela. As to the key phrase "What evidence *did he provide* to you", the "he" refers to defense counsel. The topic of the paragraph is defense counsel's argument. The argument was that defense counsel argued that Joe killed Angela, and defense counsel failed to provide evidence other than Joe's presence.

The next paragraph of the State's argument confirms this reading:

> [Defense counsel] claims [Joe's] this crazy man. And yet this crazy man came over -- apparently at the invite of the Defendant because [Joe] was allowed to stay. You didn't see any problems between Joe and Angela. There isn't one piece of evidence -- other than the fact that [Joe's] there -- that Joe did anything to Angela. [Joe's] not even there after that – [Joe's] just gone; [Joe's] not involved in any of this.

RP 2919 (bracketed language added). This is the only plausible interpretation of this passage. The key line is the first line: "He claims he's this crazy man." Who claimed Joe was a "crazy man"? Not Bowers; Bowers did not testify and no statement from him about Joe was admitted. The prosecutor was asserting that d*efense counsel* claimed Joe was "this crazy man." This was an accurate description of defense counsel's argument: "[I]n this case, we have a crazy, violent person -- his name is Joseph Bowers." RP at 2898.

It is plain from the paragraph the Court of Appeals focused on, and the paragraph following, that the prosecutor was making a proper argument about defense counsel's failure to point, in his closing argument, to any evidence that Joe killed Angela. Stripped to its essentials the State's argument was:

> Defense Counsel argues at length that apparently [Bowers'] brother killed Angela. What evidence did

> [defense counsel] provide to you? […] [Defense counsel] claims [Joe's] this crazy man….

RP 2919 (Bracketed language added]. This was proper argument directed at the lack of evidence for the defense's theory of the case—a subject the State is free to comment upon. *State v. Jackson*, 150 Wn. App. 877, 885-86, 209 P.3d 553 (2009); *State v Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994); *State v. Osman*, 192 Wn. App. 355, 367, 366 P.3d 956 (2016).

This Court should not suppose that the jury may have misunderstood the State's argument as pertaining to post-arrest silence or testimony at trial. "The jury is a 'presumptively rational factfinder,' *Ulster County Court*, 442 U.S. at 157, 99 S.Ct. at 2224, and it will be deemed to have acted rationally unless the record shows to the contrary." *State v. Delmarter*, 68 Wash. App. 770, 777,

845 P.2d 1340 (1993).[1] "This court will not willingly assume that the jury did not fairly and objectively consider the evidence and the contentions of the parties relative to the issues before it." *State v. O'Connell*, 83 Wash. 2d 797, 839, 523 P.2d 872 (1974) (citation omitted). Even if it were possible for the jury to have misunderstood the State's remarks as referring to Bowers' decision not to testify, it cannot be said that the jury would "naturally and necessarily" have misunderstood the remarks that way, as *French*, 101 Wash. App. at 389, and the cases cited therein require.

Here, the State's argument was proper, and the record does not show that the jury did not understand it. Indeed, the prosecutor's argument would have been clearer to the jury, which had the benefit of his tone of

---

[1] Citing *Cnty. Ct. of Ulster Cnty., N. Y. v. Allen*, 442 U.S. 140, 157, 99 S. Ct. 2213, 2225, 60 L. Ed. 2d 777 (1979).

voice, body language and gestures, etc., than it is from the cold record. *See State v. Perez-Valdez,* 172 Wash. 2d 808, 819, 265 P.3d 853 (2011). The State made this remark in rebuttal and the remark was plainly directed at holes in the argument defense counsel had just made. Court of Appeals erred in holding that this remark somehow commented on Bowers' silence, let alone that it did so in a flagrant and ill-intentioned way.

2. The court's holding that the second remark was improper depends on a significant misquotation of the record.

The second remark the court held was misconduct (Opinion at 34) was:

> [W]hy at any point didn't the Defendant call the police? . . .
> *How many opportunities did he have to say his brother, not him, killed Angela?* . . .
> Why didn't he call the police?

(Emphasis added.) The italicized sentence seriously misquotes the record, changing the meaning of the

prosecutor's remarks. What the prosecutor said, in context, was:

> [W]hy at any point didn't the Defendant call the police? I mean, at some point it got to a point where -- I mean, if he's truly covering for his brother, which is ridiculous -- at some point he has to say the gig's up, right?
>
> *How many opportunities did he have?* He had the opportunity when his car broke down; the fire department came; the police responded to the scene. He could have stayed there, but he didn't. The police responded to the store. He could have told them -- look, okay, I didn't -- look, here's the truth, folks; here's the truth. I -- I admit I set the car on fire or whatever, but here's what really happened. None of that happened.
>
> Why didn't he call the police? Why didn't he run toward the police? Why didn't he place his hands in the air when the police arrived?

RP 2920-21 (emphasis added). Contrary to the court's misquotation of the record, *at no point* did the prosecutor

say, “How many opportunities did he have to say his brother, not him, killed Angela?”[2]

This misapprehension of the record is extremely significant. The court reasoned that this remark:

> …implicates both a time before and after Bowers’ arrest. A reasonable listener to the rhetorical question would conclude that the State sought to incriminate Bowers for not, after his arrest, identifying his brother as the killer to law enforcement. […]
>
> Counsel questioned how many opportunities Bowers had available to cast guilt on his brother, and, again, counsel did not limit these opportunities to an interval before incarceration.

Opinion at 34-35. The State’s remark about opportunities, however, was not about opportunities to identify “his brother as the killer”, as the court said. The State’s remark about opportunities was explicitly referring

---

[2] The Court did quote these remarks accurately and in context in its summary of the trial. Opinion at 18-19.

to *opportunities to call the police or otherwise speak with police before his arrest.*

The State's remarks began, "[W]hy at any point didn't the Defendant call the police?" The State then asked, "How many opportunities did he have [to call police]?" As the Court of Appeals recognized, calling police is something one does before incarceration, not after.[3] Opinion at 34. The State continued by explicitly listing opportunities Bowers had to call or speak with police *before his arrest*: "He had the opportunity when his car broke down; the fire department came; the police responded to the scene. He could have stayed there, but he didn't." The State went on, "The police responded to the store. He could have told them -- look, okay, I didn't -- look, here's the truth, folks; here's the truth. I -- I admit I

---

[3] "Only Shannon Denton telephones the police while in police custody." Opinion at 34, referring to *State v. Denton*, 58 Wn. App. 251, 792 P.2d 537 (1990).

set the car on fire or whatever, but here's what really happened." Again, this suggests that Bowers had an opportunity to speak with police when they arrived in the area of the store and contacted him—still during the interval before incarceration. The State went on to list other opportunities Bowers had to speak with police or otherwise cooperate: "Why didn't he call the police? Why didn't he run toward the police? Why didn't he place his hands in the air when the police arrived?" Each of these are pre-arrest opportunities.

This record suggests that the prosecutor understood the line between commenting on pre-arrest and post-arrest silence. He carefully avoiding implicating Bowers' right to remain silent while in custody by limiting his remarks to the interval before Bowers was placed under formal arrest, i.e., the interval between when "his car broke down" and "when the police arrived".

In determining whether the State committed flagrant and ill-intentioned misconduct, this Court should consider only what the prosecutor actually said, not what a confused or inattentive juror might have misunderstood the prosecutor to have said. Nothing in the State's remarks "naturally and necessarily" referred to post-arrest silence. *French*, 101 Wash. App. at 389. The State's remarks were proper.

B. Bowers' argument that the court did not apply the correct harmless error is frivolous.

Bowers argues that the Court of Appeals did not apply the constitutional harmless error standard, because the court required Bowers to "show the prosecutorial misconduct resulted in enduring prejudice," did not cite to *Chapman v. California*, 386 U.S. 18, 26, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), and did not "hold the State to its burden of proving the misconduct did not contribute to the verdict." Petition at 23. Bowers, however, erroneously

conflates the court's analysis of the waiver question, where the defense does bear the burden of showing prejudice, with the court's analysis of harmless error, where the court explicitly found that the State's remarks were harmless beyond a reasonable doubt.

The court's remark about Bowers' burden to show enduring prejudice was in the court's analysis of waiver:

> Remember that, in the end, the defendant must show the prosecutorial misconduct resulted in enduring prejudice, *if counsel raised no objection.* To repeat, the rule of prosecutorial misconduct applied *when there is a failure to object* is often phrased as requiring the defendant to demonstrate that the prosecutor's remark was so flagrant and ill-intentioned that no curative instruction would have been capable of neutralizing the resulting prejudice.

Opinion at 41 (emphasis added). The references to the defense's failure to object make it plain that the court is discussing waiver. When it came to harmless error, the court explicitly applied the constitutional standard:

> A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the

> same result absent the error and when the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222 (2008). For the reasons already stated, we are convinced beyond a reasonable doubt that the comments on Bowers' silence did not impact the jury verdict.

Opinion at 43. Bowers is correct that the court did not cite *Chapman,* but the court properly cited authority from this Court stating the constitutional harmless error standard: "A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." *State v. Burke*, 163 Wash. 2d 204, 222, 181 P.3d 1 (2008). Bowers' argument, which ignores the plain

language in the opinion applying the constitutional harmless error standard, is frivolous.[4]

C. Is the finding of harmlessness appropriate for review under RAP 13.4(b)?

Bowers' only argument for review of the court's holding that the error was harmless is: "The court's misapplication of the constitutional standard merits review by this Court. RAP 13.4(b)." Petition at 27. As seen above, this argument is frivolous, as the court explicitly applied the correct standard. Thus, Bowers has failed to show that the Opinion's holding that the prosecutor's remarks were harmless conflicts with any Washington case law, presents a significant question of constitutional law, or presents an issue of substantial public interest, as required by RAP 13.4(b). Instead, the issue of

---

[4] "A frivolous position is one that a lawyer of ordinary competence would recognize as lacking in merit." *In re Disciplinary Proceeding Against Jones*, 182 Wash. 2d 17, 41, 338 P.3d 842, 854 (2014)

harmlessness is a factual question: was the evidence of Bowers' guilt overwhelming? Opinion at 42. This Court should deny review.

D. Because the evidence was overwhelming, any error was harmless merit.

Should this Court grant review, it should hold that for the reasons stated in the Opinion and in the Brief of Appellant below (at 27-36), the evidence here was overwhelming. The court correctly held that the prosecutor's remarks were harmless beyond a reasonable doubt

III. The jury instruction issue does not present a significant question of constitutional law and so is not reviewable.

Bowers argues that the jury instruction issue is reviewable under RAP 13.4(b) because the instructions were "constitutionally inadequate". Petition at 35. As with the insufficient record issue, however, it is not enough that an issue touches on a constitutional right. The issue

must present a significant question of constitutional law to warrant review under RAP 13.4(b). Bowers fails to articulate what significant question of constitutional law this Court would be answering if it reviewed the issue. Resolution of this issue depends on parsing the particular instructions to determine whether they informed the jury of the applicable law and were not misleading. The issue presents no significant question of constitutional law and so is not reviewable.[5]

As to the merits of the issue, the State relies on its briefing below and the Opinion of the Court of Appeals.

CONCLUSION

---

[5] Bowers did not object to the instructions at trial. Should this Court determine that the instructions were erroneous, it must then consider whether the this amounted to manifest error affecting a constitutional right, and whether the error was harmless—questions the Court of Appeals saw no need to reach. Opinion at 26; Brief of Appellant 60-81.

For the foregoing reasons, this Court should deny the Petition.

This document contains 5000 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 5th day of March, 2025.

Respectfully submitted,

ALBERT LIN
Okanogan County Prosecuting Attorney

By: /s/ Thomas C. Paynter_____
Thomas C. Paynter, WSBA #27761
Deputy Prosecuting Attorney
Attorneys for Respondent

OKANOGAN COUNTY PROSECUTING ATTORNEY'S OFFICE

March 05, 2025 - 4:36 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	103,853-4
Appellate Court Case Title:	State of Washington v. Lance Robert Bowers
Superior Court Case Number:	19-1-00373-0

The following documents have been uploaded:

- 1038534_Answer_Reply_20250305163456SC567070_4294.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was petition answer.pdf

A copy of the uploaded files will be sent to:

- alin@co.okanogan.wa.us
- greg@washapp.org
- wapofficemai@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Christa Levine - Email: clevine@co.okanogan.wa.us
Filing on Behalf of: Thomas C Paynter - Email: tpaynter@co.okanogan.wa.us (Alternate Email: clevine@co.okanogan.wa.us)

Address:
PO Box 1130
Okanogan, WA, 98840
Phone: (509) 422-7288

Note: The Filing Id is 20250305163456SC567070