IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. FERNANDO FELICIANO CHIRINOS, Appellant.	)	DIVISION ONE No. 64725-3-I OPINION PUBLISHED IN PART FILED: May 16, 2011

Dwyer, C.J. — Where the trial court seats an alternate juror after temporarily excusing that juror, the court must instruct the reconstituted jury to begin deliberations anew. The trial court need not, however, determine on the record that the alternate juror remains impartial, as the rule governing the seating of alternate jurors confers upon the trial court the discretion to determine whether such an inquiry is necessary. Because the trial court herein complied with the applicable rule upon seating the alternate juror, Fernando Chirinos was not denied his constitutional right to an impartial jury. Given that Chirinos's remaining claims are similarly without merit, we affirm.

I

In April 2009, Fernando Chirinos was charged by information with burglary in the first degree, robbery in the first degree, and forgery. The charges

were based upon a series of events that occurred after Chirinos asserted that his mobile device had been stolen by a friend of James Holt. According to the certification for determination of probable cause to charge Chirinos with those crimes, Chirinos broke into Holt's apartment and demanded that Holt pay him $4,000 as "collateral" for the mobile device. Holt told Chirinos that he did not have $4,000 at his home but that he had $1,100 in the bank. Chirinos stayed the night at Holt's apartment until the bank opened the next morning. Chirinos then went with Holt to the bank, where Holt withdrew $1,100 and gave it to Chirinos. Holt returned to his apartment. Two days later, he noticed that the extra set of keys to his car was missing. Holt then noticed that his car was missing and called the police. Holt later informed the police that several bank checks were also missing from his apartment.

Chirinos was subsequently arrested and booked into the King County jail. Chirinos had a preexisting injury that required medical treatment. On May 18, 2009, he was transported by King County corrections staff to an appointment at Harborview Hospital in downtown Seattle. After the appointment, Chirinos fled. He ran toward James Street and leaped into the open window of Alana Turner's car. With his legs still protruding from the car window, Chirinos grabbed the steering wheel and attempted to press the accelerator with his hand. He repeatedly yelled at Turner to "get going now." Report of Proceedings (RP) (Oct. 26, 2009) at 16. Turner screamed and pulled the keys from the ignition so

that Chirinos could not get control of the car. RP (Oct. 26, 2009) at 15. A bystander responded to Turner's screams and attempted to pull Chirinos from the car. Pursuing corrections officers then took Chirinos back into custody. The State thereafter amended the information, based upon this incident, to include additional counts of escape in the second degree and attempted robbery in the second degree.[1]

Trial commenced on October 15, 2009. After instructing the jury and allowing counsel to present closing arguments, the trial court temporarily excused Juror 6, the alternate juror. The court instructed her to continue to observe her obligation not to discuss the case:

> But there are a couple of things I want to admonish you to do for me. In the unlikely event that for some reason we should lose one of the jurors in the panel before they are able to complete their job here, I want to have the possibility of bringing you back in and recommencing deliberations. So I would appreciate you continuing to abide by that admonition not to discuss the case with anyone until you find out the jury has reached a verdict. I know you are going away and I am not even quite sure when you were coming back or where you are going, and maybe you don't know either, but I would like to keep you sort of in the batter's box in case I need you.

RP (Oct. 29, 2009) at 126. The following week, Juror 6 was called to replace a deliberating juror who was unable to continue deliberations due to work commitments. Due to the illness of another deliberating juror, the jury had deliberated for only about an hour before Juror 6 returned. Upon seating the

[1] At trial, the State again amended the information, adding an additional count of kidnapping in the first degree for the incident involving Holt. The State also added a deadly weapon enhancement to the burglary and kidnapping charges, based upon allegations that Chirinos was armed with a knife during the incident involving Holt.

alternate juror, the trial court instructed the jury to begin its deliberations anew:

> And now that she's been seated as a juror in the case, you are required to disregard all previous deliberations and begin your deliberations anew. Is that clear to you all? I see heads nodding in affirmance. I just needed to give you that instruction and excuse you back to recommence your deliberations. Okay? Thank you, folks, for your patience.

RP (Nov. 3, 2009) at 71.

Based upon the incident involving Holt, the jury found Chirinos guilty of residential burglary, extortion in the first degree, forgery, and kidnapping in the first degree.[2] Based upon the incident involving Turner, the jury found Chirinos guilty of escape in the second degree and attempted robbery in the second degree.

Chirinos appeals.

II

Chirinos contends that his right to an impartial and unanimous jury was violated where the trial court seated an alternate juror without first verifying on the record that she remained impartial and unbiased.[3] We disagree.

Criminal Rule 6.5 governs the use of alternate jurors. It provides that

> [s]uch alternate juror may be recalled at any time that a regular juror is unable to serve. . . . If the jury has commenced deliberations prior to replacement of an initial juror with an

[2] At trial, the jury received instructions on residential burglary, a lesser crime of burglary in the first degree, and extortion in the first degree, a lesser crime of robbery in the first degree.

[3] The right to an impartial jury is guaranteed by article 1, section 22 of the Washington State Constitution and by the Sixth Amendment to the United States Constitution.

Although Chirinos characterizes this assignment of error as implicating his right to both a unanimous and an impartial jury, he does not provide argument specifying how the trial court purportedly violated his right to a unanimous jury. For this reason, we hereafter reference this assignment of error as implicating only Chirinos's right to an impartial jury.

> alternate juror, the jury shall be instructed to disregard all previous deliberations and begin deliberations anew.

CrR 6.5. Juror replacement implicates "a defendant's constitutional right to a fair trial before an impartial jury and to a unanimous verdict." State v. Ashcraft, 71 Wn. App. 444, 463, 859 P.2d 60 (1993). Thus, manifest constitutional error occurs where a trial court fails to instruct a reconstituted jury on the record to disregard previous deliberations and begin deliberations anew. Ashcraft, 71 Wn. App. at 467.

The applicable rule further provides that

> [w]hen jurors are temporarily excused but not discharged, the trial judge shall take appropriate steps to protect alternate jurors from influence, interference or publicity, which might affect that juror's ability to remain impartial and the trial judge *may* conduct brief voir dire before seating such alternate juror for any trial or deliberations.

CrR 6.5 (emphasis added). CrR 6.5 does "contemplate a formal proceeding which may include brief voir dire to insure that an alternate juror who has been temporarily excused and recalled has remained protected from 'influence, interference or publicity, which might affect that juror's ability to remain impartial.'" Ashcraft, 71 Wn. App. at 462 (quoting CrR 6.5). However, its permissive language indicates that the trial court is not required to conduct a hearing prior to replacing a deliberating juror with an alternate juror. Rather, the trial court has the discretion to do so where the court deems it necessary to ensure that the alternate juror has remained impartial.

The discretion conferred upon the trial court by CrR 6.5, however, may be improperly exercised where the trial court does not provide notice to the parties prior to seating an alternate juror. In State v. Stanley, 120 Wn. App. 312, 85 P.3d 395 (2004), we reversed the defendant's conviction because the trial court had not instructed the reconstituted jury to disregard its previous deliberations and to begin deliberations anew. In so doing, this court remarked that the trial court had erred in an additional respect:

> Because we have reversed the conviction, we do not determine whether the trial court's seating of the alternate juror without determining on the record his continued impartiality was reversible error. Nevertheless, we note that this was error, and that the trial court compounded the error by not seeking out the parties through counsel to obtain input before seating the alternate juror.

Stanley, 120 Wn. App. at 318.

Because, therein, the defendant's conviction was reversed based upon the trial court's failure to instruct the reconstituted jury to begin its deliberations anew—a requirement clearly mandated by CrR 6.5—that part of the Stanley decision expounding upon additional error is dictum. Moreover, in that case, we found problematic the apparent absence of an opportunity for the parties to provide input regarding the replacement of a deliberating juror with an alternate juror. Stanley, 120 Wn. App. at 315, 318. Thus, the quoted language from Stanley should not be read as divesting the trial court of the discretion conferred upon it by CrR 6.5, thus changing the plain language of that rule—which states

that the trial court *may* conduct a brief voir dire before seating an alternate juror—from permissive to directory. Rather, this portion of our decision in Stanley should be read by trial judges as an indication that the discretion conferred upon them by CrR 6.5's permissive language should be exercised only after giving notice to the parties, coupled with an opportunity to be heard. Such a practice ensures that the defendant's constitutional right to a trial by an impartial jury is adequately protected.

Here, the trial court properly complied with CrR 6.5 by instructing the jury to begin its deliberations anew upon seating the alternate juror. The court also properly instructed Juror 6, prior to temporarily excusing her, to continue to abide by her obligation to not discuss the case. Contrary to Chirinos's contention that the State must "prove [that] the temporarily discharged juror remained unbiased," Appellant's Br. at 11, the court rules require only that the trial court "take appropriate steps to protect alternate jurors from influence, interference or publicity." The trial court did that here, by admonishing the alternate juror, prior to her temporary excusal, to continue to observe the duties that she had earlier sworn to undertake. Moreover, the seating of the alternate juror herein did not occur without notice to, and an opportunity to provide input by, the parties. Without some indication that Juror 6 had become biased during her temporary excusal, the trial court was no more obligated to voir dire Juror 6 upon her return than it was to voir dire the other jurors, who had gone home for

the weekend, before permitting them to continue deliberation.

The trial court has the discretion to determine whether to voir dire an alternate juror upon his or her return. CrR 6.5 ("the trial judge *may* conduct brief voir dire before seating such alternate juror" (emphasis added)). Nothing in the record indicates that this trial court improperly employed its discretion. Because the trial court properly instructed the alternate juror to continue to abide by her obligations and, upon her seating, instructed the reconstituted jury to begin its deliberations anew, Chirinos was not deprived of his right to an impartial jury.

The remainder of this opinion has no precedential value. It will, therefore, be filed for public record in accordance with the rules governing unpublished opinions.

III

Chirinos next contends that insufficient evidence was presented to support the jury's verdict finding him guilty of attempted robbery in the second degree. We disagree.

"The principles of due process require the State to prove beyond a reasonable doubt every essential element of a crime." State v. Marohl, 170 Wn.2d 691, 698, 246 P.3d 177 (2010). In determining whether the evidence is sufficient to support a conviction, we must "view the evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt."

State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). We "must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). "Circumstantial evidence and direct evidence are equally reliable." Thomas, 150 Wn.2d at 874.

Chirinos was convicted of attempted robbery in the second degree. Robbery in the second degree is defined as follows:

> A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190; see also RCW 9A.56.210(1) ("A person is guilty of robbery in the second degree if he commits robbery."). "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1). Chirinos asserts that the State did not prove that he intended to forcibly take Turner's car.

"Any force or threat, no matter how slight, which induces an owner to part with his [or her] property is sufficient to sustain a robbery conviction." State v.

Handburgh, 119 Wn.2d 284, 293, 830 P.2d 641 (1992). Moreover, the force or threat need not be overt or involve the display of a weapon. See, e.g., State v. Collinsworth, 90 Wn. App. 546, 553-54, 966 P.2d 905 (1997) (holding that, although bank robber neither displayed weapon nor made overt threat, his demand for money was "fraught with the implicit threat to use force"); State v. Ammlung, 31 Wn. App. 696, 704, 644 P.2d 717 (1982) (holding that threat of force was sufficient to sustain robbery conviction where evidence was presented that defendant blocked victim's path to her car at the time her keys were taken). Indeed,

> "if the taking of the property [is] attended with such circumstances of terror, or such threatening by menace, word, or gesture as in common experience is likely to create an apprehension of danger and induce a [person] to part with property for the safety of his [or her] person, it is robbery."

Collinsworth, 90 Wn. App. at 551 (quoting State v. Redmond, 122 Wash. 392, 393, 210 P. 772 (1922)).

Here, Chirinos jumped through the open window of Turner's car, grabbed the steering wheel, and attempted to press the accelerator. He repeatedly yelled at Turner to "get going now." During the incident, Turner sustained bruises and her skirt was ripped. Notwithstanding that Chirinos did not overtly threaten to harm Turner, his actions were "fraught with the implicit threat to use force." Collinsworth, 90 Wn. App. at 553-54. Such evidence is sufficient to support the jury's finding of the "use or threatened use of immediate force,

violence, or fear of injury" necessary to support a conviction for attempted robbery in the second degree.

Chirinos asserts that robbery requires the taking of property and that the taking of services, such as a ride home, is not encompassed within that crime. However, Chirinos's actions did not constitute, as he contends, a mere request for services, and the statutory definition of robbery clearly applies to the facts of this case. A person commits robbery when he "takes" the personal property of another by use or threatened use of force, which must be used to retain or obtain "possession" of that property. RCW 9A.56.190. To "take" is defined as "[t]o obtain possession or control, whether legally or illegally." Black's Law Dictionary 1590 (9th ed. 2009). "Possession" is defined as "[t]he fact of having or holding property in one's power; the exercise of dominion over property." Black's, supra, at 1281. Thus, Chirinos did not need to order Turner to exit her car in order to attempt to "take" the car. Rather, he needed only to attempt to assert power or control over the car, which he did by grabbing the steering wheel and attempting to push the accelerator.

Chirinos further contends that his actions were consistent with his testimony that he simply wanted Turner to give him a ride home. Credibility determinations, however, are to be made by the trier of fact and are not subject to review. Thomas, 150 Wn. 2d at 874. The jury was entitled to disbelieve Chirinos's testimony.[4]

[4] Chirinos additionally contends that the State misrepresented the legal elements of

Sufficient evidence supports Chirinos's conviction for attempted robbery in the second degree.[5]

IV

Chirinos next contends that the trial court erred by admitting evidence that Holt's car was stolen. Chirinos asserts that such evidence was inadmissible as character evidence pursuant to ER 404(b).[6] We disagree.

Chirinos raises this issue for the first time on appeal. An issue raised for the first time on appeal will not be reviewed by the appellate court unless the claimed error is a manifest error affecting a constitutional right. RAP 2.5(a). "Evidentiary errors under ER 404 are not of constitutional magnitude." State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Thus, where a defendant

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attempted robbery by telling the jury that the substantial step required to support a conviction for that crime requires only that the defendant "needs to have done something." Appellant's Br. at 18. This quote is taken out of context. In discussing the jury instructions, the State explained:

> Now, for something to qualify as an attempted crime the person needs to take a substantial step towards completing the crime. In this case, for the defendant to have made a substantial step towards completing the Crime of Robbery In the Second Degree, taking her car, he needs to have done something.
>
> What did he do? Evidence clearly shows you the defendant Superman'd into the car. Evidence clearly shows he put his hand toward the gas pedal. He said to her "Go, go, go." And she indicated to you that she had a fear that she would be harmed. You heard testimony that her skirt was ripped in the process.

RP (Oct. 29, 2009) at 86. When read within the context of the State's closing remarks as a whole, it is clear that the State did not misrepresent the law.

[5] Chirinos also assigns error to the trial court's denial of his motion to dismiss the attempted robbery charge due to insufficient evidence. Because sufficient evidence supports Chirinos's conviction of attempted robbery in the second degree, the trial court did not err by denying his motion to dismiss that charge.

[6] ER 404(b) provides:

> **Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

does not object at trial to the admission of evidence on the basis of ER 404(b), the defendant may not assert on appeal that the trial court erred by admitting such evidence. State v. Mason, 160 Wn.2d 910, 933, 162 P.3d 396 (2007); State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985); State v. Fredrick, 45 Wn. App. 916, 922, 729 P.2d 56 (1986).

The theft of Holt's car was referenced numerous times at trial, including in the State's opening argument and in the testimony of various witnesses.[7] Throughout the testimony regarding Holt's stolen car, the defense not once objected on the basis of ER 404(b).[8] Because the admissibility of evidence pursuant to ER 404(b) cannot be raised for the first time on appeal, Chirinos has waived this claim of error. Thus, we do not address this contention on the merits.

V

Chirinos's next contends that the prosecutor committed misconduct during Chirinos's cross-examination by asking questions that, Chirinos asserts, were

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[7] Given that the State addressed Holt's stolen car in its opening argument and that numerous witnesses testified regarding that car, Chirinos's contention that the State "slip[ped] in the allegation that Chirinos may have stolen Holt's car," Appellant's Br. at 24, is unconvincing.

[8] The defense did object to the testimony of Officer Vojir, an officer who was involved in the recovery of Holt's car. However, the defense objected solely on the basis of relevance:

> I would at this point in time object to really all of [Officer Vojir's] testimony on the grounds of relevance. It's evidently relevant to the [S]tate's case that Mr. Holt believes his vehicle to have been stolen[;] that's part of the res gestae. However, the means and manner it was recovered is irrelevant and on that grounds I would object to [Officer Vojir's] testimony.

RP (Oct. 26, 2009) at 79. Indeed, by noting that the evidence was part of the "res gestae," the defense effectively admitted that ER 404(b) does not require the exclusion of this evidence. See State v. Brown, 132 Wn.2d 529, 570-71, 940 P.2d 546 (1997) (noting that the court has recognized a res gestae, or "same transaction," exception to ER 404(b), which permits the admission of evidence of other crimes or misconduct to "complete the story of the crime by establishing the immediate time and place of its occurrence").

intended to elicit from him statements that several of the State's witnesses were lying. Chirinos asserts that, due to this misconduct, he was denied a fair trial. We disagree.

"Where prosecutorial misconduct is claimed, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Prejudice is established only where there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). "Unless [the] defendant objected to the improper comments at trial, requested a curative instruction, or moved for a mistrial, reversal is not required unless the prosecutorial misconduct was so flagrant and ill intentioned that a curative instruction could not have obviated the resultant prejudice." State v. Barrow, 60 Wn. App. 869, 876, 809 P.2d 209 (1991). Put another way, "[r]eversal is not required if the error could have been obviated by a curative instruction which the defense did not request." State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

Prosecutorial misconduct occurs where the prosecutor asks one witness whether another witness is lying. State v. Wright, 76 Wn. App. 811, 821, 888 P.2d 1214 (1995); State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991). "[R]equiring a defendant to say that other witnesses are lying is prejudicial because it puts the defendant in a bad light before the jury." Wright,

76 Wn. App. at 822. Such questions "are unfair to the witness because there may be other explanations for discrepancies in testimony." Wright, 76 Wn. App. at 822. However, the prosecutor does not commit misconduct where he or she questions the defendant about whether another witness was mistaken, as such questions "do not have the same potential to prejudice the defendant or show him or her in a bad light." Wright, 76 Wn. App. at 822.

Chirinos first asserts that the prosecutor improperly asked him to explain why his testimony was different than that of a detective who investigated the case. However, Chirinos misstates the prosecutor's question. The prosecutor did not ask Chirinos to comment on the discrepancies between his own testimony and the detective's testimony. Rather, the prosecutor asked Chirinos to explain the discrepancies in Chirinos's own statements: "So if there were any differences between *what you said* today and *what you said* to Detective Thompson, how would [you] explain those differences?" RP (Oct. 28, 2009) at 144 (emphasis added). Chirinos then explained that those differences were due to his use of narcotics and the fact that he was "intimidated by the institution." RP (Oct. 28, 2009) at 144. The prosecutor's question was not improper.

Chirinos next contends that the prosecutor improperly asked him to express an opinion as to whether Turner was lying. The prosecutor asked Chirinos: "You didn't say 'Go, go go? . . . So if she remembered that, that would not be what happened?" RP (Oct. 29, 2009) at 23. The prosecutor also asked

Chirinos: "So if [Turner] recalled a man with a dog reaching into the car and pulling you out, that would also be inaccurate, because you got out of the car yourself?" RP (Oct. 29, 2009) at 23. Finally, the prosecutor asked Chirinos: "[I]f she remembered a man pulling you out of the car, and you remember getting out of the car, are you saying that what she remembers is inaccurate?" RP (Oct. 29, 2009) at 24. Thus, with regard to Turner's testimony, the prosecutor simply asked Chirinos whether Turner's testimony was inaccurate. Because such questions, unlike questions about whether another witness is lying, are not prejudicial to the defendant, no misconduct occurred with regard to these questions. See Wright, 76 Wn. App. at 822 ("So long as they are relevant, questions about whether another witness was mistaken or had 'got it wrong' are not objectionable or improper.").

Finally, Chirinos asserts that the prosecutor committed misconduct by asking him whether Holt was lying. The prosecutor asked Chirinos multiple questions about Holt's testimony, including: (1) "With regard to Mr. Holt, Mr. Holt was not telling the truth about the fact that you said you wanted [1,100] dollars; is that correct?"; (2) "He was not telling the truth about the fact that your agreement was for [1,100] dollars, is that correct?"; (3) "He was not telling the truth about the fact that you brought up mafia, that you said you were Peruvian mafia?"; (4) "So his testimony about that was not true?"; (6) "So his testimony about that would also be a lie?"; (7) "He lied then too?"; (8) "So you would be

saying [that] he was not telling the truth on the stand?" RP (Oct. 29, 2009) at 55-57.

Such questions are improper. See Wright, 76 Wn. App. at 822-23. However, the defense never objected to this questioning of Chirinos. Where the defense does not object to the improper questioning, reversal is required only where the misconduct is so flagrant and ill-intentioned that a curative instruction would not have prevented prejudice to the defendant.[9] State v. Smith, 67 Wn. App. 838, 847, 841 P.2d 76 (1992) (quoting Barrow, 60 Wn. App. at 876); see also Casteneda-Perez, 61 Wn. App at 364. Chirinos has failed to show that a curative instruction would not have prevented any prejudice that may have resulted from the prosecutor's improper questioning. Thus, appellate relief is not warranted.

VI

Chirinos finally contends that he was denied a fair trial because the prosecutor, in closing argument, informed the jury that Chirinos had proposed instructions on two lesser included offenses. We disagree.

During closing argument, the prosecutor stated:

> The judge read to you these instructions. And there are actually eight different potential counts. You may have noticed that difference as the judge was reading through. The defense counsel has requested two lesser includeds. In my closing I will address

[9] Prior to being questioned on cross-examination, Chirinos had already called Holt a liar multiple times on direct examination. Thus, even had the jury viewed Chirinos in a bad light due to his comments about Holt's truthfulness, any prejudice that may have resulted from such commentary was not likely the product of questioning by the prosecutor. Moreover, given Chirinos's testimony on direct examination regarding Holt's truthfulness, it is understandable that defense counsel did not object to the prosecutor's questions regarding the same subject.

> the six counts the defendant is charged with, address the evidence in each count, and talk briefly about a few of the jury instructions that I feel will be helpful for you to pay specific attention to when you go to the juryroom.

RP (Oct. 29, 2009) at 79-80. The defense objected to the prosecutor's statement that the defense requested jury instructions on the lesser included offenses. The trial court sustained the objection and then instructed the jury to disregard the prosecutor's statement: "Ladies and gentlemen, I need to instruct you at this time to disregard any statement with regard to the lesser includeds in this matter. The determination of whether lesser includeds should be given to the jury is a determination that is made solely by the Court." RP (Oct. 29, 2009) at 80. In the absence of the jury, Chirinos moved for a mistrial, contending that the prosecutor's statements relieved the State of its burden of proof. The trial court ruled that the curative instruction was sufficient and denied the motion.

Where the trial court instructs the jury to disregard a prosecutor's improper statement, "the jury is presumed to follow the court's instructions to disregard it." State v. Swan, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990) (holding that, although the prosecutor's remark was improper, the defendant was not denied a fair trial where the trial court instructed the jury to disregard the improper remark). Here, the trial court instructed the jury to disregard the prosecutor's statement that the defense had requested instructions on two lesser included crimes. Moreover, both the court's instructions to the jury and the prosecutor's closing argument made clear that the State bore the exclusive

burden of proof.

Because the jury is presumed to follow the trial court's instructions, Swan, 114 Wn.2d at 661-62, and because the jury instructions herein made clear that the State bore the sole burden of proof, Chirinos was not denied a fair trial.

Affirmed.

Dwyer, C. J.

We concur:

Appelwick, J.

Becker, J.