Supreme Court No. 101985-8
(COA No. 38684-8-III)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MIREY CRUZ-HERNANDEZ,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Mirey Cruz-Hernandez, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review. RAP 13.3, RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Hernandez seeks review of the Court of Appeals decision dated April 13, 2023, attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Did the police create a custodial environment requiring *Miranda*[1] warnings when two officers entered Mr. Cruz Hernandez's home without a warrant and began questioning him without a Spanish

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

interpreter or providing him with an opportunity to decline to answer questions?

2. Must a court determine the role race plays in determining whether an interrogation is custodial when the police enter a home without the resident's permission and then proceed to question a non-English-speaking Latino suspect without first providing *Miranda* warnings?

3. Did the prosecutor's arguments, designed to reduce its burden of proof and allow the jury to speculate about evidence it did not view, deprive Mr. Cruz-Hernandez of a fair trial?

D. STATEMENT OF THE CASE

Isidoro Mellado-Rodriguez first claimed he had been assaulted in the field where he picked apples. RP

271.[2] He did not identify an assailant. After speaking with his Uber driver, Mr. Mellado-Rodriguez changed his story and implicated Mr. Cruz-Hernandez. RP 282.

In his revised story, Mr. Mellado-Rodriguez told the police Mr. Cruz-Hernandez, his roommate, assaulted him. RP 257-58. Mr. Mellado-Rodriguez claimed Mr. Cruz-Hernandez was already home when he asked Mr. Mellado-Rodriguez how his day had been. RP 252. Mr. Mellado-Rodriguez told Mr. Cruz-Hernandez he had not completed his goal of getting four bins of apples picked. *Id*. Mr. Mellado-Rodriguez then claimed Mr. Cruz-Hernandez suddenly said he was going to pay Mr. Mellado-Rodriguez back for what he did to him. *Id*. With no explanation, Mr. Cruz-Hernandez attacked Mr. Mellado-Rodriguez with a

[2] The transcripts are largely sequential. Where they are not, the date of the hearing is included.

knife, stabbing him on his third attempt. RP 257-58. Mr. Mellado-Rodriguez then left the apartment to seek medical treatment. RP 268, 270.

The government had very little evidence regarding Mr. Mellado-Rodriguez's injury or its treatment, other than that he moved from the original clinic where he sought help to another location. RP 271. He also admitted he could reduce his medical bills by implicating Mr. Cruz-Hernandez. RP 281.

At the first clinic, Mr. Mellado-Rodriguez spoke with the police. RP 276. He told them someone stabbed him in the field where he worked. *Id.* He provided no motive for the assault. RP 267-68.

Mr. Mellado-Rodriguez changed his story after getting a ride home from the second facility. RP 282. Mr. Mellado-Rodriguez stated his Uber driver told him

he should implicate Mr. Cruz-Hernandez, which he decided to do. *Id*.

After changing his story, the police focused on Mr. Mellado-Rodriguez's apartment, which he shared with Mr. Cruz-Hernandez for a short time. RP 224.

The police arrived at the apartment and spoke to the apartment manager. RP 188. Before entering the apartment, the police saw something that looked like a blood trail leading from the door. RP 192.

The apartment manager opened the door to the shared apartment and let law enforcement in without seeking permission from Mr. Cruz-Hernandez, who was in the apartment. RP 219.

The two officers came into the apartment and began asking Mr. Cruz-Hernandez questions. RP 299. Mr. Cruz-Hernandez speaks Spanish, and one of the officers interpreted the questions and answers for the

other. RP 199, CP 9. The officers did not provide Mr. Cruz-Hernandez with *Miranda* warnings. CP 9.

During his interrogation, Mr. Cruz-Hernandez denied the assault. RP 240. He said he had not left the apartment for days or seen Mr. Mellado-Rodriguez. *Id.*

The police found a knife in the apartment and sent it to the Washington State Crime Lab for testing. RP 204. The prosecuting attorney decided not to test the knife. RP 227. The police took no samples from the apparent blood trail outside the apartment. RP 218.

During jury selection, the prosecutor asked jurors if they were familiar with CSI Las Vegas or CSI Miami. RP 59. He then asked whether the potential jurors expected this trial to resemble CSI Grant County. *Id.*

The prosecutor returned to this theme in closing arguments, arguing he should not be held to the

burden of a prosecutor in a mythical CSI Grant County television show. RP 393.

The prosecutor also commented in closing arguments on his decision not to test the knife, saying testing would probably have shown DNA from Mr. Mellado-Rodriguez and Mr. Cruz-Hernandez. RP 393.

The jury acquitted Mr. Cruz-Hernandez of the first-degree assault charges but found him guilty of second-degree assault. CP 41-42. The court imposed a standard-range sentence, with an additional 12 months for the weapon enhancement, for 18 months of incarceration. CP 50.

E. ARGUMENT

1. The government's use of unconstitutionally acquired statements requires reversal.

Despite the trial court's order allowing Mr. Cruz-Hernandez's statements to be admitted over his

objection, the Court of Appeals declined to review whether his statements were admissible. App. 11-12.

First, this Court should accept review because these statements were challenged below. Even if this Court should find otherwise, it meets the standards for review as the issues raised are manifest errors affecting a constitutional right. RAP 2.5(a)(3).

This Court should accept review of whether the government's illegal seizure and subsequent custodial interrogation of Mr. Cruz-Hernandez required suppression. Because this issue is a significant constitutional question and involves an issue of substantial public interest, review should be granted. RAP 13.4(b)(3) and (4).

a. Miranda warnings are required before a custodial interrogation.

The state and federal constitutions protect a person accused of a crime against self-incrimination.

"*Miranda* warnings were developed to protect a defendant's constitutional right not to make incriminating confessions or admissions to police while in the coercive environment of police custody." *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004); U.S. Const. amend. V; U.S. Const. amend. VI; Const. art. I, § 9; Const. art. I, § 22.

Absent *Miranda* warnings, this Court presumes statements made during a custodial interrogation are involuntary. *Heritage*, 152 Wn.2d at 214. Thus, the first step in determining the admissibility of Mr. Cruz-Hernandez's statement is to determine whether he was in custody. *See State v. Rosas–Miranda*, 176 Wn. App. 773, 779, 309 P.3d 728 (2013).

b. Mr. Cruz Hernandez was not free to leave when he made his statements, implicating the requirement to provide Miranda warnings.

Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444.

Deciding whether a person is free to leave requires a court to determine "whether a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest." *State v. S.J.W.*, 149 Wn. App. 912, 928, 206 P.3d 355 (2009), *aff'd on other grounds*, 170 Wn.2d 92, 239 P.3d 568 (2010) (quoting *State v. Lorenz*, 152 Wn.2d 22, 36–37, 93 P.3d 133 (2004)).

This test allows courts to ask whether a "reasonable person [would] have felt he or she was not

at liberty to terminate the interrogation and leave." *Howes v. Fields*, 565 U.S. 499, 509, 132 S. Ct. 1181, 1189, 182 L. Ed. 2d 17 (2012) (alteration in original) (quoting *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995)).

Factors a court should consider in determining whether a person is in custody include "(1) the language used to summon the individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain the individual." *United States v. Kim*, 292 F.3d 969, 974 (9th Cir.2002) (internal marks and citations omitted).

An interrogation in a home is custodial when the circumstances turn "the otherwise comfortable and familiar surroundings of the home into a 'police-

dominated atmosphere.'" *United States v. Craighead*, 539 F.3d 1073, 1083 (9th Cir. 2008); *see also Rosas-Miranda*, 176 Wn. App. at 782-83. Where "the facts belie any conclusion that [the suspect's] home, on the morning of the questioning at issue, was the traditional comfortable environment that we normally would consider a neutral location for questioning," suppression may be required. *United States v. Revels*, 510 F.3d 1269, 1275 (10th Cir. 2007).

A reasonable person interrogated within their home may have a different understanding of whether they are "truly free 'to terminate the interrogation'" than when the interrogation occurs at another location. *Craighead*, 539 F.3d at 1083. More important than the familiarity of the surroundings where the accused is being held "is the degree to which the police dominated the scene." *Sprosty v. Buchler*, 79 F.3d 635, 641 (7th

Cir. 1996); *see also United States v. Mittel-Carey*, 493 F.3d 36, 40 (1st Cir. 2007); *United States v. Griffin*, 922 F.2d 1343, 1354–55 (8th Cir.1990). For example, the United States Supreme Court found a police-dominated scene where four officers entered a suspect's home and behaved as though the suspect was not free to leave. *See Orozco v. Texas*, 394 U.S. 324, 326, 89 S. Ct. 1095, 22 L. Ed. 2d 311 (1969).

Like *Orozco*, Mr. Cruz-Hernandez was in custody when the police took his statement. Notably, the evidence does not show that Mr. Cruz-Hernandez consented to the police entering his home. CP 9. Instead, the police had the apartment manager open the door for them without gaining permission from Mr. Cruz-Hernandez first. 11/4 RP 10.

Two officers entered Mr. Cruz-Hernandez's apartment. 11/4 RP 15, 18; CP 9. Because Mr. Cruz-

Hernandez does not speak English, one officer translated for the other. *Id*. at 11; CP 9. Questioning began immediately. *Id*. Further, the police did not activate their body cameras when they interrogated Mr. Cruz-Hernandez, making it impossible to challenge their description of the interrogation. RP 311.

Both officers appear to be regular uniformed officers. Mattawa officer Alejandro Zesati is a field training officer and school resource officer. 11/4 RP 15. Deputy Jesse King works a patrol shift. *Id*. at 8. Both officers would have been armed. Additionally, because they come from different departments, they would have arrived at Mr. Cruz-Hernandez's home in separate vehicles, a further show of force.

When the number of law enforcement personnel outnumbers the suspect, the suspect may reasonably believe that should he attempt to leave, he will be

stopped. *Craighead*, 539 F.3d at 1084-85. Surrounded by two officers and the apartment manager, Mr. Cruz-Hernandez would not have felt free to leave. *See, e.g., Orozco*, 394 U.S. at 325.

And while the police did not tell Mr. Cruz-Hernandez he could not leave, the government did not provide any evidence indicating the police informed him he could stop the questioning if he wanted to. CP 9. In cases where a suspect is informed they may leave, the chance a suspect would believe they were in custody is greatly reduced. *Griffin*, 922 F.2d at 1349. The government presented no such evidence here.

Under these circumstances, the government failed to show that *Miranda* warnings were not required. Mr. Cruz-Hernandez was accosted in his home, which the police entered without his permission. He did not even open the door for them, which was

opened by the office manager. 11/4 RP 10. Once inside, the police overwhelmed the small apartment and immediately questioned Mr. Cruz-Hernandez in a language he does not speak. CP 9.

Given the totality of these circumstances, the trial court should have found Mr. Cruz-Hernandez was not free to leave. *Rosas-Miranda*, 176 Wn. App. at 784. Because he was in custody, *Miranda* warnings were required. *Id*. The failure to provide Mr. Cruz-Hernandez with warnings required suppression. The court erred when it found his statements to be voluntary. *Craighead*, 539 F.3d at 1084-85.

Nor should this Court determine the Court of Appeals was right when it decided not to review this issue. App. 11. Mr. Cruz-Hernandez did not waive his right to have the court determine the constitutionality of his statement. He did not stipulate to its

admissibility. The Court of Appeals erred when it did not review this issue, which now meets the standards for review by this Court. RAP 13.4(b)(3) and (4).

c. Race likely played a factor in the decision to interrogate Mr. Cruz-Hernandez without Miranda warnings.

The role of racial discrimination in the criminal legal system is endemic. Permitting racial prejudice in the jury system damages "'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.'" *State v. Bagby*, 200 Wn.2d 777, 787, 522 P.3d 982 (2023) (quoting *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 137 S. Ct. 855, 868, 197 L. Ed. 2d 107 (2017) (quoting *Powers v. Ohio*, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)). Courts have an unequivocal duty to reduce and eradicate racism and prejudice and to develop the legal system into one that serves the ends

of justice. *Henderson v. Thompson*, 200 Wn.2d 417, 421, 518 P.3d 1011 (2022) (citing Open Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Cmty. 1 (June 4, 2020)).[3]

Mr. Cruz-Hernandez is a Spanish-only-speaking Latino. 11/24 RP 5. As such, the role race and ethnicity played regarding whether Mr. Cruz-Hernandez was seized must also be analyzed. *State v. Sum*, 199 Wn.2d 627, 630, 511 P.3d 92 (2022). Neither the trial court nor the Court of Appeals conducted this analysis.

This Court should accept review to hold that trial courts must look to whether an objective observer would have felt Mr. Cruz-Hernandez's race and ethnicity would have played a role in whether he was free to leave, thus requiring *Miranda* warnings.

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[3] http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf.

In *Sum*, this Court held that courts must consider the race and ethnicity of the allegedly seized person as part of the totality of the circumstances when deciding whether there was a seizure for purposes of article I, section 7. 199 Wn.2d at 656 at 110. This Court recognized that many courts have already recognize that race can be a relevant factor in determining whether a person was seized. *Id*. at 102 (*citing United States v. Smith*, 794 F.3d 681, 688 (7th Cir. 2015) (quoting *United States v. Mendenhall*, 446 U.S. 544, 558, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)); *see also Dozier v. United States*, 220 A.3d 933, 942-45 (D.C. 2019); *United States v. Washington*, 490 F.3d 765, 773 (9th Cir. 2007)). Others that had not included it as a factor had applied an improper test. *Id*.

This Court also acknowledged that "[f]or generations, black and brown parents have given their

children "the talk"—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them." *Sum*, 199 Wn.2d at 644 (*quoting Utah v. Strieff*, 579 U.S. 232, 254, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016) (Sotomayor, J., dissenting)). "History has shown that when courts create 'crippling' legal burdens to recognizing the constitutional rights of BIPOC, their lived experiences are unjustly disregarded and their rights go unprotected." *Id*. at 104 (*citing State v. Jefferson*, 192 W.2d 225, 240, 429 P.3d 467 (2018) (Gordon McCloud, J., lead opinion) (*quoting State v. Batson*, 476 U.S. 79, 92, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)).

Race played a role in Mr. Cruz-Hernandez's perception of whether he was seized. Mr. Cruz-

Hernandez does not speak English and is a migrant farm worker. RP 249. His encounters with the police likely result in serious liberty restrictions for him and others, including potential deportation. Critically, Mr. Cruz-Hernandez was not even given the courtesy of deciding whether to allow the police into his home, as the building manager let them in. RP 219. Once inside the apartment, both officers questioned him, one speaking through the other. 11/4 RP 12. These would be intimidating circumstances for anyone, but especially for a non-English-speaking person

An objective observer would have viewed race as a factor in whether Mr. Cruz-Hernandez believed he was free to leave. *Sum*, 199 Wn.2d at 652. As a Latino man without English speaking skills, Mr. Cruz-Hernandez would not have felt free to leave. Under the totality of the circumstances, this Court should find

Mr. Cruz-Hernandez was seized before his interrogation and that *Miranda* warnings were required.

The question of what role race plays in determining whether an interrogation is custodial is a significant constitutional question and involves an issue of substantial public interest. RAP 13(a)(3) and (4). The Court of Appeals was wrong in deciding it did not satisfy RAP 2.5. This Court should accept review.

2. The government's misconduct in jury selection and closing arguments deprived Mr. Cruz-Hernandez of a fair trial.

The Court of Appeals determined that the government did not commit misconduct. App. 12. After granting review, this Court will find that the government's attempt to shift its burden during jury selection and closing arguments, along with calls to speculate on what untested evidence might show,

deprived Mr. Cruz-Hernandez of his right to a fair trial. Because this issue involves a significant question of constitutional law and an issue of substantial public interest, this Court should accept review. RAP 13.4(a)(3) and (4).

a. It is misconduct when the government attempts to reduce its burden of proof or ask the jury to speculate about what evidence would show.

The Sixth and Fourteenth Amendments and article I, section 22 of the state constitution protect the right to a fair trial. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012) (citations omitted); U.S. Const. amend. VI; Const. art. I, § 22. Prosecutorial misconduct deprives a person accused of a crime of their constitutional right to a fair trial. *Glasmann*, 175 Wn.2d at 703-04 (citing *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984)).

The government bears the burden to prove a criminal case beyond a reasonable doubt and may not shift the burden of proof to the defense. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). A person accused of a crime is not required to present any evidence at trial. *State v. Osman*, 192 Wn. App. 355, 366, 366 P.3d 956 (2016).

"Arguments by the prosecution that shift or misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt constitute misconduct." *State v. Lindsay*, 180 Wn.2d 423, 434, 326 P.3d 125 (2014). A prosecutor's arguments are improper if they discuss the reasonable doubt standard in a way that "trivialize[s] and ultimately fail[s] to convey the gravity of the State's burden and the jury's role in assessing the State's case." *State v. Johnson*, 158 Wn. App. 677, 684, 243 P.3d 936 (2010) (quoting

State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010)).

Although prosecutors have "wide latitude" to make inferences about witness credibility, it is flagrant misconduct to shift the burden of proof to the defense. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997) (citing *State v. Hoffman*, 116 Wn.2d 51, 94–95, 804 P.2d 577 (1991)).

Misconduct also occurs when a prosecutor references evidence outside the record or asks the jury to speculate regarding what evidence might show. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988)). Likewise, the government commits misconduct when it suggests the jury should decide a case based on evidence outside the record.

State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012).

b. The government's arguments to reduce its burden of proof and speculate about missing evidence were flagrant and ill-intentioned.

The Court of Appeals found that the government did not commit misconduct because it asked jurors to make its decisions based on the evidence during jury selection. App. 14. But whether the prosecutor made a general statement about the evidence does not take away from its attempt to reduce its burden. In determining whether to accept review, this Court should focus instead on the prosecutor's questions about whether potential jurors were familiar with *CSI Las Vegas* or *CSI Miami*. RP 59. When they said they were, he asked them if "it would be fair to say that there's not a *CSI Grant County*." *Id.*

After some juror hesitation, the prosecutor stated, "The investigations that we see kind of on TV shows and stuff, is it fair to say that you don't believe that some of that stuff actually happens?" RP 59. He then asked whether jurors could base their decisions on the evidence they heard. *Id.* After a juror expressed concern about what evidence would be presented, the prosecutor ran out of time to explain his position and was instructed to return to the question in his second round of jury selection. *Id.* While defense counsel asked the potential juror additional questions, the government never returned to the potential juror's concerns. RP 67.

In his rebuttal closing argument, the prosecutor returned to the CSI Grant County issue. RP 393. He argued that no testing was done on the forensic evidence because the police did not "tear up the

concrete" to get a sample of suspected blood. *Id.* Immediately after, he criticized the defense argument about the blood trail, calling it an "odd" argument. RP 394. The Court of Appeals also found this was not misconduct. App. 15.

This Court should not be so persuaded. Asking the jury to discount the government's burden is misconduct, which the prosecutor did in jury selection and during the rebuttal closing argument. *Emery*, 174 Wn.2d at 760. When the government spoke in jury selection about limited resources because this was just a Grant County case, it intentionally reduced its burden. RP 393.

And as argued below, the standard does not change because a prosecution occurs in a rural county, as there is no justice by geography. The government's burden to prove its case beyond a reasonable doubt is

no different in Grant County than in Las Vegas or Miami. RP 59. To suggest otherwise, even in the context of a television show, shifted the government's burden and constituted misconduct. *Lindsay*, 180 Wn.2d at 434.

The Court of Appeals held that even if this was misconduct, it could have been cured with an instruction. App. 13. On review, however, this Court should find these arguments flagrant and ill-intentioned. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). Not only had the police done little to collect forensic evidence, but the trial prosecutor personally decided not to send the evidence the government possessed to the crime lab for testing. RP 228, 393. Nonetheless, the government argued that the evidence would likely return with Mr. Cruz-Hernandez's DNA if it had been tested. RP 393.

The prosecutor compounded this misconduct by asking the jury to speculate about what the evidence would have shown had he not decided to forgo testing the knife supposedly used in the assault. RP 393. The prosecutor's suggestion that the jury could speculate that the missing evidence would have supported the government's case became an easy argument because the prosecution had already successfully argued that his burden should be reduced. Compounding these arguments deprived Mr. Cruz-Hernandez of his right to a fair trial. *Pierce*, 169 Wn. App. at 553. Nor should this Court be persuaded that the arguments were merely responsive. App. 14. Any argument Mr. Cruz-Hernandez might have made does not justify a response that constitutes misconduct.

Instead, this Court should look to whether a timely objection could have cured the prejudice caused

by the misconduct, as no objection occurred in this case. *State v. Walker*, 182 Wn.2d 463, 478, 341 P.3d 976 (2015). In making this determination, at least two cases have examined whether the defendant suffered prejudice and whether the misconduct had been identified in prior cases. *See Johnson*, 158 Wn. App. at 685; *Fleming*, 83 Wn. App. at 213-14. It is not the strength of the evidence that determines whether prejudice occurred but whether the misconduct affected the verdict. *Walker*, 182 Wn.2d at 479.

The misconduct affected the verdict. There was no evidence Mr. Cruz-Hernandez assaulted Mr. Mellado-Rodriguez except in his testimony. Further, Mr. Mellado-Rodriguez made contradictory statements before trial, calling his credibility into question. The evidence was not so strong that the misconduct should be ignored.

This Court should accept review to determine whether the prejudice Mr. Cruz-Hernandez suffered requires a new trial. This issue is a significant question of constitutional law and involves an issue of substantial public interest. This Court should grant review RAP 13.4(b)(3) and (4).

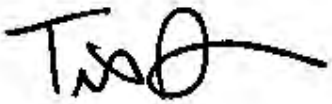
F. CONCLUSION

Based on the preceding, Mr. Cruz-Hernandez requests that review be granted. RAP 13.4(b).

This petition is 4,182 words long and complies with RAP 18.7.

DATED this 15th day of May 2023.

Respectfully submitted,



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APPENDIX

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FILED
APRIL 13, 2023
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. MIREY CRUZ HERNANDEZ, Appellant.	)))))))))	No. 38684-8-III UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — Mirey Cruz Hernandez appeals his conviction for assault in the second degree with a deadly weapon enhancement. He raises two arguments on appeal—error in not suppressing his statements to law enforcement and prosecutorial misconduct. The first is unpreserved, and the second fails. We affirm.

FACTS

Isidro Rodriguez Mellado[1] worked at an apple orchard in Grant County, where he picked apples part of the year. He met Mirey Cruz Hernandez while working in the

[1] We refer to Mr. Rodriguez by his primary last name. At trial, he stated that his primary last name is Rodriguez.

orchards five years earlier. Mr. Rodriguez leased an apartment in Mattawa, which he allowed Mr. Cruz Hernandez to occupy with him. Both men speak Spanish.

On September 1, 2021, Mr. Rodriguez went to work in the morning, then returned to his apartment. When he arrived home, Mr. Cruz Hernandez asked him how his day was. Mr. Rodriguez responded that he was a little tired and that he had fallen short of picking four bins of apples. Then, as he set his lunchbox down in the kitchen, Mr. Cruz Hernandez said, "I'm going to pay you back for what you did to me," then lunged at him with a knife three times, stabbing him above his stomach on the third attempt. Rep. of Proc. (RP) (Dec. 1-3, 2021) at 252. Afterward, while still bleeding, Mr. Rodriguez grabbed a chair to defend himself, then backed away and left the apartment.

Mr. Rodriguez then drove himself to a clinic in Mattawa. There, he told the clinic staff that a friend assaulted him in the orchards; he did not want to implicate Mr. Cruz Hernandez because he did not want to cause him any legal trouble. Based on a report from the clinic, Mattawa Police Department Officer Alexandro Herrera Zesati and Grant County Sheriff's Deputy Jesse King began investigating the stabbing. Mr. Rodriguez was taken to a hospital in Richland, where he stayed for one night.

The next day, September 2, Mr. Rodriguez took an Uber from the hospital to the clinic to pick up his car. His Uber driver asked about what happened and told him she thought it would be a mistake to let the person who stabbed him get away with it.

Once Mr. Rodriguez got his car from the clinic, he drove to his apartment where he ran into the apartment manager, Jose Fernandez. He told Mr. Fernandez that Mr. Cruz Hernandez had assaulted him. At that moment, Mr. Cruz Hernandez came out of the apartment. He approached, asked Mr. Rodriguez why he had not slept at home, and said that he was going to see a friend for a few minutes. Mr. Cruz Hernandez left and, at that time, Mr. Rodriguez called police and told them that he was stabbed by Mr. Cruz Hernandez in his apartment.

Investigation

On September 1, the day of the stabbing report, Officer Zesati responded to the clinic to take pictures of Mr. Rodriguez's stab wound. Meanwhile, Deputy King drove to an orchard outside of Mattawa city limits to investigate. When he arrived at the orchard, he found no one to speak with, so he went to a neighboring orchard and was told that workers had gone home for the day.

He resumed the investigation the next day, September 2. He returned to the orchard and spoke with a field manager and owner and asked about the stabbing. He

then drove to the Mr. Rodriguez's apartment. When he arrived, he saw what appeared to be blood on the ground leading from a parking spot to the door of the apartment. He knocked on the apartment door and received no response, so he left to meet with Officer Zesati to figure out a plan.

Officer Zesati knew Mr. Fernandez and contacted him to see if he would let the officers into the apartment. Both officers met Mr. Fernandez at the apartment building. Once Officer Zesati arrived, he saw what appeared to be a blood trail from the parking lot up to Mr. Rodriguez's apartment. The trio walked up to the apartment and Mr. Fernandez knocked on the door.

Body camera video

The next five minutes of the interaction were recorded by Deputy King's body camera. Video of the interaction first shows the officers and Mr. Fernandez walk up to the apartment door on the second floor of the building. Once at the door, Mr. Fernandez knocks, asks for "Eddie," then says "open the door" in Spanish. Ex. 20, at 49 sec. through 58 sec. A man who later identifies himself as Mr. Cruz Hernandez opens the door and says something inaudibly, an officer asks how he is doing, then Mr. Fernandez says "he says you guys can come in." Ex. 20, at 1 min., 7 sec. through 1 min., 27 sec. Before the officers enter, Deputy King asks Mr. Fernandez to tell Mr. Cruz Hernandez

that he is recording the interaction. Once inside the apartment, Officer Zesati translates Deputy King's questions and Mr. Cruz Hernandez's answers.

As Mr. Cruz Hernandez lets the officers and Mr. Fernandez into the apartment, Deputy King asks if he saw anything with Mr. Rodriguez. Mr. Cruz Hernandez denies seeing Mr. Rodriguez. He then confirms his name after Deputy King asks, then walks to the kitchen to get identification at Deputy King's request. One of the men then asks Mr. Cruz Hernandez when he last saw Mr. Rodriguez. He responds that the last time he saw Mr. Rodriguez was the day before yesterday.

Deputy King then asks Mr. Cruz Hernandez to "sit down for me for a sec.," which he does. Ex. 20, at 2 min., 13 sec. through 2 min., 26 sec. Deputy King then asks whether he worked with Mr. Rodriguez at the orchard and if there had been issues between the two. Mr. Cruz Hernandez responds that they worked together and that he had not seen Mr. Rodriguez since Tuesday. Deputy King then asks if he is aware of what happened to Mr. Rodriguez, then says "sounds like he got stabbed with a knife and I'm trying to figure out if you know anything about that." Ex. 20, at 3 min., 37 sec. through 3 min., 51 sec. Mr. Cruz Hernandez tells the officers he does not know anything about the stabbing. Deputy King asks if he noticed the blood coming from the apartment to the outside. Mr. Cruz Hernandez responds that he did not notice the blood outside because

his car is broken and he has not left. He also tells the officers that Mr. Rodriguez should have told investigators who stabbed him. Deputy King then asks to speak with Officer Zesati outside of the apartment and walks toward the door and the video ends.

After leaving the apartment, Officer Zesati met with Mr. Rodriguez to get a statement. Later that day, Officer Zesati returned to the apartment to have Mr. Rodriguez show him the knife that Mr. Cruz Hernandez used to stab him. The knife was located in the kitchen sink, inside a clear glass, which was filled with water. The blade was approximately four and one-half inches long. It was identifiable because it was one of two knives in Mr. Rodriguez's kitchen and because the tip was broken. Officer Zesati packaged the knife and sent it to the Washington State Patrol Crime Laboratory, but it was never tested for deoxyribonucleic acid (DNA) or fingerprint evidence.

Procedure

The State charged Mr. Cruz Hernandez with assault in the first degree and assault in the second degree, both with deadly weapon enhancements. Mr. Cruz Hernandez pleaded not guilty.

CrR 3.5 suppression hearing

Before trial, the court held a CrR 3.5 hearing, which is required when a statement of an accused is to be offered in evidence at trial. CrR 3.5(a). The State called both Deputy King and Officer Zesati to testify about their interview with Mr. Cruz Hernandez. Deputy King testified he did not give *Miranda*[2] warnings before asking questions. Both officers testified they did not handcuff Mr. Cruz Hernandez, tell him he was not free to leave, or tell him that he had to talk to them. Defense counsel waived argument during the hearing and made no objection to the statements or their admissibility. The body camera video was not played during the suppression hearing nor was it discussed.

The trial court admitted the statements, explaining:

> [Those appear] to be voluntary statements. Based on the facts that [Mr. Cruz Hernandez] was not in restraints, he was not told he was under arrest, he was not told he was not free to leave, and [the officers] did not curtail his movement, I find that this was not a case where Miranda was necessary, and so the Miranda did not have to be provided to the defendant, and based on that the statements are admissible under Rule 3.5.

RP (Nov. 4, 2021) at 20-21. The court later entered findings of fact and conclusions of law after defense counsel stated he agreed with them and had no objections to their entry. In relevant part, the court concluded:

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

1. The court finds the defendant was not in custody in the apartment when statements were made by the defendant, and *Miranda* warnings were not needed.
2. The court finds the defendant's statements were made freely and voluntarily.
3. The court finds that the statements made by the defendant inside of the apartment are admissible at trial.

Clerk's Papers (CP) at 9-10. The trial court later heard argument on defense counsel's motions in limine, none of which concerned Mr. Cruz Hernandez's statements to the officers in his apartment.

Voir Dire

During voir dire, the prosecutor asked potential jurors questions, including a series of questions of whether they thought television shows like *Crime Scene Investigation* (*CSI*) realistically portrayed criminal investigations.

Trial

During trial, the State called both Officer Zesati and Deputy King to testify about their involvement with the investigation and about their interaction with Mr. Cruz Hernandez inside his apartment. Officer Zesati testified that he noticed a strong and obvious odor of "Clorox" inside the apartment. RP (Dec. 1-3, 2021) at 206. Deputy King similarly testified that the apartment smelled like "fresh bleach." RP (Dec. 1-3, 2021) at 240.

The State next called Mr. Rodriguez to testify. He recounted getting off work, Mr. Cruz Hernandez stabbing him, and then obtaining medical treatment. He testified that Mr. Cruz Hernandez was well organized and cleaned during their time living together, but that the smell of bleach when he returned to the apartment with the officers was unusually strong and out of the ordinary.

The State next called Mr. Fernandez to testify. He testified that he works for the Grant County Housing Authority and is the site manager for the apartment complex where Mr. Rodriguez lives. He testified that he walks around the apartment buildings daily to check for damage. During his walk-through on September 1, he noticed blood on the sidewalk outside Mr. Rodriguez's apartment. On September 2, Officer Zesati called and told him someone had been injured inside Mr. Rodriguez's apartment. He also testified about accompanying the officers to Mr. Rodriguez's apartment and that Mr. Cruz Hernandez let them inside.

Last, the State called Gilberto Gonzalez, the foreman of the apple orchard, to testify. He testified that he saw Mr. Rodriguez leaving work on September 1 and that he did not appear to be injured or stabbed.

After the State rested, defense counsel called Officer Zesati to testify. During his testimony, defense counsel moved to admit and play the video from Deputy King's body camera. The court admitted and played the entire video.

Defense counsel next called Mr. Cruz Hernandez to testify. During direct examination, he testified he did not stab Mr. Rodriguez. He testified he saw Mr. Rodriguez on August 31, before work. During cross-examination, he testified he did not go to work in the orchards on September 1. Instead, he testified he stayed inside the apartment that day because his car was broken. He also testified he had not seen Mr. Rodriguez in two days, since August 30, which was inconsistent with his statement during direct examination. He testified he went to visit a friend the next day, September 2, but that he did not see the blood on the concrete. When asked about cleaning the apartment with Clorox, he stated "I clean every day." RP (Dec. 1-3, 2021) at 323.

Defense closing and State rebuttal

During defense counsel's closing argument, he again referred to the body camera video and emphasized that Mr. Cruz Hernandez was acting normal when he was questioned by the officers. He also criticized the State's decision not to test the knife or blood stains outside the apartment for DNA evidence.

The prosecutor then gave a rebuttal closing argument and explained why he had decided not to test the knife for DNA evidence, and why he believed the evidence presented supported conviction.

The jury found Mr. Cruz Hernandez guilty of assault in the second degree, together with the deadly weapon enhancement, and acquitted him of assault in the first degree. The trial court sentenced him to 18 months of confinement, inclusive of a 12-month weapon enhancement, and 18 months of community custody.

Mr. Cruz Hernandez timely appealed.

ANALYSIS

SUPPRESSION OF STATEMENTS TO LAW ENFORCEMENT

Mr. Cruz Hernandez contends the trial court erred by failing to suppress the statements he made to law enforcement. The State raises multiple responses, including that we should not review this issue because Mr. Cruz Hernandez never objected at trial to the admission of his statements to the officers. We agree.[3]

Failure to raise an issue before the trial court generally precludes a party from raising it on appeal. RAP 2.5. "Although this rule insulates some errors from review, it

[3] We note that Mr. Cruz Hernandez, himself, had the recorded interview admitted as part of his case—probably to show his calm demeanor and his suggestion to the investigating officers that they ask Mr. Rodriguez who stabbed him.

encourages parties to make timely objections, gives the trial judge an opportunity to address an issue before it becomes an error on appeal, and promotes the important policies of economy and finality." *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). Although RAP 2.5(a) sets forth exceptions to this rule, Mr. Cruz Hernandez does not argue that any exception applies. We therefore decline to address this unpreserved claim of error.

PROSECUTORIAL MISCONDUCT

Mr. Cruz Hernandez contends the prosecutor committed misconduct in voir dire and closing arguments. We disagree.

The defendant bears the burden of showing that the prosecutor's comments were improper and prejudicial. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). However, where, as here, the defendant fails to object or request a curative instruction at trial, the issue of misconduct is waived unless the conduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). Under this heightened standard, the defendant must show that (1) "'no curative instruction would have obviated any prejudicial effect on the jury'" and (2) the misconduct resulted in prejudice that "'had a substantial likelihood of affecting the jury verdict.'" *State v. Emery*, 174 Wn.2d 741,

761, 278 P.3d 653 (2012) (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). The focus should be less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured. *Id*. at 762.

Here, Mr. Cruz Hernandez points to two instances of alleged misconduct by the prosecutor: (1) voir dire questions about the television show *CSI*, and (2) the rebuttal closing argument about forensic testing and *CSI*. We disagree and discuss each separately.

The prosecutor's voir dire questions

First, Mr. Cruz Hernandez argues that the prosecutor's questions about *CSI* in voir dire asked the jury to discount the State's burden to prove the charged crimes beyond a reasonable doubt. He did not raise this argument below; thus, he argues that the comments were flagrant and ill intentioned.

Mr. Cruz Hernandez assigns error to the following comments that the prosecutor made to potential jurors during voir dire:

> Anyone in here seen the TV shows like CSI? Yeah, we've got pretty much everyone. Yeah. So CSI Las Vegas or CSI Miami, something like that, right?
>
> Okay. Just as a general question, do you think it would be fair to say that there's not a CSI Grant County?
>
> . . . .

> Okay. The investigations that we see kind of on TV shows and stuff, is it fair to say that you don't believe that some of that stuff actually happens? [L]et me ask this question this way instead: Throughout the trial we're going to be putting on different pieces of evidence, and I want to make sure that you are able to hear the evidence presented and only make your decisions based on the evidence as it is laid out throughout this trial. Is everyone able to do that?

RP (Dec. 1-3, 2021) at 59.

We are not persuaded that the prosecutor was attempting to shift, reduce, or misstate the State's burden based on these voir dire questions so as to constitute misconduct. Even had we so found, the jury instructions or a curative instruction would have corrected the prosecutor's questions. In fact, the prosecutor's last question quoted above is nearly identical to the first line of the jury instruction 1, which both parties agreed on: "It is your duty to decide the facts in this case based upon the evidence presented to you during this trial." CP at 22. Further, jury instruction 4 provided the correct burden of proof to the jury: "The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements." CP at 27. Jurors are presumed to follow the jury instructions. *In re Pers. Restraint of Phelps*, 190 Wn.2d 155, 172, 410 P.3d 1142 (2018). The jury instructions would have corrected any alleged

confusion based on the prosecutor's *CSI* questions; thus, a curative instruction would have also cured any confusion stemming from the prosecutor's questions.

The prosecutor's rebuttal closing argument

Second, Mr. Cruz Hernandez argues that the prosecutor's rebuttal closing arguments asked the jury to discount the State's burden and asked the jury to speculate about what the knife and the blood trail on the concrete might have shown had they been tested. He also did not raise this argument below; thus, he argues that the comments were flagrant and ill intentioned.

In the context of closing arguments, the prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). This is especially so where, as here, the prosecutor is rebutting an issue the defendant raised in his closing argument. *State v. Jones*, 71 Wn. App. 798, 809, 863 P.2d 85 (1993). It is not misconduct for the prosecutor to fairly respond to defense counsel's argument or to argue that the evidence does not support the defense theory. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). Misconduct does occur when a prosecutor references evidence outside the record or asks the jury to speculate what the evidence might show. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). We review allegedly improper

comments in the context of the entire argument, the issues in the case, and the instructions given to the jury. *Id*.

Mr. Cruz Hernandez points to the following remarks by the prosecutor to evidence his arguments:

> We'll talk about the knife first. [Defense counsel] stated a decision was made as to not test the knife. That's true. As prosecuting—as a deputy prosecutor, we make lots of judgment calls every day. The evidence that we had before us was that both [Mr. Rodriguez] and [Mr. Cruz Hernandez] admitted . . . that they were living together, at least for some time. It's likely the knife would have come back with DNA from both of them anyways. So a decision on my part was made to just not have the knife tested.
>
> Also, with that was the conclusion that the reports and testimony from officers were that—was that the apartment smelled like bleach as if it had been cleaned. And you heard that testimony today (sic), so again, the decision was made.
>
> I'd also note, you know, we mentioned at the beginning of all this about whether or not there existed a CSI Grant County, and, you know, the officers did not tear up the concrete and get the blood trail tested for the victim's blood.
>
> However, what we have is the evidence that I pointed out to you, that we know that that trail was not there on—that the blood trail was not there on Tuesday, and it was there on Wednesday.

RP (Dec. 1-3, 2021) at 393-94. Mr. Cruz Hernandez argues that these statements asked the jury to discount the State's burden by telegraphing to the jury that the State did not need to test forensic evidence because this was only a Grant County case. The State argues that the prosecutor was simply trying to manage juror expectations by referencing

his voir dire comments about making a decision based on the evidence as it is and not as they might have seen it in a television show like *CSI*.

We agree with the State. Considering the prosecutor's comments in the context of the entire argument, they did not reduce the State's burden of proof. Instead, they seem to refer back to his voir dire question about deciding the case based on the evidence presented. Regardless, if we had found that the comments were an attempt to shift or reduce the burden, they could have been cured by the jury instructions quoted above or by a curative jury instruction.

Mr. Cruz Hernandez also argues that the prosecutor's comments asked the jury to speculate that any test results of the knife, had it been tested, would have supported the State's case. We disagree.

The prosecutor's rebuttal arguments quoted above seem to be responsive to defense counsel's closing argument. Defense counsel argued in closing:

> There was, you know, no investigation done as to the blood stains, whose blood they were, no samples were taken for DNA analysis of those blood stains. A knife was seized from the apartment. It was a very serious crime and the state wants you to believe that that's the murder weapon—or not the murder weapon, but the weapon used in the assault. Okay. You'd think that they would test it, right? DNA, blood, fingerprints.
>
> But what happens instead? A decision is made by the state not to test the weapon. That's the kind of thing that you do when you've already made up your mind, you've accused someone, you don't want to be confused by any other facts that might contradict your conclusion. That's

> called confirmation bias. They've already made up their mind my client's guilty, why bother testing? Well, what the test might have shown, perhaps, who knows, it might have shown that another person's fingerprints were on that knife, it might have shown that a third person's DNA was present. We'll never know, because it was never tested.

RP (Dec. 1-3, 2021) at 391-92.

Considering the prosecutor's rebuttal in the context of the entire argument, including defense counsel's closing argument, we do not find that the prosecutor's comments about not testing the knife amount to misconduct. The prosecutor did not ask the jury to speculate about what DNA might have been on the knife. Instead, the prosecutor was responding to defense counsel's argument, which asked the jury to speculate about what forensic tests might have shown.

It is not misconduct for the prosecutor to fairly respond to defense counsel's argument or to argue that the evidence does not support the defense theory. *Russell*, 125 Wn.2d at 87. This is what occurred here. The prosecutor specifically states that he is responding to defense counsel's argument about the decision not to test the knife or blood trail, then explains that he made the decision because the knife would probably show both men's DNA because they lived together, regardless of the stabbing. The prosecutor followed up by reminding jurors about the actual evidence in the record.

Considering that the prosecutor is allowed to draw all reasonable inferences from the evidence, especially in rebuttal closing argument, we do not find the prosecutor's arguments here amounted to misconduct.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, A.C.J.
Lawrence-Berrey, J.

WE CONCUR:

Fearing, J.
Fearing, C.J.

Pennell, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Three** under **Case No. 38684-8-III**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: May 15, 2023

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May 15, 2023 - 4:26 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	38684-8
Appellate Court Case Title:	State of Washington v. Mirey Cruz Hernandez
Superior Court Case Number:	21-1-00363-9

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