SUPREME COURT NO. 102037-6

NO. 83316-2-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RONALD GUNTER,

Petitioner.

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

The Honorable Jason Poydras, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner, Ronald Gunter, the appellant below, asks this Court to review the decision referred to in Section B.

B. COURT OF APPEALS DECISION

Gunter requests review of the Court of Appeal's decision in State v. Gunter (83326-2-I) entered on May 8, 2023.

C. ISSUES PRESENTED FOR REVIEW

1. Where the defense to an arson charge is diminished capacity and the core issue for the jury to decide is whether the defendant knowingly and maliciously set the fire, does a detective unlawfully comment on a defendant's guilt when he opines that accused was trying to burn down the house?

2. Do prior convictions that carry a "domestic violence" designation establish ipso facto abuse for purposes of a sentencing aggravator under RCW 9.94A.535(3)(h)(i)?

D. RELEVANT FACTS

At approximately 3:00 a.m. on May 30, 2019, Ethan Duston noticed a fire burning on the front porch of his Bellevue

home. RP 755, 763-64. He alerted his parents. RP 769. The family exited out the back door and called the fire department. RP 769-70, 836. The fire department arrived to observe what Captain Doug Halbert characterized as "a very small amount of fire" at the entrance of the house accompanied by lots of smoke and the smell of gasoline. RP 944, 998.

Meanwhile, Ethan Dutson and his mother, Kristy Dutson, reviewed the surveillance video from their home security system with responding police officers. RP 785-86. It showed a man pouring gasoline on the doormat and lighting it on fire. Ms. Dutson identified the man in the video as her brother, Ronald Gunter. RP 842-44.

Mr. Gunter had been unemployed for decades and was homeless, mostly sleeping outside rather than contending with shelters. RP 141, 1359-60. He had grown up nearby in an abusive home and subsequently had been the subject of intense family conflict. RP 1359, 1361. Mr. Gunter asserted his family had wrongly taken his few possessions that he left at the family

home and shunned him while they lived a comfortable life. RP 1444-45. Meanwhile, family members accused Mr. Gunter of acts of domestic violence. RP 847, RP 1719-21. As a result of the conflict, Mr. Gunter was not welcome in the Dutson home. RP 843-44, 847.

On the night of the fire, Mr. Gunter had been awake for days and was wandering around Bellevue in an agitated state for approximately 40 hours. RP 142, 1385, 1432-33. He arrived at his sister's home and saw a welcome mat on the front porch. RP 1434. Feeling extremely agitated, Mr. Gunter took a gas cannister from the Dutsons' firepit, walked back around the house spilling gas, and set the welcome mat on fire. RP 1434.

The King County prosecutor charged appellant Ronald Gunter with one count of first-degree arson -- domestic violence (DV). CP 1-8. The information was later amended to add a sentencing aggravator, with the State alleging this offense was part of an ongoing pattern of abuse. CP 54-56.

Awaiting trial, Mr. Gunter was diagnosed with bipolar

disorder. RP 1362; CP 152. Evaluating psychiatrist Mark Koenen described Mr. Gunter's history as indicating "utter disfunction." RP 1359-60. Dr. Koenen diagnosed Mr. Gunter as manic depressant based on documented depressive episodes and after personally witnessing Mr. Gunter in a manic state during two interviews. RP 1356, 1361, 1370-71, 1375; CP 152.

Mr. Gunter asserted a diminished capacity as a defense. RP 51. The court, the parties, and the jury all understood the core issue in dispute was whether Mr. Gunter, given his mental state, knowingly and maliciously set fire to the Dutson home. CP 104; RP 186, 210, 1638-41, 1650-61, 1669. Dr. Koenen opined that Mr. Gunter was in a manic state when he lit the fire. RP 1389. He explained, while Mr. Gunter would have been aware of the act of setting fire to the mat, Mr. Gunter was not able to form the requisite mental state of knowingly and maliciously causing danger and damage to the property or persons inside due to the manic state he was experiencing. RP 1385-88.

The State put up their expert who offered a different diagnosis and opinion, but this witness had never seen Gunter in a manic state. RP 1515, 1524, 1530, 1547. The State also called Detective Gregory Oliden who had arrived on scene shortly after the fire was put out. RP 1034 He walked the scene, took photographs, and watched the surveillance footage.[1] Detective Oliden told the jury that he observed a strong odor of gasoline near the front door and another side of the house. RP 1042-70, 1124-29. The prosecutor asked what he thought was going on when he smelled gas outside of the house. RP 1070. Defense counsel objected to this as calling for an improper opinion, but the objection was overruled. Id. Detective Oliden answered:

> I believe that based on what I saw at the front door and the fire damage, and based on what I saw on the surveillance footage, when I smelled the

[1] The photos and video surveillance were entered into evidence for the jury to directly observe. RP 791, 1042-56, 1095-1120, 1165-69.

> gasoline on this side of the house, I believe that somebody was trying to burn down this house.

Id. Defense counsel objected again, but she was again overruled. Id. The jury ultimately found Gunter knowingly and maliciously setting the fire.

The trial then moved to the aggravator phase. The State offered seven "DV" convictions between 2008 and 2017 to show a pattern of abuse, but it provided no evidence as to the factual basis for any of these offenses. RP 1710, 1721-22; Ex. 103-08. Two of the convictions were for assault, the rest were convictions for theft, malicious mischief, and violation of a no-contact order. Id. The State's position was that the prior convictions, when viewed collectively and with the dv designation, demonstrated an ongoing pattern of abuse. RP 1730.

Defense counsel moved to exclude five of the prior convictions (those that were not assaults) as irrelevant. RP 1710-12, 1714-15. She asserted that without the underlying

factual basis, the convictions for theft, malicious mischief, and violation of no-contact orders were irrelevant because even with a dv designation they do not, ipso facto, establish the criminal conduct involved abuse. Id. The trial court denied the motion, ruling all the submitted criminal history "was relevant to the ultimate question the jury has to decide." RP 1715-16.

The defense filed a motion to set aside the verdict as to the aggravator. CP 125-32; RP 1762-65. Defense counsel renewed her assertion that without the factual basis for the prior convictions there was nothing establishing these convictions involved abusive conduct. CP 127-32; RP 1762-65. Defense counsel argued that due to the lack of a factual basis no reasonable juror could have found beyond a reasonable doubt these convictions involved abusive conduct. CP 125-32; RP 1762-65.

With regard to the prior convictions for theft, malicious mischief, and the two violations of no-contact orders, the trial court reversed itself and finally acknowledged that a rational

trier of fact would not have been able to find these were part of a pattern of abuse based on the DV designation alone. RP 1771. However, it concluded that there was sufficient evidence to uphold the sentencing aggravator based on the two assault convictions.

E. ARGUMENT IN SUPPORT OF REVIEW

I. WHETHER AN INVESTIGATING OFFICER MAY OPINE THAT AN ALLEGED ARSONIST'S INTENT WAS "TO BURN DOWN THIS HOUSE" IN A DIMINISHED CAPACITY CASE RAISES A SIGNIFICANT QUESTION OF LAW UNDER THE CONSTITUTION.

The role of the jury is to be held "inviolate" under Washington's constitution. U.S. CONST. amend. VII; WASH. CONST. art. I, §§ 21, 22. The evil sought to be avoided by prohibiting a witness from expressing an opinion as to the accused's guilt or innocence is having that witness tell the jury what result to reach rather than allowing the jury to make an independent evaluation of the facts. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); State v. Black, 109

Wn.2d 336, 348, 745 P.2d 12 (1987); 5A K. Tegland, Wash. Prac., Evidence, § 309, at 470 (3d ed. 1989). As this case demonstrates, clarification is needed as to how these constitutional tenets apply in the context of arson charges and a diminished capacity defense where state of mind is the core issue in dispute.

It is "clearly inappropriate" for the State to offer opinion testimony in criminal trials that amounts to an expression of personal belief as to the guilt of the defendant, whether direct or indirect. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (citation omitted). This Court has held there are some areas that are clearly inappropriate for opinion testimony in criminal trials. Id. Among these are "opinions, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses." Id. (emphasis added). Opinion testimony must be avoided if the information relied upon can be presented in such a way that the jury can draw its own conclusions. Id. at 592.

Given the arson charge, the State had to prove Mr. Gunter knowingly and maliciously caused the fire to the Dutson home. RCW 9A.48.020. The defense did not dispute that it was Mr. Gunter on the video setting fire to the mat. There was no dispute that he knew he was setting the fire. Thus, the core question in dispute was whether he had the capacity to form the requisite state of mind (maliciousness) when he set the fire. Accordingly, Detective Oliden's testimony that he believed (based on evidence which was already before the jury), that Mr. Gunter was trying to burn down the house. The unmistakable inference being that it was the detective's opinion that Mr. Gunter set the fire with malicious intent.

On appeal, Mr. Gunter asserted he was denied his constitutional right to a fair trial when the trial court permitted Detective Oliden to testify as to his belief that Mr. Gunter "was trying to burn this house down" because this is an improper opinion regarding the core issue in dispute – whether Mr. Gunter "maliciously" set fire to the mat. Brief of Appellant

(BOA) 11-23; Reply Brief of Appellant (RBOA) at 1-7. The Court of Appeals disagreed, concluding that "Detective Oliden's testimony commented on only the origin of the fire." Appendix at 7. However, the Court of Appeals misconstrues the detective's testimony and thereby fails to properly consider it in the context of Mr. Gunter's defense. Appendix at 7.

Detective Oliden opined that Mr. Gunter formulated the intent not just to start a fire but to light a fire with the goal of burning down the house. This was not a comment merely on the origin of the fire. Had the detective merely testified that the fire originated at the front door or was intentionally set, that would have been fair game. The problem here is that the Detective went one step beyond this when he opined as to Mr. Gunter's state of mind and his alleged goal of burning down the house. This was an opinion that spoke directly to the maliciousness element.

Without Detective Oliden's impermissible opinion as to Mr. Gunter's intent, this was "a classic battle of the experts, a

battle in which the jury must decide the victor." Intalco Aluminum v. Dep't of Labor & Indus., 66 Wn. App. 644, 662, 833 P.2d 390 (1992) (citation omitted). The differing expert opinions demonstrate that reasonable minds had reached different conclusions as to Mr. Gunter's ability to form the required intent. "It is the ... province of the jury to weigh the evidence, to determine the credibility of the witnesses, and to decide the disputed questions of fact." State v. Snider, 70 Wn.2d 326, 327, 422 P.2d 816 (1967). Our constitution required that the jury be permitted to do this without Detective Oliden's opinion as to Mr. Gunter's state of mind.

The jury saw the video Detective Oliden was referring to. It heard Detective Oliden testify he smelled gasoline as he walked the scene. It saw the pictures he took. Hence, the jury was in just as good a position as the Detective to draw reasonable inferences as to whether those facts were sufficient to establish knowing and malicious intent beyond a reasonable doubt.

Unfortunately, in deciding the case as it did, the Court of Appeals has created a conflict with State v. Farr-Lenzini, 93 Wn. App. 453, 465, 970 P.2d 313 (1999), which holds where state of mind is the core issue for determining guilt, an officer's opinion about the defendant's state of mind is inadmissible. Appendix at 6-7. In Farr-Lenzini, the State charged the defendant with attempting to elude a pursuing police vehicle. Id. at 458. The core issue in dispute was the defendant's state of mind. Id. at 463. When the State asked the pursuing police officer to give his opinion "as to what the defendant's driving pattern exhibited," the officer responded that the driver "was attempting to get away from me and knew I was back there and refusing to stop." Id. at 458. Washington Court of Appeals, Division Two held that the officer's testimony about Farr-Lenzini's state of mind violated her right to a jury trial because it constituted an opinion about the intent element of the offense, the core element in dispute. Id. 463-64. The same result should apply here.

In an attempt to distinguish Farr-Lenzini, the Court of Appeals mischaracterized the detective's statement as merely stating that "someone intentionally set the house on fire." Appendix at 7. This ignores the improper aspect of the detective's opinion which was that the fire was set with the goal of burning down the house. Based on the detective's actual comment, this case sets squarely within Farr-Lenzini's holding that officers cannot invade the province of the jury by opining as to the accused's state of mind where that is the core element in dispute.

In sum, review should be granted because this case raises a significant constitutional question regarding when an office may offer an opinion as to the state of mind of a defendant who is raising a diminished capacity defense. RAP 13.4(b)(3). Additionally, review should be granted because the Court of Appeals decision conflicts with State v. Farr-Lenzini. RAP 13.4(b)(2).

II. THE COURT OF APPEALS' CONCLUSION THAT A DEFENDANT'S PRIOR CONVICTION IS RELEVANT TO ESTABLISHING A PATTERN OF ABUSE SOLELY BY VIRTUE OF ITS DV DESIGNATION CONFLICTS WITH PRIOR DECISIONS FROM THIS COURT AND THE COURT OF APPEALS.

RCW 9.94A.535(3)(h)(i) allows for an aggravated sentence where "[t]he current offense involved domestic violence... and ... was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time." On appeal, Mr. Gunter asserts the trial court erred when it ruled his prior convictions for theft, malicious mischief, and violation of no contact orders were relevant to establishing a sentencing aggravator under RCW 9.94A.535(3)(h)(i). BOA at 33-37; RBOA at 8-13. Specifically, he asserts the State had to show a factual basis indicating abusive conduct by Mr. Gunter before it could establish a logical nexus between the proffered convictions and

the fact to be proved (i.e., physical or psychological abuse.)[2] Id. The Court of Appeals disagreed, holding that Mr. Gunter's prior convictions for dv offenses were relevant solely by virtue of their "dv" classification. This conclusion conflicts with State v. Bartlett, 128 Wn.2d 323, 333, 907 P.2d 1196 (1995) and State v. Brush, 5 Wn. App. 2d 40, 56, 425 P.3d 545 (2018).

Prior repetitive dv convictions are already accounted for in one's the offender score and should not be counted a second time in imposing a sentence outside the standard range. State v. Bartlett, 128 Wn.2d 323, 333, 907 P.2d 1196 (1995). Consequently, the jury may not use the fact of a prior dv conviction alone to justify an exceptional sentence; instead, the jury must draw "from the facts of a prior conviction to show extraordinary circumstances justifying a departure from the standard range" to establish an aggravator. Id.

[2] There must be a logical nexus between the evidence and the fact to be established. State v. Cochran, 102 Wn. App. 480, 486, 8 P.3d 313 (2000); ER 401.

In this case, there were no underlying facts establishing the criminal conduct of the prior convictions from which the jury could draw. Without evidence establishing the factual basis of these prior convictions, this evidence was irrelevant to the question of whether the current crime was part of a pattern of abuse. Hence, it should have never been allowed to go to the jury to consider as part of an aggravator. The Court of Appeals conflicts with Bartlett.

The Court of Appeals' decision also conflicts with State v. Brush, 5 Wn. App. 2d 40, 56, 425 P.3d 545 (2018). In Brush, the Court of Appeals indicated that not all acts of dv constitute abuse. It explained "psychological" abuse occurs when a person attacks or injures a person's mental and emotional condition. Id. at 52. Brush held RCW 9.94A.535 (3)(h)(i) does not apply to verbal statements or acts "that cause only minimal psychological impact on the victim." Id. at 56. Instead, "the defendant's behavior must rise to the level of 'abuse.'" Id. The State must prove the prior convictions

involved "some level of actual psychological harm." Id. (emphasis added). In other words, a dv act does not necessarily constitute abuse for purposes of RCW 9.94A.535(3)(h)(i) simply because it is classified as "domestic violence," there must be a showing of some actual harm to the victim.

When analyzing the issue here, the Court of Appeals relied on the dv designation and improperly assumed facts that were not before the jury when it came to the prior convictions that involved violations of no contact order. It assumed that the victims had actively sought legal protection from Mr. Gunter. Appendix at 9. However, a person may violate a no contact order even when invited by the victim. While the party's violation of the no-contact order is illegal despite the victim's consent, such conduct does not constitute abusive conduct as contemplated by Brush. Theft from a household member does not necessarily involve physical or psychological harm. As for malicious mischief, one can be convicted if they merely write or draw on a household member's personal property, which

does not necessarily involve psychological harm. RCW 9A.48.090. Under the reasoning in Brush, these dv conviction do not rise to the level of abuse necessary to support an aggravated sentence with evidence of actual harm.

Without a factual basis, the five convictions at issue here were not probative of abuse because there was no basis from which the jury could conclude Mr. Gunter's conduct in those prior offenses involved actual psychological or physical abuse. Indeed, the trial court eventually reached this conclusion in its post-trial ruling. It ultimately found -- even when looking at the evidence through the light most favorable to the state -- a rational trier of fact would not have been able to find the State had proved the five dv convictions were part of a pattern of abuse. RP 1771. This is correct under Brush. Yet, the Court of Appeals determined that regardless of the underlying conduct the dv designation of those priors established abuse. Appendix 9-10. Accordingly, the Court of Appeals' decision in Mr. Gunter's case has created a conflict in the law.

In sum, the Court of Appeals decision conflicts with this Court's decision in Bartlett and the Court of Appeals decision in Brush. Hence, review is appropriate under both RAP 13.4(b)(1) and (2).

F. CONCLUSION

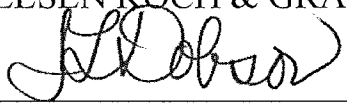
For the reasons stated above, Mr. Gunter respectfully asks this Court to grant review.

I certify that this document contains 3292 words excluding the parts exempted by RAP 18.17.

Dated this 29th day of May, 2023.

Respectfully submitted,

NIELSEN KOCH & GRANNIS



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APPENDIX

FILED
5/8/2023
Court of Appeals
Division I
State of Washington

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

THE STATE OF WASHINGTON, Respondent, v. RONALD JEFFREY GUNTER, Appellant.	No. 83316-2-I UNPUBLISHED OPINION

BOWMAN, J. — Ronald Jeffrey Gunter appeals his jury conviction for domestic violence (DV) first degree arson with a DV aggravator, alleging several errors occurred during his bifurcated trial. Gunter argues that a detective's improper opinion testimony deprived him of his right to a fair trial, that the court erred by admitting irrelevant prior DV convictions during the aggravator phase of his trial, and that the prosecutor committed misconduct by misstating the law to the jury during rebuttal closing argument. Gunter also asserts ineffective assistance of counsel and cumulative error. We affirm.

FACTS

Gunter is Kristi Dutson's estranged brother. Shortly before 3:00 a.m. on May 30, 2019, Gunter went to Dutson's home uninvited. A security camera above Dutson's front door recorded Gunter pouring liquid from a plastic gas container onto the doormat. Gunter then appears to ignite the liquid and run away.

Dutson's son, Ethan,[1] was awake in his second-floor bedroom and looking out his window when he saw an "orange glow" coming from the front porch. He went downstairs to investigate and saw smoke and flames breaching the front door. The window above the door and the two windows on either side of the door had exploded and flames were coming through the openings. Ethan ran to his parents' room, screamed "fire" several times, then called 911.

The Bellevue Fire Department and police arrived at the home and firefighters extinguished the flames. Dutson then watched the front door surveillance footage from the security camera and recognized the individual setting the fire as her brother, Gunter. Meanwhile, Bellevue Police Detective Gregory Oliden walked the scene, took photographs, and documented his observations. He smelled a "strong" odor of gasoline around the outside of Dutson's house, especially around the front door area and north side of the house. He also viewed Dutson's surveillance footage. Because of extensive structural and smoke damage, the Dutsons had to move out of their home for four to six months during repairs.

The State charged Gunter with DV first degree arson. It later amended the information, alleging the crime was an aggravated DV offense and part of an ongoing pattern of abuse. Gunter did not deny starting the fire. Instead, he claimed diminished capacity.

At the bifurcated trial, Detective Oliden testified that based on everything he saw on May 30, 2019, "someone was trying to burn down this house." The

[1] We refer to Ethan Dutson by his first name for clarity.

parties then offered competing expert testimony about Gunter's capacity to formulate the requisite intent. In closing, Gunter argued that when he set the fire, he was suffering from a manic episode due to his bipolar disorder and could not appreciate the consequences of his actions.

A jury convicted Gunter of first degree arson at the end of the trial phase.[2] By special verdict, it found Gunter and the Dutsons were members of the same family at the time he set the fire. The trial court then moved to the aggravator phase. The State offered and the court admitted certified copies of court records showing Gunter's prior convictions for seven DV offenses between 2008 and 2017. The jury determined by special verdict that the crime was an aggravated DV offense.

Gunter moved to set aside the jury's verdict as to the aggravator, asserting that insufficient evidence supported an ongoing pattern of abuse. The court denied his motion, imposed an upward exceptional sentence of 101.5 months, and entered findings of fact and conclusions of law in support of the exceptional sentence.

Gunter appeals.

ANALYSIS

Gunter argues Detective Oliden denied him a fair trial by impermissibly expressing an opinion about his guilt, the trial court erred by admitting several irrelevant prior DV convictions during the aggravator phase of his trial, and the prosecutor committed misconduct during rebuttal closing argument of the

[2] The court also gave jury instructions for the lesser included offenses of reckless burning in the first degree and arson in the second degree.

aggravator phase of trial. He also asserts ineffective assistance of counsel and cumulative error.

Opinion Testimony

Gunter argues Detective Oliden's testimony impermissibly expressed an opinion about his guilt to the jury, depriving him of his right to a fair trial. We disagree.

We review a trial court's decision to admit expert testimony for an abuse of discretion. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). The court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. State v. Quaale, 182 Wn.2d 191, 197, 340 P.3d 213 (2014). An evidentiary decision is manifestly unreasonable if it is contrary to law. Id. at 196.

Under ER 701, a lay witness may express an opinion that is (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of ER 702. Under ER 702, an expert may express an opinion if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. The witness must be qualified as an expert by knowledge, skill, experience, training, or education. ER 702.

"Generally, no witness, lay or expert, may give an opinion, directly or inferentially, on the defendant's innocence or guilt." State v. Johnson, 152 Wn. App. 924, 930, 219 P.3d 958 (2009). Impermissible opinion testimony relating to

a defendant's guilt violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). But "[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." ER 704. Whether testimony amounts to an impermissible opinion about the defendant's guilt depends on the circumstances of the case, including (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. Johnson, 152 Wn. App. at 931.

Detective Oliden testified in his capacity as an arson investigator with training, continuing education, and experience in identifying arson since 2017.[3] He walked the jury through his investigation at the Dutson residence on May 30, 2019. He told the jury what he observed when he arrived at the scene, including a charred front door, doormat, and door frame, smoke damage to the entryway and eaves, and blackened and broken windows above and next to the front door because of the intense heat of the fire. He also smelled gas outside the front area of the house and on the north side. But he explained that while he smelled gasoline on the north side of the home, he found no evidence that someone set a fire there. The prosecutor and Detective Oliden then had the following exchange:

> Q. . . . Were you able to form an opinion about what you thought was going on in this area?

[3] Gunter does not contest Detective Oliden's qualifications to testify as an expert arson investigator.

> A. Yes. I believe that based on what I saw at the front door and the fire damage, and based on what I saw on the surveillance footage, when I smelled the gasoline on this [north] side of the house, I believe that somebody was trying to burn down this house.

Defense counsel objected as "improper opinion." The court overruled the objection.[4]

Citing State v. Farr-Lenzini, 93 Wn. App. 453, 970 P.2d 313 (1999), Gunter argues that Detective Oliden's testimony amounts to an opinion on Gunter's state of mind, which was "the core issue for determining guilt." In Farr-Lenzini, a Washington State Patrol trooper observed the defendant drive her car recklessly. Id. at 456. The trooper activated his lights and siren, but the defendant kept driving for over four miles. Id. at 457-58. The State charged the defendant with attempting to elude a police officer. Id. at 458. At trial, the trooper testified that the defendant's driving showed that she " 'was attempting to get away from me and knew I was back there and refusing to stop.' " Id. The defendant testified that she did not see or hear the patrol car at first. Id. at 457. Division Two of our court held that the trooper's testimony amounted to an improper opinion. Id. at 465. The court explained that "there was an insufficient foundation to qualify the trooper as an expert for purposes of expressing an opinion as to [the defendant]'s state of mind." Id. at 461. Nor was the opinion admissible lay testimony. Id. at 462.

[4] The prosecutor also asked Detective Oliden whether someone set a fire on the north side of the house. In response, he testified, "I felt that that was going to be the intent." But defense counsel objected and the prosecutor withdrew the question. Error is generally not available to a defendant where a question is asked but withdrawn. See State v. Hunter, 183 Wash. 143, 163, 48 P.2d 262 (1935). And at oral argument, Gunter conceded that this testimony was not the focus of his argument on appeal.

This case is different than Farr-Lenzini. Here, Detective Oliden was qualified to testify as an expert arson investigator. And his opinion that somebody tried to "burn down this house" was within his area of knowledge. He based his testimony that somebody intentionally set the house on fire on his training and experience as well as his observations at the scene. Those observations included the smell of gasoline on two sides of the home, security footage of Gunter pouring liquid from a plastic gas can onto the front porch, igniting the liquid, and running away, and the damage caused by the intensity of the resulting fire.

And Detective Oliden's testimony did not go to "the core issue" of Gunter's state of mind. Gunter conceded that he intentionally lit the fire but argued through expert testimony that he could not form the capacity to do so maliciously. His expert psychiatrist testified that "[i]t's like you're dealing with the judgment of a [three]-year old. . . . It's like, 'Yeah, I've got a lighter. Yeah, I can start stuff on fire. Yeah, look, I set the curtains on fire.' " So, "to a manic person whose judgment is horrible, . . . it probably seemed like a perfectly appropriate thing to do at the time." But Detective Oliden's testimony commented on only the origin of the fire. It did not touch on the "core issue" of whether Gunter appreciated the nature of his actions. Detective Oliden did not offer an improper opinion on Gunter's guilt.

Admissibility of Prior Convictions

Gunter argues that the trial court erred by admitting several irrelevant prior convictions for DV as evidence that he committed an aggravated DV offense.

Trial courts determine whether evidence is relevant and admissible, and we review the trial court's rulings for abuse of discretion. State v. Brockob, 159 Wn.2d 311, 348, 150 P.3d 59 (2006). Evidence is "relevant" if it tends "to make the existence of any fact . . . of consequence to the determination of the action more . . . or less probable." ER 401. The threshold to admit relevant evidence is very low. State v. Briejer, 172 Wn. App. 209, 225, 289 P.3d 698 (2012). Even minimally relevant evidence is admissible. Id.

To find that a crime is an aggravated DV offense, the State must show beyond a reasonable doubt that (1) the victim and the defendant were family or household members and that (2) the offense was part of an ongoing pattern of psychological, physical, or sexual abuse manifested by multiple incidents over a prolonged period of time. RCW 10.99.020(4); RCW 9.94A.535(3)(h)(i), .537(3). The victims of the prior abuse need not be the same victim or victims of the current offense. State v. Sweat, 180 Wn.2d 156, 163-64, 322 P.3d 1213 (2014). And there is no set amount of time required for finding a prolonged pattern of abuse. See State v. Atkinson, 113 Wn. App. 661, 671-72, 54 P.3d 702 (2002) (DV abuse over 7 to 10 months during which at least three incidents of abuse required victim to seek medical attention sufficient to establish ongoing pattern of abuse); State v. Daniels, 56 Wn. App. 646, 652-54, 784 P.2d 579 (1990) (multiple incidents of child abuse within the 5-month charging period enough to

support prolonged pattern of abuse); State v. Epefanio, 156 Wn. App. 378, 392, 234 P.3d 253 (2010) (affirming jury finding that 5 to 6 weeks of sexual abuse was "a prolonged period of time").

Gunter argues that five of his past DV convictions admitted by the trial court are irrelevant to whether he engaged in an ongoing pattern of abuse. Specifically, he challenges the relevance of a 2011 conviction for DV third degree theft, three convictions for violating a DV no-contact order (NCO) in 2016, 2017, and 2018, and a 2018 conviction for DV malicious mischief in the third degree.[5] According to Gunter, these prior convictions are not relevant because "these convictions could not rationally establish abusive conduct in the absence of any factual basis revealing the nature of the illegal conduct." We disagree.

Gunter's convictions for violating DV NCOs show that he repeatedly contacted intimate partners or family members who sought legal protection from his "abuse, violence, harassment, stalking, neglect, or other threatening behavior." See RCW 7.105.900; former RCW 26.50.110 (2017). His conviction for DV malicious mischief in the third degree shows that he knowingly damaged the property of an intimate partner or family member. See RCW 9A.48.090; RCW 10.99.020(4). And his DV third degree theft conviction shows that he unlawfully took property from an intimate partner or family member. See RCW 9A.56.050; RCW 10.99.020(4). These incidents tend to make it more probable

[5] The trial court also admitted two prior DV assault convictions from 2008 and 2016. Those convictions are not at issue in this appeal.

that Gunter's current offense was part of an ongoing pattern of abuse. The trial court did not err by admitting evidence of Gunter's prior DV convictions.[6]

Prosecutorial Misconduct

Gunter argues that the prosecutor committed misconduct during rebuttal closing argument by misstating the law of the case and misleading the jury during the aggravator phase of trial. Again, we disagree.

To prevail on a claim of prosecutorial misconduct, a defendant must show that the conduct was both improper and prejudicial. State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). Prejudice is established where there is a substantial likelihood that the misconduct affected the jury's verdict. Id. We review a prosecutor's comments in the context of the entire record and the circumstances at trial. Id.

During closing argument, the prosecutor has wide latitude to argue reasonable inferences from the evidence. State v. Thorgerson, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). But a prosecutor may not misstate the law to the jury or mislead it. State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008). Misstating the law of the case to the jury is a serious irregularity having the grave

[6] Gunter claims that defense counsel was ineffective for failing to argue that the court should have excluded his prior DV convictions under ER 403. According to Gunter, the court likely would have excluded the evidence because at a post-trial hearing, the trial judge said the convictions "held very little weight" as evidence of a pattern of abuse. To establish ineffective assistance of counsel, Gunter must show that counsel's performance was deficient and that it prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). But the only legal basis Gunter offers to support his contention that the evidence was inadmissible under ER 403 is that it likely confused and misled the jury into finding the aggravating factor based on only ongoing DV instead of ongoing abusive conduct. Because we conclude that Gunter's prior DV convictions tend to show abusive conduct, we also reject his ineffective assistance of counsel claim.

potential to mislead the jury. State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

Gunter argues that the prosecutor misstated the law and "egregiously misled the jury" during the DV aggravator phase of the trial when she "essentially told the jury it could not concern itself with the lack of evidence presented by the State." He claims her argument conflicted with the court's instruction to the jury that a reasonable doubt is "a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence." But Gunter mischaracterizes the State's rebuttal argument.

In closing argument, defense counsel told the jury that nothing in the court's instructions says that "just because something is listed as a [DV] crime, that, therefore, it's part of some sort of pattern of psychological . . . abuse." She highlighted the redacted judgment and sentence for Gunter's 2011 DV third degree theft conviction, arguing that because there is no information about the underlying facts of the crime, including who the victim was, the jury could not find that the incident contributed to an ongoing pattern of abuse. She then called the jury's attention to the State's failure to call any witnesses to prove the aggravating factor. Defense counsel noted that Dutson testified during the guilt phase of the trial and then asked the jury, "[W]hy didn't we hear from Krist[i] Dutson? Why didn't we hear from the family? Why didn't we hear from individuals relating to these prior convictions?"

In rebuttal, the prosecutor correctly explained to the jury that the State need not show that Gunter's prior DV convictions involved the same victims as

the current offense to prove the DV aggravating factor. And she told the jury that "[j]ust like you were given instructions in the first part of this jury trial and the second one, you can't speculate as to which evidence came in and why or if evidence did not come in and why." The State argued that the certified records of Gunter's convictions sufficiently supported finding that he committed the aggravator:

> There's nothing that requires each of these to be [DV] offenses, but the State still has proved those to you, as well.
>
> I'm not asking you to speculate about who these prior victims are. You can't speculate as to why Krist[i] Dutson could not come in for the second portion of this trial.
>
> [DEFENSE COUNSEL]: Objection; facts not in evidence, improper argument.
>
> [PROSECUTOR]: Your Honor, this is rooted in the jury instruction and is direct rebuttal to what was stated in Defense's closing.
>
> [DEFENSE COUNSEL]: What the State is saying is inaccurate.
>
> [JUDGE]: Sustained.
>
> [PROSECUTOR] (Continuing): I'm not asking you to speculate. I'm asking you to just look at what the evidence is for this portion. And you're all reasonable, smart people, so you can make your own determinations and conclusions based on those certified documents.

Viewed in context, the State responded to defense counsel's argument that it had the burden to show the identity of Gunter's prior victims and to explain why it did not call Dutson as a witness in the aggravator phase of the trial. The State did not argue that the jury could not consider a lack of evidence in deciding whether the State met its burden of proving an ongoing pattern of abuse. Instead, the State accurately argued that the law does not require it to prove the identity of Gunter's prior victims to establish that pattern. See RCW 9.94A.535(3)(h)(i); Sweat, 180 Wn.2d at 163-64. Similarly, the State accurately

commented that the jury could not speculate about why Dutson did not testify in the second part of the trial. Dutson's testimony establishing herself as a prior victim of Gunter's DV was not relevant to any issue in the aggravator phase of the trial. And nothing in the prosecutor's comment suggested to the jury that they could not consider the lack of facts and circumstances supporting Gunter's prior convictions in reaching its determination. The prosecutor's comments were not improper.

But even if the prosecutor's comments were improper, they were in response to defense counsel's closing argument and do not warrant reversal. See State v. Fleeks, __ Wn. App. 2d __, 523 P.3d 220, 241 (2023) ("Even improper statements are not a basis for reversal when they occur as a fair response to defense counsel's arguments or where otherwise provoked."). And Gunter shows no prejudice because of the State's comments. The court instructed the jury twice—before the trial phase and again before the aggravator phase—that it could base its reasonable doubt determination on "the evidence or lack of evidence." We presume that jurors follow the court's instructions. State v. Edvalds, 157 Wn. App. 517, 525, 237 P.3d 368 (2010).

We reject Gunter's argument that we must reverse his conviction because of prosecutorial misconduct.[7]

[7] Gunter also argues that as much as "defense counsel in any way waived the prosecutorial misconduct challenge or contributed to the prejudicial effect by failing to ensure the trial court struck the prosecutor's offending argument or offered a curative instruction, defense counsel was ineffective." Because we address Gunter's argument on its merits and determine that the prosecutor did not commit misconduct, we need not address this claim.

Cumulative Error

Gunter argues that cumulative error deprived him of a fair trial. The cumulative error doctrine entitles a defendant to a new trial "when cumulative errors produce a trial that is fundamentally unfair." State v. Emery, 174 Wn.2d 741, 766, 278 P.3d 653 (2012). Reversal is not required where the errors are few and have little to no effect on the outcome of the trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Because no trial error occurred here, the cumulative error doctrine does not apply.

In sum, Detective Oliden did not offer an improper opinion on Gunter's guilt, the trial court did not err in admitting evidence of Gunter's prior DV convictions during the aggravator phase of his trial, the prosecutor's statements during closing argument did not amount to misconduct, Gunter does not show ineffective assistance of counsel, and the cumulative error doctrine does not apply. We affirm.

Brennan, J.

WE CONCUR:

Díaz, J.

Chung, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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