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No. 102375-8
COA No. 83589-1-I

THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EDWARD LEROY CARTE, JR.,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
FOR KING COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Edward Carte asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4 (b), petitioner seeks review of the published Court of Appeals decision in *State v. Edward Leroy Carte, Jr.*, No. 83589-1-I (August 21, 2023). A copy of the decision is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. The prosecution violates an accused person's constitutional rights by urging the jury to draw an adverse inference from the exercise of those rights. By arguing the accused's presence at the trial enables him to tailor his testimony, the prosecution burdens the rights to appear and defend and to confront witnesses.

Here, the Court of Appeals ruled the prosecution violated these rights by suggesting that Mr. Carte tailored his testimony based solely on his presence throughout the trial. Is an issue arising under the United States and Washington Constitutions presented where the appellate court agreed Mr. Carte's rights were violated during the State's closing argument but refuses to reverse finding Mr. Carte waived the issue?

2. The state and federal constitutions guarantee an accused person's right to present relevant evidence in his defense. The trial court violates this right by excluding evidence through erroneous application of the hearsay rule. Here, the trial court prevented Mr. Carte from recounting the complaining witness's out-of-court statements as hearsay, though none were offered for the truth of any factual assertion. Is an issue arising under the United States and Washington

Constitutions presented where these rulings violated Mr. Carte's right to present a defense?

D. STATEMENT OF THE CASE¹

Mr. Carte and Morgan Cooper-McWade began seeing each other in July 2020. RP 1755. He would visit her at her house two to three times each week, and often stayed so late that he missed the curfew at his recovery house. RP 1760–61. When he told her he worried he would lose his housing if he missed his curfew again, Ms. Cooper-McWade invited him to live with her and her two children. RP 1762–63.

Police arrested Mr. Carte in December 2020. The prosecution charged two counts of second-degree assault by strangulation and one count of harassment based on Ms. Cooper-McWade's description of events on

¹ A more complete statement of the facts can be found in pages 4-15 of the Brief of Appellant.

October 8 and November 30. RP 2046; CP 38–39. It also alleged two counts of fourth-degree assault—one based on the alleged spitting incident on November 17, and the other based on an alleged assault against C.W. sometime “between August 1, 2020 and December 31, 2020.” RP 1923; CP 39–40.

Before the trial, the prosecution moved to admit Ms. Cooper-McWade’s statements to Deputy Damerow on November 30 as excited utterances. RP 38; Supp. CP _ (sub #49 at 12–14). The prosecution represented Deputy Damerow would testify Ms. Cooper-McWade “was afraid and crying” when he interviewed her. RP 41. Based on this offer of proof, the trial court granted the motion. RP 48.

Contrary to the prosecution’s offer of proof, Deputy Damerow testified Ms. Cooper-McWade was “mostly calm” when he found her. RP 1015. Defense

counsel raised a renewed hearsay objection, which the trial court overruled. RP 1015–18.

During Mr. Carte’s testimony, the trial court ruled on objections as though every out-of-court statement was inadmissible hearsay regardless of the purpose for which he offered it. For example, when Mr. Carte described an occasion where Ms. Cooper-McWade “threw the bedroom door open” and demanded to know who he “was talking to” on the phone, the court sustained a hearsay objection. RP 1773. Likewise, the court excluded as hearsay Mr. Carte’s testimony that Ms. Cooper-McWade “asked [him] not to call the police” after she kicked him. RP 1986.

The trial court also excluded Mr. Carte’s testimony that he heard Ms. Cooper-McWade tell her child, C.W., “Call the police and tell them Bo is hitting me.” RP 1978. It issued this ruling even though defense

counsel explained the command did not “go to the truth of the matter asserted.” RP 1978.

During its rebuttal argument, the prosecution commented on Mr. Carte’s right to be present and confront the witnesses against him:

They give you the defendant’s side of the story, the side of the story that he gave to you after he had the benefit of having heard all of the evidence in this case and hearing how everyone else testified in conforming his testimony to fit for certain facts, but not others.

RP 2119.

The jury convicted Mr. Carte of harassment and two counts of second-degree assault. CP 346–48. It found him not guilty of the fourth-degree assault premised on the alleged spitting incident. CP 349. It could not reach a verdict on the alleged fourth-degree assault against C.W. RP 2138–39.

● On appeal, the Court of Appeals agreed the prosecutor committed misconduct in tailoring closing argument untethered to Mr. Carte's prior statements or testimony. The Court refused to reverse on this ground finding Mr. Carte waived the argument by failing to object and the argument was not so flagrant and ill-intentioned. Decision at 10-13. Further, the Court ruled the failure to admit several statements by Ms. Cooper-McWade was not error as they were hearsay statements whose suppression did not violate Mr. Carte's right to present a defense. Decision at 14-18.

E. ARGUMENT ON WHY REVIEW SHOULD GRANTED

1. This Court should grant review in order to rule that the manifest constitutional error standard applies as opposed to the flagrant and ill-intentioned where the State's argument is directed at the defendant's exercise of a constitutional right.

The prosecutor's comment on rebuttal that Mr. Carte "had the benefit of having heard all the evidence" and was able to "conform[] his testimony" was an improper comment on Mr. Carte's rights under article I, section 22. Moreover, this was a "generic tailoring" argument based only on Mr. Carte's exercise of his rights, not a "specific tailoring" argument based on inferences from the evidence. *Id.* at 31–32; *State v. Martin*, 171 Wn.2d 521, 536 & n.8, 252 P.3d 872 (2011); *State v. Wallin*, 166 Wn. App. 364, 374, 269 P.3d 1072 (2012).

The Court of Appeals agreed the prosecutor committed misconduct in making a tailoring argument during closing argument untethered to Carte's prior statements or testimony. Decision at 6. But, the Court ruled that Mr. Carte failed to object or show the argument was flagrant and ill intentioned, thus waiving the issue. *Id.* Contrary to the Court's ruling, the "flagrant and ill-intentioned" standard does not apply to a prosecutor's improper comment on the exercise of a constitutional right.

The Court relied on the Supreme Court's decision in *State v. Emery*, 174 Wn.2d 741, 757, 278 P.3d 653 (2012). Decision at 7. Yet, contrary to the Court of Appeals' conclusion, the Supreme Court distinguished between cases involving direct comments on the exercise of a right from arguments that merely "touch upon a defendant's constitutional rights." *Emery*, 174

Wn.2d at 763. The Supreme Court found the improper arguments in that case—misstatements of the burden of proof—fell in the latter category. *Id.* The Court therefore applied the waiver standard for misconduct that does not directly penalize a person for exercising their constitutional rights. *Id.* at 763–64.

This Court should grant review and rule the flagrant and ill-intentioned standard does not apply to errors that involve direct comments on the exercise of a constitutional right.

Rather than the “flagrant and ill intentioned” test, this Court should apply the “manifest constitutional error” standard of RAP 2.5(a)(3) to a comment on the exercise of a constitutional right. *State v. Gauthier*, 174 Wn.App. 257, 263, 298 P.3d 126 (2013).

As in *Gauthier*, this comment on Mr. Carte's constitutional rights to be present and confront the prosecution's witnesses was a manifest constitutional error. RAP 2.5 (a)(3). Mr. Carte met that standard here.

Mr. Carte's "trial boiled down to whether the jury believed or disbelieved [his] story." *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008). The prosecution presented no evidence that refutes Mr. Carte's account and corroborates Ms. Cooper-McWade's. Because Mr. Carte's credibility was "the dispositive question," the prosecutor's unconstitutional attack on his credibility was not harmless. *State v. Espey*, 184 Wn. App. 360, 368, 336 P.3d 1178 (2014).

Here, the prosecutor invited the jury to find Mr. Carte guilty because his right be present throughout his trial enabled him to tailor his testimony. RP 2119.

The prosecution did not meet its burden of proving the error beyond a reasonable doubt.

The prosecution improperly commented on Mr. Carte's rights under article I, section 22. The prosecution does not show this violation of Mr. Carte's constitutional rights was harmless beyond a reasonable doubt.

This Court should also grant review to rule that the flagrant and ill-intentioned standard should not apply when the prosecutor tailors its argument untethered to the defendant's statements or testimony. Rather, this Court should rule the manifest constitutional error standard applies instead. This Court should reverse Mr. Carte's convictions.

2. The Court should grant review and determine that the trial court's rulings violated Mr. Carte's right to present a defense.

“Few rights are more fundamental than that of an accused to present witnesses in his own defense.” *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment require that criminal defendants be afforded a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). This right by a defendant to present a defense is abridged by evidence rules that “infring[e] upon a weighty interest of the accused” and are “arbitrary or disproportionate to the purposes they are designed to serve.” *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006), quoting *United States v. Scheffer*,

523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413
(1998).

Appellate courts engage in a two-step process to review the trial court's individual evidentiary rulings for an abuse of discretion and then consider *de novo* the constitutional question of whether these rulings deprived the defendant of his right to present a defense. *State v. Arndt*, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019).

Mr. Carte contended the statements of Ms. Cooper-McWade he sought to admit were not hearsay. Secondly, he contended the failure to admit the statements violated his right to present a defense.

Perhaps the prosecution's most important corroborating evidence was young C.W.'s statement to the 911 dispatcher: "My mom's boyfriend is hitting my mom." Ex. 14, 911 Call pt1.mp3 at 0:57-0:59. This

remark was the only evidence outside of Ms. Cooper-McWade's testimony that Mr. Carte assaulted her.

Mr. Carte's testimony that Ms. Cooper-McWade told C.W. to "Call the police and tell them Bo is hitting me" would have recontextualized this evidence. Had the jury been allowed to consider this testimony, it is reasonably probable at least one of them would find Ms. Cooper-McWade told C.W. to say this to frame Mr. Carte. Without this testimony, the jury was left to believe C.W. saw Mr. Carte hit Ms. Cooper-McWade and reported what he observed.

Further, Ms. Cooper-McWade told C.W. to lie was not "ambiguous." If Mr. Carte assaulted Ms. Cooper-McWade, she would simply have asked C.W. to "call for help." *Id.* at 47. A reasonable juror could conclude there was no reason to specify what to say to the dispatcher unless she wanted C.W. to report something that was

not happening. Such a juror would also be more likely to notice other signs in the 911 call that Ms. Cooper-McWade told C.W. what to say, such as his asking “what?” to someone else in the house and Ms. Cooper-McWade’s shouting at him to “come here!”

Finally, Ms. Cooper-McWade’s demand to know who Mr. Carte was talking to and request that he not call the police were also important to his defense.

Together, these statements would have led a reasonable juror to credit Mr. Carte’s defense theory.

Key to Mr. Carte’s defense that Ms. Cooper-McWade lied about his assaulting her was motive—as the prosecutor asked, “Why would she lie?” RP 2060. Mr. Carte explained why—Ms. Cooper-McWade was jealous, especially of his friendly relationship with his ex-wife, to the point that she monitored his text messages and lashed out violently. Had the jury been

allowed to hear the demands the trial court erroneously excluded, it is at least reasonably probable one juror would have credited Mr. Carte's theory. *State v. Gunderson*, 181 Wn.2d 916, 926, 337 P.2d 1090 (2014).

The trial court erroneously excluded Ms. Cooper-McWade's non-assertive requests and demands as hearsay. That error denied Mr. Carte his constitutionally protected right to present a defense. This Court should grant review, find the trial court violated Mr. Carte's right to present a defense, and reverse his convictions.

F. CONCLUSION

Mr. Carte respectfully asks this Court to reverse his convictions and remand for a new trial.

Counsel certifies this petition contains approximately 2150 words using Microsoft Word word counter and complies with RAP 18.17.

DATED this 12th of September 2023.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EDWARD LEROY CARTE, JR.,

Appellant.

No. 83589-1-I

DIVISION ONE

PUBLISHED OPINION

MANN, J. — Edward Carte Jr. appeals his conviction for two counts of second degree assault and felony harassment. Carte’s primary argument is that the prosecutor improperly presented a “generic tailoring” argument—inviting the jury to draw an adverse inference based on Carte’s constitutional right to appear and defend himself at trial. We agree that the prosecutor committed error by making a tailoring argument untethered to Carte’s prior statements or testimony. But because Carte failed to object, and fails to demonstrate that the error was flagrant, ill intentioned, and incurable, this argument is waived.

Carte also argues that the trial court erred in excluding several statements as hearsay, improperly admitted the victim’s hearsay statement as an excited utterance, and that cumulative error deprived him of a fair trial. We disagree and affirm.

I.

Morgan Cooper-McWade is a single mother of two young children, M.C. and C.W. Cooper-McWade worked several jobs and struggled financially. Cooper-McWade met Carte through Facebook after he sent her a friend request. They eventually met in person and began seeing each other daily. At the time, Carte was living in a group home for recovering addicts.

Carte was at first “really supportive” of Cooper-McWade, assuring her that “[h]e could make the money problems go away . . . [and] help with the kids.” Carte moved into Cooper-McWade’s home soon after. Although Cooper-McWade had reservations about the relationship, she also “needed the help . . . badly.”

Carte helped with childcare, but his promises of financial support were exaggerated. The relationship quickly deteriorated and they were soon having “a lot of really explosive fights.” Carte was jealous and accused Cooper-McWade of having “something going on with somebody somewhere.”

1. October 8, 2020.

On October 8, 2020, Cooper-McWade was scheduled to work until 9 p.m. while Carte watched her children. The pair fought throughout the day and the argument continued by text message while Cooper-McWade was at work. Cooper-McWade left work early when Carte sent her a text message that implied he was suicidal and had overdosed on prescription drugs.

When Cooper-McWade returned home she found Carte intoxicated and her children asleep in their room. When Cooper-McWade texted a friend about the situation, Carte demanded to know who she was texting and wrestled the phone away

from her. When Cooper-McWade refused to unlock her phone, Carte commanded her to “[p]ack [his] shit,” and then “pulled [her] up by [her] neck and pushed [her] towards the [bed]room to start packing his belongings.”

Carte then began throwing his belongings at Cooper-McWade and repeatedly kicked and shoved her. Carte told Cooper-McWade that she made him angry and grabbed her by the neck. Carte laughed as Cooper-McWade, unable to breathe, tried to pry his hand off. Carte eventually released Cooper-McWade’s neck and she went back to packing his things. Carte continued to verbally abuse Cooper-McWade throughout the evening, and a cycle of verbal abuse and choking continued around 5 to 10 times over the course of several hours. Each time Carte would strangle Cooper-McWade until she became “really frantic,” and then he would release her before she lost consciousness. Carte told Cooper-McWade that he would kill her if she called the police. Cooper-McWade believed that Carte would kill her.

When Carte fell asleep, Cooper-McWade discreetly retrieved her phone and went to sleep in her children’s room. She did not call the police because she stated she was afraid of what Carte might do. The next morning, Carte acted like nothing happened and told Cooper-McWade to just “forget about last night.” Cooper-McWade left with her children and texted Carte to move out. She returned later with a male friend for protection.

The State charged Carte with second degree assault (count 1) and felony harassment (count 2) based on these events.

2. November 17, 2020.

Carte did not move back in with Cooper-McWade, but he would often spend time at her house to “try to fix things and hang out to make things better.” At the time, Cooper-McWade had a close friend named Luciana Argueta. Carte was extremely jealous of Argueta, and because she was a lesbian, believed Cooper-McWade was cheating on him with her.

On November 17, 2020, Carte became irate after discovering Cooper-McWade texting with Argueta. Carte grabbed Cooper-McWade’s phone and spat in her face several times. Carte also verbally abused Cooper-McWade calling her various names before leaving. Cooper-McWade called 911 and responding police arrived shortly after. Cooper-McWade was crying and appeared very frightened.

The State charged Carte with fourth degree assault (count 4) based on this event.

3. November 30, 2020.

Cooper-McWade and Argueta began a short romantic relationship in mid-November. The pair ceased seeing each other on November 24 after Argueta allegedly robbed and assaulted Cooper-McWade. Cooper-McWade reached out to confide in Carte. He moved back in shortly after. Despite the alleged assault, Cooper-McWade began speaking to Argueta again as well.

On November 30, Carte became “extremely upset” after finding Cooper-McWade on the phone with Argueta. Cooper-McWade hung up quickly, yet Carte grabbed the phone from her and demanded to know who she was talking to. Cooper-McWade refused to unlock her phone and Carte “dragged” her into the bedroom by her neck.

Carte began strangling Cooper-McWade with both hands. Cooper-McWade could not breathe and began “seeing stars.” As he had done previously, Carte strangled her for a few seconds at a time, just “enough for [her] to panic.” Cooper-McWade called out for her child, C.W., to help her during the incident. C.W. was woken by Cooper-McWade shouting his name and he recalled hearing “loud noises” and Cooper-McWade “saying stop.”

Carte briefly calmed down and returned Cooper-McWade’s phone. She left the bedroom and gave her phone to C.W., instructing him to hide and call for help. Carte reengaged with Cooper-McWade shortly after. C.W. hid in the laundry room and called 911.

C.W. told the 911 dispatcher that he needed help because “my mom’s boyfriend is hitting my mom.” Cooper-McWade and Carte could be heard arguing in the background, and Cooper-McWade could be heard crying in pain at one point. C.W. then told the dispatcher that he “can’t talk” and hung up. Carte left the house after discovering that C.W. called 911. Several police officers responded to C.W.’s 911 call, forcing the front door open when nobody answered. Cooper-McWade and C.W. emerged from hiding in a back closet.

The police officers immediately saw that Cooper-McWade “had a very large black eye . . . and . . . various different red marks around her neck and on the side of her face.” There were “little red marks” on Cooper-McWade’s chest and what looked like a thumbprint on her chin. She identified several injuries inflicted by Carte and explained that many facial marks were caused by Argueta’s earlier assault.

The State charged Carte with second degree assault (count 3) based on this event.

A jury convicted Carte of second degree assault and felony harassment based on the October 8 incident, and second degree assault based on the November 30 incident. Carte was acquitted of fourth degree assault based on the November 17 incident.

Carte appeals.

II.

Under both the United States and Washington Constitutions, a defendant has the right to “appear and defend in person,” to testify on their own behalf, and to confront witnesses against them. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22.¹ Carte argues that the prosecution violated his constitutional rights during closing argument by inviting the jury to draw an adverse inference from his appearance at trial—specifically that Carte tailored his testimony based solely on his presence throughout the trial.

We agree that the prosecution committed error by making a tailoring argument untethered to Carte’s prior statements or testimony. But because Carte failed to object, and fails to demonstrate that the error was flagrant, ill intentioned, and incurable, this argument is waived.

¹ The Sixth Amendment of the United States Constitution provides in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” The confrontation clause includes the right to be present at trial. Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). Article I, section 22 of the Washington Constitution provides in pertinent part: “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face.”

A.

To establish prosecutorial misconduct during closing argument, a defendant bears the burden of proving that the prosecutor's statements were both improper and prejudicial. State v. Allen, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). We consider the prosecutor's conduct in the context of the record and the circumstances at trial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011).

We determine whether the defendant was prejudiced under one of two standards of review. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). If the defendant made a timely objection at trial, he must demonstrate that any improper conduct "resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." Allen, 182 Wn.2d at 375. When a defendant fails to object at trial, however, "the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." Emery, 174 Wn.2d at 760-61. To prevail under this heightened standard, the defendant must show that (1) no curative instruction could have eliminated the prejudicial effect and (2) there was a substantial likelihood the misconduct resulted in prejudice that affected the jury verdict. Emery, 174 Wn.2d at 761.

B.

A claim of "tailoring" alleges that the defendant conformed their testimony to the evidence they observed while attending trial. State v. Hilton, 164 Wn. App. 81, 93, 261 P.3d 683 (2011). Tailoring arguments are considered "specific" if derived from the defendant's actual testimony, including both direct testimony and cross-examination. State v. Berube, 171 Wn. App. 103, 115-17, 286 P.3d 402 (2012). Tailoring arguments

are considered “generic,” however, if based solely on the defendant’s presence at the proceeding and not based on the defendant’s direct examination or cross-examination.

Berube, 171 Wn. App. at 115.

In Portuondo v. Agard, 529 U.S. 61, 73, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000), a majority of the U.S. Supreme Court held that tailoring arguments did not violate a defendant’s Sixth Amendment right to be present at trial. Justice Ginsburg dissented, arguing that any tailoring allegations should be explored during cross-examination rather than raised on the first time during closing argument. Portuondo, 529 U.S. at 78 (Ginsburg, J., dissenting).

In State v. Martin, 171 Wn.2d 521, 534, 252 P.3d 872 (2011), our Supreme Court declined to apply Portuondo to article I, section 22. After a Gunwall² analysis, the court held that our state constitution provides more protection from prosecutorial comments on the right to be present and to confrontation than the Sixth Amendment. Martin, 171 Wn.2d at 533. Instead of following the majority in Portuondo, the court adopted Justice Ginsburg’s dissent, that “suggestions of tailoring are appropriate during cross-examination, is compatible with the protections provided by article I, section 22.” Martin, 171 Wn.2d at 535-36. While the Martin court did not specifically address generic tailoring arguments, the court noted with approval Justice Ginsburg’s view that “a comment in closing argument that is ‘tied only to the defendant’s presence in the courtroom and not to his actual testimony’” violates the right to be present at the trial and confront witnesses. 171 Wn.2d at 535 (quoting Portuondo, 529 U.S. at 77 (Ginsburg, J., dissenting)).

² State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

In Berube, this court addressed whether a tailoring argument is always prohibited if the prosecutor makes the argument without first cross-examining on the subject—even when the tailoring argument derives from the defendant’s testimony on direct examination. 171 Wn. App. at 116. We concluded that it was not, explaining “[w]hen tailoring is alleged based on the defendant’s testimony on direct examination, the argument is a logical attack on the defendant’s credibility and does not burden the right to attend or testify.” Berube, 171 Wn. App. at 117. In doing so, we reasoned that Martin prohibited “a closing argument that burdens the exercise of constitutional rights without an evidentiary basis and in a fashion preventing the defendant from meaningful response.” Berube, 171 Wn. App. at 116-17. While this statement might be dicta, we take this opportunity to clarify and hold that a generic tailoring argument raised only in the prosecution’s closing argument, and untethered to the defendant’s direct testimony or cross-examination, violates article I, section 22 of the Washington Constitution.

C.

During closing statements, the prosecution suggested that Carte’s testimony was tailored:

[the defense] spent a lot of time trying to suggest that the victim had been violent with Mr. Carte, that she punched him, that she kicked him . . . but even if all of that information were to be true, defense does not claim any self-defense here, so none of those allegations actually matter in this case.

[The defense gave] you the defendant’s side of the story, the side of the story that he gave to you after he had the benefit of having heard all of the evidence in this case and hearing how everyone else testified in conforming his testimony to fit for certain facts, but not others.

The prosecution did not point to any specific portion of Carte’s testimony that he conformed “to fit for certain facts.” Nor did the prosecution suggest Carte’s testimony

differed in any way from statements he made before trial. Instead, the prosecution asserted Carte “conform[ed] his testimony” to the other evidence based only on the benefit of his right to attend his trial and confront the witnesses against him. The prosecution’s tailoring argument violated article I, section 22 and was improper.

D.

The State argues that Carte waived his right to appeal the improper statement because he failed to object at trial and the statement was not flagrant, ill intentioned, and incurable. Carte argues that, because the misconduct infringes on a constitutional right, we should employ the constitutional harmless error standard. We agree with the State.

After error has been established, the defendant must show prejudice. Because Carte did not object at trial, we employ the heightened standard requiring Carte to show (1) no curative instruction could have eliminated the prejudicial effect and (2) there was a substantial likelihood the misconduct led to prejudice that affected the jury verdict. Emery, 174 Wn.2d at 761. “Reviewing courts should focus less on whether the prosecutor’s misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” Emery, 174 Wn.2d at 762. Prejudice is incurable when the jury’s impartiality has been so undermined that a fair trial is no longer possible. Emery, 174 Wn.2d at 762. We review improper remarks “in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions to the jury.” State v. Pierce, 169 Wn. App. 533, 280 P.3d 1158 (2012).

If Carte objected at trial, the trial judge could have stricken the remark and instructed the jury not to draw any adverse inferences from his testimony. Jurors are presumed to follow the court's instructions. State v. Dye, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013). His failure to object deprived the court of an opportunity to remedy the error. State v. Sakellis, 164 Wn. App. 170, 185, 269 P.3d 1029 (2011).

While Carte correctly suggests prejudice was more likely because the challenged remark was made in the prosecution's rebuttal argument, this alone is insufficient to create incurable prejudice. We look also to the pervasiveness of the misconduct. A single fleeting improper comment is likely curable, while prejudice may be unavoidable when an improper argument is repetitive and thematic. See State v. Brown, 21 Wn. App. 2d 541, 571, 506 P.3d 1258 (2022) ("Any error was fleeting as opposed to pervasive and prejudicial."). The prosecutor's argument here was lengthy, lasting over an hour and about 59 pages of transcript. The improper statement was a single sentence and was never repeated.

We conclude that a timely curative instruction would have abated the potential prejudice, thus Carte cannot show that the error was flagrant, ill intentioned, and incurable.

E.

Carte argues that we should apply the manifest constitutional error standard of RAP 2.5(a)(3), that the error was harmless beyond a reasonable doubt, because the error was a direct comment on Carte's constitutional right rather than a comment that merely "touch[ed] upon [his] constitutional rights." Emery, 174 Wn.2d at 763. Washington courts have long held that prosecutors' improper comments on a

defendant's exercise of constitutional rights are evaluated under the constitutional harmless error standard. Emery, 174 Wn.2d at 757. But as Division Two of this court recognized in State v. Teas, 10 Wn. App. 2d 111, 122, 447 P.3d 606 (2019), we do not apply the harmless error standard until we conclude that the defendant preserved the error for appeal.

In Teas, during closing arguments, the prosecutor highlighted that DNA evidence placed Teas in the victim's bedroom and suggested that Teas took the stand to testify to address the overwhelming evidence against him. 10 Wn. App. 2d at 119. The prosecutor told the jury "And so that's why he got on the stand yesterday and came— came up with a story to try and explain away what happened." Teas, 10 Wn. App. 2d at 119. Teas did not object to these statements. Division Two of this court agreed with Teas that "it is improper for [a prosecutor] to speculate as to why a defendant testified to infer guilt." Teas, 10 Wn. App. 2d at 123. The State's comment implied that Teas knew he was guilty and only testified to explain the evidence against him. Teas, 10 Wn. App. 2d at 124. But Teas did not object at trial and the court concluded the comments were "not so flagrant and ill intentioned that the resulting prejudice could not be cured with a jury instruction." Teas, 10 Wn. App. 2d at 123.

As Teas recognized, when a defendant fails to object, Washington courts must decide whether the issue has been preserved for appeal before analyzing whether the error was harmless beyond a reasonable doubt. See State v. Espey, 184 Wn. App. 360, 369-70, 336 P.3d 1178 (2014) (applying the "flagrant and ill intentioned" standard before evaluating whether the error was harmless beyond a reasonable doubt). We see no compelling reason to deviate from this precedent.

Because Carte did not object at trial, he waived the issue on appeal unless he can establish that the prosecutor's comment was flagrant, ill intentioned, and incurable. Because he failed to do so, we conclude that Carte has waived this issue for appeal.

III.

Carte next argues that the trial court denied his constitutional right to present a defense when it excluded several out of court statements made by Cooper-McWade as inadmissible hearsay. We disagree.

A.

The Sixth Amendment to the United States Constitution and Washington Constitution article I, section 22 grants criminal defendants the right to present testimony in one's defense. State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). On appeal, the court reviews a violation of the right to present a defense de novo, but it reviews specific evidentiary rulings for abuse of discretion. State v. Clark, 187 Wn.2d 641, 648-56, 389 P.3d 462 (2017); State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). We engage in a two-step review process to review the trial court's individual evidentiary rulings for an abuse of discretion and then consider de novo the constitutional question of whether these rulings deprived the defendant of their Sixth Amendment right to present a defense. State v. Arndt, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019).

The trial court must provide the accused with "a fair opportunity" to defend against the government's accusations. Jones, 168 Wn.2d at 719. This right is satisfied through meaningful cross-examination. State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). But these rights are not absolute. "The accused does not have an

unfettered right to offer evidence that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.” State v. Lizarraga, 191 Wn. App. 530, 533, 364 P.3d 810 (2015). The right to present a defense is limited by the general rules of evidence. Darden, 145 Wn.2d at 621.

B.

First, we examine the trial court’s actions excluding portions of Cooper-McWade’s testimony as hearsay. “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Hearsay is generally inadmissible, even if otherwise relevant, unless it falls within one of several recognized exceptions. ER 802; State v. Garcia, 179 Wn.2d 828, 845, 318 P.3d 266 (2014). Whether an exception to the hearsay rule applies is reviewed for an abuse of discretion. State v. Blake, 172 Wn. App. 515, 535, 298 P.3d 769 (2012). That said, the more fundamental question applicable here—whether a statement is hearsay at all—is reviewed de novo. State v. Heutink, 12 Wn. App. 2d 336, 356, 458 P.3d 796 (2020).

Carte challenges three statements excluded by the trial court. We address each in turn.

1.

First, Carte testified that on November 30, he heard Cooper-McWade tell her child C.W. to “call the police and tell them [Carte] is hitting me.” The trial court sustained the prosecution’s hearsay objection and instructed the jury to disregard the statement. Carte argues that the statement is not hearsay, but a command that casts doubt on C.W.’s statement in the 911 recording that Carte was hitting Cooper-McWade.

Carte also contends that the statement did not contain a “factual assertion” and therefore could not have been offered for the truth of such an assertion. We disagree.

A request or command is not hearsay “because the questioner is not asserting a fact or belief.” State v. Kelly, 19 Wn. App. 2d 434, 448, 496 P.3d 1222 (2021).

Similarly, the hearsay rule “does not forbid the introduction of evidence that a request has been made when the making of the request is significant irrespective of the truth or falsity of its content.” Kelly, 19 Wn. App. 2d at 449. Cooper-McWade’s statement to C.W. was only helpful to Carte if interpreted as instructing C.W. to wrongfully tell the 911 operator that Carte was assaulting Cooper-McWade. Thus, the statement was not being offered merely to show a request was made, or its effect on the listener. Carte was trying to establish that the accusation of assault was false. Because the relevance of the statement depended on the truth or falsity of its content, it was hearsay. Kelly, 19 Wn. App. 2d at 449.

2.

Second, Carte testified to an occasion when he was exchanging text messages with his ex-wife and Cooper-McWade “threw the bedroom door open” and demanded to know who he “was talking to.” Carte contends the trial court erred in sustaining the prosecution’s hearsay objection and instructing Carte “not to say what somebody else who is not here in court said.” Carte argues that Cooper-McWade’s demand was evidence of her jealousy, did not contain a factual assertion, and was instead a question. We disagree.

Again, while questions are generally admissible, they are considered hearsay when making the request is “significant irrespective of the truth or falsity of its content.”

Kelly, 19 Wn. App. 2d at 449. Carte offered the statement to demonstrate Cooper-McWade's jealousy or to imply she was spying on him. Thus, the relevance of the statement depended on its truth or falsity—revealing Cooper-McWade's motive. The statement was hearsay.

3.

Third, Carte testified that Cooper-McWade asked him “not to call the police” after she kicked him on October 8. The trial court sustained the prosecution's objection as hearsay. Carte argues that the statement was a request and lacks factual content that could be offered for the truth. We disagree. Intrinsic in the alleged request was a contested factual assertion that Cooper-McWade had assaulted Carte. Because the relevance of Cooper-McWade's request to Carte depended on the truth of the assertion, it was hearsay. Kelly, 19 Wn. App. 2d at 449.

C.

The second step of our analysis under Arndt requires that we examine whether the reasoned exclusion of the hearsay testimony resulted in a violation of Carte's right to present a defense. It did not.

In Arndt, the trial court limited the testimony of the defendant's expert witness. 194 Wn.2d at 812. The defendant argued that the exclusion denied their right to present a defense. Arndt, 194 Wn.2d at 812. The Supreme Court upheld the trial court's ruling and noted the trial court has a gatekeeping function under the rules of evidence. Arndt, 194 Wn.2d at 812. Because the defendant could advance their defense theory, and the exclusion of evidence did not eliminate the defendant's entire defense, the exclusion of such evidence did not violate the defendant's Sixth

Amendment right to present a defense. Arndt, 194 Wn.2d at 814. “Accordingly, when the defendant has an opportunity to present his theory of the case, the exclusion of some aspects of the defendant’s proffered evidence will not amount to a violation of the defendant’s constitutional rights.” State v. Ritchie, 24 Wn. App. 2d 618, 635, 520 P.3d 1105 (2022).

1.

Carte argues that Cooper-McWade’s request to C.W. to “call the police and tell them [Carte] is hitting [her]” is direct evidence that her allegations were false. And that the statement casts doubt on her credibility and recontextualizes the recorded 911 call the jury heard. But Cooper-McWade’s statement was at best ambiguous. Cooper-McWade also testified that she was, in fact, assaulted several times that evening. Thus, the evidence could just as easily be interpreted as Cooper-McWade asking C.W. to report what was actually happening. The jury otherwise rejected Carte’s interpretation of events on November 30, and it is unlikely that excluding this statement would affect the jury verdict. Carte was able to put on a defense and testify to his version of events.

2.

Carte argues that excluding Cooper-McWade’s demand of who he was talking to interfered with his ability to argue that she was extremely jealous and controlling. But even without the excluded statement, Carte was able to amply present his theory.

Carte testified without objection that he was speaking with his ex-wife when Cooper-McWade entered the room. Defense counsel then asked a question that allowed Carte to explain that Cooper-McWade was spying on him and “reading my conversations.” Moreover, accusations that Cooper-McWade was jealous, erratic,

suspicious, and intrusive pervaded Carte's testimony. Portraying Cooper-McWade as violently jealous was a key aspect of Carte's defense theory, which his trial counsel had no difficulty presenting to the jury. It is implausible that the single excluded statement affected the verdict.

3.

Carte argues that excluding Cooper-McWade's statement that he not call the police interfered with his ability to argue that Cooper-McWade was herself abusive. But just after the trial court sustained the objection, Carte testified that Cooper-McWade was "very concerned" about the potential consequences of assaulting him. More importantly, Carte described the alleged assault himself during direct examination and got a chance to cross-examine Cooper-McWade on the subject as well. Again, it is implausible that admitting the excluded statement could have changed the verdict.

The exclusion of the three challenged statements did not deprive Carte of his ability to present a defense.

IV.

Carte next argues that the trial court erred in admitting Cooper-McWade's statement to responding police officers on November 30 as an excited utterance. We disagree.

A.

In a pretrial motion the State moved to admit Cooper-McWade's statement to Deputy Damerow on November 30. The prosecutor stated that police officers arrived at Cooper-McWade's house about 12 minutes after C.W.'s 911 call. After kicking in the

front door, they found Cooper-McWade and C.W. hiding in a closet. Cooper-McWade then made several statements to Damerow describing Carte's assault.

Cooper-McWade told Damerow that Carte had become enraged after finding her on the phone with Argueta. When she refused to unlock her phone for him, Carte strangled her, dragged her around the apartment, and threatened to kill her. Carte then left and Cooper-McWade hid in a closet with C.W. until police arrived. Cooper-McWade believed that Carte was capable of killing her but "hoped that he wouldn't because she's a single mom." Damerow observed that Cooper-McWade was "afraid and crying" during the conversation.

Carte objected, arguing the record was unclear as to whether Cooper-McWade was sufficiently agitated for her statements to qualify as excited utterances. The trial court overruled Carte's objection, concluding that the statements were spontaneous:

The key . . . is spontaneity . . . there was a very short time period between the time of the [911] call and the time that the officers had the conversation with the complaining witness.

This means that the witness would not have had time to fabricate or make up some kind of report. . . .

[I]f the issue was one of assault, strangulation, whatever she is claiming happened, those would be startling events. The statements made to the officer would be made while the declarant was under the stress or excitement caused by . . . those events, and it would therefore not be objectionable as hearsay.

At trial, Damerow testified that Cooper-McWade appeared "mostly calm" when police first arrived but started crying when officers began speaking with her. Damerow observed that Cooper-McWade was "shaking" while talking to him, and that she was "stutter[ing]." Damerow recalled it being "very obvious . . . that [Cooper-McWade] was scared . . . and very upset."

Carte renewed his objection, arguing that Cooper-McWade's statements did not qualify as excited utterances. The trial court declined to revisit its pretrial ruling.

B.

While typically inadmissible, hearsay can be offered at trial when authorized by a court rule or statute. ER 802. One recognized exception is found in ER 803(a)(2), which allows courts to admit "statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Courts reason that statements made while under the stress of an exciting event "could not be the result of fabrication, intervening actions, or the exercise of choice or judgment." State v. Rodriguez, 187 Wn. App. 922, 939, 352 P.3d 200 (2015). In a sense, excited utterances are "an event speaking through the person, as distinguished from a person merely narrating the details of an event." State v. Pugh, 167 Wn.2d 825, 837, 225 P.3d 892 (2009).

The party seeking to admit a statement as an excited utterance must show that (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition. State v. Ohlson, 162 Wn.2d 1, 8, 168 P.3d 1273 (2007).

The court may consider circumstantial evidence when assessing the statements, including "the declarant's behavior, appearance, and condition; appraisals of the declarant by others; and the circumstances under which the statement is made." Rodriguez, 187 Wn. App. at 938. A statement is more likely to qualify as an excited utterance if the declarant is agitated, emotional, frantic, or "visibly upset." State v.

Davis, 116 Wn. App. 81, 86, 64 P.3d 661 (2003). Yet a “state of nervousness or anxiety” by itself is insufficient. Burmeister v. State Farm Ins. Co., 92 Wn. App. 359, 370, 966 P.2d 921 (1998). We review the court’s decision to admit a statement as an excited utterance for an abuse of discretion. DeVogel v. Padilla, 22 Wn. App. 2d 39, 58, 509 P.3d 832 (2022).

C.

The first and third Ohlson factors are easily satisfied. The State’s pretrial offer of proof revealed that C.W. called 911 to report that Cooper-McWade was being actively assaulted, evidence of which could be heard in the background of the recordings. This is a startling event or condition. Being beaten and strangled by another person is certainly a stressful event. It cannot be seriously disputed that Cooper-McWade’s statement concerned the startling event.

The second Ohlson factor is also met. Officers arrived at Cooper-McWade’s house 12 minutes after C.W.’s called 911. Even after forcing entry, Cooper-McWade was contacted within about 20 minutes of the event. A 20-minute delay is well within the time frame recognized for admission of excited utterances where there is continuing stress. See, e.g., State v. Thomas, 150 Wn.2d 821, 855, 83 P.3d 970 (2004) (1.5 hours after murder); State v. Strauss, 119 Wn.2d 401, 416-17, 832 P.2d 78 (1992) (3.5 hours after rape of child). Thus, the trial court reasonably concluded that Cooper-McWade could still have been under the stress of the assault after the “very short time period.”

Cooper-McWade was also still hiding in the closet when the police arrived, which weighs in favor of admission. See State v. Guizzotti, 60 Wn. App. 289, 295-96, 803 P.2d 808 (1991) (statement admissible as excited utterance despite 7-hour delay

because the victim had been hiding and “thought the defendant was looking for her”). Deputy Damerow’s observation that Cooper-McWade was “afraid,” “crying,” “shaking,” and “stutter[ing]” also suggested she was still affected by the assault.

Carte relies on Damerow’s testimony that Cooper-McWade at first seemed calm on contact. While this fact weighs against admission, alone, it does not establish an abuse of discretion. “The crucial question with regard to excited utterances is whether the statement was made while the declarant was still under the influence of the event to the extent that his statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.” State v. Sellers, 39 Wn. App. 799, 804, 695 P.2d 1014 (1985). Because Cooper-McWade’s statement was made to the police shortly after they broke down her door to find her still hiding, and they arrived only 12 minutes after C.W. called 911, the court reasonably concluded that Cooper-McWade was still under the stress of the altercation with Carte. The trial court did not abuse its discretion.


V.

Finally, Carte argues that the cumulative effect of the prosecutor’s and trial court’s errors deprived him of a fair trial. We disagree.

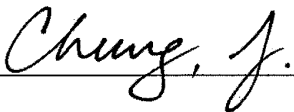
The cumulative error doctrine requires reversal when a defendant establishes that multiple accrued errors rendered a trial “fundamentally unfair,” even if these errors were individually harmless. Emery, 174 Wn.2d at 766. The doctrine applies in “instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

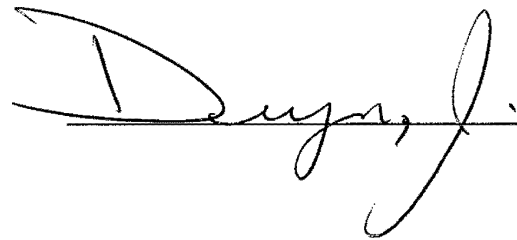
Here, Carte waived his objection to the prosecutorial misconduct claim thus it is not error. He also failed to show that the court improperly included Cooper-McWade's statement as an excited utterance. And finally, the trial court did not error in excluding the challenged hearsay.

Affirmed.



WE CONCUR:





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** under **Case No. 83589-1-I**, 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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