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NO. 102493-2

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

ALEX LOPEZ LEON,

Petitioner.

Pierce County Superior Court No. 18-1-03457-6
Court of Appeals No. 56467-0-II

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Alex Lopez Leon murdered two young men with Javier Valenzuela Felix to gain his trust so he could make money dealing large quantities of drugs with Javier. As Lopez Leon told Javier shortly after the murders, “I don’t look I don’t feel and I don’t listen, I just want to make money.” They exchanged more than 280 texts in the ten days following the murders, which revealed that Javier was Lopez Leon’s “source” for selling drugs.

Deputy Sergio Madrigal Mendoza testified about his training and experience working undercover in narcotics investigations to lay the foundation for his expert testimony interpreting their text messages, which were in Spanish and used drug terminology. His testimony was necessary to explain the nature of their drug dealing relationship and high level of trust that could only have been built up over a long period time. This was directly relevant to a central issue at trial—whether they were strangers as Lopez Leon claimed or had a preexisting relationship and acted in concert in committing the murders.

Lopez Leon believed Javier was in the cartel. His text messages immediately following the murders revealed that he wanted to “work” with Javier and “make money” and that he searched the internet for information about the “sinaloa cartel” and “Mexican drug cartel.” Thus, the limited evidence regarding cartels was relevant to explain his motive for the murders. Notably, it was Lopez Leon—not the State—who referenced the cartel in his opening and suggested it played a role in the murders. Counsel was not ineffective for making a strategic decision not to object to this relevant evidence, which also supported his theory of the case that Lopez Leon feared Javier.

The Court of Appeals acknowledged the importance of carefully considering Lopez Leon’s race-based prosecutorial misconduct claim to ensure he received a fair trial and was mindful of this Court’s instruction for courts to “endeavor to eradicate racial bias from the legal system.” With these principles in mind, the Court of Appeals carefully analyzed the “highly relevant” evidence at trial and properly concluded that, based on

the facts of this case, an objective observer aware of the history of race and ethnic discrimination could not view the prosecutor's conduct as "flagrantly or apparently intentionally" appealing to racial bias. Lopez Leon's arguments ignore the context of the evidence and its relevance to the specific issues in his case.

The Court of Appeals applied well-established law and thoroughly analyzed the apparent purpose of the evidence, which was "geared toward areas that were highly relevant" at trial. The decision raises neither a significant question of constitutional law nor an issue of substantial public interest. Accordingly, this Court should deny review under RAP 13.4(b)(3) and (4).

II. RESTATEMENT OF THE ISSUES

- A. Should this Court deny review where the Court of Appeals acknowledged the importance of race-based prosecutorial misconduct claims, carefully analyzed the evidence, and properly concluded that, under the facts of this case, an objective observer could not view the prosecutor's conduct as "flagrantly or apparently intentionally" appealing to racial bias?
- B. Should this Court deny review where the Court of Appeals properly concluded that counsel was not ineffective for making a strategic decision not to object to the limited

evidence involving cartels where it was relevant to motive and supported his theory that Lopez Leon feared Javier?

- C. Should this Court deny review where Lopez Leon failed to show prosecutorial misconduct in closing argument and where counsel made a strategic decision not to object to the isolated argument?
- D. Should this Court deny review where the Court of Appeals followed well-established law in concluding that sufficient evidence supported the murder convictions?

III. STATEMENT OF THE CASE

In an unpublished decision, the Court of Appeals affirmed Lopez Leon's convictions for the first-degree murder of Wilberth Lopez Alcala and second-degree murder of Adrian Valencia Cuevas. *State v. Lopez Leon*, No. 56467-0-II (Wash. Ct. App. Aug. 1, 2023) (unpublished).

Hours before the murders, Lopez Leon, Javier, Wilberth, and Adrian attended a party at the apartment complex where they lived. RP 737-38, 747, 775, 983-84, 999-1000. Lopez Leon lured Adrian—a stranger—to the party by repeatedly texting Adrian's brother. *See* Ex. 242; Ex. 21 at 32, 64.

After drinking and using cocaine at the party, all four men left in Wilberth's car to fire a gun. Ex. 21 at 2, 16, 22, 40; RP

1705-06. They returned to the car after Javier fired shots in the air—Wilberth was driving, Adrian was in the front passenger seat, Javier was in the back seat behind Wilberth, and Lopez Leon was to the right of Javier. Ex. 21 at 44, 68. Shortly thereafter, Javier shot Adrian in the back of his head. Ex. 21 at 24, 44-46, 77; RP 620-25, 644. Lopez Leon secretly recorded this “kill shot” and claimed he knew, without any explanation, that “something bad” was going to happen. *See* Ex. 21 at 77-78; RP 1677-79.

Lopez Leon told detectives that Javier, who was sitting directly behind Wilberth, subsequently reached around the head rest with his left arm and shot Wilberth in the left side of his head, which he reenacted and diagrammed. *See* Ex. 21 at 47, 76; Ex. 18; RP 791-92. This was inconsistent with the medical examiner’s conclusion that the shot entered the right side of Wilberth’s head and exited over his left eye. RP 599-600, 614, 659-60, 766-67, 1721-22. It was also inconsistent with ballistics evidence indicating the use of two guns based on the different

calibers of the bullet and cartridges. *See* RP 1136-38, 1174-1219, 1238-41, 1251, 1265-66, 1277-82. Lopez Leon could not explain why Javier—who he claimed was a stranger—let him live after watching Javier murder two people. Ex. 21 at 16, 48, 82-83.

After the murders, Lopez Leon exited the car and put his hand behind his back consistent with putting a gun in his waistband. RP 1689-90; *see* Ex. 14A (3:18-3:44). Lopez Leon claimed he tried to get away from Javier by “walking and running.” Ex. 21 at 26-27, 49. But surveillance video shows he deliberately caught up with Javier after exiting the car, and they are captured on several surveillance videos fleeing the scene *together*. Exs. 10-A, 12-A, 13-B; RP 681, 728, 1318-31.

They switched clothes and were captured on surveillance video boarding a bus together three hours after the murder. Ex. 149; RP 683, 1329-35. Lopez Leon claimed he boarded the bus “cause there’s people.” Ex. 21 at 50. But the bus was empty. Ex. 149. Lopez Leon waved Javier onto the empty bus, and they sat

together and talked before they exited the bus with Lopez Leon leading the way. *Id.*; RP 684-89, 1312.

After the murders, Lopez Leon lied to Adrian's mother and claimed not to know where Adrian was. RP 992-94. He disappeared from the apartment complex and would not answer her calls. RP 997-98, 1031. Instead of contacting Adrian's mother or law enforcement, Lopez Leon immediately established contact with Javier. *See* Ex. 241. They exchanged more than 280 text messages in the ten days following the murders. *Id.* Lopez Leon initiated nearly all of the contact. *See id.*

The texts reveal that Lopez Leon wanted to "move forward" selling drugs and that Javier was his "source" and fronting him large quantities of drugs. Ex. 241. Lopez Leon believed Javier was in a cartel. *See* CP 323-24 ("And when you say work in Spanish, and, I mean, and you're drinking and you have *all this coke* in your hand, you figure it out pretty much, you know.") (emphasis added). Immediately following the murders, Lopez Leon conducted internet searches for information about

the “sinaloa cartel seattle,” “arrests tied to Mexican drug cartel,” and the capture of a “Sinaloa cartel leader.” Ex. 133; RP 886-87.

Lopez Leon told Javier he “took off” after the murders to “stay ahead of the curve” and repeatedly assured Javier in texts messages that law enforcement did not know who committed the murders:

- I’ve been keeping an eye on the news you know they don’t know anything not even who it was or anything so everything’s good
- If anything comes up I’ll pass on the info so you can beat feet
- I think everything’s okay dude since they didn’t know us and besides on the news there is nothing they don’t know who or how...
- ...there is nothing about them knowing who it was or anything...If I hear anything I’ll tell you right away don’t worry
- Well dude the truth is something happens here every day they are super busy but anyway got to stay sharp and not let that stop us got to move forward and work
- Honest as for me like the prison says I don’t look I don’t feel and I don’t listen, I just want to make money if possible

Ex. 241.

Deputy Mendoza testified about his background working in undercover operations with “Hispanic drug dealers” to lay the foundation for his expertise interpreting the text messages between Lopez Leon and Javier, which were in Spanish and involved drug terminology unfamiliar to the average juror. *See* RP 1365, 1369-82. He testified that the texts revealed a high level of trust developed over a long period of time and were not discussions between strangers who recently met for the first time. RP 1395-98, 1404-06.

Deputy Mendoza described the complex process of drug dealing and cartel operations to lay the foundation for his expertise that Javier was Lopez Leon’s “source” for large quantities of drugs. *See* RP 1355-97. Although he briefly described drugs coming from Mexico, this was in the context of his expertise and was not the only source of drugs in the state. *See* RP 1361-65, 1391.

Approximately three weeks after the murders, detectives located Lopez Leon in another city and arrested him. RP 700-12; 9/7/21 RP 19, 35-36. He was in possession of two cell phones. RP 712-13. Text messages revealed he was communicating with Javier on at least two phones. Ex. 241 (“I’ll send you the address on the other phone”).

Lopez Leon claimed he only stayed in contact with Javier to help law enforcement catch him. Ex. 21 at 19, 61-62, 81, 85. But their texts revealed they met numerous times after the murders to exchange money and drugs. Ex. 241. Despite this, Lopez Leon never contacted law enforcement, even though he acknowledged seeing himself on the news. 9/7/21 RP 37-39.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals Correctly Concluded That the State Did Not “Flagrantly or Apparently Intentionally” Appeal to Racial Bias by Introducing “Highly Relevant” Evidence at Trial.

As this Court has recognized, not all references to race or ethnicity during trial are improper. *In re Pers. Restraint of Sandoval*, 189 Wn.2d 811, 834, 408 P.3d 675 (2018). In some

cases, race or ethnicity may be relevant or even necessary to discuss within the context of the trial. *State v. Zamora*, 199 Wn.2d 698, 715, 512 P.3d 512 (2022). Thus, a careful and thorough examination of the trial record is necessary when reviewing race-based prosecutorial misconduct claims.

The Court of Appeals properly recognized the importance of Lopez Leon’s race-based prosecutorial misconduct claim and explicitly acknowledged this Court’s instruction that courts “must endeavor to eradicate racial bias from the legal system.” *Lopez Leon*, slip op. at 29, 37. With these principles in mind, the Court of Appeals carefully analyzed the “highly relevant” evidence at trial under the *Bagby*¹ factors and correctly concluded that, under the facts of *this case*, an objective observer—who is aware of the history of race and ethnic

¹ *State v. Bagby*, 200 Wn.2d 777, 522 P.3d 982 (2023). Courts consider (1) the content and subject of the statements, (2) the frequency of the remarks, (3) the apparent purpose of the statements, and (4) whether the comments were based on evidence or reasonable inferences in the record. *Id.* at 793.

discrimination and the implicit, institutional, and unconscious biases and purposeful discrimination—could not view the prosecutor’s conduct as “flagrantly or apparently intentionally” appealing to racial prejudice, bias, or stereotypes.

“An allegation of race-based prosecutorial misconduct requires a close and thorough examination of the record.” *Zamora*, 199 Wn.2d at 704. The Court of Appeals did just that by carefully examining the trial record and considering the purpose of the references to race and ethnicity, which were based on the evidence and reasonable inferences therefrom. Lopez Leon’s arguments ignore the context of the evidence and its relevance to the specific issues in his case. It was this context that was crucial to the court’s analysis.

Deputy Mendoza testified about his background working in undercover operations with “Hispanic drug dealers” because this was his specific area of expertise. RP 1365-71. He frequently used his fluency in the Spanish language to work with Hispanic drug sources and informants. RP 1371-72. As the Court of

Appeals recognized, “The deputy’s native language is Spanish, his parents immigrated from Mexico, and he frequently uses Spanish in his work.” *Lopez Leon*, slip op. at 9.

Deputy Mendoza’s testimony laid the foundation for his expertise interpreting the texts between Lopez Leon and Javier, which were in Spanish and involved drug terminology. RP 1371-81; Ex. 241; *see* RP 1369 (explaining he must use the same terminology communicating with “Hispanic drug sources” for safety reasons during undercover operations); *see also* RP 1382 (testifying its common for Hispanic drug dealers to refer to heroin as “Morena” because it means “brown or dark” in Spanish, which describes heroin).

Deputy Mendoza described the complex process of drug dealing and cartel operations to lay the foundation for his expertise. This testimony was “relevant to explain the process that leads to the involvement of drug sources and their runners” and his expert opinion that Javier was Lopez Leon’s “source” and fronting him large quantities of drugs. *Lopez Leon*, slip op.

at 33-34. Thus, under the facts of *this case*, Deputy Mendoza's testimony was highly probative of central issues at trial and must be considered within that context.

Deputy Mendoza's testimony was also relevant to explain the State's theory that Lopez Leon and Javier had an existing relationship prior to the murders, despite Lopez Leon's claim that they first met the night of the murders. Deputy Mendoza testified that sources and runners can work together for a long time without meeting in person. RP 1390-91, 1406. The complex drug distribution process explained how Lopez Leon and Javier could have never met "in person" prior to the murders but still had a prior relationship. *See* RP 1390-91 (testifying that sources capable of producing ounces of heroin likely come from other parts of the state or California).

Thus, "the apparent purpose" of Deputy Mendoza's testimony "was geared toward areas that were highly relevant" at trial, including the critical question of "the level of familiarity and connection between Lopez Leon and Javier," which the

parties “placed directly at issue” by their respective theories of the case. *Lopez Leon*, slip op. at 33. The nature of the relationship between Lopez Leon and Javier was a central issue at trial, and Deputy Mendoza provided “highly relevant” testimony on this issue. Context matters.

Lopez Leon argues that review is warranted by mischaracterizing the nature and extent of the testimony. Deputy Mendoza did not repeatedly discuss the typical characteristics of “Hispanic drug dealers” as Lopez Leon claims. The Court of Appeals acknowledged the deputy’s one statement that trust is less with Hispanic drug dealers. *Lopez Leon*, slip op. at 32 (citing RP 1365). But this was within the context of explaining his background working in undercover investigations, which laid the foundation for his expertise. The jury was not invited to improperly infer a trusting relationship based on ethnic stereotypes. On the contrary, there was extensive testimony about the significant trust between Lopez Leon and Javier based on their own words contained in more than 280 text messages

exchanged during the ten days following the murders. *See* Ex. 241; RP 1373-98.

Further, the prosecutor's single reference to "Mexican drugs" was within the context of rephrasing Deputy Mendoza's extensive testimony about his area of expertise, which included "the drug trade from Mexico." *Lopez Leon*, slip op. at 34 n. 14. The context was limited to his undercover work with Hispanic drug sources and informants. *See* RP 1371-72. The prosecutor's question was not a flagrant or apparently intentional appeal to racial bias.²

Lopez Leon improperly analogizes his case to *Zamora* where the prosecutor intentionally appealed to racial bias by asking potential jurors during voir dire about illegal immigration,

² The prosecutor asked, "Now sir, you mentioned a couple of times that your focus, your expertise is related to Mexican drugs. Now do you speak Spanish, sir?" RP 1371. Deputy Mendoza answered, "I do." *Id.* The prosecutor then asked, "Do you use that ability to speak Spanish? Do you use that in your capacity as a deputy in SIU?" *Id.* Deputy Mendoza answered, "Yes, a lot. Because I focus on Hispanic drug sources and drug informants...." *Id.*

border security, and crimes committed by undocumented immigrants. The Court of Appeals properly distinguished *Zamora*, which was not “remotely” related to immigration or border security and correctly concluded that although Lopez Leon’s case also involves “comments about our Southern border with Mexico...that’s where the similarities end.” *Lopez Leon*, slip op. at 37.

Immediately following the murders, Lopez Leon conducted internet searches of the “Mexican drug cartel” and the “sinaloa cartel.” Ex. 133; RP 886-87. Thus, it was his own behavior that made this evidence relevant at trial. As the Court of Appeals properly explained, “Given the extensive text communications between Lopez Leon and Javier immediately after the murders about drug dealing and Lopez Leon’s own searches about the cartels, testimony about cartels and drug dealing was directly relevant to the State’s theories.” *Lopez Leon*, slip op. at 37.

The Court of Appeals also properly distinguished *Bagby* where the prosecutor repeatedly referred to the “nationality” of the Black defendant who was a United States citizen to distinguish him from white witnesses. “Unlike *Bagby*, the ethnicity descriptors used here were relevant to the issues in the case.” *Lopez Leon*, slip op. at 37 n. 18.

The Court of Appeals also properly distinguished *United States v. Cabrera*, 222 F.3d 590 (9th Cir. 2000). *See Lopez Leon*, slip op. at 37 n. 17. In *Cabrera*, the defendants were charged with distributing drugs, and the Ninth Circuit concluded that the repeated references to the defendants’ ethnicity and the Cuban methods for packaging drugs were not relevant and prejudiced the defendants by implying they were drug dealers because of their ethnicity. *Cabrera*, 222 F.3d at 596. The Court concluded “it was unnecessary to inject [their] national origin into the trial.” *Id.* But in *Lopez Leon*’s trial, the limited references to ethnicity were relevant within the context of the trial and the specific facts of his case. Further, unlike the defendants in *Cabrera*, *Lopez*

Leon was not charged with possessing or distributing drugs. Thus, the *Cabrera* Court's concerns that a jury would infer the defendants were guilty of dealing drugs based on their ethnicity were not present here.

The ethnicity of Lopez Leon and Javier could not be sanitized from the trial where they communicated in Spanish about drug deals. Further, Deputy Mendoza's expertise was necessary to explain the meaning of those texts to the jury. His background working with Hispanic drug dealers and expertise in the drug distribution process provided the foundation for his expertise and testimony, which was directly relevant to the issues at trial.

The jury had to assess Deputy Mendoza's credibility like any other witness. CP 98 (instructing jurors that in determining the credibility of a witness with special training and experience, they may consider his "education, training, experience, knowledge, and ability" and "the reasons given for the opinion" and the sources of his information). His expert testimony could

not be viewed in a vacuum without any context that would allow jurors to assess his credibility.

The testimony was limited in nature considering the lengthy four-week trial, and the “apparent purpose of the testimony was geared toward areas that were highly relevant for the trial.” *Lopez Leon*, slip op. at 33. Lopez Leon was not convicted based on improper generalizations or stereotypes about racial and ethnic groups. He was convicted based on the evidence admitted at trial, including surveillance videos showing his complicity and his own text messages that provided his motive for the murders.

The Court of Appeals properly recognized that not all references to race or ethnicity are improper. *See Lopez Leon*, slip op. at 31 (citing *Sandoval*, 189 Wn.2d at 834). As this Court has recognized, such references “may be relevant or even necessary to discuss within the context of trial.” *Zamora*, 199 Wn.2d at 715. Context matters. And within the context of Lopez Leon’s trial, the references to race and ethnicity were relevant and were not

elicited as a “flagrant or apparently intentional” appeal to racial bias. Deputy Mendoza’s testimony was relevant and assisted the jury in drawing reasonable inferences from the evidence about Lopez Leon’s motive and guilt.

It was Lopez Leon’s “own words and behavior” that made the limited evidence about cartels relevant. *Lopez Leon*, slip op. at 34-36. Lopez Leon believed Javier was in the Sinaloa cartel. *See* CP 323-24 (“And when you say work in Spanish, and, I mean, and you’re drinking and you have all this coke in your hand, you figure it out pretty much, you know.”) His text messages indicate that this was a lifestyle he desperately wanted and that he started selling large quantities of drugs with Javier immediately following the murders. Ex. 241. Lopez Leon’s belief that Javier was in the cartel and his internet searches regarding the “Mexican drug cartel” and “sinaloa cartel” provide circumstantial evidence of his state of mind and were relevant to explain his motive for the murders.

The evidence Lopez Leon challenges was relevant to the facts of his case and must be considered within the context of the specific issues at trial. The Court of Appeals carefully analyzed this “highly relevant” evidence and properly applied the law. Review is not warranted under RAP 13.4(b)(3) or (4).

B. The Court of Appeals Correctly Concluded That Counsel Made a Strategic Decision Not to Object to the Limited, Relevant Evidence Involving Cartels.

Ineffective assistance of counsel principles are well settled. As this Court has repeatedly recognized, to prove deficient performance by trial counsel, “the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” *See, e.g., State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995); *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). “A classic example of trial tactics is when and how an attorney makes the decision to object during trial testimony.” *State v. Vazquez*, 198 Wn.2d 239, 248, 494 P.3d 424 (2021). The failure to object is not deficient performance when the objection would

not likely have been sustained. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). The Court of Appeals adhered to these principles and correctly held that Lopez Leon failed to show the absence of legitimate strategic or tactical reasons for his attorney's decision not to object to the limited, and relevant, cartel evidence. *See Lopez Leon*, slip op. at 38-41.

Because the limited evidence of cartels was relevant to Lopez Leon's motive for the murders, it is unlikely an objection would have been sustained. First, the State did not suggest that *Lopez Leon* was in the cartel. Thus, the jury was not invited to make an improper inference of his propensity to commit the murders. But Lopez Leon's belief that *Javier* was in the cartel explained why he was complicit in the murders—he wanted to gain Javier's trust in order to make money dealing large quantities of drugs. *See Lopez Leon*, slip op. at 40; *see also* RP 1390 (“I don't look, I don't feel, and I don't listen. I just want to make money if possible.”).

Second, Lopez Leon's internet searches immediately following the murders regarding the "sinaloa cartel seattle" and "Mexican drug cartel" provided further evidence of his motive. *See* Ex. 133. These searches, combined with his belief that Javier was in the Sinaloa cartel, provided circumstantial evidence of his state of mind and explained his involvement in the murders. Notably, the trial court admitted evidence of their drug dealing because it was "highly probative" of Lopez Leon's motive and complicity in the murders. RP 297-98. The cartel evidence was admissible for the same reasons. Thus, the State connected the cartel evidence to Lopez Leon's motive for the murders, and it is unlikely an objection would have been sustained.

Lopez Leon's attorney made a strategic decision not to object to this evidence because it supported his theory that Lopez Leon feared Javier. Lopez Leon reported that he feared for his life after the shootings. RP 1461, 1471, 1514. His expert testified that he suffered from post-traumatic stress disorder and that his behavior after the murders was "self-preservation" to appease

Javier because he feared for his life. RP 1470-77, 1503-09, 1524, 1533. In closing argument, Lopez Leon argued that he feared for his life after witnessing Javier commit the murders and that he conducted internet searches on being “forced to stay quiet.” RP 1830-44, 1854.

Thus, Lopez Leon’s internet searches involving the cartel and his belief that Javier was in the cartel supported his theory of the case that he feared Javier. Jurors could have reasonably inferred that the cartel evidence supported his claimed fear as opposed to showing his complicity in the murders. *See Lopez Leon*, slip op. at 40-41. It was a legitimate trial strategy not to object to this evidence.

Moreover, counsel expressed an overall strategy to minimize objections at trial. RP 1832 (“We didn’t object to anything because it’s clear we knew that Javier did the killing.”). Thus, counsel “made a calculated decision to not object at trial to the State’s evidence of cartels.” *Lopez Leon*, slip op. at 41.

The evidence was narrow in scope and limited to Lopez Leon's internet searches, his expressed belief that Javier was in the cartel, and to Deputy Mendoza's training and experience.³ Notably, the first mention of cartels came from *Lopez Leon* during his opening statement. He stated the evidence will show Javier was angry after Adrian played a "corridos...a style of music in Mexico that kind of magnifies cartel and drug people" from a rival group, thereby suggesting this was the motive for the murders. *See* RP 439-40.⁴ This opening statement provided further support for counsel's strategic decision not to object to cartel evidence.

³ Deputy Mendoza referenced the word "cartel" only five times over four pages of his 62-page transcript during the four-week trial. *See* RP 1358-59, 1361, 1364.

⁴ Lopez Leon also informed jurors during his opening statement that the evidence will show the people at the party were "all from Mexico" and talking about what region they were from. RP 438. He then repeatedly solicited testimony that individuals involved in the case were "Spanish-speaking" or from Mexico. *See, e.g.*, RP 1016, 1083, 1700-01.

Lopez Leon's reliance on cases involving the prejudicial effect of gang evidence has no applicability to his case. *See Lopez Leon*, slip op. at 40 n. 19. He suggests the evidence must be relevant to either the "cartel's mores" or as part of an "initiation" into the cartel. Pet. Rev. at 25-26. But this is not the requirement for admissibility. The evidence is admissible if relevant to prove motive based on a nexus between the gang and the murder, and the probative value outweighs the danger of unfair prejudice. *See, e.g., State v. Embry*, 171 Wn. App. 714, 732-36, 287 P.3d 648 (2012); *State v. Scott*, 151 Wn. App. 520, 526-30, 213 P.3d 71 (2009).⁵

Here, the State connected the cartel evidence to Lopez Leon's motive for the murders and it was properly admitted on this basis. Counsel was not ineffective for making a strategic

⁵ The cases relied on by Lopez Leon involving "gang evidence" are inapposite because the State failed to show the relevance of the evidence or connect it to the motive for the crime. *See, e.g., State v. DeLeon*, 185 Wn.2d 478, 490-91, 374 P.3d 95 (2016); *State v. Scott*, 151 Wn. App. 520, 213 P.3d 71 (2009); *State v. Ra*, 144 Wn. App. 688, 175 P.3d 609 (2008).

decision not to object to this relevant evidence. There is no basis for review under RAP 13.4(b)(3) or (4).

C. The Court of Appeals Correctly Concluded That the Prosecutor Did Not Commit Misconduct and That Counsel Made a Strategic Decision Not to Object to the Isolated Closing Argument.

Applying well-established law, the Court of Appeals correctly concluded that the prosecutor did not commit misconduct during closing argument by arguing a reasonable inference from the evidence and that Lopez Leon's attorney was not ineffective for strategically choosing not to object to the isolated argument. *Lopez Leon*, slip op. at 44-46. This does not present a significant question of constitutional law under RAP 13.4(b)(3). Review is not warranted.

In a prosecutorial misconduct claim, the defendant must prove the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). If the defendant failed to object at trial, he waives any error unless the conduct was "so flagrant and ill intentioned that

an instruction could not have cured the resulting prejudice.” *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

Lopez Leon did not object to the prosecutor’s isolated argument about an inferred agreement for Javier to “take the fall” based on Javier’s guilty plea and Lopez Leon’s expressed concern that Javier would flee the country. RP 1878-82. The Court of Appeals properly concluded that arguing “a reasonable inference from the evidence is not misconduct.” *Lopez Leon*, slip op. at 46 (citing *Thorgerson*, 172 Wn.2d at 448).

But even assuming the isolated argument was improper, Lopez Leon fails to address prejudice or explain how this presents a “significant question” of constitutional law. *See* Pet. Rev. at 2, 28-31. The Court of Appeals correctly concluded that he waived any claim of error “by failing to object to the prosecutor’s comments below” and “has not demonstrated that no curative instruction could have obviated any prejudicial effect on the jury.” *Lopez Leon*, slip op. at 46. “Had counsel objected and requested a curative instruction, the trial court could have

instructed the jury to disregard the argument.” *Id.* Notably, jurors had already been instructed to disregard any remark, statement, or argument not supported by the evidence. *Id.* at 46, n. 24; *see* RP 1738; CP 92. Reviewing courts presume jurors followed the court’s instructions. *State v. Clark*, 187 Wn.2d 641, 654, 389 P.3d 462 (2017).

Lopez Leon “cannot show that defense counsel’s decision not to object was not a legitimate trial strategy” *Lopez Leon*, slip op. at 46 n. 25 (citing *McFarland*, 127 Wn.2d at 336). The Court of Appeals noted counsel’s expressed strategy not to object to anything “because it’s clear we knew that Javier did the killing.” *Lopez Leon*, slip op. at 46 n. 25. “A decision not to object during summation is within the wide range of permissible professional legal conduct.” *Davis*, 152 Wn.2d at 717. Lopez Leon failed to show that “there is no conceivable legitimate tactic explaining counsel’s performance.” *See Grier*, 171 Wn.2d at 33. This issue does not present a significant question of constitutional law to warrant review under RAP 13.4(b)(3).

Further, Lopez Leon’s reliance on an unpublished decision from the Court of Appeals, which has never been cited by any Washington court, does not provide a basis for review. *See* Pet. Rev. at 31 (citing *State v. O’Neal*, No. 50796-0-II, 2021 WL 5085417 (Wash. Ct. App. Nov. 2, 2021) (unpublished)). Nevertheless, *O’Neal* is distinguishable because the prosecutor’s arguments were inflammatory and misstated the law on self-defense, which “directly obfuscated” O’Neal’s theory of self-defense. *O’Neal*, 2021 WL 5085417, at *7-8. Here, on the other hand, the argument was a reasonable inference from the evidence and did not misstate the law or improperly appeal to the passions or prejudices of the jury.

D. The Court of Appeals Followed Well-Established Law in Concluding That Sufficient Evidence Supported the Convictions.

Courts review sufficiency of the evidence challenges by considering whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find the elements of the crime beyond a reasonable doubt. *State v. Rich*,

184 Wn.2d 897, 903, 365 P.3d 746 (2016). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that can be drawn from that evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences "must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.*

The Court of Appeals followed this well-established law in concluding that sufficient evidence supported the murder convictions and properly rejected Lopez Leon's argument that the evidence was based on speculation. *Lopez Leon*, slip op. at 21-29. Lopez Leon's reliance on *State v. Jameison*, 4 Wn. App. 2d 184, 197-98, 421 P.3d 463 (2018) was not persuasive where it merely reiterated the well-established rule that inferences based on circumstantial evidence must be reasonable and not based on speculation. The surveillance videos, text messages, ballistics evidence, and Lopez Leon's numerous statements that were inconsistent with the evidence established his complicity in both murders. This claim does not involve a significant question

of constitutional law under RAP 13.4(b)(3), and review is not warranted.

V. CONCLUSION

Lopez Leon fails to show review is warranted under RAP 13.4(b)(3) or (4). For the reasons set forth above, the State respectfully requests this Court deny review.

This document contains 5,646 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully Submitted this 5th day of December, 2023

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PIERCE COUNTY PROSECUTING ATTORNEY

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