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No. 69401-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

CITY OF KENT,

Petitioner,

v.

EVERARDO BECERRA-AREVALO,

Respondent.

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

On RALJ appeal, the superior court reversed Everardo Becerra-Arevalo's conviction for misdemeanor assault and remanded for a new trial based upon the combination of (1) prosecutorial misconduct in eliciting the investigating police officer's opinion on the defendant's credibility, (2) the prejudicial impact of the officer's opinion that the defendant was untruthful elicited by the assistant city attorney and by defense counsel's unsuccessful attempts at mitigation, and (3) the prosecutor's comment in closing argument on the defendant's right to confront witnesses.

1. The defendant has a constitutional right to a fair and impartial trial that may be violated by prosecutorial misconduct. U.S. Const. amend. XIV; Const. art. I §§ 21, 22. The prosecuting attorney elicited a police officer's opinion that Mr. Becerra-Arevalo was not being truthful when he denied the allegation against him during their interview, and later had the witness confirm that her opinion that Mr. Becerra-Arevalo was lying was based upon her entire investigation. Was the introduction of the police officer's testimony that she believed the defendant was lying so flagrant and ill-intentioned that it could not be cured by limiting instructions, requiring reversal?

2. The defendant's constitutional right to a jury trial guarantees that the jury determines whether a witness has testified truthfully. U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22. A witness may not testify that the defendant is lying or is guilty. After the police officer opined that Mr. Becerra-Arevalo appeared to be less than truthful in their interview, defense counsel tried unsuccessfully to discount her opinion in cross-examination. This resulted in numerous questions from both counsel concerning the officer's opinion of Mr. Becerra-Arevalo's credibility and guilt, culminating in her testimony that her opinion that he was lying when he denied the allegations was based upon her entire investigation. Was Mr. Becerra-Arevalo's constitutional right to a fair determination of the facts by an unbiased jury violated, requiring reversal?

3. It is misconduct for a prosecutor to comment in closing argument on the defendant's exercise of a constitutional right. The assistant city attorney commented on Mr. Becerra-Arevalo's constitutional right to confront witnesses and be present at trial when she invited the jurors to consider the complaining witness's pain and discomfort at facing the defendant in court. Was the comment on Mr. Becerra-Arevalo's right to confront his accuser so flagrant and ill-intentioned that it could not be cured by limiting instructions, requiring reversal?

4. A defendant's constitutional right to a fair trial may be violated by the cumulative impact of various trial errors, even if one or more of the errors would not mandate reversal standing alone. The critical issue for the jury in Mr. Becerra-Arevalo's trial was the credibility of two witnesses – the defendant and his accuser – and the jury repeatedly heard a police officer's opinion that the defendant lied when he denied the allegations. In addition, the prosecutor commented in closing argument on Mr. Becerra-Arevalo's right to confront the complaining witness. Must the superior court's decision reversing Mr. Becerrra-Arevalo's conviction based upon the cumulative impact of the above errors be affirmed?

B. STATEMENT OF THE CASE

Everardo Becerra-Arevalo worked as the maintenance supervisor for Plemmons Industries, owners of four industrial parks and a shopping complex in Kent. RP 15, 110-11, 200, 202.[1] Kelly Fitzpatrick was the office manager for one of Plemmons' tenants, and she would occasionally speak with Mr. Becerra-Arevalo when he was working at her office. RP 13, 15-16. Ms. Fitzpatrick found Mr. Becerra-Arevalo to be polite and friendly, and the two once went to lunch together. RP 17-20.

According to Ms. Fitzpatrick, Mr. Becerra-Arevalo touched her

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[1] RP refers to the report of proceedings in Kent Municipal Court, entitled Electronic Record Transcription, found at CP 55-354.

breasts and tried to kiss when they were alone in her office on October 27, 2009. RP 20-22. Ms. Fitzpatrick reported the incident to the police on November 12 because she did not believe her employer had adequately addressed the problem. RP 29-30, 50-51. Mr. Becerra-Arevalo denied touching Mr. Fitzpatrick when interviewed by Kent Police Officer Carrie Nastansky. RP 50, 63. The City of Kent charged him with fourth degree assault with sexual motivation, and he was convicted after a jury trial in Kent Municipal Court. CP 4-5, 21.

On appeal to King County Superior Court, Mr. Becerra-Arevalo's conviction was reversed and remanded for a new trial. CP 459-60. The Honorable Leroy McCullough ruled that Mr. Becerra-Arevalo did not receive a fair trial due to the impact upon the jury of the police officer's testimony concerning the defendant's credibility, the emphasis on lying during examination of the officer, and the city attorney's comment during closing argument concerning the defendant's constitutional right confront witnesses. Id.

At issue was the testimony of experienced law enforcement officer Carrie Nastansky concerning Mr. Becerra-Arevalo's credibility and guilt. When first asked by the city attorney what Mr. Becerra-Arevalo told her about the incident, Officer Nastansky responded that he was very cautious about what he said:

> The conversation, from what I remember, was kind of odd because it was – I don't want to say he was trying to hide something. He was very careful about what he said and how he answered questions. He told me he's only there to work. He never talks to females, just that he comes in and says hi, and then he leaves and goes back to work.

RP 56. Instead of directing the witness away from her opinion of the defendant's veracity, the assistant city attorney next asked Officer Nastansky why she believed Mr. Becerra-Arevalo was trying to hide something. Id. The court sustained defense counsel's objection, but permitted the prosecutor to re-phrase the question. Id. The assistant city attorney continued:

> Q: Officer Nastansky, was it your opinion that the defendant was being careful in answering your questions?
>
> A: Yes.
>
> Q: Why did you have that opinion?
>
> A: Because he was slow to answer as if he were trying to come up with a story in his head versus just if something had happened you would be able to freely tell the story and you wouldn't have to think about it. There would be no like okay, well did this happen and then this. You just say what happened, nothing to hide.
>
> Q: Any did you get that perception here?
>
> A: No. He was – it seemed to me that he was trying to hide something.

RP 56-57.

On cross-examination, defense counsel tried to impeach the officer by briefly asking about Mr. Becerra-Arevalo's answers to her questions to show that he denied the incident and was "slow and guarded" only when asked about his relationships with other women at work. RP 63.

The city attorney responded on re-direct by asking the officer if the defendant's answers were also "guarded" concerning Ms. Fitzpatrick's allegations. RP 66. Officer Nastansky replied that not only was Mr. Becerra-Arevalo guarded as to the incident, he also "lied" to her:

> Q: Was he also guarded with you on the events that occurred on October 27th?
>
> A: Yes he was. And he lied to me also. He told me he didn't know why I was there, although he had already been contacted by the property manager, so you would assume he would know why I was there.

Id.

Defense counsel attempted to discount this testimony in further cross-examination. The officer admitted she did not know if the manager had told Mr. Becerra-Arevalo that she was there to talk to him about the incident with Ms. Franklin, but refused to back down from her opinion that the defendant was lying.[2] RP 68, 71. Instead, Officer Nastansky claimed that she was a very good judge of when people were lying and reiterated that Mr. Becerra-Arevalo lied to her. RP 71-73.

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[2] When called as a witness on rebuttal, the property manager did not testify that she told Mr. Becerra-Arevalo why Officer Nastansky wanted to talk to him. RP 198-244.

The prosecutor then asked the officer to again confirm that she believed Mr. Becerra-Arevalo was lying to her and to explain the basis of her belief. RP 74. Over defense counsel's objection, the evidence was admitted to show the officer's "state of mind." RP 74. Officer Nastansky therefore opined:

> Because he – just the way that he kind of – when you're asked a certain question and then you answer part of it, but you don't answer the full part of if, you're really kind of choppy on what the answers are, very careful knowing that there's a police officer in front of you, you're very careful to [sic] how you answer it. Like I said before, if he didn't have anything to hide he would have told me, you know, this, this, and this happened and yes, I was in that room at that time, but I never touched her. But he didn't answer it. He didn't go into detail whatsoever. And then I offered a taped statement. . . .

RP 74-75. The court sustained defense counsel's objection when the officer began to talk about Mr. Becerra-Arevalo's decision to forgo the taped statement. RP 75.

The assistant city attorney concluded by again asking the officer to confirm the basis for her opinion that Mr. Becerra-Arevalo lied to her:

> Q: So Officer, focusing just on that initial contact that you had with the defendant and your statement today that you felt that the defendant was lying to you on that day, do you base that statement on your entire investigation and all of the information that you obtained during that investigation?
>
> A: Yes.

> Q: And to you based that opinion based on what you were told by other individuals about what occurred and what was communicated by the defendant.
>
> A: Yes.

RP 75. Finally, defense counsel responded by questioning the officer about her opinion, and she explained that guilty people are always guarded when responding to police interrogation, but innocent people generally are not. RP 77.

In closing argument, the city attorney urged the jury to discount Mr. Becerra-Arevalo's testimony based upon Officer Nastansky's expert opinion that Mr. Becerra-Arevalo's "very guarded" responses to her questions indicated he was guilty. RP 296-97.

The assistant city attorney also commented on Mr. Becerra-Arevalo's constitutional rights to confront the witnesses against him:

> But now Kelly, you saw how difficult it was for her to testify. You saw how painful it was for her to look at that defendant. You saw how much she did not want to do that. You saw how uncomfortable she was to be in this environment . . . Kelly just wanted it to go away because she didn't want to have any contact with the defendant.

RP 271-72

The superior court reversed Mr. Becerra-Arevalo's conviction based the cumulative effect of (1) the police officer's improper comment on Mr. Becerra-Arevalo's credibility, (2) the emphasis by both counsel on

questioning the officer about his "lying" and (3) the prosecutor's comment upon his constitutional right to confront the witnesses against him. CP 459-60. This Court accepted discretionary review. Order Granting Discretionary Review at 8.

C. ARGUMENT

The due process clauses of the federal and state constitutions provide that a criminal defendant receive a fair and impartial trial. U.S. Const. amend. XIV; Const. art. 1, § 3, 22; In re Personal Restraint of Yates, 177 Wn.2d 1, 30, 296 P.3d 872 (2013); In re Personal Restraint of Glasmann, 175 Wn.2d 696, 703, 286 P.3d 673 (2012) (Madsen, C.J., lead opinion). The cumulative effects of various trial court errors may therefore require reversal, even if each error examined on its own might otherwise be considered harmless. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

During Everardo Becerra-Arevalo's jury trial for fourth degree assault, an experienced police officer offered her opinion that he was lying when he denied the allegations. The prosecutor also commented on Mr. Becerra-Arevalo's right to confront the witnesses. On RALJ appeal, the superior court reversed Mr. Becerra-Arevalo's conviction and remanded for a new trial based upon the combination of (1) prosecutorial misconduct in eliciting the police officer's testimony on the defendant's credibility, (2)

the prejudicial impact of the officer's opinion that the defendant was lying elicited by both the assistant city attorney and defense counsel, and (3) the prosecutor's comment in closing argument on the defendant's right to confront witnesses. A review of the record reveals these serious errors combined to deny Mr. Becerra-Arevalo a fair trial. This Court should affirm the superior court's decision to reverse Mr. Becerra-Arevalo's conviction with remand for a new trial.

1. **Prosecutorial misconduct in eliciting a police officer's expert opinion that Mr. Becerra-Arevalo was lying when he denied the allegation against him violated his constitutional right to a fair trial.**

a. The prosecutor is a quasi-judicial officer who has a duty to ensure the defendant receives a fair trial. A public prosecutor plays a unique role in the criminal justice system that requires her to act impartially and seek a just verdict based upon matters in the record. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1934); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011) (the prosecutor owes a "duty to defendants to see that their rights to a constitutionally fair trial are not violated"); RPC 3.8. Washington courts have long emphasized that a prosecutor's misconduct may violate the defendant's right to due process and a fair trial. Glasmann, 175 Wn.2d at 703-04; State v. Reed, 102 Wn.2d 140, 146-49, 684 P.2d 699 (1984) (and

cases cited therein); State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Carr, 160 Wash. 83, 90-91, 294 Pac. 1016 (1930).

The well-known standard of review for prosecutorial misconduct requires the reviewing court to determine if the prosecutor's conduct was improper and, if so, whether there is a substantial likelihood the misconduct affected the jury verdict.[3] Glasmann, 175 Wn.2d at 704; State v. Emery, 174 Wn.2d 741, 756-59, 760, 278 P.3d 653 (2012); Monday, 171 Wn.2d at 675-76. If, however, the defendant did not object to the misconduct, the reviewing court determines whether the conduct was so flagrant and ill-intentioned that the resulting prejudice would not have been cured by a limiting instruction. Glasmann, 175 Wn.2d at 704; Emery, 174 Wn.2d at 760-61; State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); Charlton, 90 Wn.2d at 661; State v. Case, 49 Wn.2d 66, 72-74, 298 P.2d 500 (1956).

b. The assistant city attorney committed flagrant and ill-intentioned misconduct by eliciting the police officer's opinion that Mr. Becerra-Arevalo was lying. "No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). This includes

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[3] Monday's exception for cases where the prosecutor commits egregious racial misconduct is not at issue here. Monday, 171 Wn.2d at 680 (applying constitutional harmless error test).

offering an opinion on the veracity of the defendant or a witness. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008); State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); Black, 109 Wn.2d at 349. Inadmissible opinion testimony is especially prejudicial when the witness is a police officer because officers carry "a special aura of reliability." Montgomery, 163 Wn.2d at 595; Demery, 144 Wn.2d at 765.

It is misconduct for the prosecutor to elicit a witness's opinion on another witness's credibility, including the defendant's. State v. Ish, 170 Wn.2d 189, 241 P.3d 389 (2010) (misconduct for prosecutor to elicit testimony that witness entered plea agreement that included requirement of testifying "truthfully" for the State); State v. Boehning, 127 Wn. App. 511, 524-25, 111 P.3d 899 (2005) (flagrant misconduct to ask defendant if victim lying); see State v. Fisher, 165 Wn.2d 727, 747-49, 202 P.3d 937 (2009) (misconduct for prosecutor to elicit ER 404 evidence of physical abuse of a child in violation of court ruling and use the evidence to show the defendant's propensity to commit the crime). The prosecutor's questions need not be a direct question on whether the defendant is lying. State v. Ramos, 164 Wn. App. 327, 335, 263 P.3d 1268 (2101) (misconduct to ask defendant if paid informant had a motive to testify untruthfully about him); State v. Stevens, 127 Wn. App. 269, 275-76, 110 P.3d 1179 (2005) (misconduct to ask witness if victims' statements were

"consistent"), aff'd 158 Wn.2d 304, 143 P.3d 817 (2006). The assistant city attorney thus committed misconduct by eliciting the officer's opinion on the defendant's veracity and guilt.

Misconduct is flagrant and ill-intentioned if no curative instructions "would have effectively erased the prejudice." Belgarde, 110 Wn.2d at 507. Here, the officer's testimony was so prejudicial that no curative instructions could have obviated their impact on the jury. Officer Nastansky offered her opinion that Mr. Becerra-Arevalo was lying when he denied the charges because the manner in which he spoke to her made it appear that he was hiding something. RP 56-57, 74-75. She added that not only was he guarded in his responses to the officer's questions, "he lied to me also." RP 66. Finally, she explained that her opinion that Mr. Becerra-Arevalo was lying when he denied the allegations was based upon her "entire investigation." RP 75.

Washington courts have consistently held that it is improper to elicit testimony from one witness concerning whether another witness is lying, and that it is improper for a witness to testify as to her belief that the defendant is lying or is guilty. Ish, 170 Wn.2d at 199; Boehning, 127 Wn. App. at 524-25; State v. Jerrels, 83 Wn. App. 503, 507-08, 925 P.2d 209 (1996) (prosecutorial misconduct to elicit witness's opinion as to truthfulness of child rape victims); State v. Suarez-Bravo, 72 Wn. App.

359, 366-67, 864 P.2d 426 (1994) (prosecutor's repeated attempts to get the defendant to call the police liars were flagrant misconduct); State v. Castaneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74 (misconduct for prosecutor to cross-examine defendant to about whether other witnesses lying), rev. denied, 118 Wn.2d 1007 (1991). The prosecutor's decision to ignore these established legal principles and elicit a police officer's opinion that the defendant was lying several times during the trial, culminating with the officer's explanation that her opinion was based upon her entire investigation of the case was flagrant and ill-intentioned. See Boehning, 127 Wn. App. at 524-25 (flagrant misconduct to ask defendant if complaining witness "made [it all] up").

In addition, the officer's testimony was so prejudicial that the misconduct could not have been cured by limiting instructions. It is well-recognized that jurors place a high value on the testimony of law enforcement officers. Montgomery, 163 Wn.2d at 595; Demery, 144 Wn.2d at 765; State v. Quaale, ___ Wn. App. ___, 312 P.3d 726, 731 (2013); State v. Barr, 123 Wn. App. 373, 384, 98 P.3d 518 (2004), rev. denied, 154 Wn.2d 1009 (2005). A police officer's testimony normally carries "an aura of special reliability and trustworthiness." Demery, 144 Wn.2d at 765 (quoting United States v. Espinoza, 827 F.2d 604, 613 (9th Cir. 1984)). Yet, law enforcement officers have no special ability to

detect when someone is lying. See Barr, 123 Wn. App. 383; Max Minzner, Detecting Lies Using Demeanor, Bias, and Content, 29 Cardozo L. Rev. 2557, 2576 (May 2008) (law enforcement officers are no better in detecting deception in defendants than lay jurors, and some police officers are limited by a "substantial lie bias"). Informing the jury that an experienced police officer believed Mr. Becerra-Arevalo was lying, and was thus guilty, was highly prejudicial.

While jurors are presumed to follow instructions, some evidence is so prejudicial that it is not susceptible to a curative instruction. State v. Dye, 178 Wn.2d 541, 309 P.3d 1192, 1201-02 (2013) (Gordon McCloud, J., concurring); State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968).

> While it is presumed that juries follow the instructions of the court, an instruction to disregard evidence cannot logically be said to remove the prejudicial impression created where the evidence admitted into the trial in inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.

Id. Thus, the Miles Court reversed a conviction because hearsay evidence of the defendants' plan to commit a robbery like the one with which they were charged with was too prejudicial to be cured by a limiting instruction. Id. at 68, 70-71.

In a prosecution for sexual abuse of the defendant's daughter and two step-children, the prosecutors improperly elicited the children's

mother's testimony that her children were telling the truth when they reported and testified about the abuse. Jerrels, 83 Wn. App. at 504, 506-08. This Court reversed the conviction despite the lack of an objection to the misconduct. Id. at 508. Where no medical evidence could confirm the children's testimony, witness credibility was critical to the jury's determination, and this Court concluded that the mother's opinion as to her children's veracity could not have been disregarded by the jury even if it had been instructed to do so. Id. at 508.

Officer Nastansky's testimony was inherently prejudicial and unlikely to be forgotten by the jurors no matter what instruction was given by the court. In addition, the police officer's opinion was repeatedly elicited by the assistant city attorney. This is not a situation where a brief reference could be erased with a prompt curative instruction. See Case, 49 Wn.2d at 737 (prejudicial effect of repetitive misconduct may be so flagrant that no instructions could cure their combined prejudicial effect).

There were only two witnesses who knew if the Ms. Fitzpatrick's allegation was true – Ms. Fitzpatrick and Mr. Becerra-Arevalo. The credibility of these witnesses was thus critical to the jury in deciding this case. The jury heard the opinion of a respected public servant that Mr. Becerra-Arevalo lied to her and that, based upon her entire investigation, she believed he was lying when he denied the allegation. Yet, there is no

reason to believe that the officer knew how to detect lies any more than the jurors. The misconduct presenting the officer's opinion that Mr. Becerra-Arevalo was a liar was flagrant and ill-intentioned, and it was too prejudicial to be cured by limiting instructions.

c. Officer Nastansky's improper opinion was introduced by the City. Officer Nastansky first expressed her view that Mr. Becerra-Arevalo was not being forthright with her on direct examination by the assistant city attorney. RP 56. The City argues that the officer's observation was not in response to the prosecutor's question and thus not misconduct. BOP at 12-20. The city is correct that the assistant city attorney's initial question to the officer did not necessarily call for the improper opinion.[4] RP 56. The City's argument, however, is belied by the assistant city attorney's next questions, which were designed to bring out improper opinion evidence.

Instead of directing the experienced witness away from improper opinion testimony, the City's next question encouraged her to continue to offer her opinion. The prosecutor asked the officer why she believed Mr. Becerra-Arevalo was "being careful" in answering her questions and why she had that belief. RP 56-57. Defense counsel's correct objection that

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[4] The assistant city attorney asked, "And once you told him why it was that you were there did he say anything to you about what had happened?" RP 56.

the question called for "speculation" was overruled. RP 56. The officer's statement that the defendant appeared to be hiding something was in response to the prosecutor's next questions. RP 56-57.

The City also claims the testimony was proper because it was merely a description of Mr. Becerra-Arevalo's demeanor. BOP at 14. In Hagar, the Supreme Court agreed with the trial court that a police officer's testimony that the defendant was "evasive" during questioning was an improper comment on the defendant's credibility. State v. Hagar, 171 Wn.2d 151, 158-59, 248 P.3d 512 (2011). The officer's testimony that Mr. Becerra-Arevalo appeared to be making up his statements and was hiding something are similarly comments on his veracity and not descriptions of his demeanor. Compare State v. Aguirre, 168 Wn.2d 350, 360, 229 P.3d 669 (2010) (expert witness's "objective observations of the victim during their interview" admissible as testimony describing demeanor and not veracity); State v. Magers, 164 Wn.2d 174, 190, 189 P.3d 126 (2008) (officer's testimony that crime victim was crying, seemed unfocused, and was obviously traumatized was proper description of her demeanor); State v. Rafay, 168 Wn. App. 734, 806-08, 285 P.3d 83 (2012) (police officers' descriptions of one defendants at scene of crime as emotional and flushed and clutching his stomach and the other as motionless, staring straight ahead, and robotic were not comments on

veracity or guilt), rev. denied, 176 Wn.2d 103, 299 P.3d 1171, cert. denied, 134 S. Ct. 170 (2013).

The jury could not confuse Officer Nastansky's remarks with a description of Mr. Becerra-Arevalo's "demeanor." She testified that Mr. Becerra-Arevalo was "slow to answer [her questions] as if he were trying to come up with a story in his head." RP 57. She added that "he lied to me also" when he indicated he did not know why the officer was there to interview him. RP 66. She later explained she felt Mr. Becerra-Arevalo was lying throughout the interview because of his "choppy" answers and failure to "go into detail." RP 74-75. Finally, the prosecutor elicited testimony that the officer's opinion that the defendant was lying was based upon her "entire investigation and all of the information she obtained." RP 75.

d. The prosecutor's misconduct was not in response to the defense. The City attempts excuse its misconduct in eliciting the police officer's opinion that Mr. Becerra-Arevalo was lying by arguing that defense counsel "opened the door." BOP at 44-45. The officer's opinion on Mr. Becerra-Arevalo's credibility, however, was first brought out by the City in its case-in-chief. Defense counsel did not open the door to the prosecutor's misconduct.

The "open door" doctrine is an equitable evidentiary principle that pertains to whether certain subject areas are admissible at trial. The term is used in two contexts:

> (1) a party who introduces evidence of questionable admissibility may open the door to rebuttal with evidence that would otherwise be admissible, and (2) a party who is the first to raise a particular subject at trial may open the door to evidence offered to explain, clarify, or contradict the party's evidence.

Karl B. Tegland, 5 Washington Practice, Evidence Law and Practice § 103.14, 66-67 (2007). The "opening the door" doctrine thus addresses the admissibility of evidence, and "must give way to constitutional concerns such as the right to a fair trial. State v. Jones, 144 Wn. App. 284, 298, 183 P.3d 307 (2008). Thus, even if this Court assumes that Mr. Becerra-Arevalo "opened the door" to the officer's opinion that he was a liar, the prosecutor nonetheless had an ethical responsibility to "ensure a fair trial by presenting only competent evidence on this subject." Id.

> A prosecutor's duty is not merely to zealously advocate for the State, but also to ensure the accused receives a fair trial. A criminal defendant can "open the door" to testimony on a particular subject matter, but he does so under the rules of evidence. A defendant has no power to "open the door" to prosecutorial misconduct.

Id. at 295.

The open door doctrine also does not apply here because the opinion evidence the City admitted was not material or relevant. The

doctrine permits a party to "explain, clarify, or contradict" evidence first raised by the other party, but only if the evidence is "material." State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008). In addition, the doctrine is permits a party to introduce evidence on the same issue only to rebut any false impression created by the other party. Fisher, 165 Wn.2d at 750; United States v. Sine, 493 F.3d 1021, 1037 (9th Cir. 2007).

In her direct examination, Officer Nastansky made it clear that she believed Mr. Becerra-Arevalo was lying without using that word. Defense counsel was therefore permitted to try to negate or mitigate the improper, prejudicial, and irrelevant impression left by the officer's opinion on his client's veracity. It was the City that first raised the issue, and defense counsel was allowed to attempt to cure the prejudice.

In addition, defense counsel's attempts to limit the impact of the officer's opinion did not create a false impression, and the further opinions the City elicited were not material or relevant. The City thus went too far in introducing and pursuing this irrelevant and prejudicial line of examination. Officer Nastansky's opinion of Mr. Becerra-Arevalo's statements did not make the material facts of the case more or less probable and thus was not relevant. ER 401; ER 402. Moreover, as argued above, the officer's opinion of the defendant's credibility was so prejudicial that its prejudicial impact outweighed any relevance. ER 403.

In making this argument, the City relies in part upon cases addressing prosecutorial misconduct in closing argument. BOP at 44 (citing State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995) and Ramos, supra). It is well-settled that the parties have latitude in closing argument to draw inferences from the evidence, and a prosecutor's improper remarks in closing argument may not warrant reversal if they were invited or provoked by defense counsel's argument. Russell, 125 Wn.2d at 86, 92-93 (prosecutor's remarks disparaging defense counsel in closing argument appeared to be fair responses to defense counsel's attacks on prosecutor, witnesses, and government agents); Ramos, 164 Wn. App. at 334 (prosecutor's remarks in closing argument were both prejudicial and unsupported by the record). In this case, however, the misconduct was in eliciting testimony on direct and re-direct examination, not in closing argument.

The City also relies upon O'Neal for the proposition that "a prosecutor does not commit misconduct by eliciting witness testimony that vouches for or against the veracity of another witness if the defense has opened the door to such testimony by placing in issue the first witness's opinion of the second witness's veracity." BOP at 44 (citing State v. O'Neal, 126 Wn. App. 395, 109 P.3d 429 (2005), affirmed on other

grounds, 159 Wn.2d 500, 150 P.3d 1121 (2007)). O'Neal, however, is not a prosecutorial misconduct case. See O'Neal, 126 Wn. App. at 408-09.

e. The City's argument that defense counsel's made a strategic decision not to object to Officer Nastansky's testimony is not supported by the record. The City's claims that defense counsel made a strategic decision not to object to Officer Nastansky's improper opinion that his client was a liar. BOP at 31. The City does not provide a citation to the municipal court record to support this assertion. Instead, the City points to appellate counsel's presentation during oral argument for the RALJ appeal. Id. This reference is improper.[5]

The transcript of the appellate arguments in the superior court are not part of the record before this Court on discretionary review. When this Court accepts discretionary review of an RALJ decision, the records is the same as it was for the RALJ court. RAP 9.1(e); RALJ 6.4. The City nonetheless refers this Court to the verbatim report of proceedings of the superior court argument on RALJ appeal. BOP at 31 (citing transcript of RALJ oral argument (entitled Motion for Remand) at 7-8, 28). That transcript is not properly before this Court. RAP 9.1(e). The City's

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[5] This Court declined to review whether Mr. Becerra-Arevalo was denied effective assistance of counsel at trial or on RALJ appeal. Order Granting Discretionary Review at 3 n.3

argument based upon the oral argument transcript must therefore be ignored.

In addition, the City relies a comment made in oral argument by appellate counsel, not trial counsel. Mr. Becerra-Arevalo was represented at trial by David Iannotti. RP 3. RALJ counsel Andrea Beall's opinion does not establish a strategic decision by Mr. Iannotti that is never mentioned in the municipal court record. The City's argument that trial counsel's decisions in this case were strategic must be rejected.

f. The superior court's RALJ decision should be affirmed.

"Prosecuting attorneys are quasi-judicial officers who have a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant." Fisher, 165 Wn.2d at 746. The assistant city attorney committed misconduct in eliciting the police officer's opinion that Mr. Becerra-Arevalo was lying. The misconduct warranted reversal of Mr. Becerra-Arevalo's conviction because (1) no curative instruction could have obviated the prejudicial effect of the testimony, and (2) the resulting prejudice affected the jury verdict.

The City asks this Court to review the evidence against Mr. Becerra-Arevalo in determining if the prosecutorial misconduct in this case warranted the superior court's decision to reverse his conviction. BOP at 46-47. This is not the correct standard. Instead, the appellate

court determines if there is a substantial likelihood that the misconduct affected the jury verdict. Glasmann, 175 Wn.2d at 710-11 (and cases cited therein).

> [D]eciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. We do not decide whether reversal is required by deciding whether, in our view, the evidence is sufficient.

Id. at 711 (internal citations omitted).

The impact of prosecutorial misconduct on jury deliberations is especially prejudicial when the jury's decision rests largely on their determination of the credibility of witnesses. State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011) (reversal due to pervasive prosecutorial misconduct in case that hinged on witness credibility), rev. granted, remanded, 164 Wn.2d 724 (2012); State v. Venegas, 155 Wn. App. 507, 526-27, 228 P.3d 813 (reversal based upon cumulative impact of several factors, including prosecutorial misconduct, in case that "turned largely on witness credibility"), rev. denied, 170 Wn.2d 1003 (2010).

The assistant city attorney repeatedly elicited testimony from a respected public servant that she believed Mr. Becerra-Arevalo was lying when he denied the allegations made against him. Witness credibility was the key decision for the jury in Mr. Becerra-Arevalo's case, and the

opinion testimony elicited by the City meets the flagrant and ill-intentioned test. See Barr, 123 Wn. App. at 381-85 (conviction reversed where detective's testimony that the defendant's behavior during interrogation indicated he was being deceptive was "clearly designed to give the officer's opinion as to whether Mr. Barr had committed the offense"). There is a substantial likelihood that the jurors where influenced by the police officer's improper testimony, and the superior court's decision on RALJ appeal must be affirmed.

2. **Mr. Becerra-Arevalo's constitutional right to a fair trial was violated by the introduction of a police officer's expert opinion that he was lying when he denied the allegations against him.**

"A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." Miles, 73 Wn.2d at 70. The superior court reversed Mr. Becerra-Arevalo's misdemeanor conviction in part because the improper opinion testimony – elicited both by the prosecutor and by defense counsel – violated Mr. Becerra-Arevalo's constitutional right to a fair trial. CP 459-60. The superior court's decision should be affirmed.

a. A witness's testimony that the defendant is lying violates the constitutional right to a fair trial. "The right to have factual questions decided by the jury is crucial to the right to trial by jury." Montgomery,

163 Wn.2d at 590; Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). "Whether a witness has testified truthfully is entirely for the jury to decide." Ish, 170 Wn.2d at 196 (citing United States v. Brooks, 508 F.3d 1205, 1210 (9th Cir. 2007)). A witness's opinion on the defendant's guilt or veracity, even by inference, thus violates the constitutional guarantee of a fair trial before an impartial trier of fact. U.S. Const. amends. VI, XIV; Const. art. I §§ 21, 22; State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); Demery, 144 Wn.2d at 759; Black, 109 Wn.2d at 348.

In Montgomery, the defendants bought various items that could be used to manufacture methamphetamine, and a police officer testified that, based upon his training and experience, he believed this was the defendants' intent. Montgomery, 163 Wn.2d at 588. The Montgomery Court held that the officer offered an improper opinion on guilt. Id. at 594. "[T]he opinions in this case went to the core issue and the only disputed element, Montgomery's intent." Id. Furthermore, "the police officers' testimony carries an 'aura of reliability,'" and is likely to be given far greater weight than it should. Id. (citing Demery, 144 Wn.2d at 765). For future cases, the Montgomery Court even provided detailed instruction to prosecutors with the proper procedures for eliciting opinion testimony

and the importance of preparing witnesses so they do not inject opinion testimony that should not be placed before the jury. Id. at 591-94.

b. The superior court properly addressed the officer's testimony on appeal. Appellate courts do not normally review issues not brought to the attention of the trial court, but the court rules provide an exception for constitutional issues because constitutional violations may result in a serious injustice to the accused. RAP 2.5(a); Kirkman, 159 Wn.2d at 926; State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). In determining whether to review a purported constitutional error for the first time on appeal, the appellate court first determines if the error is truly of constitutional magnitude and, if so, determines the effect the error had on the trial using the constitutional harmless error standard. Scott, 110 Wn.2d at 688. "It is the showing of actual prejudice that makes the error 'manifest,' allowing appellate review." Kirkman, 159 Wn.2d at 927.

The superior court found that Mr. Becerra-Arevalo's constitutional right to a fair trial was violated by the introduction of a police officer's opinion; this is a constitutional issue. It also meets the requirement for "manifest" constitutional error because Officer Nastansky explicitly testified that Mr. Becerra-Arevalo's denial of the

accusations against him was a lie. While the burden of showing a manifest constitutional issue is high, it is met by "a nearly explicit statement by the witness that the witness believed the accusing victim." Kirkham, 159 Wn.2d at 936; Accord State v. Johnson, 152 Wn. App. 924, 934, 19 P.3d 958 (2009) (defendant's wife's testimony indicating her belief that child abused victims were telling the truth addressed for first time on appeal). Here, the police officer's testimony that Mr. Becerra-Arevalo was lying was an explicit opinion that he was guilty and a liar.

In a rape prosecution, the police detective who interrogated the defendant pointed to various verbal and non-verbal cues that showed deception, claiming he learned about these cues during his training in the Reid investigation method.[6] Barr, 123 Wn. App. at 378-79. This Court found the error was constitutional because a witness's opinion that the defendant is guilty violates the defendant's right to an impartial jury and to have the jury make an independent evaluation of the facts. Id. at 380. This Court also found that the error had "practical and identifiable consequences" at trial, noting the detective not only gave

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[6] See F. E. Inbau, J. E. Reid, J. P. Buckley & B. C. Jayne, Criminal Interrogations and Confessions (5th ed. 2011); www.reid.com/pdfs/catalog/pdf (last viewed 12/18/13).

his opinion that the defendant was guilty, but also bolstered that opinion with his Reid training, which has not been accepted as admissible evidence in Washington. Id. at 381, 380.

The same is true in Mr. Becerra-Arevalo's case. Officer Nastansky's opinion testimony violated his constitutional right to a fair and independent jury determination of the facts of his case. The evidence also had a practical impact in this case, as the jury repeatedly heard the officer's opinion that Mr. Becerra-Arevalo was deceptive when she interviewed him and her opinion, based upon the entire investigation, that he was lying when he denied the charges. The prejudice from this error could not be erased and the superior court properly addressed it on appeal.

c. The officer's opinion that Mr. Becerra-Arevalo was lying when he denied the allegations against him violated his constitutional right to a fair trial. In reviewing the admissibility of challenged opinion testimony, Washington courts consider "(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." Montgomery, 163 Wn.2d at 591 (internal quotation marks omitted)

(quoting Demery, 144 Wn.2d at 759). A review of these factors shows that the police officer's testimony was inadmissible.

First, the witness involved was a police officer. As mentioned above, jurors are likely to place great weight on the testimony of such a respected public servant, and may even believe the officer was better able to tell if Mr. Becerra-Arevalo was truthful than they were. Second, the testimony was an explicit opinion that the defendant was lying when he denied the allegations, bolstered by the officer's explanation that her opinion was based not just on her interview with Mr. Becerra-Arevalo, but also on her entire investigation of the case. The charge was a non-violent assault with sexual motivation, and the defense was general denial combined with an unsuccessful alibi. Importantly, there was no physical or other evidence to corroborate the complaining witness's account. Thus, the police officer's opinion that the defendant was lying was not admissible.

The City does not contest that most of Officer Nastansky's testimony was improper, but tries to limit this Court's inquiry to only the officer's initial statements that Mr. Becerra-Arevalo seemed to be making his story up. BOP at 41. The City thus cites Saunders for the proposition that an officer's testimony that the defendant's statements were "inconsistent" was admissible. Id. (citing State v. Saunders, 120 Wn.

App. 800, 812, 86 P.3d 232 (2004)). The superior court, however, looked at the cumulative impact of all of the officer's testimony in reversing Mr. Becerra-Arevalo's conviction. The superior court decision is actually supported by the Saunders Court's holding that the detective's testimony that the defendant's answers during interrogation "weren't always truthful" was improper opinion testimony that could be raised for the first time on appeal. Saunders, 120 Wn. App. at 812-13.

d. Defense counsel did not "invite" the error. The City argues that any error in eliciting the officer's opinion that Mr. Becerra-Arevalo was lying was invited by defense counsel's cross-examination of the witness. The issue of evasiveness and lying, however, was introduced on direct examination by the State.

The invited error doctrine prohibits a party from setting up an error in the trial court in order to complain of it on appeal. In re Personal Restraint of Tortorelli, 149 Wn.2d 82, 94, 66 P.3d 606, cert. denied, 540 U.S. 875 (2003). This doctrine applies when "a party induces the trial court to error." Jones, 144 Wn. App. at 298. Thus, in Tortorelli, the Supreme Court refused to address whether a statute admitted into evidence created an unconstitutional presumption because defense counsel had insisted the entire statute be admitted and used it to argue the defense of good faith claim of title. Tortorelli, 149 Wn.2d at 94, 96.

Mr. Becerra-Arevalo's attorney, in contrast, tried to limit the damage caused by Officer Nastansky on cross-examination by pointing out that she had no personal knowledge of the events. He was unsuccessful, however, as the witness instead became even more insistent that she was an accurate judge of who was and was not truthful. RP 68, 70-71. His objection was also overruled when the officer offered her ultimate testimony that she believed Mr. Becerra-Arevalo was lying based upon her entire investigation. RP 74. The defense gained nothing from the cross-examination, and defense counsel's inability to stop the line of inquiry with timely objections was not a planned strategy to set up an error for appeal.

e. The constitutional error is not harmless beyond a reasonable doubt. Improper expert opinions that the defendant is guilty or lying invade the province of the jury and thus violate the defendant's constitutional right to a jury trial. Barr, 123 Wn. App. at 380. The reviewing court presumes constitutional errors are prejudicial, and the State must convince the reviewing court beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. Id.; Chapman v. California, 385 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967). The constitutional harmless error standard requires both an evaluation of the incriminating evidence in the record and reflection upon

the effect of the error on a reasonable trier of fact. United States v. Bishop, 264 F.3d 919, 927 (9th Cir. 2001).

Absent Officer Nastansky's opinion that Mr. Becerra-Arevalo was untruthful, the only evidence against him was Ms. Franklin's testimony. In the absence of corroboration this evidence is not so overwhelming that the Court can be convinced beyond a reasonable doubt that the jury would have found Mr. Becerra-Arevalo guilty if it had not heard the officer's opinion of his veracity and guilt. The superior court properly reversed Mr. Becerra-Arevalo's conviction due to the prejudicial impact of the police officer's repeated testimony that he was lying when he denied the allegations. See Barr 123 Wn. App. at 384.

3. **The prosecutor's comment in closing argument on Mr. Becerra-Arevalo's constitutional rights to be present at trial and confront the witnesses against him violated his constitutional right to a fair trial.**

The superior court's decision to reverse Mr. Becerra-Arevalo's conviction was also based in part upon the prosecutors' misconduct in closing argument by commenting on the defendant's right to confront the witnesses against him.

An accused person has the federal and state constitutional right to be present at trial. U.S. Const. amends. VI, XIV; Const. art. I, § 22; Rushen v. Spain, 464 U.S. 114, 117, 104 S. Ct. 453, 78 L. Ed. 2d 267

(1983); State v. Garza, 150 Wn.2d 360, 367, 77 P.3d 347 (2003). The right of the accused to be present at trial is also essential to the dignity of the trial and the presumption of innocence. It is "one of the most basic rights guaranteed by the Confrontation Clause, Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970), and is "scarcely less important to the accused than the right of trial itself." Diaz v. United States, 223 U.S. 442, 455, 32 S. Ct. 250, 56 L. Ed. 500 (1912); see also Duncan v. Louisiana, 391 U.S. 145, 155-56, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) (fundamental right to jury trial).

In addition, the Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The essence of the Sixth Amendment's right to confrontation is the right to meaningful cross-examination of one's accusers. Crawford v. Washington, 541 U.S. 36, 53-59, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004); United States v. Owens, 484 U.S. 544, 557, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). The right to confrontation is also protected by the Washington Constitution, which provides even greater protection of

the right to meet the witnesses "face to face" than the federal constitution. Const. art. I, § 22; State v. Smith, 148 Wn.2d 122, 131, 59 P.3d 74 (2003).

"The State can take no action which will unnecessarily 'chill' or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right." State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984) (prosecutor violated defendant's due process rights by admitting his legal gun collection at death penalty sentencing hearing); see Darden v. Wainwright, 477 U.S. 168, 182, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) (prosecutorial misconduct during closing argument may infect trial with constitutional error when it "implicate[s] ... specific rights of the accused"); Griffin v. California, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (prosecution prohibited from using defendant's exercise of right to remain silent against him in case-in-chief). The right to "face to face" confrontation is "essential to fairness." State v. Jones, 71 Wn. App. 798, 810, 863 P.2d 85 (1993), rev. denied, 124 Wn.2d 1018 (1994) (citing Coy v. Iowa, 487 U.S. 1012, 1019, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988)). Thus, the City may not invite the jury to draw an adverse inference from the defendant's exercise of his constitutional right to confront and cross-examine witnesses. Jones, 71 Wn. App. at 811-12.

Here, the City attorney commented on Mr. Becerra-Arevalo's right to confront his accuser by inviting the jury to consider the pain and discomfort the complaining witness felt by having to face the defendant in court, adding that the witness did not want to have any contact with him. The assistant city attorney argued:

> But now Kelly, you saw how difficult it was for her to testify. You saw how painful it was for her to look at that defendant. You saw how much she did not want to do that. You saw how uncomfortable she was to be in this environment . . . Kelly just wanted it to go away because she didn't want to have any contact with the defendant.

RP 271-72.

This Court addressed analogous misconduct in Jones, where the prosecutor stressed in closing argument that the defendant was trying to make eye contact with the complaining witness, his girlfriend's daughter, which caused her to cry and break down so that she was unable to return to the courtroom. Jones, 71 Wn. App. at 802, 805, 806. This Court ruled that the prosecutor impermissibly commented on Jones's exercise of his constitutional right of confrontation. Id. at 811-21.

The Eighth Circuit similarly held that a prosecutor's argument that the complaining witness in a sexual assault case had to "go through those humiliating sexual assaults and those violent acts perpetrated against her" so that the defense counsel could cross-examine her was egregious

misconduct to which his trial counsel should have objected. Burns v. Gammon, 260 F.3d 892, 895-98 (8th Cir. 2001). Like the comments in Jones and Burns, the prosecutor's argument here asked the jury to draw a negative inference from Mr. Becerra-Arevalo's exercise of his constitutional rights to a jury trial and to confront the witnesses against him.

Defense counsel did not object to the prosecutor's reference to Mr. Becerra-Arevalo's right to confront witnesses, presumably to avoid highlighting the improper argument. This Court must thus determine if the misconduct was so flagrant and ill-intentioned that no objection or curative instruction would have cured the prejudice. Belgarde, 110 Wn.2d at 508. A comment on the defendant's exercise of his constitutional rights is flagrant misconduct. Curative instructions were unlikely to erase the prejudice caused by the misconduct. See State v. Stith, 71 Wn. App. 14, 21-23, 856 P.2d 415 (1993) (court's strongly-worded curative instruction could not cure prejudice where prosecutor's remarks struck at the heart of the right to a fair trial before an impartial jury and thus could not be cured); State v. Bozovich, 145 Wash. 227, 233, 259 Pac. 395 (1927) (defendant's prompt objections and court's curative instructions could not obviate prejudice when prosecutor elicited defendant's other bad acts in cross-examination of defendant's character witnesses).

As argued above, prosecutorial misconduct may be especially prejudicial where, as here, the jury's decision rests largely on their determination of the credibility of witnesses. Walker, 164 Wn. App. at 737; Venegas, 155 Wn. App. at 526-27. The superior court properly determined that the assistant city attorney's comment on Mr. Becerra-Arevalo's right to confront witnesses was flagrant and ill-intentioned misconduct that could not be cured by a jury instruction. This Court should uphold the superior court's decision that this misconduct, along with the error addressed above, warranted reversal of his misdemeanor conviction.

4. **The superior court correctly reversed Mr. Becerra-Arevalo's misdemeanor assault conviction because the cumulative impact of the above errors violated his constitutional right to a fair trial.**

At the heart of the due process clause is the guarantee that a criminal defendant receive a fair trial. U.S. Const. amend. XIV; Const. art. 1, § 22. This right may be violated by the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. Coe, 101 Wn.2d at 789. Thus, in Alexander, this Court ordered a new trial because (1) a counselor impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor

repeatedly attempted to introduce inadmissible testimony at trial and in closing. State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992). The Coe Court similarly reversed four rape convictions based upon numerous evidentiary errors and a violation of discovery rules by the prosecutor. Coe, 101 Wn.2d at 774-86, 788-89. In addition, the cumulative effect of repetitive prejudicial prosecutorial misconduct may also warrant reversal. Reed, 102 Wn.2d at 146-47; Case, 49 Wn.2d at 73-74.

In the present case, the prosecutor committed flagrant and ill-intentioned misconduct by eliciting a police officer's opinion that, based upon her investigation of the case and observations of Mr. Becerra-Arevalo, she believed he was lying. The officer's opinion was drawn out in direct examination by the City, and defense counsel unsuccessfully tried to reveal the fallacy of the officer's opinion on cross-examination. The jury heard so much irrelevant testimony about police officer's opinion that Mr. Becerra-Arevalo was lying that he did not receive a fair trial. In addition, the assistant city attorney committed further misconduct in closing argument by commenting on Mr. Becerra-Arevalo's constitutional rights to be present at trial and, confront his accuser.

Mr. Becerra-Arevalo and Ms. Franklin presented conflicting testimony as to whether the assault occurred, and the jury was required to

determine which witness to believe in order to return a verdict. The errors in this case were extremely prejudicial because they unfairly influenced the jury's critical credibility determination. The superior court correctly concluded that the cumulative effect of the prosecutorial misconduct and the officer's testimony that Mr. Becerra-Arevalo was a liar warranted reversal of his conviction. This Court should affirm the RALJ decision. See Coe, 101 Wn.2d at 788-89.

E. CONCLUSION

Mr. Becerra-Arevalo did not receive a fair trial because a police officer testified repeatedly that she believed he was lying when he denied the charges against him and because the prosecutor commented on his right to confront his accusers in closing argument. This Court should affirm the superior court's RALJ decision reversing his assault conviction and remanding to Kent Municipal Court for a new trial.

DATED this 19th day of December 2013.

Respectfully submitted,

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Washington Appellate Project
Attorneys for Respondent

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

CITY OF BOTHELL, Petitioner, v. EVERARDO BECERRA-AREVALO, Respondent.	)))))))))	NO. 69401-4-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF DECEMBER, 2013, I CAUSED THE ORIGINAL **BRIEF OF RESPONDENT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF DECEMBER, 2013.

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