Supreme Court No. 98369-1
COA No. 78802-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT ANDERSON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY

The Honorable Ellen J. Fair

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Robert Anderson was the appellant in COA No. 78802-7-I, and is the Petitioner herein.

B. OF APPEALS DECISION

Mr. Anderson seeks review of the decision entered March 9, 2020 (Appendix A – Decision).

C. ISSUES PRESENTED ON REVIEW

1. Did the court abuse its discretion in allowing police witnesses to testify, over objection, and as experts, to their opinions that Anderson had the intent to sell methamphetamine?

2. Did the prosecutor vouch for the credibility of the police witnesses in closing argument, over objection?

D. STATEMENT OF THE CASE

1. <u>Procedural history</u>. Robert Anderson was charged with possession of methamphetamine with intent to deliver. CP 62-63. Prior to trial, Mr. Anderson refused a plea offer and stated his desire to exercise his constitutional right to proceed before a jury. 1RP 4-5. The prosecutor told the court that the State was therefore adding a charge of bail jumping. 1RP 4-5; <u>see</u> 2RP 283, 303.

The court instructed the jury on the lesser offense of "possession." 2RP 344-46; CP 333. However, police witnesses

testified to their opinions that Anderson was guilty of intent to deliver. See infra. The prosecutor also vouched for the credibility of the police in closing argument, over objection by defense counsel. See infra. The jury convicted Mr. Anderson. 3RP 395; CP 333. He was sentenced to 14 months incarceration. 8/8/18RP at 7-8. Mr. Anderson's appeal was unsuccessful. (Appendix A).

2. Facts. At trial, police witnesses testified that they made contact with Mr. Anderson on January 21, 2016, on Smith Avenue in Everett, near the Men's Gospel Mission. 1RP 116-18 (testimony of Everett police sergeant J. R. Taylor), 2RP 202 (testimony of Everett police sergeant J. Hendrickson). Mr. Anderson was arrested. There was a plastic soap box in a cargo pocket of the pants he was wearing. Inside the box were 14 small, 1 in by 1 inch, plastic bags, each containing near-residual amounts of methamphetamine. 1RP 116-20, 123; 2RP 202-04; State's exhibits 2-9 (photographs of plastic bags).

Mr. Anderson also had a cell phone. 1RP 119; 2RP 203. The phone had multiple text messages on it, including messages that appeared to discuss drug purchasing and/or selling, although none of the messages contained Mr. Anderson's name, and the

photo on the home screen of the phone was of Mr. Anderson's son. 1RP 131-42; State's exhibits 30-44A.

Sergeant Taylor claimed that Mr. Anderson said that he had been selling drugs, in order to go to trucking school. 1RP 160-61, 126-27. But Mr. Anderson testified that he did not ever say this. He had merely explained that he was living at the Everett men's shelter, and while there, he was trying to earn money working as an unloader at Atlas Van Lines, while he renewed his own truck driver's license. 2RP 292, 294-96, 302. Like all the men at the Everett mission, Mr. Anderson was trying to work any odd jobs, to earn enough money to move out. 2RP 294-95.

Mr. Anderson explained that there were approximately 170 men living at the mission, and they had to share cramped facilities. People were not allowed to have a lot of clothes in their lockers, and on that January night, Mr Anderson only had shorts to wear while his clothes were in the laundry machine. 2RP 294-95. The pants that Mr. Anderson was wearing when he went outside on January 21 to smoke a cigarette were simply a pair of pants he borrowed from another man. 2RP 294-95. Mr. Anderson also explained that he let many people at the mission use his phone,

because he had a calling plan, and few of the homeless folks he had become bonded with did not. 2RP 294, 296-301.

3. <u>Prosecution reliance on police expert testimony to argue that Mr. Anderson had the intent to deliver</u>. In closing argument, the State argued that Mr. Anderson was a drug seller who must surely have split up drugs into "prepackaged" amounts for sale, just as Sergeant Taylor and Officer Kravchun had testified at trial that drug dealers do. 3RP 359-62 (State's closing argument). The State also pointed to Mr. Anderson's cell phone and text messages which the prosecutor characterized as indicative of drug dealing, along with emphasizing Anderson's alleged statements to the police. 3RP 362-63. Throughout argument, the prosecutor relied heavily on the testimony of the police officers, especially Sergeant Taylor, who were deemed to be experts at detecting the crime of intending to sell drugs, versus merely possessing drugs. 3RP 360-65. In addition, the prosecutor's arguments about text messaging, about the packaging of the substance, about the area where the defendant was located, and about the defendant not fitting the profile of a purchaser or user, were all based on the testimony of the police, who opined to the jury as "experts" that the characteristics of Mr. Anderson and his

circumstances showed that he was a drug dealer, rather than a drug user. 3RP 360-66; 3RP 387-88 (prosecutor's rebuttal argument).

E. ARGUMENT

(I). THE STATE'S EVIDENCE OF POSSESSION "WITH INTENT TO DELIVER" DOES NOT SURVIVE THE CONSTITUTIONAL ERROR OF REPEATED POLICE OFFICER OPINIONS ON GUILT.

1. Review is warranted. The Court of Appeals untenably relied on State v. Cruz, 77 Wn. App. 811 (1995), to conclude that the police officers' testimony regarding drug users and drug transactions "did not opine, either directly *or by inference*, that Anderson's actions were consistent with" drug dealing. (Emphasis added.) Decision, at p. 8. The Court failed to conclude that this testimony from the officers about the typical characteristics of drug dealing resulted in the State persuading the jury that because the defendant's behavior fit within a profile, he was guilty of the offense. See, e.g., State v. Black, 109 Wn.2d 336 (1987).

And, in its reasoning, the trial court and Court of Appeals misconstrued State v. Kirkman, 159 Wn.2d 918 (2007), which requires opinions on guilt to be direct and explicit in order to be appealable *absent objection*. Where the defense does object, as

here, opinions on guilt by ***inference***, even by police deemed to be experts because they have training in crime detection, violate the Sixth Amendment and Washington Const. art. 1, § 22 (amend. 10). Review is warranted under RAP 13.4(b)(1),(2) and (3).

2. No witness may opine on the defendant's guilt or credibility. When witnesses regale the jury with their opinions on the defendant's guilt and credibility, this violates his right to have the jury determine guilt or innocence based on its evaluation of the facts. State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014); State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); State v. Thompson, 90 Wn. App. 41, 46, 950 P.2d 977 (1998); State v. Carlin, 40 Wn. App. 698, 700-01, 700 P.2d 323 (1985).

In particular, police officers' opinion testimony is uniquely invasive of the jury's province. Courts have found testimony that a defendant is guilty particularly egregious when expressed by any government official, because the jury is more likely to be influenced by it. State v. Carlin, 40 Wn. App. at 703; see also State v. Haga, 8 Wn. App. 481, 492, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973). Where the witness is a police officer, lay juries are apt to accord even greater weight to the opinions the witness expresses. State v. Notaro, 161 Wn. App. 654, 661, 255 P.3d 774 (2011).

3. <u>Over objection, the court allowed opinion testimony by inference that Mr. Anderson was guilty of intent to sell.</u> At trial, however, Sergeant Taylor's and to a lesser extent Officer Kravchun's testimony was replete with opinions on guilt offered by inference. The prosecutor asked Sergeant Taylor whether his training and experience allowed him to recognize "indicators that would indicate a drug user." 1RP 113 Counsel objected to improper opinion, but the court allowed the State to continue:

> **Q:** Sure. What are some of the indicators that you've been trained and [sic] in your career, over the course of your career, that would indicate a drug user?
> **A:** A drug user in - so common to the drug users that I have run into during my employment at Everett, they will have typically some kind of drug paraphernalia on them for the use of whatever substance it is. They'll have - they may have a quantity of that substance on them. Typically, a fairly small or not a high dollar amount because a user is typically using the substance and not hoarding it or storing it for any reason so they'll go through it. So those would be the two - the two main things, I'd say.
> **Q:** Okay. And have you been trained in differentiating between a drug user versus a drug dealer?
> **A:** Yes.

1RP 113-15. At this juncture, defense counsel objected again, arguing that the witness's testimony was opining on the ultimate issue in violation of the pre -trial motions. 1RP 115.

The court *sustained* the objection, but the State continued:

> **Q:** Okay. And in the course of your career, are there certain indicators which would assist - which would indicate to you the difference in a drug user and a drug deal?

1RP 115-16. Once again, defense counsel objected, and argued that this opinion testimony invaded the province of the jury. 1RP 116. Unfortunately, the court then effectively *retracted* its earlier sustaining of the defense objection, and ruled that it would allow this testimony, qualifying its ruling only by saying that the prosecutor should not go "too far down this road." 1RP 116.

As a result the prosecutor, having been given license to do so, again elicited the officer's opinions and conclusions of the guilt of the defendant, as a drug dealer:

> **Q:** What are some of the signs that you would look for?
> **A:** Quantity, method of packaging, amount of money, measuring equipment, communication equipment for setting up deals.

1RP 116. The prosecutor then commenced asking Sergeant Taylor about the facts of his interaction with and arrest of Mr. Anderson, eliciting more answers that supported the Sergeant's earlier, improper opinion testimony of an 'intent to deliver.' This included eliciting testimony that the soapbox in the defendant's pants had multiple separate small bags of apparent methamphetamine, the

fact that Mr. Anderson had a cell phone (a communication device) in his pocket, and the fact that he had multiple text messages on the telephone. 1RP 119-25. These facts – on their own unobjectionable – were now being offered to the jury as support for the officer's expertise in determining what mental state was in Mr. Anderson's head.

In a recess for argument, the Court briefly agreed with the prosecutor that testimony about small amounts of drugs, and about packaging, is "probably maybe beyond the province of what somebody might know or not know" – essentially ruling that the testimony would be helpful to the jury under ER 702.

However the court stated: "[I]n terms of your case in chief, I think we've – I think we are getting dangerously close to invading the province of the jury basically saying, well, this is what a drug dealer looks like." (Emphasis added) 1RP 144.

Later in the final part of Sergeant Taylor's testimony, the witness was allowed to say that he did not locate tools used for ingesting methamphetamine on Mr Anderson, that he did not find a glass bulb pipe on the defendant, and that he did not find "anything that could be used to ingest the meth with – on the defendant." 1RP 158-59.

4. The State continued to elicit improper testimony.

The next court day, the prosecutor argued that police officer testimony "pertaining to typical drug transactions and *characteristics of a drug dealer* is not impermissible . . . expert testimony, and, also, it doesn't go to the ultimate issue of guilt of the defendant." (Emphasis added.) 2RP 183 (referencing State v. Cruz, 77 Wn. App. 811, 894 P.2d 573 (1995)). The prosecutor proposed to explore the same topics asked of Sergeant Taylor with Officer O. Kravchun, who was to testify that day. 2RP 183.

Mr. Anderson reiterated his continuing objections that the factual evidence in the case could easily be judged by the jury based on its ordinary experience and knowledge – therefore there was no need for the police officers in the case to also testify as "expert on drug deals." 2RP 186-87.

The prosecutor responded that the jurors needed to be educated about the "arcane world of drug transactions and drug dealing" and that Officer Kravchun therefore properly could testify "as an expert in this arena [and] help them determine whether or not the defendant intended to deliver drugs on that date of violation." 2RP 188.

The court recognized that "there certainly has been a lot more publicity of late" about drug matters, but reasoned that a typical juror does not know what is "involved in a drug transaction" or "with what implements methamphetamine . . would be used to be ingested," or whether "a supplier would typically be using their own name." 2RP 188-91. The court also stated it would allow testimony regarding "street terms" for drugs. 2RP 223.

The court therefore held that Officer Kravchun could "testify about those things," but could not be asked, "knowing the facts in this case, is that consistent" with drug selling as opposed to use, because that would be "very improper opinion evidence." (Emphasis added.) 2RP 189.

Officer Kravchun then testified. After detailing his training and experience, Kravchun was asked how drug transactions typically occur, and the court sustained the defense objection to the question and the witness's answer that transactions occur "[t]typically to minimize being caught by police[.]" 2RP 234.

Then, Kravchun testified that drug transactions typically involve plastic baggies and he described a range of amounts often sold. 2RP 235-36. Kravchun also described that a person would need a lighter to use the "most common" method of drug ingestion,

which was a glass pipe. 2RP 236. Finally, he testified that drug transactions often involved "hand-to-hand exchange with the already prepacked smaller amount." 2RP 237-38.

5. Even if expert testimony were needed, which it was not, expert witnesses are not given greater license to opine on guilt under ER 702. The Court of Appeals erred in measuring this case against Cruz and alternatively, in deeming it similar to Cruz. There are older cases have allowed expert testimony under ER 702 about the topics of drug dealing and use, which are matters that are now more commonly understood by the lay public. See, e.g., State v. Cruz, 77 Wn. App. 811, supra. In Cruz, the court permitted an officer who had participated in many undercover drug operations to testify solely regarding his knowledge of typical heroin transactions and typical heroin users. Cruz, 77 Wn. App. at 815. Courts viewed this type of expert testimony as helpful to the trier of fact in explaining the "arcane world of drug dealing and certain drug transactions." State v. Avendano-Lopez, 79 Wn. App. 706, 711, 904 P.2d 324 (1995).

These cases did involve arcane aspects of drug dealing that were outside the common knowledge of jurors. For example, in Cruz, the drugs were located in a potted plant in a tunnel. A

specialized drug interdiction officer – not involved in the defendant's case – provided testimony that explained how heroin dealers would typically use middlemen who arranged the sale without being in any possession of the drugs, where the actual seller never himself physically gives the drugs to the buyer, and where the drugs are located in an outdoor location. Cruz, 77 Wn. App. at 812-15.

Nonetheless, the Cruz court distinguished this type of testimony from cases where expert witnesses testified regarding the typical characteristics of a perpetrator and left the jury with only one possible inference: because the defendant fit within a profile, he was guilty of the offense. See, e.g., State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

In this case, expert testimony was not needed under ER 702, and even it was, where the defendant objects, opinion testimony is improper, including where uttered by experts, if the testimony constitutes opinions on guilt, *even by inference*. This uncomplex criminal case did not entitle the State to create a false need to 'explain' an "arcane" world of drugs – as counsel argued, this was simply window dressing to allow respected police officers to give the jury their opinions that the defendant was guilty. 2RP 185; see 5A K. Tegland, Wash. Prac., Evidence sec. 292, at 397

(3d ed.1989) (citing State v. Smissaert, 41 Wn. App. 813, 815, 706 P.2d 647 (1985) ("If the issue involves a matter of common knowledge about which inexperienced persons are capable of forming a correct judgment, there is no need for expert testimony.").

More importantly, where witnesses utter improper opinions on guilt, their expert status does not prevent the testimony from being constitutional error. "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 at 348. Simply put, expressions of personal belief as to guilt are "clearly inappropriate" testimony in criminal trials. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008).

6. Inferential opinions guilt violate the constitution – they need not meet the "nearly explicit" test, which is a requirement for appealing in the *absence* of an objection. Reversal is required in this case, for testimony by the police that plainly violated the rules against opinions on guilt, and which cannot be deemed admissible simply because the witnesses were deemed experts.

Importantly, this case does not involve the standard for making out manifest constitutional error under RAP 2.5(a)(3). It is

only when seeking to appeal in the absence of an objection that one must show that a witness made a "direct" or "nearly explicit" statement of personal opinion. State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007) (requirement that alleged opinions on ultimate issue of guilt must be "explicit or almost explicit" is test for making out *manifest* error allowing issue to be raised for the first time on appeal under RAP 2.5(a)(3)).

Rather, the applicable rule is that the constitution prohibits opinions on witness credibility and guilt, whether expressed directly or by inference. State v. Montgomery, 163 Wn.2d at 589, 594; UNITED STATES Const. amend. 6. Under these rules, then, "no witness, lay *or expert*, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." (Emphasis added.) State v. Black, supra; see also State v. Vilalastra, 207 Conn. 35, 43, 540 A.2d 42, 47 (1988) (improper to inquire whether in expert's opinion the defendant was a drug seller).

Here, Sergeant Taylor was permitted to testify about "indicators" that would distinguish a drug dealer from a drug user, detailing only those matters designed to meet the exact facts of the current case. This therefore constituted opinions on guilt, including all the testimony about packaging drugs into small amounts for the

Mens Mission area of Everett. 1RP 113-15. When the experts' opinions about supposed "general" aspects of drug dealing happen to meet the exact facts of the case they commenced by an arrest, this should be deemed improper opinion testimony. Cf. State v. Avendano-Lopez, supra, 79 Wn. App. at 710 (expert testified that drug dealers typically carry "both very large and small quantities" of prepackaged drugs, so as to be ready for the customer's desired quantity). Later, Taylor testified that drug dealers have plastic packaging, and "communication equipment for setting up deals" – obviously referring to Mr. Anderson, who, unsurprisingly, had a cell phone. 1RP 116. And the sergeant was allowed to testify about implements that drug users carry, and then to tell the jury that Mr. Anderson did not have any of these on him – this was an *opinion* that Anderson was carrying the drugs to sell them. 1RP 158-59.

Black and Montgomery forbid this sort of opinion testimony. The court recognized – but failed to enforce – that witnesses should not discuss characteristics of drug dealers versus drug users. 2RP 222-23. The police testimony was improper under the law, and under the trial court's ultimate rulings. And these were the same police officers who were involved in the arrest and search – thus the "fact" witnesses were allowed to offer expertise on the very

person they arrested. This further invades the province of the jury. See, e.g., United States v. Reyes Vera, 770 F.3d 1232, 1242 (9th Cir. 2014) ("an agent's status as an expert could lend him unmerited credibility when testifying as a percipient witness[.]").

7. Reversal is required. Mr. Anderson relies on the detailed, fact-specific argument regarding the harmful constitutional error in his Court of Appeals briefing on this issue, and on the issue of cumulative error.

(II). THE PROSECUTOR WAS ALLOWED TO VOUCH FOR THE CREDIBILITY OF THE POLICE WITNESSES.

1. Review is warranted in connection with reversibility and cumulative error. Misconduct by the prosecutor in closing argument is error. See generally State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Relevant here, a prosecutor must not vouch for the credibility of witnesses in closing, for all the same reasons that credibility is a jury question under the Sixth Amendment. United States. v. Pungitore, 910 F.2d 1084, 1125 (3d Cir.1990); State v. Jones, 144 Wn. App. 284, 293, 183 P.3d 307 (2008). The error in this case was not harmless, and independently requires reversal, or alternatively as an aspect of cumulative error

as argued in the Court of Appeals. Review is warranted. RAP 13.4(b)(1), (2), (3).

2. <u>This Court must consider this error as reversible independently, or alternatively as an aspect of cumulative error as argued in detail in the Court of Appeals</u>. In closing argument, the prosecutor argued that the police had no stake in the outcome, and indeed would be putting their careers on the line if they testified dishonestly or wrongly, eliciting two objections by the defense:

> So consider this, there are two versions you've heard. Any of them make sense of all of this evidence? So think about what the defendant is saying. Think about what the officers are saying. Who has the personal interest in this case? Who has the stakes.
> MR. FRIEDMAN: Your Honor, I'm going to object. It's reversing the burden of proof. Suggesting the defendant has --
> THE COURT: It's argument, and it is -- they have the instructions in terms of how they're to apply the testimony of witnesses.
> MS. WONG: It says you are to consider any personal interest, any bias or prejudice, consider who has the stakes when you consider the credibility. The defendant would have you believe that these officers who don't know him, who's just doing their job assigned to this anticrime team, assigned to this 36 to 3700 block of Smith Avenue, made this whole thing up, put their careers on the line, put their reputations on the line for him.
> MR. FRIEDMAN: I'm going to object. That's not the argument that I made.
> THE COURT: Overruled, counsel.

7/25/18RP at 385-86. These arguments were very similar to the argument found to be error in the recent case of State v. Mohamed Aweys Muse, where the prosecutor argued – over no objection by defense counsel:

> So, why are those five detectives credible—or those four detectives that you heard testimony from? Those detectives were on duty that day. They were patrolling the bus lines, trying to reduce the crime rate along the Metro Transit routes. They're just doing their job. They told you they've never seen the Defendant before. They weren't out to get him that day. They just saw him engage in a drug deal, and then decided to go contact him. They were just doing their job. They have no stake in the outcome of this case.

State v. Mohamed Aweys Muse, No. 77363-1-I, 2019 WL 2341274 at p. 11 (Wash. Ct. App. Div. 1, June 3, 2019) (unpublished, cited for persuasive purposes only under GR 14.1(a).

The Court of Appeals agreed,[1] finding these arguments "troubling" under State v. Jones, 144 Wn. App. at 293. There, the prosecutor argued that a confidential informant was credible because the police officers would not have risked their careers by

[1] The defense objected that the prosecutor was "reversing the burden of proof," and plainly objected on the basis that the State was suggesting that the defendant bore a burden of production or proof. The Court of Appeals noted the State's contention that this objection was inadequately specific, but assumed that the error was preserved, and addressed reversibility under the applicable standard of whether there was a substantial likelihood of prejudice. Decision, at pp. 12-14.

using an unreliable informant. Jones, 144 Wn. App. at 293. The arguments made in this case were similar, they were erroneous, and constituted prosecutorial misconduct by vouching.

(II). CUMULATIVE ERROR REQUIRES REVERSAL

As argued in detail in the Court of Appeals briefing, the combination of errors in this case requires reversal. In re Pers. Restraint of Yates, 177 Wn.2d 1,65-66,296 P.3d 872 (2013).

F. CONCLUSION

Based on the foregoing, Mr. Anderson asks that this Court accept review, and reverse his conviction.

Respectfully submitted this 6th day of April, 2020.

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

STATE OF WASHINGTON, Respondent, v. ROBERT ANDERSON, Appellant.	No. 78802-7-I UNPUBLISHED OPINION FILED: March 9, 2020

VERELLEN, J. — Robert Anderson appeals his convictions for possession of methamphetamine with intent to deliver and bail jumping. He asserts that reversal is required because the trial court admitted improper police opinion testimony and because the prosecutor vouched for the officers' credibility during closing arguments. We conclude that the officers' testimony did not invade the province of the jury. Even if the prosecutor improperly vouched for the credibility of the police witnesses, there is no reasonable probability that the error affected the outcome of the trial. Anderson also fails to establish he is entitled to a new trial based on cumulative error. Therefore, we affirm.

FACTS

On the evening of January 21, 2016, Sergeant Jay Taylor and Sergeant Jeff Hendrickson of the Everett Police Department contacted Robert Anderson on

Smith Avenue in Everett, near the Men's Gospel Mission. The officers stopped Anderson on a search warrant,[1] placed him in handcuffs to execute the search, and read him his Miranda[2] warnings. During the search, officers located a plastic soap box in a small zipper pocket in the left leg of Anderson's pants. Inside the soap box, officers discovered several loose cigarettes and 14 small plastic bags containing a crystalline substance that was later identified as methamphetamine. The officers also recovered a cell phone from Anderson's jacket pocket. The phone contained multiple text messages discussing the sale and purchase of controlled substances.

Sergeant Taylor arrested Anderson and transported him to the Snohomish County Jail. Sergeant Taylor testified that when they arrived at the jail, Anderson spontaneously admitted that he was selling drugs to make a little money before going to a commercial trucking school.

On October 11, 2017, the State charged Anderson with one count of possession of a controlled substance (methamphetamine) with intent to manufacture or deliver. After Anderson failed to appear for his omnibus hearing, the State filed an amended information adding one count of bail jumping.

Because the State anticipated Anderson would argue the drugs were for personal use and not delivery, it moved to allow police officers to testify in their expert capacity based on their training and experience regarding the

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[1] Reference to the search warrant was suppressed at trial.

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 10 Ohio Misc. 9 (1966).

characteristics and behaviors of typical drug dealers and drug users. The defense sought to restrict officers from opining that Anderson was a drug dealer predicated on the number of calls on his phone, the high drug crime rate in the area, Anderson's lack of paraphernalia or other signs of being a non-user, or that the amount of methamphetamine seized in the baggies found on Anderson was consistent with amounts used by people on the streets in the area. The court ruled that the police officers could indicate whether they believed Anderson was under the influence, but it disallowed "general testimony as to whether someone does or does not look like a meth user."[3] The court reserved ruling on other individual issues pending testimony, but cautioned that "the focus of the State's case needs to be on the defendant's conduct and the evidence that they obtained . . . and not too much generalizing because that can certainly be objectionable."[4]

At trial, the State asked Officer Taylor about his "training [and] experience as far as recognizing indicators that would indicate a drug user."[5] Defense counsel objected that such testimony was barred by the court's pretrial rulings, but the court disagreed and allowed Officer Taylor to answer. The State then elicited the following testimony:

> Q: What are some of the indicators that you've been trained and in your career, over the course of your career, that would indicate a drug user?

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[3] Report of Proceedings (RP) (July 23, 2018) at 18.

[4] Id. at 20.

[5] Id. at 113.

A: A drug user in—so common to the drug users that I have run into during my employment at Everett, they will have typically some kind of drug paraphernalia on them for the use of whatever substance it is. . . . [T]hey may have a quantity of that substance on them. Typically, a fairly small or not a high dollar amount because a user is typically using the substance and not hoarding it or storing it for any reason, so they'll go through it. So those would be the two . . . main things, I'd say.

Q: O.K. And have you been trained in differentiating between a drug user versus a drug dealer?

A: Yes. . . .

Q: O.K. And what is that training [and] experience?

A: . . . . So it's kind of the training part of it, and then seeing in real life the difference, you typically are going to see a larger quantity of a substance. It's going to be packaged differently as opposed to a user. If they buy a package, it will be one package; whereas a dealer typically will—[6]

Defense counsel again objected on the ground that Officer Taylor's testimony was "going towards the issue that the jury has to find."[7] The court sustained the objection/

The State then asked Officer Taylor, "And in the course of your career, are there certain indicators . . . which would indicate to you the difference in a drug user and drug dealer?[8] Defense counsel again objected. This time, the court

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[6] Id. at 113-15.

[7] Id. at 115.

[8] Id. at 115-16.

ruled, "In terms of in a general sense, I'll allow some limited testimony, but I don't want to go too far down this road, counsel."[9]

The State next asked Officer Taylor, "What are some of the signs that you would look for?," and Officer Taylor responded, "Quantity, method of packaging, amount of money, measuring equipment, communication equipment for setting up deals."[10]

The State later asked Sergeant Taylor how often individuals use their true name in setting up a drug transaction. The court sustained defense counsel's objection:

> Well, I mean, he certainly testified and I did allow it in terms of some signs with respect to amount and packaging and that sort of thing, and I do think that's probably maybe beyond the province of what somebody might know or not know. But in terms of . . . whether someone's using the correct name and that that means it's a drug dealer as opposed to a drug user, that sort of thing, I'm not convinced that that's relevant testimony.[11]

The following day, the State called Officer Oleg Kravchun to testify as an expert on drug transactions based on his training and experience. Defense counsel argued that such testimony was unnecessary because the jury could evaluate the factual evidence in the case based on its ordinary experience and knowledge. The court ruled that Officer Kravchun could educate the jury regarding

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[9] Id. at 116.

[10] Id.

[11] Id. at 145.

"what is typically involved in a drug transaction"[12] but cautioned that the officer could not be asked to opine whether the facts of this case fit that profile. Officer Kravchun then testified regarding how drugs are typically packaged in a drug transaction, the range of amounts sold, how methamphetamine is typically ingested, and how drug transactions are set up.

Anderson testified at trial. He denied telling Officer Taylor that he was selling drugs to make money. Rather, he said that he was living at the Everett men's shelter and trying to earn money working as an unloader at Atlas Van Lines while he renewed his truck driver's license. He testified that the pants he was wearing on the evening he was arrested were borrowed from another man at the shelter. As for the text messages showing drug dealing conversations on his phone, he explained that he often allowed other people to borrow it.

The jury convicted Anderson as charged. Anderson appealed.

ANALYSIS

Police Officers' Testimony

Anderson contends that reversal is required because the trial court allowed Sergeant Taylor and Officer Kravchun to offer improper opinions on guilt that infringed on his constitutional right to an impartial jury. We disagree.

Trial courts "must be accorded broad discretion to determine the admissibility of ultimate issue testimony."[13] ER 704 provides that "[t]estimony in

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[12] Id. at 188.

[13] City of Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993).

the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." "'[T]estimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony.'"[14] However, "[n]o witness, lay or expert, may testify to his opinion as to the guilt of the defendant, whether by direct statement or inference."[15] "In addition, inferential testimony that leaves no other conclusion but that a defendant is guilty cannot be condoned, no matter how artfully worded."[16] "Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury."[17]

Generally, a police officer testifying as an expert is permitted to make reasonable inferences based on the evidence and the officer's training and experience.[18] "An opinion as to the guilt of the defendant is particularly prejudicial and improper where it is expressed by a government official, such as a sheriff or a police officer."[19] "The determination of whether testimony constitutes an

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[14] State v. Cruz, 77 Wn. App. 811, 814, 894 P.2d 573 (1995) (quoting id. at 578).

[15] State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

[16] Cruz, 77 Wn. App. at 814.

[17] State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

[18] State v. Thein, 138 Wn.2d 133, 148, 977 P.2d 582 (1999).

[19] State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992).

impermissible opinion as to the defendant's guilt depends on the particular circumstances of each case."[20]

Police officer testimony regarding typical criminal activity is not necessarily impermissible. In State v. Cruz, where the defendant was charged with delivery of heroin, the trial court permitted a police officer to testify about "typical" heroin transactions.[21] In closing, the prosecutor argued that Cruz's actions fit the detective's description of the typical transaction.[22] The appellate court held that the detective's testimony did not constitute an impermissible opinion on guilt because it "did not amount to a directive telling the jury what result to reach on the issue of Cruz's guilt or innocence."[23]

Here, as in Cruz, the record does not support Anderson's assertion that the police officers' testimony regarding drug users and drug transactions amounted to an impermissible opinion on guilt. They testified only in general terms based on their training and experience. They did not opine, either directly or by inference, that Anderson's actions were consistent with typical drug transactions with which they were familiar. "The fact that an opinion encompassing ultimate factual issues supports the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt."[24]

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[20] Cruz, 77 Wn. App. at 814-15.

[21] 77 Wn. App. 811, 813-14, 894 P.2d 573 (1995).

[22] Id. at 814.

[23] Id. at 815.

[24] Heatley, 70 Wn. App. at 579.

Anderson likens his case to State v. Farr-Lenzini, but that case is distinguishable.[25] The State charged Farr-Lenzini with attempting to elude a pursuing police vehicle.[26] When the State asked the pursuing police officer to give his opinion "as to what the defendant's driving pattern exhibited," the officer responded that the driver "was attempting to get away from me and knew I was back there and refusing to stop."[27] Division Two of this court held that the officer's testimony about Farr-Lenzini's state of mind violated her right to a jury trial because it constituted an opinion about the intent element of the offenses.[28] Here, in contrast, the police officers did not draw a conclusion for the jury regarding whether the facts of Anderson's case met an element of the charged offense.

Anderson further asserts that by the time Officer Kravchun testified, the court came to realize that the State's case was impermissibly based on profiling testimony and responded by more tightly restricting the proper bounds of the police testimony. He contends that this response demonstrates the impropriety of Sergeant Taylor's testimony. The record does not support this assertion. The court consistently ruled that the State could elicit general educational testimony regarding drug use and drug sales, but not that the facts of this case were consistent with those characteristics or with an intent to deliver. In applying this

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[25] 93 Wn. App. 453, 970 P.2d 313 (1999).

[26] Id. at 458.

[27] Id.

[28] Id. at 463-64.

principle, the court frequently reserved ruling on individual issues pending testimony. This approach was proper.

Closing Argument

Anderson contends a new trial is required because the State committed prosecutorial misconduct during closing argument. "The propriety of a prosecutor's conduct is 'reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.'"[29] "In closing argument, a prosecutor is afforded wide latitude to draw and express reasonable inferences from the evidence."[30] To prevail on a claim of prosecutorial misconduct, the defendant bears the burden of establishing that the conduct was both improper and prejudicial.[31] To establish prejudice, the defendant must show "a substantial likelihood that the misconduct affected the jury verdict."[32] "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions."[33]

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[29] State v. Reed, 168 Wn. App. 553, 577, 278 P.3d 203 (2012) (quoting State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994)).

[30] Id.

[31] State v. Thorgerson, 172 Wn.2d 438, 460, 258 P.3d 43 (2011).

[32] State v. Hecht, 179 Wn. App. 497, 319 P.3d 836 (2014).

[33] State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

In his closing argument, defense counsel sought to cast doubt on Officer Kravchun's and Sergeant Taylor's memory of events. In rebuttal closing argument, the prosecutor stated:

> PROSECUTOR: So consider this. There are two versions you've heard. Any of them make sense of all of this evidence? So think about what the defendant is saying. Think about what the officers are saying. Who has the personal interest in this case? Who has the stakes?
>
> DEFENSE: Your Honor, I'm going to object. It's reversing the burden of proof. Suggesting the defendant has—
>
> COURT: It's argument. . . . [T]hey have the instructions in terms of how they're to apply the testimony of witnesses.
>
> PROSECUTOR: It says you are to consider any personal interest, any bias or prejudice, consider who has the stakes when you consider the credibility. The defendant would have you believe that these officers who don't know him, who's just doing their job assigned to this anticrime team, assigned to this 36 to 3700 block of Smith Avenue, made this whole thing up, put their careers on the line, put their reputations on the line for him.
>
> DEFENSE: I'm going to object. That's not the argument that I made.
>
> COURT: Overruled, counsel.[34]

The State asserts the prosecutor's remarks were not improper because jurors can reasonably infer that an officer would not risk consequences to his

[34] RP (July 25, 2018) at 386-87.

career and reputation for fabricating a story and testifying to it during trial. This argument is troubling.

A prosecutor commits misconduct by personally vouching for the credibility of a witness.[35] Improper vouching occurs when the prosecutor expresses a personal belief in a witness's credibility or refers to evidence not presented at trial to support a witness's testimony.[36] It is improper for prosecutors to bolster a police witness's good character even if the record supports such argument.[37]

State v. Jones is instructive.[38] There, the prosecutor argued that a confidential informant who did not testify was credible because the police officers would not have risked their careers by using an unreliable informant:

> And how much sense does it make to you that . . . any narcotics detective would put their own reputation on the line? Their own credibility? Their own integrity of their investigation? Their very livelihood on the line for one silly person who is duping or snookering them somehow?[39]

The appellate court held that these statements improperly bolstered the officer's credibility "by using facts not in evidence, namely, that police . . . would suffer professional repercussions if they used an untrustworthy informant."[40]

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[35] State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010).

[36] Id.

[37] State v. Jones, 144 Wn. App. 284, 293, 183 P.3d 307 (2008).

[38] 144 Wn. App. 284, 183 P.3d 307 (2008).

[39] Id. at 293.

[40] Id. at 293-94.

Here, the prosecutor similarly urged the jury to find that the testifying officers were credible because they would not jeopardize their careers by giving false testimony. And defense counsel did not assert in closing that the officers gave false testimony; he merely questioned the accuracy of their recollections. The prosecutor's arguments were problematic.

But, where the defense fails to object to an improper statement, the error is waived unless the statement is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury."[41] The State contends Anderson failed to preserve the issue because he did not object on the basis that the argument presented facts outside the record or that it bolstered the police officers' credibility. Anderson asserts that he sufficiently preserved the issue by objecting on the basis that the State reversed the burden of proof and mischaracterized his closing argument.

Even assuming that Anderson's objections were sufficient to preserve the error, we conclude that reversal is not required because Anderson has not demonstrated a substantial likelihood of prejudice. At the time of arrest, Anderson was carrying a small box containing 14 identically-packaged bags of methamphetamine in the pants he was wearing. The pants fit him and matched the sweatshirt he was wearing. Anderson's phone also contained multiple threads of text messages showing conversations about drug dealing. Ample physical

[41] State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

evidence corroborated the police officers' testimony. There is no reasonable probability that the prosecutor's improper argument materially affected the outcome of the trial.

Cumulative Error

Anderson asserts that the cumulative effect of the improper opinion testimony and the prosecutorial misconduct entitle him to a new trial. The cumulative error doctrine "applies when a combination of trial errors denies the accused a fair trial, even when any one of the errors taken individually would be harmless."[42] Anderson was affected by only one error, and he failed to demonstrate prejudice. He is therefore not entitled to a new trial.

Affirmed.

WE CONCUR:

[42] State v. Salas, 1 Wn. App. 2d 931, 952, 408 P.3d 383 (2018).

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 78802-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: April 6, 2020
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