Supreme Court No. 98823-4
(COA No. 36328-7-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID MCGOVERN,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

David McGovern petitions this Court for review of the Court of Appeals opinion, filed June 25, 2020. RAP 13.3, 13.4.

B. COURT OF APPEALS DECISION

A jury convicted Mr. McGovern of first-degree theft after a trial filled with evidentiary errors and prosecutorial misconduct. The Court of Appeals rejected Mr. McGovern's challenge to improper expert testimony narrating a video of the incident despite recognizing the testimony "lacked foundation" and opined on events not displayed on the video. Opinion at 9-10. The Court of Appeals acknowledged the error but nonetheless affirmed.

The Court of Appeals also rejected Mr. McGovern's challenge to the prosecutor's misconduct. Although the Court of Appeals recognized some of these actions were improper, it dismissed each error as without considering their cumulative prejudice.

C. ISSUES PRESENTED FOR REVIEW

1. A person accused of a crime has the right to have the jury find the facts based on relevant, admissible evidence, and not improper opinion testimony. Here, rather than simply play the inconclusive surveillance video and allow the jury to evaluate the evidence, the court permitted witnesses to offer "expert" opinions and testify to events not displayed on

the video. This Court should accept review because the improper opinion testimony invaded the province of the jury and violated Mr. McGovern's right to a fair trial, contrary to the Due Process Clause, the presumption of innocence, and ER 702.

2. A fair trial includes the right to be free from prosecutorial misconduct. The prosecutor employed an array of improper tactics, including eliciting opinions of Mr. McGovern's guilt, minimizing the burden of proof and presumption of innocence, conveying his personal disbelief of Mr. McGovern, and shifting the burden of proof. The Court of Appeals disregarded each instance of misconduct and failed to consider their cumulative harm. This Court should accept review because the cumulative effect of the prosecutor's repeated improper conduct prejudiced Mr. McGovern and was flagrant and ill-intentioned.

D. STATEMENT OF THE CASE

David McGovern, a middle-aged man with no criminal record, worked as an assistant manager for Walmart. RP 297-98, 358; CP 54. His position required him to enter the accounting room and access the safe daily. RP 195-206, 297-98. Mr. McGovern was one of 20-25 employees with access to the safe. RP 199-200, 255-56.

An employee discovered the safe was missing a bag containing the cash deposits for a weekend day. RP 206-07, 263, 276-77, 284.

Surveillance video of the accounting office showed five employees entering the safe during the period during which management believed the bag went missing. RP 217, 288.

Suspicion focused on Mr. McGovern to the exclusion of the other four employees also seen on the video. RP 217, 223-24, 283, 307-09. The managers believed the video showed Mr. McGovern behaving "abnormally" because: Mr. McGovern started work early; had a bag with him; was on his cellphone in the safe area; did not open the safe door as wide as normal; took too long in the safe; and went home after being in the accounting office before returning to work. RP 211-215, 298-307.

Mr. McGovern maintained his innocence and denied knowing what happened to the missing deposit bag. RP 218-19, 326-27, 329-30, 335, 362-63. The lead investigator for Walmart, who interrogated Mr. McGovern, freely admitted he was not interested in Mr. McGovern's denials. RP 219-20, 223-24. He acknowledged that he had made up his mind that Mr. McGovern was guilty and that Mr. McGovern could not have changed his mind during the interrogation. RP 223-24.

Unsatisfied by his interrogation, the manager called the police. RP 220. Rather than conduct an independent investigation, the officer gathered the opinions of the managers. RP 220, 325. The managers told the officer they believed Mr. McGovern took the deposit bag. They

showed him the video and told him "why I thought [McGovern] did it" and "where [McGovern] did it at." RP 220-21, 325.

Mr. McGovern denied taking the missing deposit bag during his interrogations. RP 327, 329-30, 334-40. The State nevertheless charged Mr. McGovern with theft sixteen months later. CP 1-2.

At trial, Mr. McGovern denied taking the bag. RP 357-73. Mr. McGovern stated he usually came into work about one hour early. RP 358. Videos from three other days played for the jury confirmed his routine. RP 315-17. The managers testified Mr. McGovern was in the safe longer than normal on the day in question, spending "approximately five minutes" there but also agreed Mr. McGovern regularly took between "two to four minutes" in the safe. RP 214-15, 299-305.

Mr. McGovern explained he went home that day because he forgot his radio. RP 329, 339, 360. The managers verified he carried a radio and employees may take their work radios home if they like. RP 216, 309-10, 316-17. Mr. McGovern also described the source of several deposits to his bank account after the bag went missing, including family loans, "side job" earnings, retirement account withdrawals, and his last paycheck. RP 364, 367-68. Two family members corroborated several loans. RP 348-56.

Five Walmart employees testified about general procedures in preparing deposits, as well as their activities in the safe area the day the

deposit bag went missing. *See generally* RP 225-36, 236-43, 252-68, 269-72, 272-28. The two Walmart managers who investigated the missing deposit bag testified about the actions they took in investigating the missing deposit bag and narrated the surveillance video from the accounting office. *See generally* RP 189-225 (Smith), 278-320 (Fryer).

Both managers offered their interpretation of Mr. McGovern's actions and provided their opinion that the video showed him taking the missing deposit bag. RP 209-17, 284-309. The prosecutor acknowledged the video did not show this. RP 54. The court nonetheless admitted this testimony as expert opinion testimony over Mr. McGovern's motion in limine and objections. CP 27-29; RP 42-58, 213-14, 215, 292-3, 296, 304.

E. ARGUMENT

1. The court violated Mr. McGovern's right to have the jury decide the facts when it admitted improper expert opinion testimony.

a. It is the role of the jury, not experts, to evaluate the evidence and decide the facts.

"The role of the jury is to be held 'inviolate' under Washington's constitution. The right to have factual questions decided by the jury is crucial to the right to trial by jury." *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (citing U.S. Const. amend. VII; Const. art. I, §§ 21, 22). Juries, not experts, must consider the evidence and determine the facts. *Id.* "[I]mproper opinion [testimony] undermines a jury's

independent determination of the facts, and may invade the defendant's constitutional right to a trial by a jury." *State v. Olmedo,* 112 Wn. App. 525, 530-31, 49 P.3d 960 (2002).

Expert opinion testimony is limited to opinions "concerning [the expert's] fields of expertise," where the matter is "not within the understanding of the average person," and where "those opinions will assist the trier of fact." *Montgomery,* 163 Wn.2d at 590. Expert opinion testimony is only permissible if it is helpful to the jury. ER 702; *State v. Black,* 109 Wn.2d 336, 348, 745 P.2d 12 (1987). An opinion that is not helpful to the jury is not admissible. ER 701, 702; *City of Seattle v. Heatley,* 70 Wn. App. 573, 578-79, 854 P.2d 658 (1993). If the subject matter is "easy enough for the jury to understand without help from an expert," an opinion does not meet the requirements of ER 702 and is inadmissible. 5B Karl B. Tegland, Washington Practice Series: Evidence Law and Practice § 704.4 (6th ed. 2018).

In addition, Washington courts have long held a witness' opinion on the guilt of the defendant is improper and inadmissible. *See, e.g., State v. Garrison,* 71 Wn.2d 312, 315, 427 P.2d 1012 (1967); *State v. Trombley,* 132 Wn. 514, 518, 232 P. 326 (1925). "Permitting a witness to testify as to the defendant's guilt raises a constitutional issue because it invades the province of the jury and the defendant's constitutional right to a trial by

jury." *Olmedo*, 112 Wn. App. at 533. Because it is the role of the jury to decide questions of fact and determine guilt, opinions of guilt are unconstitutional. Const. art. I, §§ 21, 22; *Montgomery*, 163 Wn.2d at 590-91. Opinion testimony regarding the veracity of the defendant is unfairly prejudicial because it invades the exclusive province of the jury." *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

b. The narration of the video and interpretation of Mr. McGovern's actions were not based on specialized knowledge, were unhelpful to the jury, and invaded the fact-finding province.

Mr. McGovern objected before and throughout the trial to the managers' "expert" opinions that the video showed Mr. McGovern taking the deposit bag, as well as their "expert" opinions interpreting Mr. McGovern's actions. CP 27-29; RP 42-58, 213-14, 215, 292-3, 296, 304. Mr. McGovern argued the State should "simply show the video" to the jury without narration. CP 27-29; RP 42-58. He also argued the interpretation "describing things" not apparent on the video was improper opinion testimony, implied opinions of guilt, and speculation. RP 52-54.

The State acknowledged that the witnesses intended to explain things that could not be seen in the video. The prosecutor stated:

> The two loss prevention guys, both of them can watch the video and go, "That's the bag." And at various points in the video they can -- and they go, "And there it is here." And they can point it out. You, Mr. Jones [defense counsel] and

> I, we can't see it, honestly. I mean, you -- you -- they see it, they're picking up on things. They understand how that safe is supposed to be organized and the behavior and what's going on and they're able to track it.

RP 54.

The court granted the motion to preclude the witnesses from offering their opinions on Mr. McGovern's guilt but denied the motion in limine to preclude the explanations. CP 29; RP 55-56. Both managers offered their interpretation of the video for the jury. *See generally* RP 209-17 (Smith's testimony interpreting video), 284-309 (Fryer's testimony interpreting video). The managers opined about what they saw that was unusual and interpreted Mr. McGovern's actions. RP 211-17.

Manager Fryer testified about how the deposit bag did not move at certain times during the video when other employees were present, implying other individuals could not have taken it. RP 294-97. He told the jury Mr. McGovern acted "unusually" and "completely abnormally." He described the "key point" of the video as the deposit slip from the missing deposit bag "floating," then "mov[ing]," and "disappear[ing]" during the time Mr. McGovern is in the safe. RP 301-06.

c. Admission of the improper opinion testimony violated Evidence Rule 702 and Mr. McGovern's constitutional rights to a fair trial and to have the jury decide the case.

The court erred in permitting expert opinion testimony from the managers because the testimony was not helpful to the jury, invaded the province of the jury, and did not meet the requirements of ER 702.

First, the video spoke for itself. The jury should have been permitted to watch the video and decide what the video showed.

Second, the opinions were too speculative to be helpful to the jury. The State admitted no one could see what the managers opined was occurring. RP 54. A proper opinion cannot be to see something that is not present. Each witness explained the actions of Mr. McGovern, which he did not personally observe.

Finally, the two witnesses stated their opinions as fact, informing the jury, among other things, "you'll see the clear deposit bag," and "it's a deposit slip," despite the State's admission that the deposit slip and bag could not be seen on the video. RP 54 (State's admission), 215 (Smith's testimony), 305 (Fryer's testimony).

What the video showed was a matter of dispute and a fact the jury was required to determine, not something the witnesses could decide for the jury. It is exclusively the role of the jury to decide questions of fact. U.S. Const. amend. VI; Const. art. I, §§ 21, 22. The witnesses' testimony

interpreting the video and informing the jurors of what the video showed presented as fact a disputed issue. This violated Mr. McGovern's constitutional right to have a trial by jury where the jury decides the factual questions. *Montgomery*, 163 Wn.2d at 590.

d. The Court of Appeals wrongly affirmed Mr. McGovern's conviction despite admission of the improper opinion testimony over Mr. McGovern's objections because the evidentiary errors unduly prejudiced Mr. McGovern.

The Court of Appeals acknowledges Mr. McGovern correctly objected to the expert's inaccurate narration and agrees the court should have sustained Mr. McGovern's objection. Opinion at 9-10. However, the Court of Appeals found the error harmless because it believed the jury should have been able to discern the mistake. Opinion at 10.

Such constitutional error is harmless "only if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error." *State v. Quaale*, 182 Wn.2d 191, 202, 340 P.3d 213 (2014). The State did not sustain its burden here. The State presented an entirely circumstantial case based on an ambiguous video and evidence Mr. McGovern experienced financial struggles. The main evidence against Mr. McGovern was the video, accompanied by the managers' "expert" opinions highlighted in closing argument. RP 394-95.

The extensive testimony addressed the core issue in the case – whether Mr. McGovern took the missing deposit bag – and the admission of the improper opinions denied Mr. McGovern his right to a fair trial. This Court should accept review. RAP 13.4(b).

2. The prosecutor engaged in improper behavior, which pervaded the trial and denied Mr. McGovern his right to a fair trial.

The prosecutor engaged in a pattern of misconduct that pervaded this case. The cumulative impact of this misconduct prejudiced Mr. McGovern and denied him his right to a fair trial. The Court of Appeals erroneously focused on each error in isolation and did not consider their cumulative effect of the misconduct. This Court should accept review.

a. <u>The prosecutor repeatedly elicited three witnesses' impermissible opinions of Mr. McGovern's guilt.</u>

In addition to the error in permitting the mangers to offer their "expert" opinions, portions of their testimony were also improper because it conveyed their opinions on Mr. McGovern's guilt. The prosecutor repeatedly elicited their opinions, despite the motion in limine precluding such testimony. CP 29; RP 56. A prosecutor commits misconduct when he violates an in limine ruling. *State v. Gregory*, 158 Wn.2d 759, 864-67, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014).

The prosecutor introduced opinion testimony as to Mr. McGovern's guilt through the managers and the police. Rather than have the witnesses testify to what they did, they offered their opinion of Mr. McGovern's guilt by explaining *why* they took the actions they did.

The manager who interviewed Mr. McGovern stated he "ruled . . . out" all the other employees because it was "clear" they did not take the deposit bag. RP 217. He explained that he "wasn't really asking [Mr. McGovern] if he did it, I was wanting to try and understand why he did it." RP 219. Finally, the manager explained to the jury that he showed the officer the video and "showed them where he did it at." RP 220-21.

The prosecutor also elicited multiple instances of improper opinion testimony from the other manager. That manager testified all the investigators suspected Mr. McGovern after watching the video. RP 283. He said they interviewed Mr. McGovern and no one else based on "the case that we felt that we had built . . . on the basis of what we saw in the video" and that he concluded Mr. McGovern took the money because "it was pretty apparent" from the video. RP 308-09.

Finally, the prosecutor also elicited opinions of guilt from the officer. The officer testified the managers "showed me what was going on in the video, and why they were led to believe that the particular individual in that video was responsible for taking -- the deposit." RP 325.

The officer also told the jury he did not interview any other employees because the evidence led him in "a certain direction." RP 330-31.

In all of these instances, the prosecutor elicited impermissible testimony of the witnesses' opinions of Mr. McGovern's guilt and directly violated the court's in limine ruling.

b. The prosecutor repeatedly and improperly conveyed his opinion to the jury that Mr. McGovern was lying.

"It is improper for a prosecutor to express his personal opinion about the credibility of a witness and the guilt or innocence of the accused in a jury argument." *State v. Sargent*, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985). A prosecutor's clear expression of his personal opinion of the credibility of a witness prejudices a defendant and may require reversal even where there is no objection. *Id.* at 344-45.

The prosecutor conveyed his personal disbelief of Mr. McGovern by characterizing his testimony as "convenient" three separate times in cross-examination and referring to it as "convenient" twice in closing arguments. RP 366, 368-69, 404. The effect of the prosecutor's comments on the "convenience" of Mr. McGovern's answers was to convey to the jury his incredulity of Mr. McGovern's testimony and communicated to the jury the prosecutor's opinion that Mr. McGovern was lying.

c. The prosecutor's urging the jury to be guided by Occam's Razor trivialized the presumption of innocence and the burden of proof.

Prosecutors commit misconduct when they employ arguments that "trivialize[e] and ultimately fail[ ] to convey the gravity of the State's burden and the jury's role in assessing [the State's] case." *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). "When a prosecutor compares the reasonable doubt standard to everyday decision making, it improperly minimizes and trivializes the gravity of the standard and the jury's role." *State v. Lindsay*, 180 Wn.2d 423, 436, 326 P.3d 125 (2014) (quoting opinion below). Thus, prosecutors have an obligation not to trivialize the jury's role by comparing the jury's duty to everyday commonplace events.

The prosecutor trivialized the jury's role and minimized the presumption of innocence and the burden of proof by repeatedly encouraging the jury to adopt Occam's Razor, described as the principle that the simplest explanation is generally the correct one, as its guiding principle. RP 182, 185, 390, 397. This argument trivialized the jury's role and diluted the constitutional principles of the presumption of innocence and the burden of proof beyond a reasonable doubt. The theme permeated the case, and the prosecutor employed it to supplant the presumption of innocence and proof beyond a reasonable doubt.

The prosecutor began his opening statement by saying:

> So there is a principle that is present in physics, biology, religion and even the court system. It's called Occam's Razor. You may not know the name Occam's Razor but the principle stands for the idea that the simplest explanation to a problem is generally the right one. I'm going to ask that you keep Occam's Razor in mind as you listen and evaluate the testimony that's going to be presented during the course of this trial.

RP 182.

The prosecutor ended his opening statement by reminding the jury of this principle and urging the jury to use it and not the presumption of innocence as the lens through which the jury should view the case. "Ladies and gentlemen, at the conclusion of all of the evidence I'm going to ask you to apply Occam's Razor to the facts that will be presented and find Mr. McGovern guilty of the crime he's been charged with." RP 185.

The prosecutor began his closing argument by again urging the jury to apply the principle of Occam's Razor to their deliberations.

> Yesterday during my opening statements I told you about Occam's Razor, about the simplest explanation to a problem is generally the right one. **I would like you to keep that <u>one</u> principle in mind as you go back and you deliberate this case.** I'd like that to be your mantra. So please repeat it as you're deliberating.

RP 390 (emphasis added).

The prosecutor also ended his closing argument by urging the jury to apply Occam's Razor to their deliberations. "So again I ask that you

evaluate all of the evidence, apply your common sense, apply Occam's Razor and find Mr. McGovern guilty." RP 397.

By asking the jury to adopt Occam's Razor as its **one** guiding principle, the State urged the jury to supplant the constitutional guiding principles of the presumption of innocence and proof beyond a reasonable doubt. The State also trivialized the jury's role and diluted the importance of these constitutional principles.

The prosecutor's reference was not a single, isolated comment. The pervasive nature of the improper argument and the placement at the beginning and end of his opening statement, as well as the beginning and end of his closing argument, magnifies its impropriety. In *State v. Ramos*, the court found improper the State's argument that the case was about preventing drug dealing in the neighborhood and recognized the placement of the improper argument, as well as its repetition, heightened its impact. 164 Wn. App. 327, 340, 263 P.3d 1268 (2011). "Rather than an isolated instance of misconduct, the prosecutor's improper comments were made at the beginning of closing argument as a prism through which the jury should view the evidence." *Id.*

The prosecutor did not merely compare the reasonable doubt standard to Occam's Razor. Instead, he urged the jury to supplant the reasonable doubt standard and adopt the theory of Occam's Razor.

d. The prosecutor's improper question and argument shifted the burden of proof to Mr. McGovern.

Prosecutors commit flagrant and ill-intentioned misconduct when they shift the burden of proof. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 713, 286 P.3d 673 (2012). Arguments that the defendant has an affirmative duty to present evidence or an explanation are a form of improper burden shifting. *See, e.g., State v. Johnson*, 158 Wn. App. 677, 684, 243 P.3d 936 (2010).

Here, the prosecutor impermissibly pressed Mr. McGovern to speculate about his guilt and improperly argued Mr. McGovern did not explain what happened to the deposit bag. The prosecutor asked Mr. McGovern, "if you were going to steal from the store how would you do it." RP 371. The prosecutor also argued Mr. McGovern could not explain what happened. RP 392 ("But he can't provide an explanation for how that happened."); RP 404 ("they can't explain" cash deposits). The improper question and repeated improper arguments shifted the burden to prove the crime from the State to Mr. McGovern to disprove the crime and explain the charge. *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 80 (2003).

e. The Court of Appeals erred by considering each instance instead of collectively where the multiple instances of improper conduct by the prosecutor prejudiced Mr. McGovern.

The multiple instances of prosecutorial misconduct permeated the entire trial process. The evidence against Mr. McGovern was far from

conclusive. The prejudicial impact of repeated misconduct is increased in the absence of overwhelming evidence. The primary evidence against Mr. McGovern was the video. The repeated improper opinions of guilt offered by the witnesses narrating the video and opining on Mr. McGovern's actions is particularly significant. Also, the State's repeated argument about Occam's Razor suggested to the jury it should use this concept as the "prism through which the jury should view the evidence" and diluted the burden of proof. *Ramos*, 164 Wn. App. at 340.

However, the Court of Appeals considered each act of misconduct in isolation and found them either not to be error or to be harmless. Opinion at 10-13. This analysis is contrary to this Court's precedent, which requires reviewing courts to consider the collective impact of misconduct. *State v. Walker*, 182 Wn.2d 463, 478-79, 341 P.3d 976 (2015) (recognizing impact of multiple instances of misconduct in context of entire case); *Glasmann*, 175 Wn.2d at 707 (addressing "pervasive" nature of misconduct).

The repeated and persistent misconduct invaded the whole trial and was not isolated. It created an enduring and incurable prejudice. Considering the misconduct collectively, the prosecutor's improprieties were prejudicial and incurable. The prosecutorial misconduct deprived Mr. McGovern of his right to a fair trial. This Court should accept review.

F. CONCLUSION

This Court should grant review pursuant to RAP 13.4(b).

DATED this 27th day of July 2020.

Respectfully submitted,

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APPENDIX

June 25, 2020, Opinion

State v. McGovern, 36328-7-III

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

STATE OF WASHINGTON, Respondent, v. DAVID MATTHEW MCGOVERN, Appellant.	)))))))))	No. 36328-7-III UNPUBLISHED OPINION

PENNELL, C.J. — David Matthew McGovern appeals his conviction for first degree theft. We affirm his conviction, but remand for reconsideration of discretionary legal financial obligations (LFOs).

FACTS

On August 23, 2015, David McGovern was working as a Walmart night manager when a deposit bag containing over $20,000 in cash went missing from a store safe. At the time of the loss, approximately 20 to 25 Walmart employees had authority to access the safe. However, video surveillance revealed only five employees in the area during the critical time period. One of the five people was Mr. McGovern.

Walmart's asset protection managers reviewed video surveillance footage of the cash office containing the safe. They observed Mr. McGovern accessed the safe at

approximately 7:00 p.m., one hour prior to his scheduled shift. No one else was in the vicinity at the time. When Mr. McGovern entered the cash office he was talking on a cell phone. Contrary to company policy, Mr. McGovern wore a jacket and carried a satchel. Mr. McGovern stayed on his phone as he began pulling bags of cash (known as re-set bags) meant to replenish self-checkout stations. As he pulled the bags, he hugged the safe's door up against him. This blocked the surveillance camera from recording what Mr. McGovern was doing inside the safe. The video did record a deposit slip visible briefly at Mr. McGovern's right side as he was working inside the safe. Walmart's deposit bags contain deposit slips. Re-set bags do not.

Videos from prior shifts indicated Mr. McGovern normally took about two to four minutes to pull re-set bags. On August 23, it took him five minutes. Once he was done with the safe, Mr. McGovern left the cash office, went to the men's bathroom (where there was no video), and then left the building and drove off in his car. Shortly thereafter he returned to Walmart, went back to the cash office and reopened the safe two times before leaving.

The asset protection managers observed Mr. McGovern was the only employee who deviated from standard procedures on August 23. The other four employees who

accessed the safe all engaged in typical shift work. In addition, most of the other employees who accessed the safe were not alone.

After reviewing the surveillance video, the asset protection managers determined their sole target of investigation was Mr. McGovern; none of the other employees had done anything abnormal. Mr. McGovern was interviewed and disclaimed any knowledge about the missing money. However, after the loss prevention mangers laid out the results of their investigation, Mr. McGovern said, "'Well, you already know what I did so do what you gotta do.'" Report of Proceedings (RP) at 219. Walmart subsequently terminated Mr. McGovern's employment and the matter was turned over to law enforcement.

A police officer assigned to the investigation interviewed Mr. McGovern. During the interview, Mr. McGovern recounted what he was doing during the surveillance footage. Mr. McGovern said he dropped a deposit bag and had to kneel to collect the cash that spilled from it.[1] He also explained he briefly went home prior to his shift on August 23 because he realized he forgot his work radio. Mr. McGovern mentioned he had filed for bankruptcy and was getting a divorce.

[1] The video does not contain any footage indicating a bag had been dropped on the floor or that Mr. McGovern knelt down to retrieve fallen bills.

The officer interviewed the four other Walmart employees who had access to the safe on August 23. The officer asked the employees questions about their work routines and financial circumstances. Based on his interviews, the officer concluded his sole focus of investigation was Mr. McGovern.

A warrant was obtained for Mr. McGovern's financial records. It was discovered Mr. McGovern started making large cash deposits (hundreds or thousands of dollars) into his bank account the day after the Walmart money went missing. In a follow-up interview, Mr. McGovern told law enforcement he had considered stealing from Walmart, but decided not to. Mr. McGovern stated he had cashed out approximately $7,000 in retirement funds to pay his debts. He also borrowed another $7,000 from family. Mr. McGovern claimed he was hiding cash from his wife in order to avoid giving her money in the event of a divorce. Mr. McGovern again denied taking money from the Walmart safe.

The State charged Mr. McGovern with first degree theft. Prior to trial, Mr. McGovern filed a motion in limine objecting to the State's attempt to have Walmart's asset protection managers narrate the events of the surveillance video. Mr. McGovern argued the video should stand on its own. Mr. McGovern also objected to testimony from the State's witnesses that would express an opinion on his guilt.

The trial court granted Mr. McGovern's motion in part. The court agreed to prohibit the State's witnesses from providing opinions as to guilt. However, the court allowed the Walmart managers to testify as experts on store procedures and to provide narrative explanations of the surveillance video footage. Mr. McGovern was advised he should object if he believed the testimony veered from this approved scope of testimony into improper opinions of guilt.

The case proceeded to trial. The State presented testimony from two Walmart asset protection managers, five employees (including all employees who had access to the safe on August 23, other than Mr. McGovern) and the investigating police officer. At no point during the State's case did Mr. McGovern object to testimony from the State's witnesses as constituting improper opinion testimony as to guilt. Nor did Mr. McGovern make any objections based on prosecutorial misconduct. In his case in chief, Mr. McGovern presented testimony from two relatives who verified loaning him money. Mr. McGovern also testified on his own behalf. The jury convicted Mr. McGovern as charged.

At sentencing, the parties agreed on restitution in the amount of $20,533.66. In addition to restitution, the trial court imposed mandatory and discretionary LFOs. Prior to imposing discretionary LFOs, the trial court did not make an individualized inquiry into

Mr. McGovern's ability to pay. Instead, the court cited Mr. McGovern's excellent work history.

Mr. McGovern timely appeals his judgment and sentence.

ANALYSIS

Mr. McGovern argues for reversal of his conviction based on evidentiary error and prosecutorial misconduct. He also challenges imposition of LFOs. Much of our analysis is guided by principles of error preservation.

Appellate review of trial errors generally requires preservation through a contemporaneous objection. *See* RAP 2.5(a). Exceptions exist for constitutional errors and errors as to jurisdiction or failure to state a claim. *Id*. But evidentiary errors are not constitutional. They are generally deemed waived if unaccompanied by an objection. *State v. Powell*, 166 Wn.2d 73, 84, 206 P.3d 321 (2009) (plurality opinion).

While allegations of prosecutorial misconduct are constitutional, unpreserved errors are still rarely recognized on appeal. *See In re Pers. Restraint of Phelps*, 190 Wn.2d 155, 165, 410 P.3d 1142 (2018). To warrant review, an allegation of misconduct must have been so flagrant and ill-intentioned that it could not have been neutralized by a curative instruction. *Id*. Contrary to what is often suggested in appellate briefing, alleging multiple trial errors is not a basis to recognize unpreserved errors on appeal. The doctrine

of cumulative error has to do with assessing the prejudice arising from error. *See In re Pers. Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). It is irrelevant to the issue of error preservation. *Rookstool v. Eaton*, __ Wn.2d __, 457 P.3d 1144, 1149 (2020) ("Cumulative error is not a method for considering unpreserved issues on appeal.").

Errors at sentencing are different than trial errors. Consistency is an important goal of sentencing jurisprudence. Furthermore, remand for correction of sentencing errors does not raise the same type of finality concerns as remand for retrial. Our courts will consider errors at sentencing for the first time on appeal when compelled by due process. *State v. Ford*, 137 Wn.2d 472, 484, 973 P.2d 452 (1999). When it comes to unpreserved allegations of improper LFOs, Washington's appellate courts will often grant substantive review if the record indicates commission of a potentially harmful legal error. *State v. Blazina*, 182 Wn.2d 827, 833-34, 344 P.3d 680 (2015); *State v. Glover*, 4 Wn. App. 2d 690, 693, 423 P.3d 290 (2018) ("In the wake of *Blazina*, appellate courts have heeded its message and regularly exercise their discretion to reach the merits of unpreserved LFO arguments.").

With these principles in mind, we address Mr. McGovern's three challenges on appeal.

1. Trial error—evidentiary rulings

The only evidentiary issue that has been preserved for appeal is Mr. McGovern's complaint that the Walmart asset protection managers should not have been permitted to narrate the State's video evidence and provide expert opinions as to what was occurring therein. Our analysis is guided by ER 702, which governs the admissibility of expert opinions. We review a trial court's decision to permit expert testimony for abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 655, 790 P.2d 610 (1990).

Witnesses may testify as experts under ER 702 as long as two preconditions are met. First, the witness must be qualified by virtue of "knowledge, skill, experience, training or education." ER 702. Second, the expert's testimony must be helpful, in that it will "assist the trier of fact to understand the evidence or to determine a fact in issue." *Id*. An expert's testimony is not inadmissible simply because it "embraces an ultimate issue to be decided" at trial. ER 704.

The trial court here had ample basis to admit the testimony of Walmart's loss prevention mangers under ER 702. The loss prevention managers were familiar with standard procedures for accessing the cash room and handling deposit and re-set bags. Their expertise placed them in a superior position to recognize the contents of the safe and point out when the deposit bag at issue in the case was visible and when it no longer

appeared in view of the video camera. The managers also had a superior ability to recognize items such as deposit slips that might go unnoticed by an untrained observer.

This court's review of the surveillance video confirms the importance of the State's expert testimony. The video is in color, but blurry. It is lengthy and lacks audio. Contrary to Mr. McGovern's position, the video does not speak for itself. Without narrative testimony from the transcript, it is difficult to discern what is happening in the video, especially with respect to the contents of the safe. In this type of circumstance, opinion testimony is warranted. *See State v. Collins*, 152 Wn. App. 429, 437-38, 216 P.3d 463 (2009).

The video was published to the jury as an exhibit. Mr. McGovern was therefore free to provide his own narration of what happened. He also could have used the video to impeach the managers' testimony, should their descriptions of the video's contents go too far. The trial court thus properly found the testimony from the State's experts was appropriate and not unfair.

Mr. McGovern points out that, at one point in the testimony, one of the asset protection mangers inaccurately testified he could see the deposit bag in the surveillance video. Our review of the video indicates that, at the point in time specified by the witness, the video's view of the safe's interior was obstructed. Mr. McGovern objected and the

objection should have been sustained. But the reason the testimony was improper was not because the witness lacked expertise under ER 702. It instead was that the particular portion of expert testimony lacked foundation. While the trial court should have sustained Mr. McGovern's objection on this point, the failure to do so was harmless error. The jury, like this court, could see the video and discern the witness was mistaken. The fact that the witness was inaccurate as to a portion of the testimony undermined the witness's credibility to the jury, but it did not create a risk of prejudicing the jury's verdict.

2. Trial error—prosecutorial misconduct

For the first time on appeal, Mr. McGovern makes several allegations of prosecutorial misconduct. As previously noted, the lack of a contemporaneous objection presents a significant hurdle to appellate review. Our analysis indicates none of Mr. McGovern's allegations meets the requisite standard for relief.

Mr. McGovern first claims the prosecutor violated the trial court's in limine order by eliciting opinions of guilt from the asset protection managers and the police officer. *See State v. Scherf*, 192 Wn.2d 350, 389, 429 P.3d 776 (2018) (A "witness, lay or expert, may not testify about the defendant's guilt or innocence."). We are unswayed. The trial court specifically instructed Mr. McGovern to object if the State's witnesses strayed beyond their approved expert testimony. He did not do so. Instead, Mr. McGovern

elicited his own testimony on this issue as part of a defense strategy to argue a rush to judgment and inadequate investigation. Given defense counsel purposefully delved into this topic, a remedy on appeal is unavailable. *See State v. Rushworth*, 12 Wn. App. 2d 466, 476, 458 P.3d 1192(2020).

Next, Mr. McGovern argues the prosecutor improperly asserted an opinion about Mr. McGovern's guilt. Mr. McGovern points to statements made during his cross-examination and in closing, where the prosecutor noted Mr. McGovern's testimony was "convenient." The comments made during questioning may have been argumentative, but there was no blatant expression of a personal belief in Mr. McGovern's guilt. An objection and request for curative instruction could have cleared any possible confusion. Appellate relief is therefore unwarranted.

Third, Mr. McGovern claims the State trivialized its burden of proof by referring to the principle of Occam's Razor in opening and summation. *See State v. Lindsay*, 180 Wn.2d 423, 434, 326 P.3d 125 (2014) (noting misconduct for prosecutor to misstate burden of proof). The prosecutor described Occam's Razor in opening as follows:

> [T]here is a principle that is present in physics, biology, religion and even the court system. It's called Occam's Razor. You may not know the name Occam's Razor but the principle stands for the idea that the simplest explanation to a problem is generally the right one. I'm going to ask that you keep Occam's Razor in mind as you listen and evaluate the testimony that's going to be presented during the course of this trial.

RP at 182. The prosecutor asked the jury to "apply Occam's Razor" to the facts of the case. *Id*. at 185. In summation, the prosecutor asked the jurors to keep the principle in mind during deliberations as a "mantra." *Id*. at 390.

In context, the prosecutor's comments about Occam's Razor amounted to an argument about how to assess circumstantial evidence, not the burden of proof. The prosecutor's point was that the simplest explanation for the circumstantial evidence pointing to Mr. McGovern's guilt was that Mr. McGovern in fact stole the money. This perspective contrasted with Mr. McGovern's theory of the case, which was that he was the victim of an unfortunate combination of circumstances, such as isolated access to the case, dropping the money, and large cash deposits into his bank. While the prosecutor should not have engaged in argument during opening statement, doing so did not amount to improper burden shifting. To the extent Mr. McGovern believed there was a danger of the jury misunderstanding the Occam's Razor analogy, an objection and curative instruction would have adequately addressed the issue.

Finally, Mr. McGovern claims the prosecutor improperly shifted the burden of proof by questioning Mr. McGovern in cross-examination about how he would have stolen from Walmart. *See State v. Sundberg*, 185 Wn.2d 147, 153, 370 P.3d 1 (2016) (noting misconduct to shift burden of proof to defense). The problem for Mr. McGovern

is that he objected on the basis of relevance, not misconduct or burden shifting. *See Powell*, 166 Wn.2d at 82-83 (Error preservation requires the defendant cite the same basis for objection at trial and appeal.). Given Mr. McGovern's admission to law enforcement that he had thought about stealing from Walmart, the trial court correctly deemed the prosecutor's question relevant. Had Mr. McGovern also objected the State was engaged in burden shifting, the trial court could have taken appropriate responsive action. Mr. McGovern's unpreserved claim of misconduct is not a basis for reversal on appeal.

3. Sentencing error—LFOs

Mr. McGovern argues the trial court should not have imposed waivable LFOs ($200 criminal filing fee, $50 booking fee, and $250 appointed attorney fee) because it lacked complete information regarding his finances. *See* RCW 10.01.160(3); RCW 36.18.020(2)(h). As Mr. McGovern recognizes, the current record does not establish whether he meets the pertinent definition of indigence. *See* RCW 10.101.010(3)(a)-(c). Given this circumstance, remand for reconsideration of waivable LFOs is appropriate. On remand, the trial court shall ensure any nonrestitution LFOs are not assessed interest, pursuant to RCW 10.82.090(1). LAWS OF 2018, ch. 269, § 1.

CONCLUSION

The judgment of conviction is affirmed. This matter is remanded for reconsideration of LFOs.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, C.J.

WE CONCUR:

Korsmo, J.

Fearing, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 36328-7-III
	)	
DAVID MCGOVERN,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF JULY, 2020, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	DAVID MCGOVERN 525 EAST 7TH AVENUE COLVILLE, WA 99114	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF JULY, 2020.

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